

Legal protection of social and economic rights
of children in developing countries: reassessing
international cooperation and responsibility

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Abstract

One of the trends in the twentieth century international law-making is the proliferation of legal norms that recognise economic and social rights. Among the landmark developments in this process was the enactment of the UN Convention on the Rights of the Child 1989. This Convention declares universal rights of every child and has been ratified by virtually all states including the developing countries. This raises the issue as to whether and how the economic and social rights of children can be implemented in the developing world. One approach to this issue is to explore how the concept of international cooperation in the protection of economic and social rights has been applied to determine and assign external obligations to states parties to the UN Charter.

This study examines the scope of obligations and responsibility for the fulfilment of children's social and economic rights under international law. It argues that in addition to the domestic/vertical obligations of states' parties to regimes of human rights law, international law on the protection and promotion of the social and economic rights of children as recently interpreted and applied by states parties entrenches binding external/diagonal obligations of states to support global fulfilment of these rights. Besides recognising their external diagonal obligations, states have adopted legal instruments assigning duties to non-state actors to contribute to the universal fulfilment of children's social and economic rights. The present study interrogates these developments and explores how the emerging jurisprudence on states' extra-territorial obligations regarding children's social and economic rights and the responsibilities of non-state actors can be further mainstreamed in the legal discourse on international protection of economic and social rights.

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Abbreviations

ACP	African Caribbean Pacific
CBO	Community Based Organisation
Child Convention	UN Convention on the Rights of the Child 1989
CIDA	Canadian International Development Agency
CRC	UN Convention on the Rights of the Child
CSO	Civil Society Organisation
DANIDA	Danish International Development Agency
DFID	Department for International Development
Economic Covenant	International Covenant on Economic, Social and Cultural Rights 1966
EFA	Education for all
FPE	Free Primary Education
GoK	Government of Kenya
GTZ	German Technical Cooperation
HIPC	Highly Indebted Poor Countries
IDB	Islamic Development Bank
IGO	Inter-governmental Organization
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
JICA	Japan International Cooperation Agency
MCH	Maternal Child Health
MDG	Millennium Development Goals
MNCs	Multinational Corporations
NEPAD	New Partnership for African Development
NGO	Non-governmental Organisation
ODA	Overseas Development Assistance
OPEC	Organisation of Petroleum Exporting Countries
PRSP	Poverty Reduction Strategy Paper
SAP	Structural Adjustment Programme
SIDA	Swedish International Development Agency
SWAP	Sector-wide Approach
TNCs	Transnational Enterprises
UNCRC	United Nations Convention of the Rights of the Child
UNDCP	United Nations Drug Control Programme
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United National Population Fund
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UPE	Universal Primary Education
USAID	United States Agency for International Development
WFC	World Fit for Children
WHO	World Health Organisation.

Table of contents

Abstract	ii
Acknowledgments	iii
Abbreviations	iv
Table of contents	v
 Chapter 1 : A general introduction	 1
1.1 What this study is about	1
1.2 Theoretical framework	4
1.2.1 Three exploratory perspectives	4
1.2.2 The aspect of cultural rights	7
1.2.3 Applications of the principle of the best interests of the child	8
1.3 Method of investigation	10
1.4 Summary of chapters	10
 Chapter 2	
The legal and institutional framework for international protection of children's social and economic rights	15
2.1 Introduction	15
2.2 The legal framework for international protection of children's economic and social rights	15
2.2.1 Children's economic and social rights in the child convention	16
2.2.2 Economic and social rights under the international covenant on social, economic and cultural rights 1966	17
2.2.3 Protection of children's social and economic rights under regional human rights systems	18
2.3 Determining the normative content of social and economic rights	19
2.3.1 Legal protection of the minimum core content of all economic and social rights	20
2.3.2 Judicial interpretations of the minimum core obligations and states' reasonable compliance: the South African experience	23
2.3.3 Minimum core content and the right to effective delivery systems	28
2.4 Three-fold typology of states parties' obligations	29
2.5 Actors in the operating system and implementation processes	33
2.5.1 State actors: the domestic State	34
2.5.2 State actors: third States	39
2.5.3 Non-State actors	40
2.6 Conclusion	41
 Chapter 3	
Implementing the social and economic rights of children in developing countries: the place of international assistance and cooperation	44
3.1 Introduction	44
3.2.1 General characteristics of developing countries	45
3.2.2 Macro-economic problems and challenges facing developing countries	47
3.3 Legal implications of failure to implement economic and social rights of children in developing countries	54
3.4 Implementing free primary education in developing countries: a case study	63
3.5 Conclusion	72
 Chapter 4	
Re-examining States' external obligations to implement economic and social rights of children: towards a theory of diagonal obligations	75
4.1 Introduction	75
4.2 Dissecting states two-level legal obligations to implement social and economic rights	78
4.3 'International cooperation' as the legal basis for external obligations to fulfil social and economic rights	87
4.4 Propounding the content of diagonal human rights obligations as an element of international cooperation in the protection of social and economic rights	89
4.4.1 UN General Assembly resolutions	91
4.4.2 Interpretations and approaches adopted by donor States' parties to the Child Convention and the economic covenant	96
4.4.3 interpretation of diagonal obligations by UN Committees	103
4.4.4 Expositions of diagonal obligations by UN Special Rapporteurs	106
4.4.5 The contribution of academic writers	108
4.4.6 States' shared obligations to protect human rights	113

4.4.7 Perspectives of human rights NGOs	114
4.5 Illustrating a threefold typology of states' diagonal obligations	115
4.5.1 Diagonal obligations to respect social and economic rights	116
4.5.2 Diagonal obligations to protect social and economic rights	117
4.5.3 Diagonal obligations to fulfil social and economic rights	120
4.6 Conclusion	121
Chapter 5	
Reconstructing the legal basis and scope of states' fulfil-bound diagonal obligations in economic and social rights	
Introduction	126
5.1 Normative legal framework for states' fulfil-bound diagonal obligations in economic and social rights	127
5.1.1 States' affirmations of diagonal fulfil-bound obligations in binding treaties	128
5.1.2 Affirmations of diagonal obligations in non-binding international agreements	134
5.1.3 How soft law is reshaping the scope of states' diagonal obligations	138
5.2 Operational legal framework for states' fulfil-bound diagonal obligations in economic and social rights	141
5.2.1 National legislation and administrative structures in developed countries	142
5.2.2 Inter-regional agreements for economic and social cooperation	143
5.3 Scope of legal duties under diagonal fulfil-bound obligations	144
5.3.1 Primary and auxiliary fulfil-bound obligations	144
5.3.2 Fulfil-bound external duties as obligations of conduct	146
5.3.3 Diagonal human rights obligations as a fourth level of subsidiarity	148
5.4 Further reflections on legal basis of states' diagonal fulfil-bound obligations	152
5.4.1 Diagonal fulfil-bound obligations inherent in the purpose of conventions on economic and social rights	153
5.4.2 Considerations of humanity and humanitarianism	158
5.5 Diagonal obligations and the global distributive justice	160
5.6 Conclusion	166
Chapter 6	
Securing implementation and enforcement of states' diagonal obligations to support fulfilment of economic and social rights	
Introduction	167
6.1 The problem of securing compliance with external obligations	167
6.2 Theoretical approaches to state compliance	169
6.2.1 State-leadership horizontal model	170
6.2.2 The constructivist model	172
6.2.3 The philosophical model	175
6.3 Practical applications	177
6.4 Integrating diagonal obligations in the global human rights movement	180
6.4.1 Features and weaknesses of conventional approaches	180
6.4.2 Alternatives to current practice: a modest proposal	184
6.5 Conclusion	189
Chapter 7	
Beneath and beyond states: exploring global obligations of non-state actors to fulfil children's economic and social rights	
7.1 Introduction	190
Part I: The theoretical context: tracing obligations of the global general public	191
7.2.1 Revival of the spirit of the Geneva Declaration of the Rights of the Child 1924	191
7.2.2 Individuals, States and human rights duties: philosophical and theoretical perspectives	198
Part II: Exploring practical perspectives	202
7.3.1 Obligations to respect	202
7.3.2 Obligations to protect	204
7.3.3 Obligations to fulfil	210
7.4 Normative content of article 32 of the WFC: moral or legal obligations?	211
7.4.1 A budding internationally accepted custom binding non-state actors	211
7.4.2 A soft law instrument capturing what could not be enacted in a treaty	213
7.4.3 A pragmatic strategy of states to engage non-state actors	214
7.4.4 Enforcement and legal framework	221
Part III: Necessity to activate non-State actors' collaboration	222
7.5.1 The challenge of financing programmes for realising economic and social rights	222
7.5.2 Human rights implications of the millennium development goals	223
7.5.3 Addressing the MDG roadmap's financing gap	224

7.5.4 Some assumptions about meeting the MDG	226
7.6 Conclusion: the justification for engaging non-State actors	227
Chapter 8	
Conclusion and further reflections	229
8.1 A legacy of legalisation of global human rights norms	229
8.2 Alternative perspectives	234
8.3 Plotting further steps	237
Bibliography	239

Chapter 1

A general introduction

1.1 What this study is about

This study examines the rules and norms for the recognition, promotion and protection of social and economic rights of children under international law with a view to mapping out the scope of states' domestic, international and global obligations. Beyond theoretical analysis, it attempts to explore how states' international human rights obligations can be reconfigured and applied in various paradigms to enhance global cooperation towards universal fulfilment of social and economic rights. A survey of the history of international law on the rights of the child indicates that the protection and promotion of the economic and social rights of children has been an important concern of the international community of states. Starting with the Geneva Declaration of the Rights of the Child 1924¹ which acknowledged that 'mankind owes the child the best it has to give,' states have sustained the momentum for international protection and promotion of the rights of the child through adopting global and regional declarations and conventions with the objective of entrenching and implementing standards and norms on the economic and social rights of the child. As part of this process, several international legal instruments including the UN Declaration of the Rights of the Child 1959, the International Covenant on Economic, Social and Cultural Rights 1966, the UN Convention on the Rights of the Child 1989², the Millennium Declaration 2000, the Protocol to the Convention on the Rights of the Child on the Sale of Children 2000³ and the Declaration on a World Fit for Children 2002⁴ have been adopted in what appears like an emerging global consensus on the rights of the child.⁵

The UN Convention on the Rights of the Child 1989 (hereinafter, the Child Convention) stands out as the first international convention to codify and enact norms on the rights of the child in a comprehensive binding legal text. In view of these developments, one gets

¹ Adopted by the General Assembly of the League of Nations resolution O.J. Spec. Supp. 21 of 26th September 1924.

² The UN Convention on the Rights of the Child, GA Res. 44/25, 44, UN. G.A.O.R. Supp. (No. 49) at 165, UN. Doc. A/44/736 (1989) Reprinted in 28 ILM 1448 (1989).

³ Adopted by UN GA Resolution A/RES/54/263, entered into force on 18th January 2002.

⁴ A World fit for Children UNGA/A/S-27/2 Annex of 10th May 2002, Article 32.

⁵ For examination of these treaties and legal instruments, see Trevor Buck, *International Child Law* (Cavendish Publishing, London 2005).

the impression that today's children who were born after 1990⁶ have arrived in the world at the right time. They were born in an era when the global community has, after many years of consensus building, demonstrated a common understanding⁷ on what it legally owes the child and even fashioned apparatus at the international and regional levels ostensibly to work towards creating a world fit for children. Yet, in one of its reports, UNICEF noted that 'the lives of over 1 billion children (more than half of the children in developing countries) are blighted by poverty despite the wealth of nations.'⁸ Poverty and underdevelopment have been identified as the major threats to child survival in less developed countries as they limit the capabilities of families and governments to secure the standard of living for children envisaged in the Child Convention. It seems paradoxical and disturbing that with all the developments in international law on the protection of economic and social rights of the child, childhood could *still* be under threat to such scale.

As children in the developing world continue to face the spectre of deprivation and difficult circumstances of subsistence and survival, the functioning of the current international regime for the promotion and protection of social and economic rights of the child has become an urgent question because arguably, such casualties are victims of a failing system. Any analysis of the international protection of social rights of the child demands an interrogation of the design, content and status of the legal provisions and institutional structures and procedures established to carry out the measures required to *implement* these rights.⁹

My point of departure is that the institution of law provides the framework of binding rules and principles (the normative system) upon which procedures, organisations and

⁶ On 2nd September 1990, the UN Convention on the Rights of the Child 1989 came into force, being the 30th day following receipt by the Secretary-General of the United Nations of the 20th instrument of ratification in accordance with Article 49 of the Convention.

⁷ This conclusion can be drawn from the fact that all the member states of the UN have *signed* this Convention, and of these only two- the USA and Somalia have not ratified it. Somalia is still in a transitional process to restore a failed state and would not be in a position to ratify the Convention till then. The USA signed the Convention in 1995 and its domestic processes towards ratification are still on course, See Susan Kilbourne, 'U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights' (1996) 6 *Transnat'l L. & Contemp. Probs.* (1996), pp. 437-461, and Cynthia Price Cohen, (1995), United States Signs the Convention on the Rights of the Child, 3 *Int'l J. Child. Rts.* 281-282. Although it has not ratified the Children's Convention, the U.S. ratified the two protocols to the Children's Convention on 23rd December 2003. See 'U.S. Ratification of Protocols to the Child Convention' (2003) 97 *American Journal of International Law* pp. 443-444.

⁸ United Nations Children's Fund (UNICEF), 2004, *State of the World's children 2005: Childhood under Threat* (UNICEF, New York), p. 10.

⁹ There is an interesting debate by international law and international relations scholars on whether the institution of law and its edifice of rules and structures are of any significance to influencing state behaviour in relation to human rights and other issues. For some of these see, Anthony Clark Arend, 'Do Legal Rules Matter? International law and International Politics' (1998) 38 *Virginia Journal of International Law* 107; Sarah Kreps and Anthony Clark Arend, 'Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes,' (2006) *Duke J. Comp. & Int'l L.* 331; Oona Hathaway, 'Do Human Rights Treaties Make a Difference' (2001-2002) *Yale Law Journal* 1935

arrangements (the operational system), for advancing human rights can be established.¹⁰ It affords a formal medium for adopting human rights concerns, supplies the concepts for entrenching rights into the social fabric of the national and international community and clothes human rights claims in a standardised language fit for universal application. These are outcomes that could not be achieved without such 'legalisation.'¹¹ After so much international law making in the field of economic and social rights in the twentieth century, the main task for studies in the twenty-first century seems to be to focus attention towards interpreting, implementing and internalising the legal norms so far ratified by the international community.

International law on the rights of the child as enacted in the Child Convention declares social and economic rights that can be asserted universally for every child. However, the realisation of economic and social rights demands that in addition to legal recognition of these rights claims, there must be mobilisation of private and public resources to secure access to the minimum core content of these basic decencies of life. It is an unfortunate coincidence that a vast majority - in fact over eighty-eight percent - of the world's children live in developing countries where families' and governments' efforts to secure an adequate standard of life for children are constrained by systemic poverty and underdevelopment.¹² Indeed, the *economics* of economic and social rights seems to be the main determinant of the level of enjoyment of these rights in any society, so that current initiatives on improving the living conditions of children in poor countries such as the United Nations' Millennium Development Goals seem to have been predominantly conceptualised under the discipline of development economics. However, in tackling such a problem, scholars in the fields of law, international relations and development economics cannot work in isolation but rather, a clearer understanding of the legal obligations of states and societies under current international human rights law can be obtained through inter-disciplinary approaches aimed at exploring the range of options for international action to secure the global implementation of the rights of the child.

¹⁰ This approach to law as an instrument of social regulation is influenced by the socio-legal theory of law. For analysis of the various strands of this, see Malcolm Feeley 'Three Voices of Socio-Legal Studies' (2001) 35 *Isr. L. Rev.* vol. 35, pp. 175-205.

¹¹ For a similar argument see Catherine Wong, 'Taking back our Language: the Consequences of Legalizing Human Rights' (2006) 1 *Interdisciplinary Journal of Human Rights Law* 43.

¹² In 2005, the world's children population stood at 2,183,143,000 of whom 1,928,976,000 (88.4%) live in the developing countries: UNICEF *State of the World's Children 2007* (UNICEF, New York 2006), p. 40.

1.2 Theoretical framework

1.2.1 Three exploratory perspectives

The theory and practice on the legal protection of the social and economic rights of children in international law can be approached from three basic viewpoints. The first is that the enactment of these rights in international treaties, and the ratification of the Child Convention by virtually all the member states of the UN signify a major advance in the appreciation of the rights of the world's children. It means that the ideas on the rights of the child have been consolidated into rules of international human rights law, and the coming onto force of the Child Convention and the supervisory mechanisms under the convention exert pressure on states parties to implement this *law*. In the area of economic and social rights, it is apparent that poor states face serious challenges in securing the resources required to meet the cost of systems and processes for guaranteeing fulfilment of these rights. This means that despite the ratification of the Child Convention by developing countries, and enactment of domestic legislation to incorporate it in national law, there is a huge contrast between the legal protections of economic and social rights in the national and international law, and the *de facto* conditions of living for children in these less developed regions.¹³ This scenario presents a dilemma as regards the status of economic and social rights in poor countries.¹⁴ If the economic resources available in a developing country are inadequate to meet the cost of providing systems for securing fulfilment of economic and social rights, then either the fulfilment of these rights must be suspended until such time when resources would be available or some external means must be found to supplement domestic capabilities.¹⁵ As attempted in this study, it is necessary to explore the legal principles and mechanisms by which external actors such as third states can be engaged as supplementary and alternative duty-bearers to support the efforts of the domestic state to secure fulfilment of economic and social rights in the developing world.

Another perspective is that in a world that has industrialised high-income countries side by side with developing, least developed and highly indebted poor countries, some states and societies would possess more capabilities to meet the costs of systems for fulfilling these

¹³ Frans Viljoen, *International Human Rights Law in Africa* (OUP, Oxford 2007), 126, 261, explaining that continent wide conditions of poverty, illiteracy and underdevelopment indicate a failure by African states to implement economic and social rights.

¹⁴ M. Monshipouri, 'Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries' (2001) 4 *Yale Hum. Rts & Devt. LJ*, 25-61, at 29.

¹⁵ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (Oxford University Press, Oxford 1995), 144.

rights than others. In the course of crafting international universal human rights laws in the twentieth century, these international and global concerns have been addressed in the treaties for international protection and promotion of social and economic rights partly through clauses that call for international action and cooperation.¹⁶ These treaties can be examined and interpreted to redefine the scope of states parties domestic and international obligations.¹⁷

The third perspective in this study is that in the process of charting the course of securing global implementation of children's economic and social rights, states have adopted resolutions that attempt to prescribe the responsibility of non-state actors.¹⁸ This 'baby-step' towards assigning positive obligations to non-state actors to support fulfilment of economic and social rights by the international community can be re-examined to explore possibilities for enhancing the engagement of non-state actors in international efforts to secure global fulfilment of these rights.¹⁹

Although children's social and economic rights are now recognised in national and regional legal orders, this study is centred on the global regimes created under the aegis of the United Nations. Two reasons influenced this choice of focus. First, the standards and rules relating to economic and social rights were pioneered in international law, with national legal orders hesitantly following²⁰ so that many countries lack national standards of economic and social rights. These rights are still yet to be entrenched in national laws and practices of many countries.²¹ Moreover, the law on the rights of the child as a distinct subject of study has received attention from scholars and commentators only very recently, after its 're-discovery' and formulation in international law through comprehensive enactment in the Child Convention.²² Therefore, international law remains the principal repository of norms on economic and social rights by means of which the

¹⁶ These are examined in chapter two.

¹⁷ This is discussed in chapters four and five.

¹⁸ UN General Assembly Declaration on A World fit for Children UNGA/A/S-27/2 Annex of 10th May 2002, Article 32.

¹⁹ This is attempted in chapter six.

²⁰ For example, the USA signed the International Covenant on Economic, Social and Cultural Rights in 1977, and the Children's Convention in 1995, it has not ratified these treaties. However it ratified the International Covenant on Civil and political Rights 1966 in 1992.

²¹ Paul Hunt, *Reclaiming Social Rights* (Aldershot, Dartmouth 1996) chapter 1; E.R. Robertson, 'Measuring State Compliance with the Obligation to devote the 'the maximum available resources' to realizing Economic, Social and Cultural Rights' (1994) *16 Hum. Rts. Q.* 1994, pp. 693-714. This is in contrast to the civil and political rights that have evolved through centuries of political struggles between citizens and rulers with international law on these rights reflecting national constitutional settlements in the Western countries.

²² Andrew Bainham with Stephen Cretney, *Children: The Modern Law* (Jordans, Bristol 1994) Chapter 1. Bainham observed that the study of the law on the rights of the child as a distinct course in English law schools is a very recent phenomenon.

content of these rights and adherence to these norms by states in their domestic and international relations can be conceptualised and determined.

Secondly, although the process of translating international law principles and standards of human rights from ‘paper rights’ to steps, measures and programmes that impact peoples’ lives is approached within the national legal context, the implementation of some of the economic and social programmes demands competencies which might be lacking in the least developed countries. As Richard Bilder has argued, efforts to promote the fulfilment of economic and social rights in poor countries may require physical resources, technology and expertise beyond such societies’ internal capabilities and it is only with external assistance from other governments that real progress can be achieved.²³ For such resource-weak countries and regions, international law of human rights especially the aspect of states’ international obligations offers the legal framework for engaging other actors in the international community who can make significant contributions towards enhancing capabilities for universal fulfilment of social and economic rights. As Charles Beitz suggested, the range of opportunities for fulfilment of economic and social rights in poor countries suddenly opens up if the production capacities and economic resources of the entire global economy are taken into account as being potentially available to such disadvantaged societies through appropriate international mechanisms of redistribution.²⁴

Indeed, both at the drafting and adoption of the Child Convention developing countries were made to understand that their support for the Convention would be rewarded in the sense that the findings and recommendations of the monitoring committee would be used as a basis for discussions with international and bilateral development partners on technical and financial aid towards national implementation.²⁵ In other words, international law on economic and social rights of the child is part of the initiatives of the global community to establish an international legal order to facilitate universal fulfilment of these rights through internationally supported national delivery systems.²⁶

²³ Richard Bilder, ‘Rethinking International human Rights: Some Basic Questions’ (1969) *Wisconsin Law Review* 171, 191.

²⁴ Charles Beitz, ‘Economic Rights and Distributive Justice in developing Societies’ (1981) 33 *World Politics* 321, 322.

²⁵ Thomas Hammarberg, ‘Children’ in Eide, W.B. and Uwe Kracht (eds) *Food and Human Rights in Development* (Intersentia, Antwerp 2005) 353, 372. This, perhaps, might explain the overwhelming support for ratification of this Convention by developing countries.

²⁶ Universal Declaration of Human Rights 1948, Article 28.

1.2.2 The aspect of cultural rights

It is noted that the International Covenant on Economic, Social and Cultural Rights 1966 and Article 4 of the Child Convention approach economic, social and cultural rights as one bundle of related rights. Indeed, these rights like all other human rights can be said to be interconnected and interdependent. However, for purposes of this study, it is intended to focus only on economic and social rights but not the segment of cultural rights. As Alston correctly suggests, one reason for such distinction is that whereas cultural rights can be clearly distinguished from other rights, 'economic and social rights' cannot be clearly distinguished from each other.²⁷ Secondly, whereas the approach to defining and realizing cultural rights can be specific and limited to the cultural and local context of the affected communities, the measures required for securing implementation of economic and social rights are such that they can be approached through generic policies and programmes, adaptable for general application at national, regional and global levels. For example, the UN Millennium Development Goals embody a roadmap for achieving levels of global economic and social development that addresses the broad concerns for economic and social rights.

Thirdly, although the economic deprivation occasioned by poverty and underdevelopment in the poor regions of the world seriously degrades the quality of life of the affected communities, it does not necessarily destroy their freedoms of cultural expression and cultural life and identity. Therefore, urgent academic concern can focus more on the denial and non-fulfilment of economic and social rights in the poor parts of the world manifested in the over 11 million preventable child deaths every year. Indeed, the literature on the subject demonstrates a general trend whereby scholars and commentators examine issues in 'economic and social' rights under a combined conceptual matrix, quite apart from the domains of cultural rights.²⁸ In view of these considerations, and given the space constraints, the present work is intended to explore the protection of economic and social rights in international law and interrogate the developing perspectives in this area.

²⁷ Philip Alston, 'Economic and Social Rights,' (1994) 26 *Stud. Transnat'l Legal Pol'y* 137, 138.

²⁸ Hertel Shareen and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, Cambridge University Press 2007), Bilchitz David, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP, Oxford 2007), Eide Asbjørn, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *Human Rights Quarterly* 35, Jheelan Navish, 'The enforceability of Socio-economic Rights' (2007) *European Human Rights Law Review* 146, Alston Philip, 'Economic and Social Rights' (1994) 26 *Studies in Transnational Legal policy* 137.

1.2.3 Applications of the principle of the best interests of the child

One of the fundamental principles in the Child Convention is found in Article 3(1) which is that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In structuring this study, two issues relating to the application of the best interest principle arise. The first issue is to consider how this principle applies to the protection of economic and social rights of children in terms of defining the scope of obligations contained in this principle. Secondly, it is necessary to consider how the best interests principle interacts with broader issues regarding the protection of the social and economic rights of children on one hand and the economic and social rights of the wider society in general.

In terms of the obligations to respect economic and social rights, the provisions of Article 3(1) can be construed as placing legal duty on all private and public actors to refrain from depriving children or otherwise engaging in action that impedes the realisation of these rights. It is significant to notice that the Article applies the best interest principle not only in the traditional contexts of family law and administrative proceedings but in relation to all actions concerning children.²⁹ Thus it can be extended to both domestic and global dimensions of state and non-state actions that have a bearing on the realisation of the rights of children. In practice, implementing children's economic and social rights, especially the aspect of supporting fulfilment of these rights for the economically deprived sections of society requires governments to design and roll out programmes for enhancing universal access to the basic decencies of life. By asking states and non-state actors to assess the impact of their policies and actions on the welfare of children, the best interests principle can be a useful organising concept for rallying the national and global community to support international action for the protection and fulfilment of economic and social rights of children around the world. Moreover, this Article can be interpreted as assigning legal duties to both private and public actors to create and maintain institutional arrangements, systems and processes for securing universal protection and fulfilment of the social and economic rights of the world's children. In this context, the principle of best

²⁹ Philip Alston, 'The Best Interests principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1, at p. 4

interests of the child provides a basis for the proposition that under Article 3, all the states parties to the Child Convention have undertaken domestic and international responsibility to promote the fulfilment of the rights of the world's children. This results from the fact that the policies and actions of states and non-state actors can affect the welfare of children in the country concerned and also the children of the world.

The second aspect relates to how the best interests principle interacts with the social and economic rights of the wider society. Children's economic and social rights are mainly concerned with providing secured access to the basic decencies necessary for the survival and development of children. In the practical context, implementation of children's economic and social rights involves cross-cutting themes that inevitably integrate not only children but also their families and communities. For example programmes for the provision of clean drinking water tend to benefit broad communities. Another example relates to promoting the right of the child to basic education in Latin American countries. As illustrated in chapter 3, government authorities realised that efforts providing free education were being undermined by low enrolment in the schools since children from poor families were engaged in child labour instead.³⁰ To address this problem, governments have introduced cash transfer programmes whereby families with a child of compulsory school age receive a modest allowance on condition that the child attends full-time education.³¹ Therefore, the principle of the best interests of the child can be deployed as a proxy argument for advocating for the implementation of economic and social rights for deprived communities generally, at local and global levels.

In this study, the primary focus is on the implementation of children's economic and social rights. However, in view of the above propositions, emphasis tends to vary from chapter to chapter. For example, chapters 2, 3, 4 and 7 are centred on child rights analysis, while chapters 5, 6 and 8 place the study of children's economic and social rights in a much broader context. This is because the issues and problems relating to the implementation of children's economic and social rights such as child health, nutrition, education, housing etc are inextricably intertwined with the broader policy themes that cannot be completely separated from the wider concerns affecting children and their families and societies.

³⁰ Section 3.4, below.

³¹ For analysis of pro-child education cash transfer programmes in Brazil, Mexico and South Africa, see A. Barrientos and J. Dejong, 'Reducing Child Poverty With Cash Transfers: a Sure Thing?' (2006) 24 *Development Policy Review* pp. 537-552.

1.3 Method of investigation

This study is centred on the institutional framework established by the UN human rights regimes designed for the protection and promotion of economic and social rights of the child. Therefore the investigation has a focus on the examination of the core treaties on these rights, especially the interpretations given to the concept of international cooperation by states parties and the treaty monitoring bodies. In the process of exploring the principles of international law on the subject, this study examines the practice of states and their interpretations of treaty obligations. Examples of such practice examined in this study include non-binding international agreements in the field of social and economic cooperation, periodical reports of states parties submitted to the treaty monitoring committees, national legislation like the US Millennium Challenge Act,³² and inter-regional social and economic cooperation agreements such as the Cotonou Agreement 2002.³³ The burden of this study is to attempt to construct a theory of the scope of states' responsibility for securing realisation of economic and social rights that is rooted in state practice.³⁴

1.4 Summary of chapters

The aim of this introductory chapter is to give a preview of the issues and sub-themes explored in the study. International laws on economic and social rights aim at securing a minimum standard of life that guarantees access to the basic decencies of life for all human beings. Chapter two describes the structure of the conventions that seek to entrench the norms on economic and social rights into international human rights law and discusses the normative content of these rights. The chapter identifies some of the weaknesses in the international legal and institutional architecture for the protection of children's economic and social rights especially the absence of a coordinated system for securing global implementation of these rights.

³² The Millennium Challenge Act of 2003, Pub.L. 108-199, Div. D. A full text of the Act can be accessed at: http://www.mcc.gov/mcc/bm.doc/mca_legislation.pdf

³³ The Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000. Text of the Cotonou Agreement can be accessed at: <http://www.acpsec.org/en/conventions/cotonou/accord1.htm>; http://www.acpsec.org/en/conventions/cotonou/pdf/agr01_en.pdf

³⁴ For works taking a similar approach to the study of themes in public international law, see Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge Mass 1995) and Thomas Risse, S.C. Ropp and K.Sykkink, *The Power of Human Rights: International Norms and Domestic Change* (CUP, Cambridge 1999).

Chapter three discusses the progress and problems relating to the implementation of economic and social rights in developing countries. In this chapter it is observed that the implementation of economic and social rights depends to a large extent on the levels of the country's economic development that determines the private and public resources accessible to individuals and governments. It is argued in this chapter that we should not be quick to let governments of developing countries off the hook: their policies on the management of national resources and external resources accessed through international cooperation must be subjected to critical scrutiny to ensure they demonstrate full commitment to poverty reduction and universal fulfilment of social and economic rights. Reports of grand corruption and massive looting of the government accounts of developing countries by heads of state and their cronies proliferate in the international media.³⁵ Questions must continue to be raised both in national and international bodies regarding decisions by present governments of developing countries to purchase military hardware instead of investing in child development and financing subsidised acquisition of agricultural equipment and inputs for food crop production, providing essential economic infrastructure such as roads, power generation plants and water works, needed to support rapid economic growth.

Due to the severe economic constraints facing developing and least developed countries, many of the governments' programmes intended to secure access to basic economic and social welfare such as immunization, water, primary education and food security are under-resourced and largely dependent on external assistance. In other words, without such external assistance and donor funding, it would not be possible to provide the programmes for fulfilling social and economic rights of children in the developing world. This de facto dependence on external donors raises the question as to whether the richer states parties to international treaties on social and economic rights have any binding legal obligations to provide external aid to support fulfilment of these rights in the less developed countries. This issue is deferred for discussion in chapter four.

International law on the protection and promotion of social and economic rights binds states parties to respect, protect and secure these rights both in their own territories as well

³⁵ Transparency International, *Global Corruption Report 2004* www.globalcorruptionreport.org, <http://www.scribd.com/doc/267740/The-Kroll-Report-The-looting-of-Kenya> Xan Rice 2007 The looting of Kenya The Guardian Friday August 31, 2007 http://www.marsgroupkenya.org/pages/stories/looting_Kenya/index.php http://wikileaks.org/wiki/The_looting_of_Kenya_under_President_Moi For links to the report: http://www.mentalacrobatics.com/think/blogdocs/Kroll_Report_Corruption_Kenya.pdf

as to contribute to the programmes for such fulfilment in other countries in a strategy that aims at global implementation of these rights. Chapter four takes up this theme and explores the legal basis for states' extraterritorial obligations to respect, protect and support fulfilment of social and economic rights. The chapter surveys the relevant treaty texts, explanatory resolutions of the UN General Assembly and interpretational statements contained in states' periodic reports submitted to the UN monitoring committees and argues that recent state practice and interpretation of human rights obligations confirms the extraterritorial obligations to support fulfilment of these rights. Since these are obligations to fulfil the rights of human beings in other countries rather than obligations to third states, they can be referred to as 'diagonal obligations.' As Matthew Craven argued, there is a gap between the present capabilities of developing states in terms of what they can do now and the capabilities of needed to secure the enjoyment of social and economic rights: international cooperation was intended to fill this gap.³⁶ However, the nature of international cooperation required to fill up this capabilities gap in some states parties and regions was not defined in the texts of the Economic Covenant or the Child Convention. This chapter argues that the doctrine of external diagonal obligations is an aspect of the concept of international cooperation and is now recognised by the states through a series of interpretational resolutions in the UN General Assembly and in the periodical reports of donor states to the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. Moreover, these expert monitoring committees as well as Special Rapporteurs on the Right to Food and the Right to Health and writers on the subject have argued that signatories to the international conventions on economic and social rights have both domestic and external obligations to support universal fulfilment of these rights.³⁷

The mechanism of establishing a standing committee of experts to examine states parties' reports makes it inevitable that the Committees must interpret and develop an understanding of the treaty and apply such interpretation to the examination and discussion of states parties' reports. In the process of interpreting and applying the human rights treaties, the human rights monitoring Committees also expound on the content of legal obligations and implications of human rights treaties through Committees'

³⁶ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (Oxford University Press, Oxford 1995), 144.

³⁷ See Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the development of International Law* (OUP, Oxford 2007), Sigrun Skogly, *Beyond National Borders: States' Human Rights obligations in International Cooperation* (Intersentia, Oxford 2006); Thomas Pogge, *World Poverty and human Rights* (Blackwell Publishers, Oxford 2002) chapter 4.

concluding observations on states parties reports, General Comments and general recommendations. Thus, the processes of interpretational and application of human rights by states parties and treaty monitoring Committees produces a canopy of additional rules and principles that supplement the provisions of the human rights treaties.³⁸ These additional rules that develop from the application of human rights treaties constitute what is also known as the 'acquis' of the treaty and are regarded as part of the initial commitments agreed by the signatories to the treaty.³⁹ As Liesbeth Lijnzaad argues, there is a very thin line between interpreting treaties to appropriately fill lacunae in its text and introducing new rules into the text of the treaty that distort its original meaning and content.⁴⁰ This chapter explores the approaches of states parties to the emerging acquis on international cooperation and concludes that there is a convergence of perspectives by both states and the monitoring Committees on the theory of states external diagonal human rights obligations.

The fifth chapter analyses some detailed aspects of the doctrine of states' external obligations and examines further the legal basis, nature and scope of state's responsibility. The chapter surveys both the normative and operational systems for international social and economic cooperation and explores the legal duties with respect to the doctrine of states diagonal obligations to support global fulfilment of economic and social rights. In particular, it appreciates the tensions and conflicts between international human rights law and classical doctrines of state sovereignty and identifies a pattern of soft law instruments applied by states to define diagonal human rights obligations. This chapter also examines the interactions between domestic and diagonal human rights obligations of states in relation to fulfilment of economic and social rights and attempts to sketch the parameters of these obligations.

After examining the theoretical issues in chapters 4 and 5, chapter 6 discusses the various models for implementing states diagonal obligations in relation to the fulfilment of economic and social rights. It argues that whereas states can discharge their extraterritorial obligations in a variety of international assistance models, the doctrine of states external diagonal obligations provides a firm legal basis for engaging the rich states to participate in a coordinated system for mobilising resources to underwrite global fulfilment of social and economic rights. More specifically, the chapter suggests that the existing tradition of

³⁸ Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Kluwer, The Hague 1995) p. 79.

³⁹ Ibid.

⁴⁰ Ibid.

voluntary international assistance protocols can be improved by an alternative model for an international revenue system that is based on the obligations of all states to establish and maintain institutional structures for international action for realisation of economic and social rights.

The fulfilment of economic and social rights of children remains a very difficult task for many poor countries. Most of the rights regimes in poor countries remain under-funded. It is with such a focus on the economic and social rights of children that the UN Millennium Development Goals have been adopted to guide initiatives for international cooperation in the 21st century. However, despite the pledges of increased Official Development Assistance (ODA) by the richer countries, these resource transfers through aid seem to fall short of what is urgently needed to re-establish minimum basic decencies of life for over 1.9 billion of the world's children living in poor countries. It is with this need in mind that in 2002, the UN General Assembly has endorsed a broad-based global partnership that integrates states, Intergovernmental organizations and non-state actors to work together towards universal fulfilment of the social and economic rights of children in its clarion call: to build a world fit for children.⁴¹

However, in the study of this and other resolutions of the UN General Assembly, it is apparent that the community of states by such non-binding legal instruments intends to assign positive duties to non-state actors to 'provide resources' required for the fulfilment of the rights of the world's children. In that case non-state actors such as the global corporate sector seem to have been constituted as a bearer of legal duties to fulfil the social and economic rights recognised under international law. This issue is examined in chapter seven where I argue that this small step demonstrates an important development that implies that the law relating to duty-bearers in the fulfilment of children's social and economic rights could be entering a new territory and is adequate for purposes of further child rights advocacy. In particular, I suggest that the global corporate sector has enormous organizational capabilities that can be harnessed to establish a global revenue system that enables major business to act as agencies for collecting a global solidarity contribution through price adjustments. Finally, the study ends with conclusions in chapter eight that also presents some reflections on the potential contributions this work can make to the theory and practice of international human rights law.

⁴¹ UN General Assembly Resolution on A World fit for Children UNGA/A/S-27/2 Annex of 10th May 2002, Article 32.

Chapter 2

The Legal and Institutional Framework for International Protection of Children's Social and Economic Rights

2.1 Introduction

The essence of economic and social rights consists of moral claims to secured access to the basic decencies of life, which can be summed up in the claim to a standard of life adequate for the health, well-being and human development of the person and his family.¹ In the present study, children's economic and social rights represent the interests of every child to have legally protected access to basic subsistence, health care, nutrition, education, housing, and more broadly, a standard of life adequate for the child's development. These claims to social and economic well-being of children have been recognised by the international community of states as being so important as to justify the protection of the various apparatus of international law. This chapter examines the legal and institutional framework for the promotion and protection of the social and economic rights of children under international law.² The first part of this chapter surveys the conventions and other normative instruments that have been applied to entrench economic and social rights in international human rights law while the second part examines some aspects of the normative content of social and economic rights. The third section discusses the institutional framework for implementing children's social and economic rights.

2.2 The legal framework for international protection of children's economic and social rights

This part surveys the 'legalisation' of the social and economic rights of children under international human rights law. It demonstrates that claims of rights of children are an

¹UN Declaration of Human Rights captures these rights in Articles 22-26. A list of the items that constitute the essentials of a package for social and economic rights is contained in the famous speech given by US President Roosevelt in the State of the Union message on January 11, 1944. Text and audio tape of the speech can be accessed at : <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> See also Albie Sachs, 'Social and Economic Rights: Can they be Made Justiciable' (2000) 53 *South Methodist University Law Review* 1381, 1382.

² For analysis of the historical development of economic and social rights see Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford University Press, Oxford 2000) p. 242, Asbjorn Eide, 'Economic and Social Rights' in Janusz Symonides (ed.) *Human Rights: New Dimensions and Challenges* (Ashgate, Dartmouth 1998), pp. 109-174; Paul Hunt, *Reclaiming Social Rights* (Ashgate, Dartmouth, 1998). For a study of international cooperation in the protection and promotion of the rights and welfare of children in the early twentieth century, see Marshall Dominique, 'The Construction of Children as an object of international relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations 1900-1924,' (1999) 7 *International Journal of Children's Rights* 103.

element of international human rights law and form part of the global norms that have been set by the international community of states to inform and constrain the policies and practices of states and non-state actors.³

2.2.1 Children's economic and social rights in the Child Convention

International norms on the rights of the Child have been comprehensively codified in the Child Convention.⁴ Article 6 that commences the list of rights recognised in the Convention declares that every child has an inherent right to life and that it is the responsibility of states parties to ensure to the maximum extent possible, the survival and development of the child. This text can be interpreted broadly to include the negative obligations of states to refrain from deliberate destruction of the rights of the child through death penalty, unlawful disappearances and extra-judicial killing of children⁵ and also positive obligations of states to establish systems that guarantee access by all children to the services and goods necessary to sustain a standard of living adequate for the child's survival and development.⁶ Other provisions of the Child Convention relating to economic and social rights run from article 23 to 32. Article 23 recognizes *inter alia* the rights of a child with mental or physical disability to enjoy a full and decent life, including the right to effective access to education, training, health care and rehabilitation services. Article 24 recognises the right of the child to the highest attainable standard of health, access to facilities for preventive health care such as immunisation, the treatment of illness and rehabilitation of health.⁷ The Convention also recognises the right of the child to benefit from social security and social insurance⁸, to a standard of life adequate for the child's physical, mental, spiritual, moral and social development⁹ and to education.¹⁰ The Convention also recognises the rights of the child to leisure, and to participate in cultural and artistic life.¹¹ Article 32 of the Child Convention binds states parties to protect the child from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health, physical, mental, spiritual, moral or social development. While it can be argued that these

³ John Montgomery, 'Fifty years of Human Rights: An Emergent Global Regime' (1999) 32 *Policy Sciences* 79, 86.

⁴ For detailed discussion of the proceedings for drafting the Child Convention, see Sharon Detrick, J. Doek and N. Cantwell, *The United Nations Convention on the Rights of the Child: A guide to the Travaux Préparatoires* (Martinus Nijhoff, London 1992). For analysis of the Convention, see Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 *International Journal of Law and Family* 132.

⁵ Douglas Hodgson, 'The Right of the Child to Life, Survival and Development' (1994) 2 *International Journal of Children's Rights* 369,380.

⁶ Id, p. 382.

⁷ Article 24.

⁸ Article 26.

⁹ Article 27.

¹⁰ Article 28.

¹¹ Article 31.

rights claims are not new since they could be properly made within the generic system under the International Covenant on Economic, Social and Cultural Rights 1966,¹² by 1978, when the UN declared 1979 the International Year of the Child, the international community of states had accepted the principle that children represented a special category of vulnerable persons and their human rights required additional and specific legal protection.¹³

The Optional Protocol on the Sale of Children 2000 also forbids the economic exploitation of children and enacts domestic and international obligations of states parties to address the underlying problems of underdevelopment and global poverty that push families to sell children or expose them to the risk of economic exploitation.

2.2.2 Economic and social rights under the International Covenant on Social, Economic and Cultural Rights 1966

Part III¹⁴ of the Economic Covenant enacts its substantive rights provisions. The right to work set out in Article 6 when applied to children must be read together with Article 10 which deals inter alia with the rights of children in the work place. Article 10 raises three important points. First, whereas children of sufficient competence have a right to economic participation in the work-place as part of their right to work, there is a legal duty on the part of states parties to protect child workers from economic and social exploitation. In this regard, the Article specifically requires that states parties promulgate and enforce regulations for the kinds and terms of lawful child work and legitimate economic participation of children, minimum age for entry in employment, prohibition of child labour, i.e. work that hampers the child's normal development and punishment of all forms of economic exploitation of children.¹⁵ Secondly, it demands that all states parties take 'special measures of protection and assistance' on behalf of children and young persons without any discrimination.¹⁶ No schedule of such measures is prescribed, and the obligation is cast in general terms and open to the interpretation of states parties in line with their domestic capabilities. What seems clear from this clause is that there is a legal obligation to provide programmes and facilities to cater for the rights and welfare of children in *need*. Thirdly, there is a legal obligation on the part of states parties to provide

¹² See W.H. Bennett Jr., 'A critique of the emerging Convention on the Rights of the Child' (1987) 20 *Cornell International Law Journal* 1.

¹³ Lawrence LeBlanc, *The Convention on the Rights of the Child* (University of Nebraska Press, London, 1995), 16; Cynthia Cohen, 'The Developing Jurisprudence of the Rights of the Child' (1993) 6 *St. Thomas Law Review* 9, 10.

¹⁴ Articles 6-15.

¹⁵ Article 10(3).

¹⁶ *Ibid.*

appropriate assistance to the family to enable it perform effectively its responsibility for the care and education of dependent children.¹⁷

In Article 9, the Economic Covenant recognises the right of everyone to social security including social insurance, while Article 11 affirms the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing and to the general improvement of living conditions. In addition, the rights to the highest attainable standard of physical and mental health¹⁸ and education, in particular free and compulsory primary education¹⁹ are also recognised. It is evident that the Economic Covenant contains provisions that address the rights and welfare of children and also those that deal with social and economic rights generally.²⁰

2.2.3 Protection of children's social and economic rights under regional human rights systems

Social and economic rights of children are not only entrenched in the UN human rights system: they are also recognised and given protection in regional human rights systems of Europe, Africa and the inter-America regions. Due to constraints of space and context, as the focus here is mainly on the UN system, it is not intended to discuss these systems here, but only to mention the recent proliferation of norms on economic and social rights aimed at protecting and promoting them at the regional level of international collaboration.²¹ In this regard, there is universal consensus that economic and social rights are human rights deserving the recognition and protection of law in national, regional and global legal and

¹⁷ Article 10(1). This state-parent partnership of sharing child support obligations is one of the principles underlying Article 18 and 27 of the Children's Convention.

¹⁸ Article 12.

¹⁹ Article 13-14.

²⁰ Besides the foregoing UN conventions, several normative standards relating to the protection of the economic and social rights of children have been elaborated and adopted by states members of the International Labour Organization (ILO). These include the Worst Forms of Child Labour Convention No. 182 (Adopted on 17th June 1999 by the General Conference of the ILO, entered into force on 19th November 2000).

²¹ Social and Economic Rights are recognised under the Revised European Social Charter 1996, Articles 1,2,7,9,10,11,12,13,14,15, 16,30 and 31. For analysis of this system see David Harris and John Darcy, *The European Social Charter* (Ardsley Transnational Publishers, New York 2001). Article 26 of the American Convention on Human Rights 1969 obligates states parties to 'adopt measures, both internally through international cooperation towards achieving the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States. A more elaborate scheme of social and economic rights is set out in the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988 (the Protocol of San Salvador) which came into force in 1999. This Protocol recognises the rights to social security, health, food and free and compulsory primary education, (Articles 6,7, 9,10,12 and 13). The African Charter on Human and Peoples' Rights 1981 recognises the right to work, health and education, (Articles 15,16 and 17 respectively). For detailed analysis see Ouguergouz, Fatsah (ed.), *The African Charter of Human and Peoples' Rights : a comprehensive agenda for human dignity and sustainable democracy in Africa* (Kluwer, The Hague 2003); Malcolm D. Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights : the system in practice* 1986-2000(Cambridge University Press, Cambridge 2002). In addition to this generic rights system, the African Charter on the Rights and welfare of the Child 1990, the first regional convention on children's rights affords additional apparatus for the protection of the rights of the African child. The Charter recognises the rights of the child to life, survival and development, free and compulsory basic education, health and protection from child labour.

political systems. From the foregoing descriptive account, it is evident that children's economic and social rights have been recognised and expressly enacted in international human rights law both at regional and global levels. The next section discusses the theoretical aspects of the concepts and content of these rights.

2.3 Determining the normative content of social and economic rights

Having outlined the texts of international legislation on economic and social rights, attention can be focussed on a discussion of the nature and content of these rights. One of the distinctive features of the legal standards on economic and social rights is that some of them apply various adjectives to express the claims of these rights. Thus, there is recognition and protection of the right of everyone to an *adequate* standard of life including *adequate* food, clothing and housing;²² and also the right of everyone to the enjoyment of the *highest* attainable standard of physical and mental health.²³ Similar words are applied in the Child Convention that recognises and protects the right of every child to the *highest* attainable standard of health,²⁴ including the provision of *adequate* nutritious food and clean drinking water.²⁵ Moreover, the Child Convention recognises the right of every child to a standard of living *adequate* for the child's physical, mental, spiritual, moral and social development.²⁶ Perhaps, these provisions suggest idealistic claims since it is not stipulated in the treaty texts just how the standards of living would be measured to determine state compliance.

The use of such seemingly indeterminate adjectives to frame rights claims in the treaty texts has led some critics to suggest that such provisions lack specificity and normative content and cannot be translated into genuine rights. Bennett Jr argued that the technique of enacting what appear like manifesto statements in treaties on economic and social rights might result in dilution of rights into policy claims.²⁷ Fortin has defended the view that provisions such as Articles 24 and 27 in the Child Convention are not rights at all but in reality mere aspirations regarding what should happen if governments were to take children's needs seriously.²⁸ Indeed, it is difficult to secure judicial enforcement of claims

²² Economic Covenant, Article 11.

²³ Id, article 12.

²⁴ Child Convention, Article 24 (1).

²⁵ Id, Article 24(2) (c).

²⁶ Id, Article 27(1).

²⁷ W.H. Bennett Jr., 'A critique of the emerging Convention on the Rights of the Child' (1987) 20 *Cornell International Law Journal* 1, 36.

²⁸ Jane Fortin, *Children's rights and the Developing Law* (Lexis Nexis, London 2003) pp. 43-44. This is a formidable argument. It seems rather difficult to imagine how the law can possibly guarantee maximum outcomes such as the

to maxima such as ‘the highest possible levels of physical health.’²⁹ These concerns about the normative content of economic and social rights are important because they illustrate that the validity of the norms on economic and social rights is still a contested issue in human rights discourse. Space constraints do not permit an extensive review of this debate here.³⁰ This section examines how the treaty texts on economic and social rights have been interpreted in attempts to clarify the normative content of these rights.

2.3.1 Legal protection of the minimum core content of all economic and social rights

Although the treaty texts refer to adequate standards of living and the highest attainable standards of health, in the context of legal protection, it is difficult to determine the adequate standard of realisation of these rights when the treaties do not specify the minima. Attempts to interpret the normative content have begun with establishing the basic starting point of *minimum* standards of economic and social rights. The UN Committee on Economic, Social and Cultural Rights has clarified that the Covenant should be interpreted as protecting the access to and enjoyment of a minimum core content of all the rights recognised therein. Accordingly, states parties to the Economic Covenant have a core obligation to secure the enjoyment of this irreducible minimum core content of these rights for all persons. In its groundbreaking interpretation of the scope of states parties obligations, the Committee stated:

A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a *minimum core obligation*, it would be largely deprived of its raison d'être.....Any assessment as to whether a State has discharged its *minimum core obligation* must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its *minimum core*

highest attainable standards of health for every child, in view of the multiplicity and complexity of the social determinants of individuals' standards of health.

²⁹ For critical assessment of the limitations of claims of economic and social rights, see Cass Sunstein, 'Against Positive Rights' (1993) 2 *East European Constitutional Review* 35; E.W. Vierdag, 'The Legal nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69; David Bentham, 'What Future for Economic and Social Rights' (1995) 43 *Political Studies* 41.

³⁰ For answers to criticisms of economic and social rights see G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomasevski (eds.) *The Right to Food* (Martinus Nijhoff Publishers, Dordrecht 1984) 97; H. Schwartz, 'Economic and Social Rights' (1993) 8 *American University Journal of International Law and Policy* 551; Philip Alston, 'Economic and social rights,' (1994) 26 *Studies in Transnational Legal policy* 137; Paul Hunt, *Reclaiming Social Rights* (Ashgate, Dartmouth, 1998).

obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.³¹

The Economic Covenant assigns to states parties core obligations to secure fulfilment of the minimum essential levels of each of the rights recognised in the Covenant such that these two aspects i.e. the minimum core obligations and the minimum core content are corresponding parts of the same concept.³² In this regard, the legal norms in these conventions seek to protect access for every person to ‘the minimum decencies of life:’³³ food, potable water and sanitation, basic health services, housing, education and social security. They are in essence ‘public goods,’³⁴ services and facilities required to meet basic human needs that should be universally available to everyone. The substance of social and economic rights is that they are claims to protected access to and consumption of certain identifiable tangibles, goods, services and opportunities to a minimum basic level necessary to sustain life on earth. Sometimes labelled ‘welfare rights’ social and economic rights can be understood as claims to a secured economic floor, below which human beings should not fall, as that would imperil their subsistence and survival and expose them to want and destitution.³⁵ In other words, the conventions on economic and social rights seek to entrench moral claims to basic human needs into treaty texts to secure their universal fulfilment through legal protection and enforcement.³⁶

Although the factors are not identical for each rights theme, the following aspects are consistent in the exposition of the UN Committee on Economic, Social and Cultural Rights: availability of the social and economic goods, accessibility to those goods by the

³¹ General Comment No. 3 Nature of States Parties’ Obligations (1990), E/1990/23/Annex III, paragraph 10, emphasis mine.

³² For the view that the minimum core content and minimum core obligations are different, see Audrey Chapman, ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’ in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, Cambridge University Press 2007) 143, 154. Chapman argues that ‘the minimum core content is the essential element of a right, without which it loses its substantive significance as a human right, while minimum state obligations refer to obligations to ensure a minimum floor below which conditions should not be permitted to fall’ p. 154. It is difficult to determine the distinction between these two.

³³ Albie Sachs, ‘Social and Economic Rights: Can they be Made Justiciable’ (2000) 53 *South Methodist University Law Review* 1381, 1382.

³⁴ Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ‘Protocol of San Salvador’ Article 10(2).

³⁵ Economic Covenant, Preamble. For an attempt to distinguish between social and economic rights in the Economic Covenant see Henry Steiner, ‘Social Rights and economic development: Different Discourses?’ (1998) 4 *Buffalo Human Rights Law Review* 25. Steiner suggests that economic rights relate to workplace and employment related rights (Articles 6-8), while social rights relate to social welfare rights (Articles 11-14). Steiner does not seem to recognise the interdependence of these two categories of rights and even suggests rather erroneously that they keep a distance from each other, (p. 28).

³⁶ See David Trubek, ‘Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs’ in Theodor Meron (ed.) *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, Oxford) pp. 205-274.

national communities and quality of the public goods and the legal protection of these interests.³⁷ To arrive at a judgment of the state party's compliance or non-compliance requires a quantitative assessment and analysis of data on these factors and determination of the national minimum benchmark, which is used to decide if the state party's minimum core obligation has been discharged in relation to the claimant(s). The Committee has recommended that states parties themselves should set these minimum national benchmarks and publish them in their periodic reports to the Committee.³⁸ The Committee has not prescribed any indicators of the factors identified above, and in the absence of any other alternative, it seems to have approved application of standards developed by the UN specialised agencies and programmes such the World Health Organization, International Labour Organisation and United Nations Development Programme to determine specific benchmarks of minimum core content of social and economic rights.³⁹

Using this method, what initially appear as aspirational stipulations in the texts of international norms on economic and social rights can be systematically quantified into measurable minimum thresholds of availability and quality of and access to necessary social public goods, the entitlement to which can be asserted as legal rights. This approach has received considerable endorsement.⁴⁰ Scott Leckie has demonstrated that identifying the minimum core obligations of the states parties is the first step in measuring violations of economic and social rights,⁴¹ while Bilchitz suggests that the idea of a minimum core obligation is based on the fact that there are degrees of fulfilment of a right and that a

³⁷ General Comment No. 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights (1997), paragraph 7, General Comment No. 12 on the Right to Adequate Food (1999), paragraphs 6,8,29 and 30, General Comment No. 13 Right to Education (1999) E/C.12/1999/10, paragraph 57, General Comment No. 14 Right to Health (2000) E/C.12/2000/4GC, paragraphs 19,43 and 45 and General Comment No.15 Right to Water (2002) E/C.12/2002/11 paragraphs 6 and 37.

³⁸ General Comment No. 1 Reporting by States (1989), paragraph 6. States parties have not taken this route.

³⁹ This is the approach taken by the Committee in its General Comments on the Right to Health, and the Right to Water. Chapman argues that such generic data is collected for use in other disciplines, and is not accurate for legal rights analysis. She suggests that special rights-focussed indicators need to be developed to apply to monitoring economic and social rights. See Audrey Chapman, 'A violations Approach for Monitoring the International Covenant on economic, Social and cultural rights' (1996) 18 *Human Rights Quarterly* 23.

⁴⁰ Danilo Türk, Report of the Special Rapporteur on the Realization of Economic, Social and Cultural Rights, UN ESCOR, Comm'n on Hum. Rts., 43rd Sess., Agenda Item 8, at 18 paragraph 52(d), UN Doc. E/CN.4/Sub.2/1991/17 (1991), Bard-Anders Andreassen et al, 'Assessing Human Rights performance in Developing Countries: The case for a minimal threshold Approach to Economic and Social Rights' in *Yearbook of Human Rights in Developing Countries* 1987/1988pp. 333-341, Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *Human Rights Quarterly* pp 35-41, David Bilchitz, 'Giving Socio-Economic Rights Teeth: the Minimum core and its importance' (2002) 119 *S. African Law Journal* 484; Chapman, A. and Russell, S. (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Oxford 2002)

⁴¹ Scott Leckie, 'Another step towards Indivisibility: identifying the key features of violations of economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly*, pp. 81-124, at 102.

certain minimum level of fulfilment takes priority over a more extensive realisation of that right.⁴²

At the first conference of experts on international law and human rights held in Maastricht in 1987 attended by newly elected members of the inaugural Committee on Economic, Social and Cultural Rights, 103 principles on the implementation of the Economic Covenant were adopted. Among these was that 'states parties are obligated, regardless of the level of economic development, to *ensure respect for minimum subsistence rights for all*.'⁴³ Ten years later, another conference of human rights experts was held at the same venue on the anniversary of the Limburg Principles where the Maastricht Guidelines on Violations of Economic and Social Rights were also adopted. Paragraph 9 of these guidelines affirms the minimum core obligations approach.⁴⁴

2.3.2 Judicial interpretations of the Minimum core obligations and states' reasonable compliance: the South African experience

This section discusses judicial approaches to the concept of minimum core obligations of economic and social rights, with reference to the South African Constitutional Court. The constitution of the Republic of South Africa is one of the post-Cold war constitutional settlements that enact and protect economic, social and cultural rights alongside both civil and political rights.⁴⁵ Engagement of courts in the protection of human rights begins by the filing of complaints relating to alleged violations of human rights. Complaints of violation of economic and social rights typically involve claims by deprived persons, challenging government policies and decisions alleged to cause or exacerbate the claimants' suffering or disadvantage. When such complaints are litigated in court, it amounts to inviting the judicial arm of government to question decisions made by the executive in a domain constitutionally reserved for the executive. Moreover, if courts sit in judgment on matters reserved for the competence of the executive, this might contravene the principle of separation of powers, since courts might impose their preferences on the government and upset the policies of the state's elected political leadership.

⁴² David Bilchitz, 'Towards a reasonable approach to the minimum core: Laying the foundation for the future socio-economic rights jurisprudence' (2003), 19 *South African Journal on Human Rights* 1, 13.

⁴³ Limburg Principles on the Implementation of the International covenant on Economic, social and cultural rights 1987, UN doc. E/CN.4/ 1987/17 reprinted in (1987) 9 *Human Rights Quarterly* 121, no. 25, emphasis mine.

⁴⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997 http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html

⁴⁵ See Eric Christiansen, 'Exporting South Africa's Social Rights Jurisprudence' (2007-2008) 5 *Loyola U. Chi. Int'l L. Rev.* 29.

Secondly, it is not immediately clear how court cases for enforcement of economic and social rights would be resolved where allegations involve failure by government to provide programmes and systems for the realisation of these rights. From a legal point of view, the courts must at least interpret the legal content of these rights and then consider whether there has been a violation. However, the problem that faces courts is what remedy to award in such cases. This arises from the fact that processes and programmes for maintaining systems to secure fulfilment of economic and social rights involve intricate political deliberations on national resource allocation priorities. Such systems entail administrative and logistical complexities that courts would not be able, in the ordinary course of their work to adjudicate and reorganize. These are the kind of tasks constitutionally assigned to the executive arm of government that can deploy its bureaucratic machinery to address. These questions have on several occasions been litigated in the Constitutional Court of South Africa in the context of the country's written constitution.⁴⁶ In these cases, the Constitutional Court of the Republic of South Africa has attempted to clarify the legal position regarding how the court process can be used to enforce economic and social rights.⁴⁷ In the *Government of the Republic of South Africa and others v. Grootboom and others*,⁴⁸ a group of 900 squatters evicted from a private property had sued the government seeking enforcement of their constitutional right to housing. The issue before the court was how the normative content of the right to housing could be determined and enforced by courts. Yacoob J considered the approach of the UN Committee on Economic and Social Rights but, without rejecting the core minimum content approach, declined to make a judicial determination of what is the minimum core obligation of the state in the fulfilment of the right to housing. In his view, with which the rest of the court agreed, the real question is whether the measures taken by the government to realise the right afforded by the Constitution are reasonable. This would involve

⁴⁶ The three leading cases are: *Thiagraj Soobramoney v. Minister of Health, Kwa Zulu-Natal* 1998 (1) SA 765 (CC) (S.Afr.) accessible at [http://www.constitutionalcourt.org.za/Archimages/\[1234\].PDF](http://www.constitutionalcourt.org.za/Archimages/[1234].PDF); *Government of South Africa v. Grootboom* 2001 SA 46 (CC) (S.Afr.), accessible at <http://www.constitutionalcourt.org.za/Archimages/2798.PDF>; *Minister of Health v. Treatment Action Campaign* (No.2) 2002 (5) SA 721 (CC) (S.Afr.) accessible at <http://www.constitutionalcourt.org.za/Archimages/2378.PDF>.

⁴⁷ For an examination of the recent case law see Eric Christiansen, 'Exporting South Africa's Social Rights Jurisprudence' (2007-2008) 5 *Loyola U. Chi. Int'l L. Rev.* 29.

⁴⁸ 2001 (1) SA 46 (CC). For analysis of this case see Albie Sachs, 'Judicial Enforcement of Socio-economic Rights: The Grootboom Case,' in Sajó Andras and Renate Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International, Utrecht 2005) 79, Daniel Schneider, 'The Constitutional Right to Housing in South Africa: The Government of the Republic of South Africa v. Irene Grootboom' (2004) 2 *International Journal of Civil Society Law* 45, Pierre de Vos, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *South African Journal on Human Rights* 258, J. Sloth-Nielsen, 'The Child's Right to Social Services, the Right to Social Security and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom' (2001) 17 *South African Journal on Human Rights* 210, Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 *South African Journal on Human Rights* 206.

establishing and implementing a coherent, well-coordinated inclusive programme towards progressive realisation of the right to housing.

However, in considering reasonableness the court will not inquire whether other more desirable or favourable measures could be adopted as it recognises that the state can use a wide range of measures to meet its human rights obligations. In that case the Court found that the government had launched a housing development programme which though satisfactory in some respects failed to provide for any arrangements for people in desperate need and for that reason, fell short of reasonable compliance with the constitutional obligations.⁴⁹ The Court consequently made an order directing the government to 'adopt reasonable measures to provide relief for people in desperate need.' However, since the Court's test of reasonableness was in effect based on whether the government's programme makes provision for the vulnerable, critically desperate homeless persons, it is in essence built on the idea of a minimum core obligation.⁵⁰ Under this approach, the onus is on the government to demonstrate that it has done and/or is doing something, however modest, by way of plans, steps, measures and arrangements whereby either presently or in the reasonable foreseeable future, the right of the claimant(s) especially the economically marginalised groups, to have access and consume the social and economic goods will be assured and realised. Thus, in the *Grootboom* case, whereas the government was directed to ensure that a more inclusive housing plan was prepared and implemented that made provision for persons in desperate need such as the claimants, this did not necessarily mean that the state was ordered to immediately provide housing for the claimants.⁵¹ One writer has suggested that the reasonable compliance approach is consistent with the reality of resource constraints on the enforcement of economic and social rights which make this approach more flexible in application.⁵² Whenever people's circumstances drop below a minimum core content of fulfilment of

⁴⁹ Paragraph 13.

⁵⁰ See David Bilchitz, 'Towards a reasonable approach to the minimum core: Laying the foundation for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

⁵¹ About five months after the decision of the Constitutional Court, Daniel Schneider visited the site and found that the litigants in that case had still not been provided with state housing. The government agencies explained that the Grootboom community would not be catered for in isolation, but were being systematically integrated in the citywide programme for state housing without allowing anyone to use the judgment to jump the queue. He wrote: 'After the Constitutional Court announced its decision, the Grootboom community thought the battle had been won. They believed they would receive the fruits of their victory soon, in a matter of months. They would surely be disappointed, for even if they obtained some type of improved housing from the government, it would take more than a few months for them to get it and they would certainly not receive the type of housing they were expecting. Many difficult decisions and choices lay ahead...under severe budgetary constraints with numerous social problems competing for attention.' Daniel Schneider, 'The Constitutional Right to Housing in South Africa: *The Government of South Africa v. Irene Grootboom*,' (2004) 2 *Int'l J. Civ. Soc'y L.* pp. 45-6, at 62..

⁵² Navish Jheelan, 'The enforceability of Socio-economic Rights,' *European Human Rights Law Review*, (2007) 146-157, at 156.

economic and social rights, the answer to the question as to what is the core content of states' obligations seems to be self-evident.⁵³

In the *Treatment Action Campaign* case (hereinafter the TAC) the government had devised a programme for the prevention of mother-to-child transmission of HIV at birth through the provision of Nevirapine as its drug of choice. The Nevirapine therapy for preventing Mother-to-Child transmission of HIV consists of a single dose given to the pregnant mother at the onset of labour and a single dose given to the baby immediately after birth. There were two contentious issues relating to the government's programme. First, Boehringer Ingelheim - the patent holder of Nevirapine had, on 7th July 2000, offered to provide free supplies of the drug to governments of developing countries, including South Africa, for a period of five years. However, until 21st August 2001, the government of South Africa had declined to take up the offer, opting instead to pay for a very limited supply of the drug it had ordered for use in its research and training pilot programme. This delayed availability of the drug in government health facilities for over one year while other countries in the region rolled out national programmes for the distribution of the drug. Secondly, even after accepting the manufacturer's donation of the drug, the government's programme still imposed restrictions on the availability of Nevirapine in the public health sector to only two pilot sites in each of the nine provinces, serving less than 10% of the population. The government defended its policy of restricting access to Nevirapine in public health care sector to only 18 pilot training and research sites on two premises. First, it argued that the efficacy and safety of the drug needed to be tested and proved over a period of time at the pilot and research sites. Secondly, even if the efficacy and safety were confirmed, it was necessary to develop sufficient institutional capacity to provide counselling, testing and post-natal support including formula-feeding substitute for breast-feeding before rolling out a nationwide programme of access. On 21st August 2001, Treatment Action Campaign, a non-governmental organization leading a coalition of professional associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections, filed an

⁵³ E.R. Robertson, 'Measuring state Compliance with the obligation to devote the maximum available resources to realising economic, social and cultural rights'(1994) 16 *Human Rights Quarterly* 693, 702.

application in the High court to challenge the government's policies and programmes in dealing with the HIV/AIDS pandemic.⁵⁴

The applicants' case was that these restrictions were unreasonable and violated the constitutional right of HIV-positive pregnant women to access to reproductive health care recognised by section 27 of the Constitution. Moreover, the government's policies and practices violated the right of every child to access to basic health care protected under section 28 of the Constitution. The High Court ruled in the applicants' favour.⁵⁵ However, the government appealed to the Constitutional Court, seeking review of the High Court's interpretation of the government's obligations and the legality aspects of the of the court order that seemed to dictate policy to the executive. In particular, the government argued that the High Court's order amounted to prescribing Nevirapine, and an attempt by the court to formulate and impose a policy on the executive.

The Constitutional Court, concurring with the High Court, held that the government's policy of restricting the availability of Nevirapine in public health centres to only two pilot sites per province was not reasonable and was an unjustifiable obstacle to the progressive realisation of the right of HIV-positive mothers and their children to basic health care. The court also held that by failing to develop a comprehensive coordinated nationwide plan to roll-out the Prevention of Transmission from Mother to Child programme, the government's approach to the right to health was not reasonable and failed to discharge the constitutional obligations. The government's failure to distribute anti-retroviral drugs such as Nevirapine to HIV-positive expectant women to reduce the risk of transmitting the virus to their unborn children fell below the reasonable compliance test and violated the rights of the affected children to access to basic health care services. However, the Constitutional Court varied the High Court order in two important respects. First, the Constitutional Court clarified that the South African Constitution recognised the version of 'minimum core content of social and economic rights' which is only an element of 'reasonable compliance by the government' and not a self standing right conferred to everyone.⁵⁶ Therefore, the express enactment of economic and social rights in the constitution cannot be construed as entitling anyone to demand that the minimum core be provided to them.

⁵⁴ *Treatment Action Campaign and Others v. Minister of Health and Others* High Court of South Africa, Transvaal Provincial Division, Pretoria; Case No. 21182 of 2001.

⁵⁵ For analysis of the decision of the High Court that declared the government's policies and programme unconstitutional and violations of the right of access to basic health care see Evarist Baimu, 'The government's Obligation to Provide anti-retrovirals to HIV-positive pregnant women in an African human Rights Context: The South African Nevirapine Case,' (2002) 2 *African Human Rights Law Journal* 160.

⁵⁶ *TAC* case par. 35.

Secondly, although the Constitutional Court declared the government's policies and programmes to be violations of the right of access to basic health care services, the court refrained from imposing any policy directive to the government. As the Constitutional Court explained:

The courts are ill-suited to adjudicate upon issues where court orders have multiple social and economic consequences for the community. The constitution contemplates rather a restrained and focussed role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative, and executive functions achieve appropriate constitutional balance.⁵⁷

In this context, the Courts recognise and respect the mandate of the government to determine policies and priorities for implementing the social and economic rights as part of the broader political responsibility for managing the nation's economy. However, while government's have a latitude of discretion to determine national priorities and policies relating to economic and social rights and welfare, this discretion is subject to judicial review to ensure compliance with the state's human rights obligations. The approach taken by the Constitutional Court of South Africa is to insist that the government has a constitutional obligation to implement the economic and social rights enacted in the constitution and domestic legislation. In this matter the government cannot be a judge of its own conduct. The courts have the duty to consider in each case brought before them whether the government's policies and programmes constitute *reasonable compliance* with the government's constitutional obligations. In doing this the courts would not be in breach of the principle of separation of powers, but fulfilling their own duty of upholding the law and ensuring that the reasonable steps are being taken by the government to discharge its constitutional responsibilities.

The minimum core obligations concept is a useful organising principle for understanding economic and social rights. As national delegations explained in a session of the Working Committee on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 'the exact content of economic and social rights cannot be legislated in precise detail because they are context-dependent and are given substantive

⁵⁷ *TAC* case par. 37-38.

interpretation within particular situations when violations are alleged.’⁵⁸ The determination of violations of the actual minimum core entitlement is best approached on a case to case basis incorporating along the way other general principles such as reasonable compliance with the human rights obligations. Indeed, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008 provides that when considering a complaint against a state party, the UN Committee on Economic, Social and Cultural Rights shall take into account the reasonableness of the measures taken by the government of the state concerned.⁵⁹

2.3.3 Minimum core content and the right to effective delivery systems

According to Paul Hunt, the UN Special Rapporteur on the Right to Health, the right to health can be understood as a right to an effective and integrated health system, encompassing health care and the underlying determinants of health, which is responsive to national and local priorities and accessible to all.⁶⁰ This approach looks at key health outcomes, but, places more emphasis on the *systems and processes* by which such outcomes are achieved. While this perspective is used to develop a theory on the right to health, Hunt suggests that all human rights can be conceptualised as being claims to effective systems of legal protection and fulfilment: the right to health is approached through and accessible health care *system*, an effective *court system* underpins the right to fair trial, the right to vote is realised through a *democratic political system* and so on.⁶¹ This approach is in line with the texts of treaties on economic and social rights that require states parties to take steps, implement measures and establish programmes and systems for realization of these rights. In this context, there is a core obligation of states to establish systems, processes and programmes for securing fulfilment of the minimum core content of all economic and social rights. In addition to the minimum core obligation, there is a duty of states parties to ensure progressive realisation of economic and social rights through continuous improvement of the existing social and economic rights delivery systems and standards of living.

⁵⁸ Economic and Social Council Commission on Human Rights: Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, First session 5th March 2004 E/CN.4/2004/44.

⁵⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights UN General Assembly Resolution A/RES/63/117 of 10th December 2008, Article 8(4):

‘When examining a communication under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.’

⁶⁰ UN Commission on Human Rights, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and mental Health, Paul Hunt 3rd March 2006, E/CN.4/2006/48, par. 4

⁶¹ Id, par. 20.

2.4 Three-fold typology of states parties' obligations

The foregoing section attempted to examine the nature and content of economic and social rights. In a nutshell, social and economic rights are claims to a system of access to and enjoyment of certain social and economic goods to at least a minimum level necessary to sustain life and promote the social wellbeing and development of the full potential of individuals and groups of claimants. Such legal claims of social and economic rights are directed at respondents who must be made to comply with certain prescribed conduct as a concomitant correlative of these rights.⁶² This section examines various typologies of human rights obligations and how they have been applied to clarify the content of economic and social rights.

Regimes of rights claims can only yield fruit to the rights-holders when the concomitant obligations have been clarified and the compliance of respective respondents/obligors duly secured: hence the stress on obligations in social and economic rights theory. Although individuals and groups have the same basic social and economic rights concerns, they will make different claims and demands on their government depending on their respective stations in life, especially their relative resource competences to meet social and economic needs from private resources. This implies that the practical context of implementation of economic and social rights is far more complicated than what appears in the treaty texts. It indicates the existence of more than one level of obligations: the general level for everyone and the specific level including targeted action in favour of the economically disadvantaged. In its interpretative comments on the Economic Covenant, the UN Committee on Economic, Social and Cultural Rights has developed a conceptual approach to the content of rights under the Economic Covenant entails a three-fold scheme of obligations as part of the definition of the content of the right. These are the obligations of states parties to respect, protect and fulfil the rights recognised in the Covenant.⁶³

⁶² This scheme of claims of rights as jural correlatives of duties/obligations was first developed by Wesley Hohfeld's *Some Fundamental Legal Conceptions as applied in judicial Reasoning* (1913) 23 *Yale L.J.* 16 especially at p. 32. For analysis of this see, J.G. Wilson, 'Hohfeld: A Reappraisal' (1980) 11 *Queensland L.J.* 190; A.K.W. Halpin, 'Hohfeld's Conceptions: From Eight to Two' (1985) 44 *Cambridge L.J.* pp. 435.

⁶³ UN, Committee on Economic, Social and Cultural Rights (1999), General Comment No. 12 on the Right to adequate food E/C.12/1999/5. 'The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their

The obligation to respect is a ‘negative duty’ that binds states parties’ governmental bodies and all persons or agencies acting in the name of the state to *desist* and *refrain* from any conduct of whatever kind that would interfere or tamper with the *existing* standard of economic and social rights of the affected persons. This is a general basic duty to all persons both rich and poor by which the state is forbidden from denying such people the use of their own private resources to arrange for their social and economic rights provisions. Indeed, state authorities can through deliberate action destroy the social and economic well-being of the community through illegal mass demolition and evictions, closure of public and even ban of privately run facilities and establishments for providing health and education services, re-allocation of public land from use as a public school to a private developers for non-social and economic rights use, abolishing existing schemes access to health services and introduction of user fees and cuts in public expenditure on social and economic welfare programmes and so on. So there is an immediately binding and mandatory obligation on the part of states to refrain from all those acts that would degrade the already established standard of enjoyment of social and economic rights. Asserting economic and social rights does not mean demanding to be given free public goods by the government. Indeed the Committee on Economic, Social and Cultural Rights confirms that ‘many of the measures required to promote the right to housing would only require the abstention by the government from certain practices and a commitment to facilitating self-help by the affected groups.’⁶⁴

The second type of obligation is the obligation to protect these rights which demands that states parties install procedures and mechanisms to stop and *restrain* non-state actors from unlawfully interfering with the enjoyment of these rights by the affected persons or groups. It denotes the ‘horizontal enforcement’ of human rights as it enjoins states parties to provide effective, accessible remedies for violations of human rights by private non-

disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.’ Par. 15. Earlier expositions of this approach were pioneered by Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, New York 1980) pp. 35-64, and Eide Asbjørn, (1995), ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjørn Eide, Catarina Krause and Allan Rosas, (eds) (1995), *Economic, Social and Cultural Rights : A Textbook* (Martinus Nijhoff, Dordrecht 1995), 109.

⁶⁴ General Comment No. 4 on the Right to Adequate Housing, (1991) UN Doc. E/1992/23/, Annex III, par. 10. Despite the far-reaching danger posed by states’ non-compliance with the obligation to respect economic and social rights, this negative-duty component of economic and social rights is frequently ignored or suppressed and the rights have been persistently mis-labelled ‘positive rights.’ See for example Cass Sunstein, ‘Against Positive rights’ (1993) *East European Constitutional Review* 35, reprinted in Henry Steiner and Philip Alston (eds), *International Human Rights in Context* (OUP, Oxford 2000) pp. 280-282.

state actors.⁶⁵ Third party violators can be private individuals, groups, corporations and also public and quasi-public agencies acting under instructions of the government. In many countries, legislation and regulations have been enacted to deal with child labour, environmental degradation, tampering with water resources, food safety, etc and are enforced through various techniques ranging from criminal sanctions, prohibition, prosecution and punishment of all acts of violations by non-state actors to schemes for compensation and restitution. What is required is to adapt them into human rights norms as measures to discharge the obligation of the state to protect the economic and social rights of the affected complainants.

The third category is the obligation to *fulfil* the economic and social rights, and can be split into two: the obligation to promote and the obligation to provide. The obligation to promote requires states parties to institute measures to entrench international norms on economic and social rights in the national law to give them the full legal status and application by domestic public and private human rights bodies. This may necessitate repealing national laws and practices that contradict international norms on economic and social rights and hinder the enjoyment of these rights. Other promotional strategies include educating society on its freedoms, entitlements and obligations relating to economic and social rights with a view to enhancing public awareness of and respect for these rights, disseminating information on the availability and accessibility of resources, facilities, public and opportunities for utilising existing and potential arrangements for social and economic rights and developing and implementing policies to facilitate continuing improvements of existing standards of economic and social rights.

The obligation of States parties to provide refers to what states are required to do in those situations where individuals or groups of persons are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. It goes beyond the general obligations to respect, protect and promote in the sense that it places a positive duty to mobilise national resources to supplement to efforts of those whose private resources are not sufficient to secure their access to and consumption of social and economic goods even at the subsistence level. Accordingly, the states' parties are obligated to take positive measures within their resource competences to provide programmes and arrangements necessary to (re)establish an adequate minimum standard

⁶⁵ Dankwa, V., Flinterman, C. and Leckie, S. (1997), Commentary on the Maastricht Guidelines on Violations of Economic, social and cultural rights <http://www.uu.nl/content/20-02.pdf>, pp. 13-34, at p. 20.

of access to these public social goods as expeditiously as possible. Programmes for social and economic rights like all other rights require mobilisation and allocation of resources to finance the provision of these goods. Seeing that social and economic rights have been embraced in universal norms various appropriate delivery models and strategies can be designed for developed and developing countries commensurate with their respective capacities with the aim of targeting the economically marginalised groups and individuals to reconnect them to the society's life-line.

All states, no matter their level of economic development, have at their disposal a measure of resources, and however modest these might be, there is an obligation to allocate the maximum available resources prioritising the fulfilment of economic and social rights.⁶⁶ Surveys by UNICEF indicate that most developing countries allocate less than 14% of the total public expenditure for health and education, which fails to provide adequate funds for social welfare rights programmes.⁶⁷ As a result, a vast majority of the lower income sector of the people lack access to basic social welfare programmes which either do not exist or are so skewed in spread that they do not reach the poorest. It has now been proposed under the 20/20 Initiative that at the very least, developing countries should allocate 20 percent of their own national budget and also 20 percent of all donor aid they receive on basic social services.⁶⁸ Subject to this 20/20 benchmark, each state party has the burden to prove that it has indeed mobilised and devoted 'maximum resources' towards fulfilment of social welfare rights. While this is a good guideline for national social policies, it is also possible that even with allocations of 20 per cent of the national and external resources to social welfare programmes there can still be large disparities in distribution leaving many economically deprived communities socially excluded.

There is an obligation to seek international cooperation to facilitate access to international technical and material assistance. Phrases 'its available resources' and 'their available resources' in the Economic Covenant and the Child Convention respectively, refer to resources available to the states *both* from within the state and those accessible from the international community through international cooperation and assistance.⁶⁹ A state party would be violating international law on social and economic rights where it fails to actively seek international assistance or declines to accept such assistance towards

⁶⁶ Limburg Principles no. 25

⁶⁷ UNICEF, *Poverty Reduction Begins with Children*, (UNICEF, New York 2000) pp. 30-32.

⁶⁸ Ibid. p. 31.

⁶⁹ Limburg Principles, par. 26.

implementing its national economic and social rights programmes. As the UN Committee on Economic, Social and Cultural Rights observes in its analysis of the right to adequate food, a State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international assistance.⁷⁰

2.5 Actors in the operating system and implementation processes

This section discusses the institutional structures and procedures for implementing the normative standards examined above. It is noted that states as signatories to the international human rights treaties are the main actors in the implementation processes, but in doing so they interact and collaborate with many other actors including inter-governmental bodies as well as local and global non-state actors such as NGOs and the business sector.

2.5.1 State actors: the domestic state

In the texts of human rights treaties, obligations to respect, protect and fulfil economic and social rights are directed at states parties. It is the fundamental responsibility of every government to manage and administer the state's national resources and capabilities in such manner as to secure fulfilment of the minimum core content of all economic and social rights for its subjects. Therefore, the fulfilment of economic and social rights can be approached from the context of domestic resource mobilisation and implementation of national policies and legislation.⁷¹ The provision of systems and programmes for guaranteeing human rights including economic and social rights is therefore an element of the right to good governance that can be asserted and enforced through political process such as general elections and referenda by which societies constitute government leadership.⁷² In the processes of competitive politics, the people can reconstitute their state leadership by choosing policies and personalities most suitable to give effect to their economic and social rights.⁷³ Moreover, national judicial procedures can be utilised to

⁷⁰ UN Committee on Economic, Social and Cultural Rights General Comment No. 12 on the Right to Adequate Food 1999, para. 17.

⁷¹ George Kent, 'Realizing children's international rights to health through implementation of national law' (1997) 5 *International Journal of Children's Rights* 439.

⁷² D.T. Meyers, 'Human Rights in Pre-Affluent Societies' (1981) 31 *The Philosophical Quarterly* pp. 139.

⁷³ *Id.*, 144.

challenge government inaction, neglect and mishandling of children's economic and social rights issues in its policies especially in the appropriation of public funds.⁷⁴

Monitoring state compliance by the UN Committees

Both the Economic Covenant and the Child Convention apply a system of monitoring state parties' compliance with the treaties' norms through examination of periodic reports submitted by the states. The Economic Covenant⁷⁵ requires states parties to prepare reports on the measures they have adopted and the progress made in achieving the observance of the rights recognised in the Covenant. These country reports are submitted to the UN Economic and Social Council Economic, through the office of the Secretary-General of the United Nations to facilitate monitoring of adherence to the Covenant's norms.⁷⁶ After two failed attempts to monitor state reports by its own inter-governmental sub-committee, comprising of representatives of interested states parties, the Economic and Social Council established by its resolution⁷⁷ the Committee on Economic, Social and Cultural Rights to assist it in exercising this mandate. The Committee on Economic, Social and Cultural Rights comprises of 18 persons of competence in human rights who are elected by the Economic and Social Council, but serve in their personal capacities, for a term of four years.⁷⁸

In the context of the Child Convention, Article 43 establishes the Committee on the Rights of the Child consisting of 18⁷⁹ experts of high moral standing and recognized competence in the rights of the child, elected by states parties to serve in their individual capacities for a term of four years.⁸⁰ States parties are required under Article 44 of the Convention to submit reports of the steps they have taken to implement the rights recognized in the Convention within two years after its entry into force in the state party and thereafter

⁷⁴ See Philip Alston, 'Economic and Social Rights'(1994) 26 *Studies in Transnational Legal policy*137, Geraldine van Bueren, 'Combating child poverty through Human Rights Approaches'(1999) 21 *Human Rights Quarterly* 680.

⁷⁵ Articles 16 and 17.

⁷⁶ In its Resolution No.1988/4 para. 6, of 24th May 1988, the Economic and Social Council amended Article 17 of the Economic Covenant to provide that States' parties reports are due within two years after the Covenant's entry into force in the country and thereafter every five years.

⁷⁷ ECOSOC Resolution No. 1985/17 of 28th May 1985.

⁷⁸ Id.

⁷⁹ The original number of 10 members was amended by the UNGA resolution No. 50/155 of 21st December 1995, replacing it with 18. The amendment came into force on 18th November 2002 upon receiving ratification of 128 of the 191 signatories in accordance with Article 50 of the Convention.

⁸⁰ For discussion of the Committee's procedures, see Marilia Sardenberg, 'Committee on the Rights of the Child: Basic Processes' (1996) 6 *Transnat'l L. & Contemp. Probs.* 263.

every five years.⁸¹ The two Committees have also adopted a standard procedure for examination of reports of states parties and use a similar working method.⁸²

Facilitating international cooperation

Another aspect of the processes of examination of states parties reports is that these mechanisms facilitate information exchange that enables the international community to consider how to respond to challenges facing global implementation of economic and social rights. Under the Economic Covenant, copies of country reports submitted for examination by the Committee are also transmitted to the UN's specialised agencies that have competence in the matters contained in such reports or relevant parts thereof.⁸³ Additionally, the specialised agencies are mandated to make reports to the UN Economic and Social Council based on independent evaluation of state parties' implementation of the Covenant and the agencies may present detailed information on recommendations and decisions of their competent organs.⁸⁴ They also have an advisory role in determining and setting standards for the enjoyment of social and economic rights and also rendering technical support to states parties in the design and implementation of social rights programmes.⁸⁵ The Economic and Social Council assisted by the Committee on Economic, Social and Cultural Rights may bring to the attention of the other organs of the United Nations and specialised agencies any matters arising out of the reports submitted by states parties⁸⁶ including but not limited to any recommendations to facilitate international measures to improve the economic and social rights conditions in any country. The procedure for reporting opens up states' practices to scrutiny by the UN monitoring bodies. This system also facilitates exchange of information and where a country's report demonstrates need for assistance, it provides an opportunity for international engagement in implementing the regime of economic and social rights in that country. The Child Convention authorises specialised agencies to participate in the consideration of states parties reports and to provide expert advice to the Committee on the Rights of the Child regarding implementation of the Convention relating to matters falling within the scope of their respective mandates. Moreover, the Committee may, in

⁸¹ Article 44(1).

⁸² For details of the Economic Covenant's Committee's working method see <http://www.ohchr.org/english/bodies/cescr/workingmethods.htm>. For details of the Children's Committee's working methods see <http://www.ohchr.org/english/bodies/crc/workingmethods.htm>.

⁸³ Article 16(b).

⁸⁴ Article 18.

⁸⁵ Ibid.

⁸⁶ Article 22.

appropriate cases, forward state parties' reports together with any its own recommendations that contain requests or indicate need for assistance, to UNICEF and other specialised agencies.⁸⁷

*State Reporting as a mechanism for reform*⁸⁸

The reporting system is based on the expectation that the states' parties will perform their obligations in good faith and regularly present their assessment of their own progress. This process has the potential to catalyse reform in the national and even international systems of economic rights delivery in three important ways. First, the reporting process enables the state parties themselves to carry out comprehensive reviews of their national programmes for economic and social rights, which in turn aids the process of diagnosis of existing problems and reform of national priorities and policies in line with international guidelines. To the state parties, preparing a progress report to be submitted for international public scrutiny is an occasion for corporate introspection, as state actors are pushed to the wall to reflect on what was promised in the law, what the state has capacity to do but has refused and what it is doing for/to the children since the last review. As a result of participating in the reporting process, states parties gradually but surely begin to identify with the standards and norms of that regime and internally alter their attitudes and national approaches to reflect their acquired identity as partakers of that regime. Such transformation of states through their participation in international regimes they have created / joined is one of the possible benefits of the reporting system. When states participate in a legal regime they have voluntarily created/ joined, believing in its ideas, and subscribing to its practices and speaking the language of that regime, over a period of time, they become socialised into the norms of that system. This socialisation in turn can alter the identity of the state actors to reflect what they believe they ought to be as partakers of a progressive human rights order. As one commentator puts it 'states may have a particular identity at a given time but as states develop new rules of international law either through treaty or custom- their participation in the legal regime may alter that original identity.'⁸⁹

⁸⁷ Article 45(b).

⁸⁸ This discussion is based on the exposition of the dynamics of states' reporting processes, by the Committee on Economic, Social and Cultural Rights, General Comment No. 1 Reporting by States Parties 24th February 1989 E/1989/22. For detailed readings on the UN treaty system of monitoring, see Philip Alston and James Crawford, (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP, Cambridge 2000).

⁸⁹ A.C. Arend, 'Do Legal Rules Matter? International law and International Politics' (1998) 38 *Virginia Journal of International Law* pp. 107-153, at p. 153. A further discussion of theories of states parties' compliance with human rights treaties is attempted in chapter 5.

Secondly, within the state party's jurisdiction, the reports provide material for constructive national dialogue between and among the various interest groups particularly those with capacity to influence public policy, such as legislators, political parties, independent national commissions/ committees on human rights, professional societies, trade unions, media houses, Non-governmental human rights organisations, lobby groups, activists, researchers and other human rights practitioners. It is particularly instructive that Article 44(6) of the Child Convention provides that states parties 'shall make their reports widely available to the public in their own countries' to feed the intra-state human rights discourse. When a critical mass of human rights activism has formed, it can coordinate political pressure both from the national coalitions and the networks of international human rights community and like-minded foreign state agencies to challenge inappropriate government policies and practices that are inconsistent with the state's obligations under international law on economic and social rights of the child.

Thirdly, the reporting process affords the Committees an opportunity to contribute to the reform process in the context of recommendations to a state party or generally. The Committee on the Rights of the Child has a broad mandate to initiate reforms and improvements in the child rights delivery systems through proposals for studies on specific child-rights issues and/or suggestions and recommendations.⁹⁰

Individuals' complaints mechanism

Under the Child Convention, there is no provision for hearing and determination of complaints against states parties. Some writers have considered this to be a serious weakness in the effectiveness of monitoring implementation of the Convention.⁹¹ However, in the case of the Economic Covenant, the Optional Protocol on the Competence of the UN Committee on Economic, Social and Cultural Rights to consider communications and complaints against states parties was adopted by the UN General Assembly in December 2008. When it comes into force, this Protocol will pave way for the UN Committee on Economic, Social and Cultural Rights to determine complaints brought by state and non-state actors regarding compliance by respondent states of their

⁹⁰ Article 45(c) and (d).

⁹¹ T.J. Fitzgibbon, 'The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation?' (1987-88) 20 Loy. L.A. Int'l & Comp. L.J 325, 341, especially works cited in footnotes 174 and 175.

obligations under the Economic Covenant in a similar manner as the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights. With this new route being opened, complaints regarding states parties' non-compliance with the legal obligations to respect, protect or fulfil economic and social rights of children could be brought to the UN Committee on Economic, Social and Cultural Rights.

Critics of the individual complaints mechanisms argue that the supposed effectiveness of these procedures is exaggerated. Dennis and Stewart argue that the establishment of a new adjudicative complaints mechanism such as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights will remedy neither the depressed material conditions of over half of the world's population surviving on less than \$2 a day nor the lack of financial and technical capacity which resource-weak Southern states need to provide programmes for these rights.⁹² Indeed, equal protection of human rights does not necessarily mean that the Economic Covenant should be amended to replicate the structures in the International Covenant on Civil and Political Rights for the sake of symmetry, as different strategies that are more appropriate for protecting this type of rights can be nurtured on their own different pathways.⁹³

Absence of international programme for global implementation

Although the claims of social and economic rights of children are expressed in supposedly universal terms, and asserted for all children as a group, the actual implementation of these rights is approached within the framework of national legislation and policies of each state. Whereas the UN specialised agencies such as the UNICEF, ILO and the WHO have been in the forefront in determining international standards and preparing reports on global implementation of the rights themes falling within their respective mandates, these agencies are not assigned the legal obligations under the treaties to guarantee implementation of social and economic rights. Thus, there is no programme for securing global fulfilment of the internationally recognised social and economic rights of the child and these remain an unfulfilled aspiration in many poor countries.⁹⁴

⁹² M.J. Dennis and D.P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462-515.

⁹³ *Id.*

⁹⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties obligations (art. 2, para. 1 of the Covenant) 14/12/2990, par. 14.

2.5.2 State actors: third states

One of the strategies applied in international treaties for the protection and promotion of economic and social rights is secure commitments of the international community of states to undertake international action and provide international cooperation required to achieve global fulfilment of these rights.⁹⁵ This raises the issue as to whether and how the poor countries that have ratified the Child Convention can draw on international assistance and cooperation to mobilise the resources required to fulfil social and economic rights of children in their respective territories.⁹⁶ It also raises the question as to whether third states i.e. richer states have any legal obligations to support fulfilment of these rights in the poor countries. These issues can be approached by examining the emerging practice of states especially how states parties are interpreting their domestic, international and global obligations under international law on the protection and promotion of economic and social rights.⁹⁷

It can be argued that if a state party has economic capabilities to support global fulfilment of economic and social rights, then such a state party might have an obligation to participate in a system for resource transfers to poor states as part of responsibility in international cooperation. Moreover, if the deprivation and poverty in the domestic state is traceable to some culpable conduct of third states, then such third states would be liable to make appropriate resource contributions to remedy such deprivations in the domestic state.⁹⁸ For example if societies in the developing world face famine as a result of drought, triggered by global warming, and this climatic catastrophe is traceable to excessive toxic emissions from the industrialised countries, then the latter might have an obligation to remedy the consequences of such environmental degradation.

2.5.3 Non-state actors

In the practical context of approaching systems and programmes for economic and social rights, states engage with non-state actors i.e. both the NGOs and the business sector. In

⁹⁵ UN Charter 1945, Articles 1(3), 55 and 56; International Covenant on Economic, Social and Cultural Rights 1966, Article 2(1); UN Convention on the Rights of the Child 1989, Article 4.

⁹⁶ This point is discussed in chapter three, below.

⁹⁷ This is examined in chapter four, below.

⁹⁸ These points are examined in chapters four and five below.

the modern era of privatisation of public services, the business sector offers the resources and means for fulfilling economic and social rights in the form of private sector-provided housing, health care, schools, insurance, water and sanitation, public-private partnerships etc. Moreover, with the moves towards liberalised markets and price decontrol, the business sector can wield considerable power to determine accessibility and affordability of basic social services and goods. In view of these developments, it can be argued that non-state actors and the corporate businesses have legal obligations to respect and refrain from interfering with the enjoyment of economic and social rights of communities where they operate as a basic requirement of corporate citizenship.⁹⁹ It is also possible to explore how the organizational and resource capabilities global business sector can be harnessed to establish systems for resource mobilisation to support the current efforts by states to finance programmes for fulfilling economic and social rights.¹⁰⁰ Besides the business sector, NGOs can also assist states to explore mechanisms for the progressive realisation of economic and social rights including establishing global networks for promoting and protecting the rights and welfare of the world's children.¹⁰¹ The aspect of how international law on economic and social rights is gradually extending responsibility to non-state actors is explored further in chapter six below.

2.6 Conclusion

As this chapter illustrates, considerable effort has been committed by the international community of states to create through international law the institutional architecture for the protection and promotion of children's economic and social rights. From humble beginnings in the Geneva Declaration of the Rights of the Child 1924, through the UN Declaration on the Rights of the Child 1959, this process of legalising the moral claims to economic and social well-being of the child has been concretised in the adoption and coming into force of the Economic Covenant 1966 and the Child Convention 1966 and its two protocols. After so much international human rights law-making activity in the twentieth century and as the dust settles down, one of the main tasks for studies in the

⁹⁹ Steven Ratner, 'Corporations and Human Rights: A theory of Legal Responsibility' (2001) 111 Yale Law Journal 443

¹⁰⁰ Peter Spiro, *New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace* (1996) 18 Cardozo Law Review 957. A partnership between states and the global business sector to mobilise resources for children's rights and welfare programmes has been proposed in the UN General Assembly resolution on A World Fit for Children UNGA res. A-Res-S-27-2E of 10th May 2002, Article 32.

¹⁰¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RES/53/144 of 8 March 1999, Article 16. See also N.H. Hart and L. Thetaz-Bergman, 'The Role of Nongovernmental organizations in Implementing the Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* pp. 373-392, at 381; Eckhardt Fuchs, 'Children's Rights and Global Civil Society', (2007) 43 *Comparative Education* pp. 393-412 at 394.

twenty-first century is to interpret and fathom the practical dynamics of the institutional heritage delivered by these legal developments. Indeed, these treaties are not only intended to adorn international rhetoric about human rights but they also have an objective of shaping global consciousness about the rights of the world's children and are intended for full implementation. The current legal apparatus for protecting and promoting economic and social rights has two features. The first feature addresses the issues of minimum core content, core obligations, standards and assessment of the implementation of the rights recognised in the regimes on economic and social rights. Here the focus is on examining the de-facto circumstances and conditions of living of rights-holders and applying indicators to identify best practices and determine violations of these rights in each jurisdiction.

The second feature of international regimes on the protection of economic and social rights concentrates on the actors: the bearers of obligations created under the international law on the protection and promotion of economic and social rights. The concern with actors in this context is two-fold: first, to identify the principal and supplementary bearers of the legal duties correlative to these rights and second, to determine the scope of these actors' respective obligations. This aspect, the focus on actors is at the heart of this study because, when all standards and norms have been set, the pressure for enforcement and implementation must be directed at some competent agency to establish and maintain systems and processes for bringing about the intended results. What animates this study is that despite the adoption of comprehensive standards and norms of economic and social rights by the international community, the realisation of these rights remains an unfulfilled aspiration in many developing countries.¹⁰² Thus, quite apart from adopting universal human rights norms and enacting them in legislation, the actual delivery of programmes and arrangements for securing enjoyment of economic and social rights depends on the conditions of the national macroeconomic portfolio and the availability of private and public resources. Yet, by adopting and sponsoring international treaties for protecting and promoting economic and social rights, the international community of states can be considered to have intended that these rights should be the subject of international action, concern and collaboration, and that their enjoyment should be universally secured through arrangements for global implementation. It is the central proposition of this thesis that states have attempted to incorporate the idea of international responsibility to work

¹⁰² UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties obligations (art. 2, para. 1 of the Covenant) 14/12/2990, par. 14.

towards universal implementation of economic and social rights through the use of the concept of 'international cooperation' in human rights treaties.

As Matthew Craven has argued, there is a gap between the present capabilities of developing countries in terms of what they can do now and the capabilities of required to secure the enjoyment of social and economic rights: either the fulfilment of these rights must be put off or some external means are found to supplement national capabilities.¹⁰³ International cooperation was intended to fill this gap such that these rights could become a reality to all rights-holders around the world.¹⁰⁴ The nature of international cooperation required to fill up this capabilities gap in some states parties and regions was not defined in the texts of the Economic Covenant or the Child Convention.

In this study, it is argued that in order to achieve global implementation of the rights affirmed in international law on the protection of economic and social rights, the legal obligations of states parties to these regimes must be construed to integrate both internal or domestic responsibility to secure the realisation of these rights within the state party concerned and also international and external responsibility to contribute to the global implementation of these rights. The line of argument suggested above transcends the classical doctrine of states' human rights obligations since it means that states parties to international treaties on economic and social rights have obligations both on a domestic level towards their own subjects and also on an external (diagonal) plane towards rights-holders abroad who would normally be in a vertical relationship with their own domestic states. In the next chapter, an attempt is made to present accounts of how several developing countries are approaching their domestic obligations to implement economic and social rights of the child and the challenges facing such states and to explore the role of international cooperation in these processes.

¹⁰³ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (OUP, Oxford 1995), 144.

¹⁰⁴ Id.

Chapter 3

Implementing the social and economic rights of children in developing countries: the place of international assistance and cooperation

3.1 Introduction

This chapter examines the implementation of economic and social rights of children in the developing world with a view to identifying the contribution of international cooperation and assistance in these processes. It is a common feature of the treaties on international protection of economic and social rights that all states, regardless of their financial capabilities or other macro-economic status, are invited to ratify these treaties.¹ Indeed, within the first year of its adoption, the Child Convention had been swiftly ratified by virtually all states in what seems like international consensus on the fundamental principles of children's rights and the necessity to recognise and secure global fulfilment of these rights.² Twenty years on, the fanfare of formal ratification of the Child Convention has calmed down, but many questions about international protection of the rights of the child still demand attention. Among these questions, and one that is at the heart of this chapter, is the issue as to whether and how the states parties in the developing world can really perform their legal obligations under the Child Convention and guarantee the fulfilment of the Convention's economic and social rights in view of the various economic problems and challenges facing such states.³

The chapter begins with an examination of the economic and social conditions of developing countries and how these features affect the fulfilment of children's economic and social rights. The discussion then turns to the legal implications of the dismal performance in efforts to secure the fulfilment of economic and social rights in the developing world, while the final part surveys the various ways in which developing countries and the international community have been engaged in cooperating towards enhancing the fulfilment of economic and social rights of children, using implementation of the right to primary education as a small case study. The gist of the discussion

¹ The Convention on the Rights of the Child 1989, Article 46; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Article 13 'This Protocol is open for signature by any state that is party to the Convention or has signed it.' An example of such a case is the USA that has signed but not ratified the Convention: it had legal standing to ratify the Protocol under this Article. See also the International Covenant on Economic, Social and Cultural Rights 1966, Article 26.

² Trevor Buck, *International Child Law* (Cavendish Publishing, London) p. 17.

³ For analysis of some of these problems see Thomas Pogge, *World Poverty and human Rights* (Blackwell Publishers, Oxford 2002) chapter 4.

presented in this chapter is that despite their macro-economic disadvantages, developing countries can accelerate the processes of achieving full implementation of economic and social rights if they have access to appropriate arrangements for external technical and financial cooperation and assistance. This external cooperation and assistance enables governments in developing countries to overcome resource constraints and design and implement policies and programmes for realisation of economic and social rights.

3.2.1 General characteristics of developing countries

The Child Convention makes four references to the phrase ‘developing countries’ whereby it stresses that particular attention should be had to the needs of societies living in those parts of the world.⁴ Moreover, the concept of developing countries is applied in Article 2(3) of the Economic Covenant, which places some limits on developing countries’ treaty obligations towards persons who are not nationals of those countries. Although these international conventions have applied the concept of developing countries, there is no definition of developing countries in the international law of human rights. Indeed, to gain an understanding of the various development indices and the sorting of countries into categories according to their respective levels of development we need to refer not to legal texts but to the formulations of practitioners in development economics. The World Bank has ranked 209 economies with a population of over 30,000 in accordance with their per capita gross national product. These are classified into four groups as shown in the table below:⁵

Table 3.1 Classification of economies

Gross annual Per capita Income bracket	Rank
\$9,386 and above	High Income economies
\$3036-\$ 9,385	Upper Middle Income economies
\$766- \$3,035	Lower Middle Income economies
\$765 and less	Low Income economies

Source: World Bank

According to this classification, there are sixty-five High-Income developed economies, comprising 27 member states of the Organization for Economic Cooperation and

⁴ 13th preambular paragraph, Articles 23(4), 24(4) and 28(3).

⁵ World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/> accessed 28th December 2008.

Development (OECD) and 38 non-OECD High Income Countries. The remaining 144 countries are developing countries.⁶

Under conventional ranking of the world's economies, developing countries are those with Gross Per Capita Income of less than \$9,386. This means all the countries of the world, with the exception of the High Income Countries are developing countries.⁷ The category of developing countries includes the Upper Middle, Lower Middle and Lower income countries. Given such a broad classification it is clear that there is a wide range of difference between the Upper Middle Income Countries (UMC) and the Low Income Countries (LIC). For instance, on the one hand, Mexico, Brazil, South Africa, India, Turkey, Philippines, China, Malaysia and Thailand whilst ranked as developing countries are also classified as newly industrialising countries (NICs) on account of their rapid export oriented-economic growth and strong manufacturing sector.⁸ On the other hand, the World Bank and IMF have identified 41 Least Developed Countries (LDCs) that have, since 1997, had unsustainable levels of external debts; thirty-three of those countries are in Sub-Saharan Africa.⁹

It can be seen from these figures that while the analytical category of developing countries is applied in human rights treaties, the status of a developing country is not determined by legal criteria, but refers to the de facto economic conditions of the respective countries such as the per capita income, economic growth etc. The macro-economic indicators applied to rank states into developed and developing countries are not static: sustained economic growth can lift a country to a higher status, just in the same way that persistent spells of recession might downgrade an economy to a lower status.¹⁰

⁶ For the full list of the ranking of developing and developed economies, distributed by region see <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/> accessed 28th December 2009.

⁷ For extended discussion of these categories, see Michael Todaro and Stephen Smith, *Economic Development* (Pearson Addison Wesley, London 2006) pp.49-50

⁸ Todaro and Smith, above, p.40

⁹ Afghanistan, Benin, Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Cote d'Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Ghana, Guinea, Guinea-Bissau, Haiti, Honduras, Kyrgyz Republic, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Nicaragua, Niger, Republic of Congo, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, The Gambia, Togo, Uganda and Zambia.

¹⁰ Todaro and Smith, n. 6, above, pp. 126-129, contrasting the economic transition of South Korea from a poor Japanese colony until independence in 1945, to an industrialised developed country status in 2000, with the economic decline in Argentina. See also Verena Fritz and Alina Menocal, 'Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda' (2007) 25 *Development Policy Review* 531.

3.2.2 Macro-economic problems and challenges facing developing countries¹¹

Despite the diversity of the developing countries, they share certain general common characteristics. Many developing countries have in the recent past experienced stagnating and declining rates of real per capita income growth. As a result of this, an overwhelming majority of populations in developing countries are trapped in absolute poverty, with over 1.3 billion people living on per capita income of less than U.S. \$370.¹² This income poverty situation is exacerbated by the fact that the national income is inequitably distributed so that the top 20% of the population receives 5 to 10 times as much income as the bottom 40%. Low levels of government investment in social infrastructure sectors such as health, food production, education and water contribute the high incidence of ill health, high rate of infant and child mortality, malnutrition and low levels of literacy in the developing countries.

Secondly, developing countries' economies are characterised by low levels of labour productivity that are the direct consequence of absence or lack of physical capital and experienced management. Estimates based on data for 2002 indicate that whereas the income of all the countries of the world was valued at U.S. \$ 32 trillion, the developing countries contributed less than U.S. \$ 7 trillion while U.S. \$ 26 trillion was generated in developed countries.¹³ This implies that although developing countries account for 85% of the world's population, they contribute and subsist on only about 20% of the global income. Conversely, developed countries have only 15% of the world's population but produce and control 80% of the world's income.¹⁴ Even where developing countries are endowed with natural resources such as fossil fuels and other minerals, due to their low levels of income and savings, they do not possess the technology and physical capital required to extract and process such wealth: for these factors of production, they resort to the developed countries-based multinational corporations. As these multinationals repatriate profits from such concerns to their holding companies, developing countries suffer a net transfer of resources from their foreign dominated industrial sectors to the developed world.¹⁵

¹¹ This account draws on Michael Todaro and Stephen Smith, *Economic Development* (Pearson Addison Wesley, London 2006), chapter 2.

¹² Id. p. 50-59

¹³ Id. p. 50.

¹⁴ Id.

¹⁵ Id. p. 712.

Thirdly, developing countries have high rates of population growth and dependency burdens.¹⁶ The crude birth rates in developing countries especially in Sub-Saharan Africa are 35 to 50 per 1,000 which are higher than twice the developed countries rate of 10 to 15 per 1,000.¹⁷ Moreover the average annual population growth rate in the developing countries stands at 1.6% compared to 0.7% in the developed countries. Of the world's 6.4 billion people, 5.3 billion or 83% live in the developing countries. The world's children population is estimated at 2.2 billion, of which 1.9 billion or 86% live in developing countries, while only 300 million or 14% live in the developed world. This implies that with children accounting for almost 40% of the population in the developing countries, the societies in the developing world have a higher economic dependency burden compared to the richer countries.¹⁸ This in turn has a negative impact on the marginal propensity to save resources for capital accumulation and investment as a higher percent of the household incomes is allocated to consumption for basic subsistence.

Fourthly, developing countries are characterised by dependency and vulnerability in international relations. Given the unfavourable economic conditions in the developing countries, they have very limited economic and political power in their dealings with other major actors in the international community such as the rich states. As a result of the unequal distribution of power between rich and poor states, the international political and economic system operates in such a way that the developed countries dictate the rules of access to international markets, terms of international trade, transfer of technology, international aid and private foreign investment and foist them on the developing countries. As a result of the crises of debt and recession of the early 1980s developing countries have become extremely vulnerable to the influence of developed donor countries and to the international financial institutions controlled by them.¹⁹ The vulnerability of the developing countries means that forces outside their control have decisive and dominating influences on their social and economic welfare policies and programmes. For example, most of the developing countries rely on production and export of primary agricultural commodities, whose world prices are determined by the international markets controlled by the more economically advanced states.

¹⁶ Id, pp. 65-66.

¹⁷ Id.

¹⁸ Id.

¹⁹ South Centre, *What UN for the 21st Century? A New North-South Divide* (South Centre, Geneva 2005), 14.

A glimpse into the recent history of these countries indicates that not only do they lack a tradition of entrenched social welfare programmes as is witnessed in the Western Europe since the 19th century, but they have also been victims of slave trade, colonialism and neo-colonial exploitation by the richer world powers.²⁰ Slavery and colonialism and the distortions they produced in the developing world are so profound that their debilitating effects are still being witnessed in the economic and political vulnerability of the poor countries.²¹ Following decolonisation in the early 1960s, newly independent states in Africa and Asia assumed responsibility to promote social and economic development and welfare for a deprived populace but did not have the necessary financial resources. For budget support they turned to the international financial institutions - the IMF and World Bank as well as the donor states, for loans to finance social programmes. A combination of poor economic performance, unfavourable conditions for foreign aid and loans and the fluctuations of international commodity prices especially the first world oil crisis in 1973 made it difficult for developing countries to repay these loans leading to the phenomenon of international debt crisis.²² When it became apparent that the external debt of developing countries was getting worse, the IMF and World Bank introduced Structural Adjustment Programmes (SAP) as conditions for further lending. These programmes typically required developing countries to cut down public spending including budgetary allocation to the social sectors such as health and education in measures aimed at ensuring that repayments of earlier loans are maintained even in times of serious economic recession in the debtor countries.²³ Unfortunately, after swallowing the bitter pills of SAP, the economic conditions of developing countries deteriorated to negative growth rates. In particular, the cuts in social sector allocations and introduction of user fees in the health and education sectors, exacerbated poverty as the majority of the people were excluded from access to these social goods.²⁴ A recent study has demonstrated that these structural adjustment programmes were inconsistent with the domestic human rights obligations of the developing countries, worsened the levels of governments' respect for economic and

²⁰ For critical historical surveys, see Walter Rodney, *How Europe Underdeveloped Africa* (Heinemann, London, 1992), James Walvin, *A Short History of Slavery* (Penguin Books, London 2007).

²¹ Id. See also Todaro and Smith, n.6 above, p.71. For extended analysis see also James A. Robinson, D. Acemoglu, S. Johnson 'The colonial Origins of Comparative Development: An empirical investigation' (2001) 91 *American Economic Review* 1369.

²² For a detailed study of this issue, see C.G. Locke and F.Z. Ahmadi-Esfahani 'The origins of the International Debt Crisis' (1998) 40 *Comparative Studies in Society and History* pp. 223-246.

²³ For extended examination of this issue see C. Carvounis, *Foreign Debt/National Development Conflict* (Quorum Books, Westport 1986)

²⁴ For a UNICEF sponsored documentation of the negative impact of SAP on the social and economic welfare of marginalised and economically vulnerable communities in developing countries, see G.A. Cornia, R. Jolly and F. Stewart, eds., (1987) *Adjustment with a Human face: Protecting the Vulnerable and Promoting Growth* (Clarendon Press, Oxford 1987).

social rights and resulted in failure to secure fulfilment of the minimum core content of many social and economic rights in these countries.²⁵

Despite the adverse effects of their economic policies in developing countries, the IMF and World Bank have continued to exert pressure on developing countries to adopt new economic experiments. The two Bretton Woods institutions replaced the SAP with the Poverty Reduction Strategy Papers (PRSP) as the blue print for economic recovery and new conditions for loans and financial assistance to developing countries.²⁶ Yet again, the success of the IMF and World Bank as guardians of the developing world has been anything but satisfactory since this financing facility has retained some of the lending conditions previously attached to loans under the Structural Adjustment regimes.²⁷ A recent investigation demonstrates serious flaws in IMF/World Bank approved Poverty Reduction Strategies and their failure in three countries in Latin America.²⁸ This attests to the vulnerability of developing countries as they submit to the uncertain untested prescriptions of these donor-country dominated institutions. As one writer has pointed out, the policies and institutions which the developed countries through the IMF and World Bank recommend to and impose on developing countries are not only contradictory to the pre-industrialization policies these developed countries followed to reach their high levels of development but such prescriptions have also failed to produce the promised accelerated economic growth and in many cases have led to economic collapse.²⁹

Quite apart from the unfavourable economic conditions of exploitation and domination by external powers, developing countries have also suffered from internal problems such as armed conflict and civil war. In 2003, there were 19 major armed conflicts in the world, mostly taking the shape of civil war in developing countries.³⁰ The combination of poor governance, inept and corrupt leadership, misallocation of resources, inequitable distribution of national resources and in some cases such as the Peruvian government

²⁵ Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment* (CUP, Cambridge 2007), chapter 6.

²⁶ For a human rights critique of Poverty Reduction Strategies, see Arne Tostensen, 'The Bretton Woods Institutions: Human Rights and Poverty Reduction Strategy Papers' in Margot Salomon, A. Tostensen and W. Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp 2007) pp. 185-210.

²⁷ M. Rodwan Abouharb and David Cingranelli, no.22, above.

²⁸ G. Dijkstra, 'The PRSP Approach and the Illusion of Improved Aid Effectiveness: Lessons from Bolivia, Honduras and Nicaragua' (2005) 23 *Development Policy Review*; G. Holmqvist and K.M. Cueva, 'If the Poverty reduction Strategy Experience in Latin America is a Disappointment, What is the Alternative?' (2006) 24 *Development Policy Review* pp. 477-480.

²⁹ Ha-Joon Chang, *Kicking Away the Ladder-Development Strategy in Historical Perspective* (Anthem Press, London 2002). At the creation of the Bretton Woods institutions in 1944, the developing world was still under colonial rule. Perhaps, one might ask whether the Bretton Woods institutions that were initially designed to facilitate reconstruction of post-war Western European countries could handle the new role of managing underdevelopment and poverty in the developing world.

³⁰ Stockholm Peace Research Institute, 'Patterns of Major Armed Conflicts, 1990-2003' *SIPRI Yearbook 2004* (OUP, New York 2004) Appendix 3A..

under president Fujimori, systematic clientelism have scuttled rights-based programmes for social and economic rights.³¹ As one writer has argued, due to inept and corrupt leadership, public financial resources that should have been utilised to provide basic social and economic infrastructure in African countries have been stolen and transferred by African leaders and officials into private bank accounts in Western banks.³² Leaders such as Sani Abacha of Nigeria and Mobutu Sese Seko of Zaire looted national treasuries and transferred the money to European banks.³³ Estimates of funds looted from African economies and stashed in foreign banks stand at US\$400,000,000.³⁴ Evidently, the travails of developing countries to secure implementation of economic and social rights are undermined by both internal and external forces. Therefore, any initiative for realization of human rights in these countries must include strategies to integrate and re-mobilise both the domestic and external actors.³⁵ For instance, before seeking assistance from the international community to implement programmes for economic and social rights, developing countries should demonstrate that they have utilised maximum domestic resources in the best way possible for this purpose.

The foregoing aspects of the macro-economic outlook of developing countries have had a negative impact on the realisation of economic and social rights for the majority of the population living in the developing world. More specifically, the conditions of systemic poverty and underdevelopment have had serious consequences on the rights and welfare of children in developing countries, to the extent that even the minimum core content of economic and social rights has not been secured for these children.³⁶ Estimates based on 2002-2003 data indicate that the number of under-5 deaths every year is 10,643 million.³⁷ More recent estimates show that over one billion people in the developing world subsist

³¹ Clientelism is a neo-feudalist practice of skewed management of state resources in such a manner that the government elites at the centre monopolise access to these resources. The system establishes a hierarchy of power brokers from the head of state at the top through regional, district and area point-men through whom government resources, opportunities and benefits are doled out to people in return for political support to the leaders. Every broker maintains a network of 'clients' below him who benefit from such patronage. Such political practices compromise social and economic rights. For further discussion see A. Schneider and R. Zuniga-Hamlin, 'A strategic Approach to Rights: Lessons from Clientelism in Rural Peru' (2005) 23 *Development Policy Review* 567.

³² Shedrack C Agbakwa, 'Reclaiming Humanity: Economic, social and Cultural Rights as the Cornerstone of African Human Rights' (2001) 4 *Yale Human Rights and Development Law Journal* 177, 195, arguing that among the main causes of non-fulfilment of social and economic rights by governments in Africa is the fact that many of such governments are presided over by inept and corrupt leaders who steal public funds by rejecting policies that would spur development and promote economic social and cultural rights in favour of policies that bring greater personal profits.

³³ *Id.*

³⁴ Transparency International (2005) *Annual Report 2005*, p.7. www.transparency.org

³⁵ For a critical assessment of the supposed roles and contribution of internal and external actors to the human rights practices in developing countries see, Makau Mutua, 'Savages, Victims, and Saviors: the Metaphor of Human Rights,' (2001) 42 *Harvard International Law Journal* 201.

³⁶ For critical global surveys of these problems see UNDP, *Human Development Report 2005: International Cooperation at Crossroads: Aid, Trade and Security in an Unequal World* (OUP, Oxford 2005).

³⁷ UNICEF, *State of the World's Children 2005: Childhood Under Threat* (UNICEF, New York 2004), pp. 106-109. See also World Health Organization, *The World's Forgotten Children* www.who.int/ceh/publications/01mortality.pdf accessed 24th December 2007.

below the poverty line of 2 US dollars a day and the minimum core content of economic and social rights cannot be secured for a large percentage of children, leading to 9,733,000 child deaths every year, with 9,614,000 (approximately ninety-nine per cent) of these occurring in the developing world.³⁸ The causes of under-5 child mortality are as follows: peri-natal diseases (within 7 days of birth) 23%, Acute respiratory disease 18%, diarrhoea 15%, Malaria 11%, Measles 5%, Human Immunodeficiency Syndrome (HIV) 4%, Others 24%. Child deaths from causes such as acute respiratory disease, diarrhoea, Malaria and Measles which account for 49% can be prevented by inexpensive intervention measures such as vaccination, antibiotic/anti-malarial therapy, provision of insecticide-treated mosquito nets, and improved water and sanitation systems.³⁹ Yet, due to poverty and underdevelopment, national response systems to child mortality are hampered by shortage of public financial resources. Ingestion of unsafe water, inadequate availability of water for hygiene and lack of access to sanitation contribute to about 1.5 million child deaths and 88% of deaths from diarrhoea every year.⁴⁰ The rate of child mortality is an indicator of the overall levels of social and economic wellbeing enjoyed by children and their families. High rates of infant and child mortality can be seen as evidence of the hardships experienced by children, their care givers, families and surviving siblings. In another survey, it has been established that in developing countries, every day, 18,000 children die of hunger and malnutrition, while children who survive early childhood nutritional deprivation are condemned to limited physical and intellectual development, thus 'crucified' at birth.⁴¹

Extreme poverty and disconnection from social safety structures contribute to the inability of poor families in developing countries to provide their children with basic needs, a factor that leads to withdrawal of the children from school to avail them for employment in the informal sectors. This is the main reason why child labour and other forms of economic exploitation of children are rampant in poor countries. While this system appears like as a mechanism for survival, it violates minimum content of the right of the child to primary education and also contravenes the right of the affected children to a standard of life adequate for their development promised in the Child Convention.⁴² As one writer notes:

³⁸ UNICEF, *State of the World's Children 2008: Child Survival* (UNICEF, New York, 2007) p. 115.

Online copy can be accessed at http://www.unicef.org/publications/files/The_State_of_the_Worlds_Children_2008.pdf

³⁹ G. Jones, R.W. Steketee, R.E. Black, Z.A. Bhutta, S.S. Morris and the Bellagio Child Survival Study Group 'How many child deaths can we prevent this Year? (2003) 362 *The Lancet* 65-71

⁴⁰ R.E. Black, S.S. Morris and J. Bryce, 'Where and Why are 10 million children dying every year' (2003) 361 *The Lancet* pp. 2226-2243, at 2227.

⁴¹ UN GA/ Human Rights Council Report of the UN Special Rapporteur on the Right to food, Jean Ziegler to the UN Human Rights Council A/HRC/4/30 (19th January 2007) par. 21-33.

⁴² Article 27, and 28.

Households in extreme poverty resulting from low income and high unemployment of the adult members, lack of social protection and high dependency burden, with little or no assets, and limited access to any physical and financial resources are often compelled to engage their minor children in various household economic activities or send them to work for wages instead of enrolling them in schools.⁴³

It seems, therefore, that under such economic desperation, many poor families regard their children as the only 'economic resource.' Besides deploying children in exploitative child labour, some parents and care givers deliberately maim and deform their children so as to use them more effectively in begging.⁴⁴ In some more desperate cases, children in poor families are at risk of being trafficked for harvesting of body organs and child prostitution.⁴⁵ Such hard conditions of subsistence explain the prevalence of human trafficking in developing countries. A recent survey of trafficking and smuggling for forced labour in Europe found that the victims of human trafficking are uneducated and economically deprived children and young adults from developing countries in Eastern Europe and Asia, with destinations being the more affluent Western European countries.⁴⁶ Another phenomenon associated with poverty and underdevelopment in developing countries is the escalating number of children living in urban streets, also called 'street-children.'⁴⁷ However, the urban street-children phenomenon is only a tip of the iceberg, a symptom of the more extensive economic deprivation that suffocates children and families in poor countries. As Judith Ennew has demonstrated, the street children manifest only a tiny segment of child poverty and there is far larger constituency of poor and

⁴³ M. Masum, 'Eradication of Child Labour in Bangladesh: The need for an integrated strategy' (2002) 10 *International Journal of Children's Rights* pp. 233-268, at 240.

⁴⁴ One report states: 'Given the extent of poverty in Bangladesh, substantial numbers of people, including children, exist by begging. Begging is known to be a well-organized business run by gangs who share out the money they receive between their members, though rarely on an equitable basis. Children are often used in the front line. In addition to the basic fact of using a child for begging, a number of exploitative practices exist, which are designed to trigger sympathy or revulsion in those approached for money and therefore to increase the amount given. These include women carrying another woman's baby and the deliberate maiming of persons (including children) used for begging. A new offence is included in the Suppression of Violence against Women and Children Act 2000 - that of maiming, crippling or disfiguring a child for the purpose of begging (or to sell their body parts).' Bangladesh Second periodic reports of States parties 2001 CRC/C/65/Add.22 par. 20,395-6

⁴⁵ Ibid.

⁴⁶ ILO Forced labour, Child labour and Human Trafficking in Europe: An ILO Perspective a Technical paper for the EU/IOM STOP 'European Conference on Preventing and Combating Trafficking in Human Beings' 18-20 September 2002, Brussels, Belgium. For a survey of anti-trafficking programmes in East Asia see Lisa Kurbiel, 'Implementing the UN Trafficking Protocol to Protect Children: Promising Examples From East Asia' (2004) 24 *Children's Legal Rights Journal* 73.

⁴⁷ For comparative surveys see Marc Seitles, 'Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia and Guatemala' (1997/1998) 16 *In Public Interest* 159; Beth Colgan et al. 'Street Children in Tanzania: Effects of Economy and Education' (2000) 20 *Children's Legal Rights Journal* 2; Irene Rizzini, 'Poor Children in Latin America: A Case Example of Social Inequality' (1998) 18 *Children's Legal Rights Journal* 50.

economically deprived children in developing countries who do not live in town streets, but in urban slums, squatter settlements and rural villages.⁴⁸

Another issue of concern in developing countries is that not only are the rates of enrolment in primary and secondary schools very low but the rates of dropping out of primary and secondary school are very high in comparison with developed states.⁴⁹ A recent survey indicates that by age 7, almost all children in the OECD countries are in primary school, compared with 40% for sub-Saharan Africa, and at age 20, in OECD countries, 30% are in post-secondary education and only 2% in Sub-Saharan Africa.⁵⁰ One of the main obstacles facing the realisation the right of the child to education is the inadequate mobilisation of domestic resources to finance education programmes, that results in decisions to charge school fees to make up for the shortfall in public expenditure on education.⁵¹ Such practices and policies contravene the minimum core content of the right of the child to free and compulsory primary education.⁵²

3.3 Legal implications of failure to implement economic and social rights of children in developing countries

Despite the grave economic problems that constrain the efforts of developing countries to guarantee fulfilment of economic and social rights, all these countries have ratified the Child Convention. In many African countries, the Child Convention has been incorporated in national legislation, and given legal effect at least on paper.⁵³ Indeed, today, the main claims of children's economic and social well-being have been recognised and enacted in international human rights law and accepted as basic norms of behaviour.⁵⁴ It seems apparent that there is a performance gap as regards the fulfilment of legally recognised

⁴⁸ Judith Ennew, 'Why the Convention is Not About Street Children' in Deirdre Fottrell (ed.) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (Kluwer law International, the Hague 1999) pp 169-182.

⁴⁹ Todaro and Smith, n. 6 above, p. 58.

⁵⁰ UNESCO, *Education For All Global Monitoring Report 2009 Overcoming Inequality: Why Governance Matters* (UNESCO, Paris 2008), p. 8.

⁵¹ Katarina Tomasevski, 'School fees as a Hindrance to Universalizing Primary Education' Background paper prepared for the Education for All Global Monitoring Report 2003/4, UNESCO, 2004/ED/EFA/MRT/PI/73.

⁵² Fons Coomans, 'Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization,' in Yvonne Donders and Vladimir Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO Publishing/ Ashgate, Aldershot 2007) 183, 209.

⁵³ For a regional survey, see Julia Sloth-Nielsen, 'Strengthening the Promotion, Protection and Fulfilment of Children's Rights in the African Context' in Andre Alen et al. (Eds) *The UN Children's Rights Convention : Theory Meets Practice* (Intersentia, Antwerp 2007) 81. See also G. Odongo, 'The Domestication of International Standards on the Rights of the Child' (2004) 12 Int. J. Ch.Rts 419, Michael Wabwire, 'Rights Brought Home? Human Rights in Kenya's Children Act 2001' in Andrew Bainham (ed.) *International Survey of Family Law* (Jordan Publishing, Bristol 2003) 393.

⁵⁴ John Montgomery, 'Fifty Years of Human Rights: An Emergent Global Regime' (1999) 32 *Policy Sciences* pp. 79-94.

economic and social rights in the least developed countries: twenty years since the coming into force of the Child Convention, the norms written in this and other human rights treaties have not been implemented in the domestic practice of developing countries. This section reflects on two approaches to the implications of the disconnection between the de jure recognition and ‘protection’ of children’s economic and social rights in the legal orders of the developing countries and the de facto conditions that demonstrate non-fulfilment of these rights on the ground.

Comparative development approach

According to the comparative development argument, the principle that there is a universal minimum core content of economic and social rights should be qualified by the consideration that the actual determination of the minimum core content should be flexible, taking into account the diverse circumstances applicable to states parties. A much lower standard should be applied to set the minimum essential levels of enjoyment of economic and social rights for the least developed economies than the one for high income economies. This argument is formidable and should be examined further. Since states constitute the political structures in which international human rights are norms are translated into national practices, the standards and goals for human rights should be pegged on what can reasonably be achieved within the means and resources of each national economy.⁵⁵ By insisting on different minima for different societies, the comparative development argument challenges the universal standards such as the minimum core content of economic and social rights, suggesting that these supposedly universal ideals and benchmarks might only represent subjective prescriptions and agendas touted by executives of the global human rights agencies.⁵⁶ If this line of argument is taken to its logical conclusion, it implies that the circumstances described in the preceding section regarding the non-fulfilment of economic and social rights in the developing countries would not be considered as violations or denials of human rights, but would pass as reasonably ‘normal happenings’ commensurate with available domestic resources at the disposition of these states and the state of their economic development. Actually, programmes for social and economic rights and welfare thrive on the availability of economic surplus to be redistributed so as to bring the lowest income groups to the guaranteed minimum floor of subsistence leaving the ceilings to be determined by the

⁵⁵ For extended defence of this argument see David Miller, *National Responsibility and Global Justice* (OUP, Oxford, 2007)

⁵⁶ For extended defence of this view, see M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, NJ. 2001).

relative means of society's members themselves. Indeed, national systems for securing social and economic wellbeing become feasible because of the economic growth and development that generate new wealth and expanded surplus: these processes support the establishment of an enhanced organizational structure through which benefits could be delivered.⁵⁷ According to this view, only nations at a particular level of social and economic development can develop programmes for guaranteeing economic and social rights.⁵⁸

Writing on the progress of implementing human rights in Africa, Rhoda Howard observed that although African countries have undertaken the legal obligations to implement economic and social rights under international and domestic laws, the economic and social conditions of developing countries are similar to those of pre-industrial Western European states.⁵⁹ Therefore, it is inaccurate to compare the performance of developing countries in implementing universal human rights standards with that of contemporary developed states.⁶⁰ Howard noted that the implementation of state policies for securing economic and social rights in Western European states began in earnest in the late nineteenth century when governments had command of accumulated wealth of four centuries of imperialism and industrialisation.⁶¹ Historians explain that until the mid-nineteenth century, many Western European countries did not have programmes for economic and social welfare and, and child mortality in Western European cities was very high.⁶² It was only after programmes for providing water, sanitation and sewers had been implemented and general standards of living and incomes had improved that Western Europe registered a dramatic decline in child and infant mortality.⁶³

From the time the international community adopted universal norms of human rights social and economic rights, states parties to the Charter of the United Nations have been under legal obligation to submit their national human rights practices to international monitoring procedures. In the process of this monitoring, reports of states parties and the field surveys and reports of the UN specialised agencies facilitate comparisons between the achievements and progress of pre-industrial developing countries and the

⁵⁷ Jill Quadagno, 'Theories of the Welfare State' (1987) 13 *Annual Review of Sociology* pp. 109-128 at 111-112.

⁵⁸ *Id.*

⁵⁹ Rhoda Howard, 'Evaluating Human Rights in Africa: Some Problems Implicit in Comparisons' (1984) 6 *Human Rights Quarterly* 160-179, at 169.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hugh Cunningham, *Children and Childhood in Western Society since 1500* (London, Longman, 1995) p. 166.

⁶³ *Id.* See also E. Hopkins, *Childhood Transformed: Working Class Children in Nineteenth Century England* (Manchester, Longman 1994).

industrialised developed world.⁶⁴ As developing countries participate in the international regimes on economic and social rights, they grapple with the dilemma of having to meet, within a short time span, and, with very limited economic resources and technical capabilities, the expectations set in the standards of economic and social welfare that seem to reflect what has been achieved in the industrialised countries. In a way, this appears like attempting a huge leap into the history of development of the poor countries. Dowell-Jones has suggested that one of the ways to resolve the issue of states' minimum core obligations under Article 2(1) of the Economic Covenant is to narrow down the analysis to two principles: the states parties should demonstrate that the measures and programmes being undertaken are affordable within the country's existing economic means and, that the objectives set do not detrimentally impact on the future ability of the state to implement the Covenant.⁶⁵ Dowell-Jones' thesis seems to be more applicable in the rich countries that have broader latitude of economic discretion; but it offers little comfort to the thirty-one Heavily Indebted Poor Countries (HIPC) in the developing world whose national economic resources fall short of what is required to secure access to the minimum core content of economic and social rights.

If, at the time of adopting or acceding to the international norms on economic and social rights, a country's economic development is such that it would not meaningfully guarantee realisation of such rights, then such ratification of these treaties by poor states and their purported commitment to such standards is unrealistic.⁶⁶ Therefore, it seems only logical that such poor states should defer their accession to or ratification of international norms on economic and social rights until such time that they would have developed adequate domestic capacity to perform the obligations entailed in securing the implementation of these rights. However the comparative development argument is inconsistent with the idea of a universal minimum core content of economic and social rights, necessary to secure the dignity, health and life of every human being. Even before interpretation and implementation processes can start, the ratification of treaties on human rights is itself a symbolic victory since it integrates the international community to 'a gravitational pull,'

⁶⁴ Specialised agencies of the UN have a legal mandate to prepare and submit reports regarding progress in implementing economic, social and cultural rights under Article 18 of the Economic Covenant and Article 45(a) of the Child Convention. UN agencies such as the World Bank, IMF, UNICEF, UNDP and WHO have the standing practice of preparing global, regional and country reports that present comparative information on states' performance regarding various economic, demographic, health, education and other indicators of economic and social rights.

⁶⁵ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff Publishers, London 2004) 55.

⁶⁶ Mahmood Monshipouri, 'Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries' (2001) 4 *Yale Hum. Rts & Devt. LJ*, 25 at 61.

towards consensus on the content of universal human rights.⁶⁷ The comparative development approach in effect condones gross inequalities between and within states. It fails to recognise that the minimum core content is not to be defined by reference to specific groups but is a general concept, seeking to guarantee a basic common floor of legal protection of the access to the basic decencies of life for every human being, and is applicable across the entire human species.⁶⁸ Contrary to the segregationist bent of the comparative development argument, human rights are both a national and international concern: the international community of states has a shared legal responsibility to cooperate towards reducing the inequalities among societies and re-establishing the global fulfilment of minimum core content of all economic and social rights.⁶⁹

Therefore, the more appropriate application of comparative development analyses is to insist on a universal minimum core content of all social and economic rights as a legitimate legal guaranteed floor of economic and social welfare for every person: states owe a legal duty to ensure for each person access to this basic minimum floor, below which the dignity, health and life of the person would be severely imperilled. Beyond the minimum core content, the levels of enjoyment of these rights would vary depending on the resource capabilities of individuals and states, such that ceilings would vary across households, states and regions etc. An illustration of this point has been attempted by Raymond Torres in a comparative assessment of the application of international labour standards. Torres argued that there is broad international consensus by both rich and developing countries on four core labour standards, i.e. the elimination of exploitative child labour, abolition of forced labour, non-discrimination in employment and, freedom of association and collective bargaining: these constitute the minimum core content.⁷⁰ However, other labour standards such as the minimum wage or social security protection have not been implemented as ‘universal human rights’ and depend on the state of economic development of each country.⁷¹ It seems therefore that the correct theory of comparative development accepts the minimum core content of economic and social rights, that can be expanded in line with the concept of progressive realisation and continuous improvement in the rights-holders’ living standards.⁷²

⁶⁷ Frans Viljoen, *International Human Rights Law in Africa* (OUP, Oxford 2007) 126.

⁶⁸ See David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP, Oxford 2007), chapter 6.

⁶⁹ Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford 2007), chapter 5.

⁷⁰ Raymond Torres, ‘Labour Standards and Trade’ (1996) 202 *The OECD Observer* pp. 10-12.

⁷¹ *Id.*

⁷² Economic Covenant, Articles 2(1) and 11, The Child Convention Article 4.

The Violations Approach

The second approach insists that the failure of a state party to the international norms on economic and social rights to fulfil the minimum core content of these rights for its subjects is *prima facie* a violation of these rights and a contravention of international law.⁷³ Chapman explains that the UN Committee on Economic and Social and Cultural Rights, has indicated in its Concluding Observations on various states parties' reports the 'principal subjects of concern' showing that failure of the state to implement the core minimum of the economic and social rights in a state party is a violation of the Economic Covenant.⁷⁴

The theory of the implementation of economic and social rights is grounded on the principle that economic, social and cultural rights entail the enjoyment of a minimum essential level - the minimum core content of all these rights, below which the normative rights claims would be emptied of all their meaning. Thus, a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.⁷⁵ All states parties, regardless of their level of economic development have a mandatory obligation to discharge this minimum core obligation.⁷⁶ As the Committee on the Rights of the Child explains, all states parties to the Child Convention are required, whatever their economic circumstances, to undertake all possible measures towards realization of the rights of the child, giving special attention to the most disadvantaged groups.⁷⁷

Indeed, to allow governments to indefinitely procrastinate the performance of their legal obligations under the guise of inadequate level of economic development is a sure recipe for disaster, as there can be no limit to the use and abuse of this excuse.⁷⁸ Some government officials in Africa who claimed their countries lacked the resources to fulfil the minimum content of the economic and social rights recognised in the African Charter on Human and Peoples' Rights actually presided over regimes that looted national coffers

⁷³ See Audrey Chapman, 'A Violations Approach for Monitoring the International Covenant for Economic, Social and Cultural Rights,' (1996) 18 *Human Rights Quarterly* 23.

⁷⁴ *Id.*, p. 58.

⁷⁵ UN Committee on Economic Social and Cultural Rights General Comment 3 (14/12/1990) The Nature of States Parties' Obligations (Art. 2, par.1) par. 10.

⁷⁶ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122-135, No. 25.

⁷⁷ UN Committee on the Rights of the Child (2003), General Comment No. 5 General measures of Implementation CRC/GC/2003/5 par. 8.

⁷⁸ Shedrack Agbakwa, 'Reclaiming Humanity: Economic, social and Cultural Rights as the Cornerstone of African Human Rights' (2001) 4 *Yale Human Rights and Development Law Journal*, pp.177-216.

and stashed the countries' wealth in foreign banks.⁷⁹ Moreover, such political leaders suppressed policies intended to promote economic and social rights in favour of those which facilitate personal aggrandisement of the political elites.⁸⁰

If any state claims that its failure to perform the minimum core obligations to secure fulfilment of the minimum core content of economic and social rights has been occasioned by lack of resources, it has the burden to prove that every effort has been made to use all resources that are at its disposition to satisfy those minimum obligations as a matter of priority.⁸¹ This approach helps to redirect attention on state authorities whose policies and programmes are responsible for determining the level of enjoyment of economic and social rights in domestic context. Some cases of non-fulfilment of economic and social rights are the result of misallocation and misuse of national public resources rather than lack of such means. For example, in 1998, against the advice of international financial institutions, Zimbabwean President Robert Mugabe appropriated public funds to finance deployment of troops in the Democratic Republic of Congo, a move that compromised the government's efforts to manage the country's budget deficit. This prompted the World Bank and IMF to suspend aid and loans to the country, until it implemented measures to reduce military spending and introduce administrative and political reforms.⁸² However, President Mugabe rebuffed these conditions for international cooperation.⁸³ Since then, the country has been excluded from the IMF and World Bank credit programmes and the government has been unable to provide or sustain programmes for fulfilling basic economic and social rights in the country.

The former UN Rapporteur on the Right to Education has correctly argued, the non-fulfilment of economic, social and cultural rights is caused, not by poverty but bad policies, and it is the responsibility of the human rights community to expose and oppose governments' policies and practices that distort, deny or violate human rights.⁸⁴ It is when allegations of violation of human rights are clarified that defaulting states parties can appreciate the need to review and correct their policies to realign them towards addressing their human rights obligations in a more effective manner. However, there can be

⁷⁹ Id, p. 195.

⁸⁰ See also Oloka-Onyango, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' (1995) 26 *Cal. W. Int'l L.J.* 1 for discussion of various case studies.

⁸¹ UN Committee on Economic Social and Cultural Rights General Comment 3 (14/12/1990) The Nature of States Parties' Obligations (Art. 2, par.1) par. 10.

⁸² Arthur Goldsmith, 'Donors, Dictators and Democrats in Africa' (2001) 39 *The Journal of Modern African Studies*, pp. 411-436, at 416.

⁸³ Id.

⁸⁴ Katarina Tomasevski, 'Unasked Questions about Economic, Social and Cultural Rights' (2005) 27 *Human Rights Quarterly* 709, at 714-5.

situations where the state adopts policies and practices that advance and promote economic and social rights but its economic capabilities fall short of what is required to guarantee the minimum core content of economic and social rights. In such a case it might be harsh to adjudge such as state to be violating human rights. Nevertheless, as the Committee on the Rights of the Child has clarified, international law requires such a state to seek international action and assistance as part of its obligations in international cooperation for fulfilment of economic and social rights.⁸⁵

Scott Leckie has clarified that a distinction can be drawn between those situations where the state has acted in good faith and sought to rectify problems relating to social and economic policy but in the meantime, the results are not yet satisfactory, and those where the state is violating these rights through deliberate action, policies and laws, discrimination and omission.⁸⁶ Therefore, not all cases where the Committee has expressed criticism or concern amount to violations as such a concept would be so too loose to retain any credibility.⁸⁷ As Asbjørn Eide has suggested, since economic and social rights have been adopted at universal level, they are intended for universal implementation in both the industrial and agricultural (pre-industrial) contemporary societies, leaving no room for discriminatory treatment against any human being on the grounds of her country's level of economic development.⁸⁸

The violations approach examines the purpose and logic of ratification of international human rights norms on economic and social rights by all members of the United Nations including those that do not, for now, possess the economic capabilities of implementing even the minimum core content of these rights. The universal endorsement of the Child Convention by all states provides additional legal tools for advancing the agenda for global fulfilment of the rights of the child through arrangements for international action, assistance and cooperation. One of the ways in which the Child Convention can have significant effect on the lives of the world's children, is to use it as a basis for mobilising resources and programmes at the national and international level to secure its universal

⁸⁵ UN Committee on the Rights of the Child, General Comment No. 5 (2003), *General Measures of Implementation for the Convention on the Rights of the Child*, CRC/GC/2003/5 par. 7.

⁸⁶ Scott Leckie, 'Another step towards Indivisibility: identifying the key features of violations of economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81, 102.

⁸⁷ Id.

⁸⁸ Asbjørn Eide, 'Economic and Social Rights' in Janusz Symonides (ed.) *Human Rights: Concepts and Standards* (UNESCO/Ashgate, Aldershot 2000), pp.109-173, at 115. For a similar argument, see Robert Robertson, 'Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights' (1984) 16 *Human Rights Quarterly* 694.

implementation.⁸⁹ At the adoption of the Child Convention developing countries understood that their support for the Convention would be rewarded in the sense that the findings and recommendations of the monitoring Committee would be used as a basis for discussions with international and bilateral development partners on technical and financial aid towards national implementation.⁹⁰ The World Conference on Human Rights observed that the Child Convention provided a platform for international cooperation and solidarity for implementing the rights of the child and recommended that children's rights should be a priority in the United Nations system-wide action on human rights.⁹¹

In this context, it can be argued that the circumstances relating to the non-fulfilment of the economic and social rights of children described in this chapter constitute an indictment of the domestic and international human rights systems: the annual ten million child deaths are casualties of a failing system for international protection of economic and social rights. However, it would be inaccurate to paint a completely pessimistic picture of what is happening in these poor parts of the world. There are struggles and endeavours in the developing countries to secure fulfilment of economic and social rights; governments and international community have been working together on these issues. This point is discussed in the next section.

3.4 Implementing free primary education in developing countries: a case study

The list of economic and social rights in the treaty texts tends to be extensive, with cross-cutting interconnected rights themes. For example, the right to education is considered to be both a human right in itself and also an indispensable means of realizing other human rights.⁹²

As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women,

⁸⁹ Lawrence Barsh, 'The Convention on the Rights of the Child: A Reassessment of the Final text,' (1990) 7 *New York Law School Journal of Human Rights*, pp142-160, at pp. 152-153, Thomas Hammarberg, 'The UN Convention on the Rights of the Child-and How to Make it Work' (1990) 12 *Human Rights Quarterly* pp. 97-105, at 104.

⁹⁰ Thomas Hammarberg, 'Children' in Eide, W.B. and Uwe Kracht (eds) *Food and Human Rights in Development* (Intersentia, Antwerp 2005) 353, 372. This, perhaps, might explain the overwhelming support for ratification of this Convention by developing countries.

⁹¹ The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23, par. 21.

⁹² UN Committee on Economic Social and Cultural Rights General Comment No. 12: The Right to Education Article 13: E/C.12/1999/10, par. 1.

safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.⁹³

This section examines some of the developments relating to international cooperation in implementing the right of the child to primary education as they demonstrate an emerging trend that is relevant to the central thesis of the present study. Although the right to education has the minimum core content of the right to have access to free primary education,⁹⁴ it is actually not free, since private and public resources are required to meet the cost of programmes for providing primary education. In the early 1970s, several African countries introduced programmes for free primary education financed with public resources.⁹⁵ In the 1980s, public funding for the education sectors of developing countries was reduced and resources diverted to service foreign loans under the infamous Structural Adjustment Programmes that included imposition of austerity measures by the IMF and World Bank aimed at controlling public expenditure in the social sectors of poor indebted countries.⁹⁶ In the attempt to meet the shortfall in public expenditure for primary education, these countries introduced school fees, such that the financial burden on meeting the cost of these programmes was shifted from the government to families.⁹⁷ This constituted a serious financial barrier to the enjoyment of the right to free primary education as the minimum core content of the right to free primary education was effectively abrogated for the majority of the population in these countries who have to survive with means way below the poverty line and could not afford the school fees.⁹⁸

Since the mid-1990s, several Sub-Saharan countries have re-introduced free primary education by abolishing all user fees in primary school.⁹⁹ The funds required for these programmes would henceforth be provided through increased domestic resource mobilisation and allocation to the education sector. However, due to the severe economic constraints and low levels of national revenues, domestic resources alone could not adequately provide the required financing for these programmes and these countries have had to rely heavily on bilateral and multilateral aid from the international community.

⁹³ Id. See also UNICEF, *Poverty Reduction Begins With Children* (UNICEF, New York, 2000) p. 20.

⁹⁴ Economic Covenant, Article 13(2) (a), the Child Convention Article 28 (1) (a).

⁹⁵ Moses Oketch and Caine Rolleston, 'Policies on Free Primary and Secondary Education in East Africa: Retrospect and Prospect' (2007) 31 *Review of Research in Education* 131-158 (2007)

⁹⁶ Katarina Tomaševski, *Education Denied: Costs and Remedies* (ZED Books Ltd, London 2003).

⁹⁷ M. Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment* (CUP, Cambridge) chapter 6.

⁹⁸ Katarina Tomaševski, 'School Fees as Hindrance to Universalizing Primary Education' Paper commissioned for the *Education For All Global Monitoring Report 2003/4: The Leap to Equality* (UNESCO, Paris 2004).

⁹⁹ For detailed reviews of the Free Primary Education programmes in Kenya, Malawi, Tanzania, Uganda and Zambia see Abby Riddell, 'The Introduction of Free Primary Education in sub-Saharan Africa,' Paper Commissioned for *Education For All Global Monitoring Report 2003/4: The Leap to Equality* (UNESCO, Paris 2004)

Abby Riddell observed that in all the five countries where Free Primary Education had been recently introduced, Governments are dependent on external finance for funding the Free Primary Education, a trend that was likely to extend for the mid- to long-term, through the current Sector-Wide Approaches (SWAs) aid modalities.¹⁰⁰ The Free Primary Education programmes in these countries have resulted in a tremendous rise in enrolment in primary school. With the external donor funding accounting for between 30 and 50 per cent of the cost of the Free Primary Education programmes, it is quite clear that the provision of these programmes would not have been feasible without such a modality of international assistance and cooperation.

In its second periodic report submitted to the UN Committee on the Rights of the Child, the government of Uganda documents details of external funding received under the Heavily Indebted Poor Countries (HIPC)/Poverty Reduction Strategy (PRS) initiative.¹⁰¹ As the data in Table 3.2 shows, it is apparent that the component of HIPC assistance funding stands at approximately 55 per cent of government's annual development budget for basic social services, a significant part of which is used to finance the country's Free Primary Education. The government's report confirms the country would certainly not sustain its social sector programmes without such substantial external financial support.¹⁰²

¹⁰⁰ Id., p. 14.

¹⁰¹ UN Committee on the Rights of the Child second Periodic Report Uganda 2003 CRC/C/65/Add.33, par. 82.

¹⁰² Id.

Table 3.2: Sources and uses of the Poverty Action Fund (PAF) in 1998/99 (billion Uganda shillings)

A. Sources		Amount		
HIPC Debt Initiative		44.64		
Debt buyback (Austria)		4.26		
Additional donor financing		20.89		
Netherlands		8.78		
Sweden		8.31		
United Kingdom		3.80		
Total PAF		69.79		
B. Uses		Additional expenditures		
	GoU budget 1997/98	From PAF 1998/99	GoU budget 1998/99	% increase
Donor supported				
Primary school construction	0.00	6.22	6.22	n.a
Primary health care conditional grant	1.70	4.66	6.36	274
Monitoring activities	0.00	0.37	0.37	n.a
Subtotal donor	1.70	11.25	12.95	662
GoU/HIPC-supported				
Primary education conditional grant	21.99	8.01	30.00	36
Primary education development budget	4.52	2.39	6.91	53
Rural roads conditional grant for maintenance	4.99	7.00	11.99	140
Rural roads development budget	6.44	6.86	13.30	107
Agriculture extension conditional grant	0.00	4.00	4.00	n.a
District water supply and sanitation development budget	3.88	8.10	11.98	209
NGO primary health care	0.00	3.00	3.00	n.a
Primary health care development budget	2.77	2.88	5.65	104
District health units – lunch allowance	0.50	4.73	5.23	946
Inspector General of Government	1.00	0.82	1.82	82
Provision for enhanced monitoring of expenditures	1.52	2.63	4.15	173
Subtotal GoU/HIPC	47.61	50.42	98.03	106
Total gross expenditure	49.31	61.67	110.98	125

Source: Ministry of Finance, Planning and Economic Development, Republic of Uganda

In Kenya, Malawi, Tanzania and Zambia, the introduction of Free Primary Education was preceded by regime change following election of new political leadership that had pledged to prioritise the implementation of legislation and policies for providing these programmes.¹⁰³ However, these policies were turned into successful programmes largely because the International Financial Institutions and bilateral donors had already identified free primary education as a key component of their Poverty Reduction Strategies for

¹⁰³ Riddell, n. 99, above, p.15. In the Kenyan case, during the 2002 elections campaigns, the government of President Daniel arap Moi, despite passing the Children Act 2001 that incorporated the provisions of Article 28 of the Child Convention argued that it was not possible to implement a programme for Free primary Education due to resource constraints. However, the opposition National Rainbow Coalition (NARC) pledged to re-introduce this programme and when upon winning the December 2002 elections by a landslide, the NARC government introduced the free primary education programme in January 2003. This illustrates that with proper leadership and policies, it is possible to overcome the obstacles to the realization of economic and social rights in developing countries. For critical analysis of the Kenya programme, see Daniel Sifuna, 'The Illusion of Universal Free Primary Education in Kenya' (2005) 20 *Wajibu* Vol. 20 - No. 4 - December 2005 http://africa.peacelink.org/wajibu/articles/art_6901.html

countries receiving development assistance funds. In 1996 the World Bank and IMF established that a growing number of less developed countries were so deeply steeped in external debt that their levels of indebtedness were becoming unsustainable. In fact these countries were spending over 30 per cent of their national budget on servicing such foreign debts. In response to these problems, the IMF and World Bank introduced the Highly Indebted Countries (HIPIC) initiative to provide conditional debt relief to these countries. Under these initiatives, the selected countries are required to introduce poverty reduction strategies and undertake to commit more national resources to pro-poor sectors such as basic education, health, water, agriculture, roads etc. The Poverty Reduction Strategy Paper that guides this initiative is developed by the government of the applicant state with the broad-based participation of national development stakeholders in consultation with the World Bank and the IMF.

Under the Poverty Reduction Strategy, countries that demonstrate commitment to poverty reduction to the satisfaction of criteria set by IMF and World Bank can obtain up to full cancellation of their bilateral and multilateral debts.¹⁰⁴ In this way, the national funds that had been previously used to service these debts are freed from the debt capture and made available for financing the poor country's social and economic welfare programmes. Investment in the education sector, starting with provision of free primary education is indicated as a key aspect of this strategy. This initiative has had considerable impact on the participating countries. As of end of September 2008, 22 developing countries were receiving HIPIC initiative assistance¹⁰⁵ while 10 others are in the process of reaching the decision point.¹⁰⁶ The report submitted by the Republic of Tanzania to the United Nations Committee on the Rights of the Child indicates that the financial assistance provided by the HIPC initiative has enabled the government to increase allocations to the social sectors including financing of the Free Primary Education programmes:

Due to enormous external debt servicing requirements, Tanzania has been granted debt relief through the enhanced Highly Indebted Poor Countries (HIPC) initiative. The debt policy has enabled the Government through HIPC, to allocate funds to pro-poor sectors. These are education, health, agriculture, rural roads and water. The Multilateral Debt Relief Fund has been an important

¹⁰⁴ The Multilateral Debt Relief Initiative (MDRI) allows for 100 percent relief on debts by three multilateral institutions—the IMF, the International Development Association (IDA) of the World Bank, and the African Development Fund (AfDF). In 2007, the Inter-American Development Bank introduced debt relief scheme to the five HIPCs in the Latin American region.

¹⁰⁵ These are: Benin, Honduras, Niger, Bolivia, Madagascar, Rwanda, Burkina Faso, Malawi, São Tomé & Príncipe, Cameroon, Mali, Senegal, Ethiopia, Mauritania, Sierra Leone, Ghana, Mozambique, Tanzania, Guyana, Nicaragua, Uganda and Zambia.

¹⁰⁶ Afghanistan, Republic of Congo, Guinea-Bissau, Burundi, Democratic Republic of the Congo, Haiti, Central African Republic, The Gambia, Chad and Guinea

mechanism for safeguarding expenditures on social services. In addition, bilateral aid agencies continue to contribute towards extension of this fund.¹⁰⁷

In the 1999-2002 phase, Zambia's Basic Education Sub-Sector Investment Programme (BESSIP) was financed jointly by the Government of Zambia (49%) which was spent mainly on paying teachers' salaries, while external, bilateral and multilateral donors provided the remaining 51%.¹⁰⁸ Table 3.3 shows the details of the donor support for the country's education sector.

In Kenya the introduction of free primary education in January 2003 was aimed at enhancing access, retention and equity in education and to attain Universal primary Education and Education For All in line with the Millennium Development Goals.¹⁰⁹ Financing for this programme has been facilitated by grants from the UNICEF and other donors.¹¹⁰ The Kenya Education Sector Support Programme (KESSP) is being financed jointly by the government and the World Bank, ODA/DFID, JICA, the European Union, USAID, CIDA, SIDA, UNESCO, UNFPA, UNDP, UNDCP, ILO/IPEC, UNICEF and OPEC fund.¹¹¹

¹⁰⁷ Committee on the Rights of the Child second Periodic Report of State Party: Tanzania 2004 CRC/C/70/Add.26 par. 9.

¹⁰⁸ Committee on the Rights of the Child Initial Report of State Party: Zambia 2002, CRC/C/11/Add.25, par. 457-467.

¹⁰⁹ Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Second Periodic Reports of States Parties: Kenya CRC/C/KEN/2 20 September 2005, pars. 393-394.

¹¹⁰ Id.

¹¹¹ Id, par.398.

Table 3.3 International cooperation in Zambia's education sector

Agency	Sector Issues	Activities and Focus
DFID	Programme management; Teacher development; Reading in Zambian languages	Support for pre-BESSIP fund; AIEMS (Action to Improve English, Mathematics and Science); Literacy and reading in Zambian languages
Irish Aid	Programme management; Basic school infrastructure; Teacher development	Support for pre-BESSIP fund; Region-based support for education in Northern Province
DANIDA	Teacher development; Curriculum development	Support for ZATEC; Support for curriculum review
FINNIDA	Basic school infrastructure	Support for Buildings Unit, Ministry of Education; Maintenance and rehabilitation
JICA	Basic school infrastructure	School construction
Netherlands	Programme management; Quality decentralization; Equity	Support for BESSIP preparatory fund; Support for quality enhancement, decentralization and equity in Western Province.
Norway	Education materials; Equity	Support for pre-BESSIP fund; Support for provision and distribution of textbooks; Support for distance education programme and NGO activities
USAID	Equity	Girls' education
EU	Equity; Capacity building; Basic school infrastructure	Pilot bursary scheme; Technical assistance and training for Planning Unit, MOE; Support for Micro Projects Unit
UNICEF	Equity and girls' education community schools; HIV/AIDS; Education materials	(PAGE) Programme for the Advancement Action of Girls' Education in Eastern Province; HIV/AIDS, life skills, community schools, school health and nutrition
UNDP	Capacity building	Support for Central Ministry training.
OPEC	Basic school infrastructure	School construction
ADB	Basic school infrastructure	School construction and rehabilitation

Source: Government of Zambia

Malawi's Education for All initiative has been heavily financed through external aid, without which it would not have been sustainable on national resources alone.¹¹² As the government report acknowledges, donor funding plays a crucial role in the country's education sector.¹¹³ Table 3.4 shows the main areas of donor collaboration in Malawi's primary education programmes.¹¹⁴

¹¹² UN Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties: Initial reports of States parties Malawi 1st August 2000 CRC/C/8/Add.43, par. 293-301.

¹¹³ Id., par.295.

¹¹⁴ Id.

Table 3.4 Cooperating partners in Malawi's primary education Programme: donors and NGOs

NGO/ donor	Area or activities
Save the Children Fund/US	Established 44 village based schools, Trained 44 school management committees, Employed and trained para-professional teachers for the schools
Plan International	Constructed the country's largest school complex of 16 classrooms Donated reading and learning materials, Funded in-training of teachers
World Vision	Constructed 126 classrooms and 140 teacher houses
Action Aid	Constructed 12 classrooms and teacher houses
The Samaritan	Extends primary education to street children
UNICEF	Provision of learning materials, Formulation and promulgation of MEFA, (community schools, para-professional teacher training, etc.)
GTZ	Development of science curriculum, (basic education, teacher training, training of school committees and coordinators, etc.)
IDA	Infrastructure development, Teacher training, Text distribution, Formulation of PIFs
DfID	Support of primary community school project, (community school building, training and supporting teachers, etc.), Support of Malawi School Support Systems Programme, (school supervision and training of school heads)
CIDA	Rehabilitation of schools
USAID	Reprinting of teaching and learning materials for standards 5-8
EU	Construction of low-cost classrooms and teacher houses
ADB/ADF	Building and equipping urban primary schools, and DEOs and Division Education offices
UNESCO	Curriculum review, policy development, development of teacher/learning materials

Source: Government of Malawi 2000.

In Bangladesh, since 1994, the primary and mass education programmes have been jointly funded by the government and international donors.¹¹⁵ External donors for Bangladesh's education sector includes United Nations agencies - UNICEF, UNDP, UNESCO and UNFPA; International Financial Institutions - World Bank, Islamic Development Bank and Asian Development Bank and Bilateral donors - DFID, GTZ, OPEC, Saudi Fund for Development, Norway, Sweden, SDC, JICA, CIDA and USAID.¹¹⁶ These international development partners have contributed up to 22.9% of the expenditure on the government's primary and mass education programmes besides also financing local NGOs' education provision initiatives.¹¹⁷

¹¹⁵ UN Committee on the Rights of the Child, Second Report of State Party: Bangladesh 2001: CRC/C/65/Add.22 par. 273-274.

¹¹⁶ Id.

¹¹⁷ Id, par. 274.

Nepal's Basic and Primary Education Programme (BPEP II) launched in 1999 is one of the programmes being implemented by the government of Nepal in collaboration with external donors. The government's Second Periodic Report to the Committee on the Rights of the Child states as follows:

Nepal continues to cooperate with donors, bilateral and multilateral organizations and international NGOs to implement programmes for child development and rights. Many children, especially vulnerable and underprivileged children, benefit from programmes aimed at improving children's education, health and nutrition...External development partners are supporting activities as diverse as building schools, providing primary health care, preparing textbooks for primary grades, and combating trafficking in girls. Also, a coalition of United Nations system and donor agencies is assisting the Government in mainstreaming gender issues in various sectoral policies and programmes...Nepal is heavily dependent on foreign aid for its development.¹¹⁸

In Bolivia, under the extended HIPC initiative, one-fifth of the funds secured through the debt relief have been allocated to improving the country's education infrastructure, enhancing the quality of education services through purchase and distribution of school equipment and learning materials.¹¹⁹ In addition, funds have been allocated towards programmes for providing incentives to retain children in schools and reduce the dropout rates in primary schools. The report indicates that the country's domestic resources are insufficient to meet the needs arising from the implementation of human rights standards for the entire population, and especially for children and adolescents, and the government has received considerable financial assistance from the international community, in addition to debt-relief, without which many of these programmes would not have been feasible.¹²⁰

Unlike the Sub-Saharan region, most Latin American countries have already implemented free basic education programmes whereby in all public primary and secondary schools fees have been abolished.¹²¹ Unfortunately, however, the enrolment and completion levels remained low due to poverty and low incomes that drove families to withdraw children

¹¹⁸ UN Committee on the Rights of the Child, Second Report of State Party: Nepal 2004; CRC/C/65/Add.30, par. 39, 40 and 264. The Report indicates that the external development partners involved in child- and women-related programmes include ILO/IPEC, DANIDA (Denmark), JICA (Japan), DFID (United Kingdom), GTZ (Germany), USAID, World Bank, Asian Development Bank, Finnida (Finland), and NORAD (Norway), par. 39.

¹¹⁹ UN Committee on the Rights of the Child, Third Report of State Party: Bolivia 2002; CRC/C/125/Add.2 par. 367

¹²⁰ Id, par. 362, 367.

¹²¹ Katarina Tomaševski, 'School Fees as Hindrance to Universalizing Primary Education' Paper commissioned for the *Education For All Global Monitoring Report 2003/4: The Leap to Equality* (UNESCO, Paris 2004), p. 62; showing that by 2002, all South American states except Colombia, Grenada, Haiti, Nicaragua, Paraguay, Peru, St. Vincent, Suriname and Trinidad and Tobago have abolished school fees. See also, UN Commission on Human Rights 'Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski 2001' U.N. Doc. E/CN.4/2001/52 (2001).

from school to join the labour force for basic subsistence.¹²² It is estimated that 70% of children in Bolivia's rural areas are engaged in employment, to try to eke out a living and their families' economic survival, but this interferes with their school attendance, leading to high rates of dropouts from primary school.¹²³ To address this problem, the Ecuadorian government has implemented a strategy to boost retention and completion rates in primary schools by introducing a school grant programme that provides a modest sum of money to families in the poorest fifth of the population to help meet the basic needs of school going children of the age of 6 to 15.¹²⁴ This grant is a Conditional Cash Transfer (CCT) and is paid to parents or care givers of school going children on the condition that the targeted children maintain full-time attendance of primary school and after-school tuition session. It is intended to increase the families' disposable income and enhance the attendance of children in economically disadvantaged social backgrounds who would otherwise drop out of school to engage in child labour for subsistence. Again as in other developing countries, the school grant programme is supported by funds obtained through international assistance and cooperation from the UNICEF and other donors.¹²⁵

From these accounts, it can be observed that the injection of funds from external sources to support the financing of programmes for economic and social rights of children in the developing world is the modality of international cooperation that bears a direct and immediate impact in this field. However, external assistance funds are most effective when applied to support the initiatives of aid-receiving countries to implement sector-wide reforms aimed at enhancing access to basic social and economic needs.¹²⁶ In other words, such external assistance can be utilised to bolster national capacity building in the short-term to medium term, and should be reviewed in the long-term in line with the progress in the receiving states, rather than establishing a practice of addiction to aid. In this way, not only does external aid work, but it has also been instrumental in enabling governments to work and implement policies and programmes for fulfilling economic and social rights.¹²⁷

¹²² Committee on the Rights of the Child, Third Report of State Party: Bolivia 2002; CRC/C/125/Add.2 par. 310.

¹²³ *Id.*

¹²⁴ UN Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Second and Third Periodic Reports of States Parties: Ecuador 2003 CRC/C/65/Add.28, par. 271.

¹²⁵ *Id.* For analysis of similar models of pro-child education cash transfer programmes in Brazil, Mexico and South Africa, see A. Barrientos and J. Dejong, 'Reducing Child Poverty With Cash Transfers: a Sure Thing?' (2006) 24 *Development Policy Review* pp. 537-552.

¹²⁶ See also World Bank, *Assessing Aid: What Works and What Doesn't and Why* (OUP, Oxford 1998)

¹²⁷ For a similar argument from the perspective of development economics, see Jeffrey Sachs, *The End of Poverty: How we Can Make it Happen in our Lifetime* (Penguin Books, London 2005), chapter 5.

As the survey of implementation of Free Primary Education illustrates, through this collaboration, the ‘paper-rights’ ideas in the international and national legal texts have been made to materialize into actual arrangements and programmes for securing access to the some elements of the minimum core content of this right. The states parties’ reports confirm that all these programmes would not have been possible or sustainable except with substantial external financial assistance either in form of loans or grants/aid. It seems that harnessing opportunities for support from the international community then becomes the most viable lifeline for developing countries caught up in a poverty trap, yet having to account for the survival of 1.9 billion young souls: 86% of the world’s children.¹²⁸ As a form of re-distribution of foreign economic surplus, aid represents a very crucial aspect of international cooperation and is a building block for further developments in global partnerships and solidarity in implementing social and economic rights programmes.¹²⁹

3.5 Conclusion

The macro-economic outlook of developing countries and the attendant problems of poverty and underdevelopment are unfavourable to the enjoyment of economic and social rights by a vast majority of society there. In these countries, even with good government policies, domestic resource capabilities alone are inadequate to guarantee implementation of these rights. Nevertheless, developing countries have undertaken legal responsibility to respect, protect and fulfil these rights to the maximum of available resources, broadly defined to include domestic resources and those accessible through arrangements for international assistance and cooperation.¹³⁰ From the reports submitted by states parties to the UN Committee on the Rights of the Child, it is evident that developing countries are receiving international assistance and cooperation in implementing their national programmes for securing fulfilment of economic and social rights. The structure of this international cooperation has been in the form of bilateral and multilateral arrangements with the developed states and intergovernmental organizations, including international financial institutions.

¹²⁸ UNICEF, *State of the World's Children 2008: Child Survival* (UNICEF, New York, 2007) p. 115.

¹²⁹ This practice is consistent with the statement in the Millennium Declaration: ‘We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs’ The Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, Art.2

¹³⁰ UN Committee on Economic Social and Cultural Rights General Comment No. 3 (14/12/1990) The Nature of States Parties’ Obligations (Art. 2, par.1) par. 13.

This chapter illustrates that, as a matter of fact, there is an emerging system of international cooperation aimed at supporting global fulfilment of the economic and social rights of the child. One major aspect of this system is the international aid finance, which facilitates the transfer of economic and financial resources from the developed states to the less developed states to enable the latter reduce the resources-gap in implementing programmes for fulfilling economic and social rights. However, it is one thing to provide financial assistance towards poor countries' social welfare programmes and thus create de facto arrangements for international cooperation in these fields. Yet, it is an entirely different issue to consider if there is any binding obligation on the part of the rich states to establish and maintain those international cooperation arrangements and provide such assistance, as a matter of law. Leading human rights scholars have expressed doubts as to the existence of such obligations in the Economic Covenant¹³¹ and in the Child Convention.¹³² This question, regarding states' external and global obligations to support universal fulfilment of economic and social rights requires fresh re-assessment, and is at the heart of the present study.

It can be argued that international law on economic and social rights is part of the initiatives of the global community to establish an international legal order aimed at facilitating universal fulfilment of these rights through internationally supported delivery systems at the domestic level.¹³³ That order does not just happen: it must be deliberately forged and sustained by the international community of states, with each state bearing responsibility commensurate with its capabilities. Article 4 of the Child Convention requires states parties to take all necessary measures to implement the Convention's rights and to promote children's economic, social and cultural rights within the framework of international cooperation. Moreover, states parties to the Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography affirms the legal obligations of states parties to promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.¹³⁴ The Protocol specifically enacts that *states parties in a position*

¹³¹ Magdalena Sepúlveda, *The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp 2003), p. 374.

¹³² See Wouter Vandenhole, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate for Development?' (2009) 17 *International Journal of Children's Rights* 23.

¹³³ 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Article 28.

¹³⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, Article 10(3).

*to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.*¹³⁵ In its expert analysis of states' parties' obligations under the Child Convention, the UN Committee on the Rights of the Child has interpreted Article 4 of the Child Convention to the effect that all states parties have the legal obligation to secure fulfilment of the rights of the child both within their respective jurisdictions and also to contribute to the global realization of the economic, social and cultural rights of the child.¹³⁶ Besides, the UN Committee on Economic, Social and Cultural Rights has explained that in its interpretation of the Economic Covenant and other provisions of international law including the Charter of the United Nations, all states have a legal obligation to facilitate and participate in international cooperation for development and thus for the universal realization of economic, social and cultural rights.¹³⁷ In this regard, by creating and participating in de facto arrangements for international assistance and cooperation towards universal fulfilment of economic and social rights of children, the more developed states can be considered to be taking steps towards addressing their respective obligations under international law.

The range of opportunities for fulfilment of economic and social rights in poor countries suddenly opens up if the production capacities and economic resources of the entire global economy are taken into account as being potentially available to such disadvantaged societies through appropriate international mechanisms of redistribution.¹³⁸ As the patterns emerging from current state practice in this field are re-examined, it can be argued that the United Nations' regimes of human rights treaties by their very purpose of promoting universal fulfilment of human rights assign both internal obligations of states parties to secure domestic implementation and also international and external obligations to support global fulfilment of these rights. Accordingly, it is the central thesis of this study that the regimes of international protection of children's economic and social rights allocate to states parties both internal obligations to secure realisation of these rights within the jurisdiction of each state party and also external obligations of states parties to contribute to the universal implementation of these rights.

¹³⁵ Id, Article 10(4), emphasis added.

¹³⁶ UN Committee on the Rights of the Child (2003), General Comment No. 5 General measures of Implementation CRC/GC/2003/5 para.7.

¹³⁷ UN Committee on Economic Social and Cultural Rights General Comment 3 (14/12/1990) The Nature of States Parties' Obligations (Art. 2, par.1) par. 13-14. This includes even those states that have not ratified the human rights treaties.

¹³⁸ Charles Beitz, 'Economic Rights and Distributive Justice in developing Societies' (1981) 33 *World Politics* 321, 322.

Chapter 4

Re-examining States' external obligations to implement economic and Social rights of children: towards a theory of diagonal obligations

4.1 Introduction

As the preceding chapter demonstrates, due to the social and economic constraints facing developing countries, their domestic capabilities would not be adequate to sustain programmes for securing fulfilment of social and economic rights. In order to establish systems and programmes for securing realisation of economic and social rights, developing states have heavily relied on external assistance of the developed states in what appear like de facto arrangements for international cooperation in this field. This chapter examines the scope of legal obligations that arise from the ratification of international treaties on social and economic rights, with a focus on states parties' external obligations towards persons and societies in other countries. In view of the context of this study, additional attention is given to the developments in the law and practice relating to international protection of the economic and social rights of children. The modern history of international human rights law indicates that in the aftermath of the bloodbath of the Second World War that witnessed the horrendous murder of approximately six millions Jews in Europe during the Holocaust, states became more aware of and concerned about the weaknesses and failures of national human rights practices under traditional conceptions of state sovereignty.¹ The international community responded to these aggravated violations of human rights by creating institutional structures and mechanisms for international protection and promotion of human rights, starting with the Charter of the United Nations 1945. In this process of establishing institutions for global protection and promotion of human rights states have adopted the Universal Declaration of Human Rights 1948 and six major conventions that set out international regimes of human rights norms and create various mechanisms for

¹ For a discussion of this aspect of the history of human rights law, see Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn OUP, Oxford 2008), p. 22. For a detailed analysis of the events and statistics of the annihilation of European Jews and other civilians by the Nazis before and during the World War see William Seltzer, 'Population Statistics, the Holocaust and the Nuremberg Trials' (1998) 24 *Population and Development Review* 511-552. For accounts of the murder of Jews in Europe between 1st September 1939 and 8th May 1945 with disaggregated data for each affected country see Martin Gilbert, *Atlas of the Holocaust* (Routledge, Oxford 2nd edn 1994). Apart from Jews, other minorities were also casualties of the Holocaust: see Robert Kesting, 'Forgotten Victims: Blacks in the Holocaust' (1992) 77 *Journal of Negro History* 30. For insightful reflections on the diverse perspectives of the Holocaust see John Conway, 'The Holocaust and the Historians' (1980) 450 *Annals of the American Academy of Political and Social Science* 153; Robert Braun, 'The Holocaust and Problems of Historical Representation' (1994) 33 *History and Theory* 172; Omer Bartov, 'Defining Enemies, Making Victims: Germans, Jews and the Holocaust' (1998) 103 *The American Historical Review* 771.

monitoring implementation.² From the texts of the Charter of the United Nations 1945, the Universal Declaration of Human Rights 1948 and the subsequent international human rights Conventions, it seems that the intention of the project for international protection of human rights has always been to establish legal machinery to secure the protection and universal enjoyment of an irreducible minimum core content of all human rights i.e. both civil and political rights as well as economic, social and cultural rights. This has been affirmed in the Vienna Declaration on Human Rights adopted by the World Conference on Human Rights.³ Therefore, the fervour and commitment to purpose with which international human rights regimes have been created can be applied to develop an appropriate legal response to the deaths of 9 million children in the developing countries every year that result from inability of their states to secure the fulfilment of social and economic rights.⁴

Since the Peace of Westphalia of 1648 European states adopted a conception of sovereignty to counter threats of imperial conquest and absorption by rejecting and resisting all forms of external scrutiny.⁵ This traditional conception of sovereignty deferred to states complete freedom of action in dealing with their own nationals on their own territory: thus matters relating to human rights were regarded as falling within the domestic jurisdiction of the state, and not the concern of international law, interference or intervention.⁶ It meant that save for the treatment of foreign nationals on its territory; a state did not have to account to another state or group of states or any other external power for the treatment of its own nationals.⁷ Even in the case of treatment of foreign nationals, the host state owed inter-state duties to the home state of the foreigners within its

² These are: the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of Discrimination Against Women 1979, Convention Against Torture 1984, Convention on the Rights of the Child 1989, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990. For discussion of the supervisory mechanisms through expert committees under these conventions, see Malcolm Shaw, *International Law* (Cambridge University Press 2003) 285-312

³ 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' Vienna Declaration and Programme of Action on Human Rights 1993 adopted by the World Conference on Human Rights on 25th June 1993, Article 5.

⁴ UNICEF, *State of the World's Children 2005: Childhood Under Threat* (UNICEF, New York 2004), pp. 106-109. See also World Health Organization, *The World's Forgotten Children* www.who.int/ceh/publications/01mortality.pdf accessed 24th December 2007

⁵ F.J. Flood, *The Effectiveness of UN Human Rights Institutions* (Westport, London 1988) p. 24. For analysis of the history and terms of the Westphalian settlement, see Leo Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 *American Journal of International Law* 20. For discussion of world political structures that preceded the Peace of Westphalia including the imperial authority of the Holy Roman Emperor and the Pope, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Macmillan, London 1977).

⁶ Paul Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford 1983) p. 11.

⁷ *Id.*

jurisdiction, rather than any duties to the individuals as such.⁸ This traditional conception of sovereignty and human rights prevailed for centuries, and was at the heart of public international law through the two World Wars until the founding of the United Nations.⁹ As a result of the influence of this traditional conception of state sovereignty, ‘international’ of human rights law did not grow from state practice or custom: the emergence of international protection of human rights had to be deliberately created through the enactment of human rights regimes beginning with the Charter of the United Nations and the international human rights covenants and conventions, constituting the International Bill of Rights.¹⁰ Thus, international human rights law is all new law, at most about only three-score years old, established principally by treaty, drawing on contemporary liberal national constitutions such as the U.S. constitutions for norms on civil and political and political rights and borrowing from the social welfare systems created by Western European states in the late 19th Century for norms on economic and social rights but, without any foundation or context of custom.¹¹

The core of the argument presented in this chapter is that the rise of international human rights law since 1945 signals two simultaneous tectonic shifts in the structure of traditional ideology of state responsibility and sovereignty derived from the Westphalian tradition. In the first shift, international of human rights law seeks to subject the internal conduct of states and their treatment of their own subjects to formal monitoring scrutiny by the international community.¹² The second shift is that in addition to addressing domestic human rights obligations of their own subjects, states parties to the international regimes of social and economic rights also bear external obligations that include the duty to support the fulfilment of these rights in other countries. For example, the objective of applying the mechanisms of reporting by states and other information gathering activities of the international human rights agencies is to enable the monitoring Committees, and the States parties as a whole, to facilitate the exchange of information among States, develop a better understanding of the problems faced by States and identify the most appropriate means by which the international community might assist States secure universal fulfilment of these

⁸ Id.

⁹ Jack Donnelly, *International Human Rights* (Westview Press, Oxford 1998) p. 22.

¹⁰ Loius Henkin, ‘Human Rights and State Sovereignty’ (1996) 25 *Georgia Journal of International and Comparative Law* pp. 31, at 36.

¹¹ Id, at 40. For a history of the evolution of international human rights law see P.G. Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Pennsylvania 1998).

¹² Thomas Buergenthal, ‘International Human Rights in a Historical Perspective’ in Janusz Symonides (ed.) *Human Rights: New Dimensions and Challenges* (Ashgate, Aldershot 2000) pp. 3, at 5, Paul Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford 1983) p. 11.

rights.¹³ The chapter begins with an examination of the dual responsibility of states to protect and promote human rights under international human rights law in both the domestic and external dimensions of states' human rights obligations. It proceeds to locate and explore the legal basis of states' external obligations to fulfil economic and social rights. The aim here is to review the emerging interpretations of states' obligations under the concept of international cooperation in the field of human rights. The chapter concludes with illustrations of the application of states' external obligations in economic and social rights.

4.2 Dissecting states two-level legal obligations to implement social and economic Rights

The focus of this section is on the scope of states obligations with regard to the realisation of economic and social rights. For some writers, the states parties' responsibility relates only to the measures adopted and steps taken to secure fulfilment of these rights within the country concerned, i.e. the internal obligations regarding the treatment by the state of its subjects.¹⁴ It is an important starting point that all states parties to international treaties on social and economic rights ensure that they address their internal obligations to fulfil these obligations within the territory over which they exercise sovereign jurisdiction.¹⁵ However, in order develop a holistic perspective on the concept of states' human rights obligations; one must be prepared to advance beyond this starting point. To the extent that the policies and activities of modern states and other global actors can bring about positive and adverse effects on the enjoyment of human rights by human beings around the world, it is necessary that international law must maintain and uphold a system of both internal and external human rights obligations of all states.¹⁶ Moreover for persons living in failing and failed states that are unable to guarantee fulfilment of basic human rights, the only approach to human rights obligations applicable to their predicament is one that recognises

¹³ Committee on Economic, Social and Cultural Rights, General Comment No.1: Reporting by States 24/12/1989, par. 9.

¹⁴ Jack Donnelly, *Universal Human Rights* (Cornell University Press, Ithaca 2003), p. 34.

¹⁵ 'Unless a different intention appears from the treaty, or it is otherwise established, a treaty is binding upon each party in respect of its entire territory,' Vienna Convention on the Law of Treaties of 23rd May 1969 Article 29.

¹⁶ See, UNCHR, Report of the Special Rapporteur on the Right to Food Jean Ziegler, UN Doc. E/CN.4/2005/47 (2005) par. 9: 'There are many policies and actions of Governments that have negative impacts on the right to food for people living in other countries. For example, in the arena of international trade, countries of the North, subsidizing agriculture and selling products at below the cost of production, are displacing millions of farmers in the South out of agriculture, when agriculture is their only comparative advantage. Other examples, include unjustified embargoes imposed by one country that affect the lives of millions living in another.'

the legal responsibility of other states to contribute to the protection and fulfilment of their rights including restoring an appropriate political order in the country.¹⁷

The processes of monitoring states' compliance with human rights obligations yield considerable volumes of data regarding the realisation as well as non-fulfilment of these rights in countries around the world. With all this information, including the data collected by the UN Special Rapporteurs on human rights and the studies and surveys of the UN specialised agencies, it seems that the developed states with capacity to address these economic and social problems of the less developed states could be required as a matter of legal obligation to go beyond their domestic responsibilities to support the fulfilment of economic and social rights in other countries. It is the central argument of this chapter that in addition to the domestic obligations of states to respect, protect and fulfil human rights, the international treaties on economic and social rights could be interpreted as also assigning external obligations of states to respect, protect and support the universal fulfilment of these rights. This perspective is illustrated in Figure 4.1 below.

The promise and dilemmas of universal human rights under traditional Statism

Before the rise of international protection of human rights, international law was concerned primarily with regulating the horizontal relationship between sovereign nation states.¹⁸ The first shift dealt by the universal human rights project involved adoption of principles for regulating the vertical relationship between rights-holders and their domestic state authorities i.e. the supervision of the performance of states' internal human rights obligations. This paradigm of vertical human rights obligations applies to the relationship between states and their subjects within domestic constitutional systems. Under this approach, a constitutional covenant exists between the government and its subjects, whereby each individual, together with his compatriots transferred his individual rights to implement the law of nature to a public authority, on the condition that the state would guarantee the protection of individual rights and freedoms and protect them from invasion. This doctrine is an established aspect of the domestic responsibility of governments,

¹⁷ G.B. Helman and S.R. Ratner, 'Saving Failed States' (1992-93) 89 *Foreign Policy* 3. In the article, Helman and Ratner argued that the phenomenon of failed and failing states was set to become a familiar facet of international affairs and would continue to exert pressure on the member states of the United Nations to progress from the current ad hoc responses and create a permanent regime of conservatorship to manage growing national instability, state collapse and human misery. This perspective presupposes that the international community of states has a common responsibility to uphold universal human rights.

¹⁸ See Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens, London 1964) chapter 6.

founded on the social contract political theory.¹⁹ Authors on the subject of international protection of human rights and therefore the university courses for training lawyers in the principles of human rights tend to concentrate their examination of states' human rights obligations on this vertical-domestic paradigm of human rights.²⁰ As Jack explains, although human rights norms have been entrenched in international conventions, their implementation remains an 'almost exclusively' national, domestic matter, and the international mechanisms for supervision through expert committees and rapporteurs focus on regulating the relationship between states and their nationals.²¹ For purposes of this study, this paradigm of human rights obligations can be called 'traditional statism,' in the sense that it focuses on the states' obligations to rights-holders within the territory of the state. Consequently, the current system of monitoring states' compliance with human rights norms concentrates on the performance of states' vertical obligations. Under traditional statism, with concern focussed mainly on internal obligations, it is not immediately clear whether the impact of a state's foreign policies on the human rights of persons in other states is part of the human rights responsibilities of such a state.²² More specifically, it is not clear whether and to what extent states have any extraterritorial human rights obligations towards persons in other countries and how the supposedly universal human rights claims would be realised in the less developed countries. Perhaps, a commitment to traditional statism would result in endorsing a realist approach whereby each state pursues foreign policies designed to advance a purely nationalistic self-interest agenda in its international relations, with human rights relegated to the domestic front.

Traditional statism seems ideally suited for a world in which all states possess not only formal equality as sovereign states but also equal capabilities to fulfil and guarantee civil and political rights. However, in the sphere of economic, social and cultural rights, it becomes apparent that the less developed countries face serious economic constraints which is the main reason for their inability to guarantee universal fulfilment of these rights. On closer examination, the actual processes by which states endeavour to promote and secure fulfilment of economic and social rights represent only one of the various aspects of the broader enterprise of managing the state's economy whereby there are interactions of many variable factors including resources, population, employment, incomes, taxation

¹⁹ See John Locke, *Two Treatises of Government* (Peter Laslett ed.) (CUP, Cambridge 1960).

²⁰ See Malcolm Shaw, *International Law* (CUP, Cambridge 2003), chapter 6.

²¹ Jack Donnelly, *Universal Human Rights* (Cornell University Press, Ithaca 2003), p. 34.

²² *Id.*, p. 179.

etc.²³ In an increasingly interdependent global economy, the challenges facing implementation of these rights in developing countries cannot be fully addressed by recourse to exclusively domestic approaches but through cooperation with other states and non-state actors in the international community. In this way, such cooperation enables the risks and costs involved in securing fulfilment of economic and social interests to be redistributed across a wider spectrum of domestic and global economic actors thus enhancing the opportunities for universal fulfilment of basic human needs which international law has legislated into regimes of economic and social rights. Some of the areas in which such cooperation would be particularly significant in this field include the terms of international development assistance and aid, international trade and international credit administered by international financial institutions.²⁴ It is for this reason that the international conventions for the protection and promotion of economic and social rights specifically prescribe international cooperation of all states parties. For example, unlike the International Covenant on Civil and Political Rights which applies a territorial jurisdiction clause in Article 2(1)²⁵ the Economic Covenant and the Child Convention do not contain such a territorial jurisdiction clause.

Moreover, under a radical approach to traditional statism, there are legal obstacles to the idea of universal fulfilment of economic and social rights. In the first place, the resources required for establishing programmes for these rights are controlled by a few rich states and subject to their exclusive use and enjoyment under traditional rules of sovereignty over national resources.²⁶ Secondly there is no hard law norm in the law of nations binding developed states to 'share with' or transfer any such national resources to less developed states to support the cause of universal human rights: instead, article 25 of the Economic Covenant declares that 'nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.'²⁷ Evidently, there is a serious dilemma. Whereas states have proclaimed the project for protection of economic and social rights proclaims in a universalistic vision of

²³ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff, Leiden 2004), 189.

²⁴ See Glenn Mower Jnr., *International Cooperation for Social Justice: Global and Regional protection of Economic and Social Rights* (Greenwood Press, London 1985).

²⁵ 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Article 2(1).

²⁶ Charter of the United Nations 1945 Article 2 (7).

²⁷ For a critical dissection of these issues see Peter Jones, 'International Human Rights: Philosophical or Political' in Simon Caney, David George and Peter Jones (eds.) *National Rights, International Obligations* (Westview Press, Boulder, Colo. 1996), pp. 121-146.

human rights, this vision lacks the facility of a single cosmopolitan global state within which execution of the necessary tasks for securing fulfilment of these rights for the entire human species could be singularly undertaken. Instead, with 191 sovereign states across the planet, and so huge economic inequalities between these states such that most of the states in the Global South do not have the economic capabilities to guarantee fulfilment of economic and social rights, such proclamations of universal rights of the child would have to face the dilemma of failed implementation in poor countries.

It seems that the project of universal human rights *cannot* be delivered under a state-centric system of international law and only a cosmopolitan law of mankind administered by a global state can meaningfully secure this.²⁸ It is apparently impractical to operate a universal programme of economic and social rights without the benefit of a facilitative political platform that a global state would provide.²⁹ The current political structures of sovereign states seems incapable of providing an egalitarian world order that would abolish the existing inequalities the distribution of the world's economic resources among regions, and peoples and secure universal realisation of the rights of individuals as proclaimed in regimes of international human rights law.³⁰ One option, other than abandoning the project, would be to create a global state either under an international agreement for voluntary winding up and transfer of all the existing state sovereignties to one federal global state; or if the negotiations for such transition are not forthcoming, a worldwide 'peaceful' revolution can be used to replace all the existing states with a single global state. In that case, this would result in the extinction of international law, in a transition to a cosmopolitan law of a single global state.

Therefore a perspective of strict traditional statism is inadequate to understand and interpret the agenda for universal human rights dealt by the proclamation of universal human rights in international law since it represents only one side of the coin. A holistic interpretation of international conventions on economic and social rights leads us to transcend traditional statism and consider the second aspect of the obligations created by international human rights law.

²⁸ Jürgen Habermas, 'Kant Idee des ewigen Frieden aus dem historischen Abstand' (1995) 28 *Kritische Justiz*, 193 translated 'Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years' Hindsight' in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (MIT Press, Cambridge, 1997).

²⁹ See Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113.

³⁰ See Allen Buchanan, 'Rawls's Law of peoples : Rules for a Vanquished Westphalian World' (2000) 110 *Ethics* 697.

Second side of the coin: Cosmopolitan statism and states' diagonal obligations

The second aspect of states' human rights obligations is that international human rights law assigns to all states a dual responsibility of addressing both domestic and external obligations. In this paradigm, states transcend the traditional domestic bent of traditional statism, and undertake to fulfil both the domestic and external obligations to support the global fulfilment of economic and social rights. Thus, the global agenda of universal human rights, especially the economic, social and cultural rights, conceived within the context of international law must necessarily rely on the agency of the existing political structures of states to carry out both domestic and global responsibility. Here, states have been re-designated as both local and global actors and bearers of common and shared obligations to establish and maintain the conditions necessary for the enjoyment of the basic universal minimum core content of economic and social rights for every human being. In this paradigm, states, whether they accept it or not, have been reconstituted by international human rights law to transcend the traditional statism paradigm of vertical obligations to embrace a paradigm of 'cosmopolitan statism' bearing both domestic and global responsibility.

This second shift in the structure of states' responsibility involves the obligations of states in relation to the universal realisation of human rights especially social and economic rights of societies in other countries, particularly in the less developed countries. Since there is a gap between the present capabilities of less developed states in terms of what they can do now and the capabilities of needed to secure the enjoyment of social and economic rights, either the fulfilment of these rights must be deferred to a future date when such capabilities would have been developed endogenously or some external means must found to supplement national capabilities.³¹ Matthew Craven suggested that international cooperation was intended to fill this gap.³² However, the nature of international cooperation required to fill up this capabilities gap in some states parties and regions was not defined in the texts of the Economic Covenant or the Child Convention two propositions can be considered. The first approach is to regard international cooperation as part of the traditional horizontal relationship between states. However, this approach, with its reliance on inter-state diplomacy is inadequate and unsuitable to sustain a theory of external human rights obligations of states because human rights are about protecting,

³¹ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (Oxford University Press, Oxford 1995), 144.

³² Id.

promoting and fulfilling the interests of human beings at the grassroots, rather than advancing the political agendas of states and their leaders at the top. The second approach which is adopted in this study understands international cooperation in terms of legal obligations of third states to contribute to the fulfilment of economic, social and cultural rights of persons in other states.

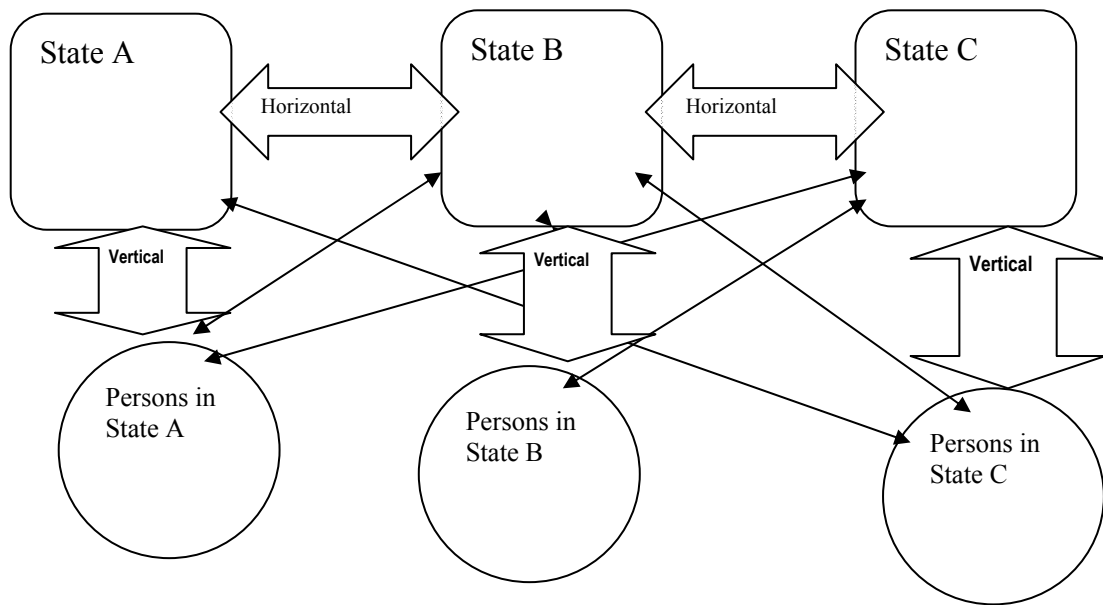


Figure 4.1: Vertical and Diagonal human rights obligations of states

In Figure 4.1 above, states' external responsibility is shown in two dimensions i.e. the horizontal block arrows and the diagonal line arrows. The aspect of states' external *human rights obligations* is indicated in diagonal line arrows, to distinguish it from the generic horizontal responsibility for inter-state cooperation. External human rights obligations are directed at securing the realisation of the human rights of *persons* rather than furthering the political interests of states. Therefore a distinction can be made between the traditional horizontal obligations between states and, the obligations that all states bear in common to contribute to the universal fulfilment of human rights. These obligations relate directly between such foreign states, hereinafter, 'third states' and persons in other states, in a 'diagonal' sense since there is no vertical constitutional relationship.

There are two other reasons for recasting the external or extraterritorial human rights obligations of third states in a diagonal paradigm rather than trying to compress them within the horizontal inter-state relations. First, a diagonal obligations paradigm permits third states broad room to manoeuvre in determining how best they could approach such

obligations. For instance the diagonal human rights obligations of third states can be performed in a variety of arrangements: through bilateral collaboration with the domestic state, multilateral engagement using intergovernmental organizations, unilateral mechanisms and even contracting non-state actors such as specialist local and global non-governmental organizations.³³ Therefore, a breakdown of horizontal relationship between the domestic state and third states, say in the event of imposition of economic sanctions against a state or suspension of diplomatic relations between states, does not affect the diagonal obligations of such third states towards persons in the state that is subjected to these measures. Thus, the horizontal inter-state relationship between states can be distinguished from the diagonal human rights obligations of third states towards persons in other states.

Secondly, the concept of diagonal obligations mandates a variety of actors in the global human rights community besides the domestic state to advance the case for the performance of such obligations on behalf of rights-holders in other countries, beyond the narrow avenues of traditional horizontal interstate communications. In other words, the performance of diagonal obligations can be advocated through the very same mechanisms that are used to advance the fulfilment of states' vertical human rights obligations.

This study develops a perspective on the legal basis of states diagonal obligations as an integral element of the institutional structure for international protection and promotion of economic and social rights. The terminology of diagonal obligations is not a frequent staple of current human rights discourse partly as a consequence of the general neglect of the states' external obligations and the preoccupation with vertical obligations under traditional statism. However, with the reassertion of cosmopolitan statism, its twin element of diagonal obligations must also be recognised as the proper interpretation of the modern theory of the protection of universal human rights under current regimes of international law. Indeed the terminology of states' diagonal obligations has only recently begun to be used in the fledgling literature on the subject.³⁴ It is noted that there is no settled consensus on the proper name for states' external obligations: writers on the subject use 'transnational

³³ For examination of these, see Celine Tan, 'Evolving aid modalities and their impact on delivery of essential services in low income countries' (2005) *Law, Social justice and Global development Journal* (LGD) ejournal website <http://www.go.warwick.ac.uk/elj/lgd/2005_1/tan>

³⁴ Arjun Sengupta, 'Poverty Eradication and Human Rights' in Thomas Pogge (ed.) *Freedom from Poverty as a Human Right* (OUP, Oxford 2007), 323 at 344. For other works affirming diagonal external obligations of states see Sigrun Skogly, *Beyond National Borders: States' Human Rights obligations in International Cooperation* (Intersentia, Oxford 2006) p. 48; Sigrun Skogly and Mark Gibney 'Transnational Human Rights Obligations' (2002) 24 *Human Rights Quarterly* 781.

human rights obligations,³⁵ ‘extraterritorial human rights obligations,’³⁶ ‘external obligations’³⁷ or ‘international obligations’.³⁸ By insisting that these are diagonal human rights obligations of states, this study presents and defends a conceptual matrix in which states obligations *erga omnes*, recognised by the International Court of Justice forty years ago³⁹ can be recast in a perspective that integrates states’ domestic and external human rights constituencies. For many children and families in poor countries whose private and national resources and arrangements are inadequate to secure guaranteed access to the basic decencies of life, the promise of universal human rights held out in international human rights regimes would be a blatant lie unless, other actors such as third states alongside the domestic states are regarded as co-bearers of the duties correlative to these rights.

An examination of the objectives and texts of international conventions on the protection and promotion of social and economic rights leads to the inescapable conclusion that they are aimed at establishing the paradigm of cosmopolitan statism for states’ human rights responsibility. It is ‘cosmopolitan’ in the sense that it binds all states to embrace and support global fulfilment of the economic and social rights of the entire human species, but it is still ‘statism’ because it remains anchored in the current political structure of modern states. The type of cosmopolitanism adopted in this scheme is a moderate one that recognises the essential agency roles performed by states, and considers that states can be reconfigured as units for mobilizing global implementation of universal standards: it requires international joint action to ameliorate the condition of the most vulnerable groups in world society and to ensure that they can defend their legitimate interests by participating in effective universal communicative frameworks.⁴⁰ The closest that human rights texts have come in expressing the intention establish a human rights community of states based on cosmopolitan statism is by the repeated use of the concept ‘international

³⁵ Sigrun Skogly and Mark Gibney ‘Transnational Human Rights Obligations’ (2002) 24 *Human Rights Quarterly* 781

³⁶ Rolf Künemann, ‘Extraterritorial application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Oxford 2004), 201, Sigrun Skogly and Mark Gibney, ‘Economic Rights and Extraterritorial obligations’ in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, Cambridge University Press 2007) p.267.

³⁷ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford 1995),150.

³⁸ Fons Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Oxford 2004), 183,186.

³⁹ *Case Concerning the Barcelona Traction, Light and Power Company, Second Phase (Belgium v. Spain)* ICJ 5 February 1970, ICJ Reports (1970) 32,§33.

⁴⁰ Andrew Linklater, *The Transformation of Political Community* (Polity Press, Cambridge 1999) p. 207.

cooperation’ in these fields. The remainder of this chapter examines the legal basis and other dynamics of this concept.

4.3 ‘International cooperation’ as the legal basis for external obligations to fulfil social and economic rights

This section illustrates that the external obligations of states to fulfil economic and social rights for persons outside their territories is founded on the concept of ‘international cooperation’ which is entrenched in three core human rights treaties: the Charter of the United Nations 1945, the Economic Covenant 1966 and the Child Convention. As already explained in the preceding Part, the movement towards international cooperation on a global scale is a twentieth-century phenomenon given impetus by the establishment of the United Nations under the Charter of the United Nations in 1945. From the outset the United Nations has had a threefold mission centred on promoting and maintaining international peace and security⁴¹, pursuing international development⁴² and promoting and encouraging international respect for and enjoyment of human rights and fundamental freedoms⁴³ and the organization is designated as the centre for harmonizing international operations⁴⁴ employing international machinery to attain these ends.⁴⁵

Moreover, Article 55 states that it is the responsibility of the organization to promote higher standards of living, full employment, conditions of economic and social progress and development, solutions to international economic, social, health and related problems, international cultural and educational cooperation and universal respect for, and observance of human rights and fundamental freedoms for all. Under Article 56, all members of the United Nations pledge to take joint and separate action in cooperation with the organization for the achievement of the purposes of Article 55 of the Charter. It seems therefore, from this account that read together Articles 1, 55 and 56 of the Charter of the United Nations provide a legal basis for the proposition that all members of the United Nations have binding internal and external legal obligations to ‘work together ’ towards achieving the aims and purposes of the organization. Since the Charter of the United Nations is accepted as having become part of international customary law, then, these provisions calling for international collaboration can be taken to be binding upon states

⁴¹ Charter of the United Nations 1945 Article 1(1).

⁴² Ibid. Article 1(3).

⁴³ Ibid.

⁴⁴ Article 1(4).

⁴⁵ Preamble.

that are not members of the United Nations. These human rights objectives of the United Nations were amplified in the Universal Declaration of Human Rights 1948 which besides stating that “children are entitled to special care and assistance,”⁴⁶ also provides that “everyone has a right to a social and international order that is conducive to the full realization of the rights recognized in the declaration.”⁴⁷ This implies that whereas the enjoyment of rights of recognized therein will be secured within national laws and domestic arrangements, there is a collective obligation on the part of international community especially members of the United Nations to contribute to the creation of a facilitative political, social and economic system.

Apart from the Charter of the United Nations, Article 2(1) of the Economic Covenant binds parties take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively, the full realization of the rights recognised in the Covenant. Article 11(1) recognises the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It also requires States Parties to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Besides, the Covenant reiterates the obligation to provide “international cooperation”⁴⁸ in effecting “international measures”⁴⁹ to implement the rights recognised therein. In Article 23 a non-exhaustive list of forms and processes of international cooperation are suggested as follows:

The States Parties to the present Covenant agree that *international action* for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

⁴⁶ Universal Declaration of Human Rights 1948 Art. 25 (2)

⁴⁷ Art 28

⁴⁸ Articles 11 (2) and 15 (4)

⁴⁹ Article 22

Turning now to Child Convention we find that “international cooperation” is at the heart of the convention in which the phrase appears no less than six times.⁵⁰ The Child Convention codifies the international customary law norms relating to social and economic rights of children and makes reference to the provisions of the Charter of the United Nations 1945 and the Economic Covenant 1966.⁵¹ More specifically Article 4 states:

“States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention. With regard to economic, social and cultural rights, states parties shall undertake such measures to the maximum extent, where needed, within the framework of international cooperation.”

In addition, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000⁵² emphasizes that the elimination of the sale of children, child prostitution and child pornography requires a holistic approach, tackling both the causes of these threats to the right of the child to survival and development. The Protocol calls upon states parties to establish procedures and measure to detect, investigate, prosecute and punish those involved in acts of sale of children, child prostitution, child pornography and child sex tourism. In all these endeavours, states parties are required to ‘strengthen and promote international cooperation’ to achieve these objectives.

4.4 Propounding the content of diagonal human rights obligations as an element of International cooperation in the protection of social and economic rights

As the preceding section indicates, in the Charter of the United Nations, the Economic Covenant and the Child Convention, ‘international cooperation’ was fashioned as a general legal obligation, whose precise content and scope could not be settled or determined in the treaties. Its parameters and practical dynamics were intended to be shaped by the evolving

⁵⁰ See the 13th paragraph of the preamble, Article 4, 17(b) (in the production, exchange and dissemination of information and material of social and cultural benefit to the child), 23(4) (exchange of information on preventive health care and treatment of disabled children), and 24 (4) (towards achieving progressively the full realization of the right of the child to the highest attainable standard of health and access to health care services) and 45 (responsibility of the Committee on the Rights of the Child to facilitate exchange of information and initiate appropriate international action to foster effective implementation of the Children’s Convention.)

⁵¹ Preamble.

⁵² Article 10:

(3) States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.

(4) States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

phases of international relations and other consensus building processes conceived in the background of the hard norms of these international treaties. It appears that the concept of international cooperation is an entrenched precept of the UN Charter-based international legal system and a centrepiece of international law on economic and social rights. Its entrenchment in the binding treaties on human rights provides an international law basis for external obligations of states to contribute to the universal fulfilment of economic and social rights of children. When legal norms are first adopted, their full scope and effects are not immediately self-evident from the texts: successive phases of evolution of the norms through state interpretation, practice and internalisation enable the parameters of human rights legal norms to progressively take shape.⁵³ Moreover, after human rights conventions have come into force, the advocacy and promotional activities and processes of local and global actors other than states such as non-governmental organizations, intergovernmental organizations and other organs of society can also contribute to the further clarification of international law norms.⁵⁴

This section presents a seven-point illustration to demonstrate that the concept of international cooperation in implementing social and economic rights has taken the distinctive shape of states' diagonal obligations to support the universal fulfilment of these rights. Firstly, the General Assembly of the United Nations has adopted a number of declarations which assign to member states the diagonal obligations as part of international cooperation obligations towards universal realisation of economic and social rights. Secondly, in their periodic reports submitted under the Child Convention, most donor countries have affirmed the principle that the Child Convention assigns both domestic and diagonal obligations, which they recognise and are endeavouring to address through various modalities. Thirdly, the UN Committee on the Rights of the Child and UN Committee on Economic, Social and Cultural Rights have, in the course of examining states parties' periodical reports recognised the principle that pursuant to the duty to provide international cooperation under these treaties, signatories to these treaties bear both domestic and diagonal obligations. Fourthly, UN Special Rapporteurs under various mandates in the field of economic and social rights have attempted to construct perspectives on states' external human rights obligations which can be categorised as diagonal obligations.

⁵³ The Vienna Convention on the Law of Treaties, 1969, entered into force on 27th January 1980, Article 31(3), (b);

⁵⁴ For commentary on these processes, see Charlotte Ku and Paul F. Diehl, 'Filling in the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System' (2006) 12 *Global Governance* 161.

Fifthly, several academic writers have defended the theory of states external human rights obligations. Sixthly, there is an emerging doctrine of states' shared international obligations to protect human rights that binds the international community of states to intervene whenever the domestic state is unable to guarantee these rights. Finally, human rights NGOs are insisting that states should not only recognise, but also fully address their diagonal human rights obligations. These points are further discussed below.

4.4.1 UN General Assembly resolutions

The Universal Declaration of Human Rights 1948 recognises that 'children are entitled to special care and assistance,'⁵⁵ and also states that 'everyone has a right to a social and international order that is conducive to the full realization of the rights recognized in the declaration.'⁵⁶ This implies that whereas the enjoyment of rights of recognized therein will be secured within national laws and domestic arrangements, there is a collective obligation on the part of international community especially members of the United Nations to contribute to the creation of a facilitative political, social and economic system.

In 1969, the General Assembly of the United Nations adopted the Declaration on Social Progress and Development to provide a framework for national and international social policies.⁵⁷ One of the central themes of this Declaration is that economic growth and development can enhance the technical and resource capacities of the less advanced states to fulfil their economic and social rights obligations under international law. Such states will then be able to achieve the minimum threshold levels social welfare and guarantee fulfilment of basic human needs, without which the enjoyment of any human rights would be inconceivable. Accordingly, the Declaration states that whereas the primary responsibility for the development of the developing countries rests on those countries themselves, all Member States of the United Nations '*shall* have the *responsibility* to pursue internal and external policies designed to promote social development throughout the world, and in particular to assist developing countries to accelerate their economic growth.'⁵⁸ Article 9 of the Declaration is to the effect that social progress and development

⁵⁵ Universal Declaration of Human Rights 1948 Art. 25 (2)

⁵⁶ Art 28

⁵⁷ General Assembly Resolution 2542 (XXIV) of 11 December 1969.

⁵⁸ Ibid. Preamble.

are the common concerns of the international community, which *shall* supplement national efforts to raise the living standards of people. Article 23 suggests that the more developed states should provide financial aid of at least 1 per cent of the gross national domestic product of the economically advanced countries to the developing countries, in addition to providing ‘technical, financial and material assistance, both bilateral and multilateral, to the fullest possible extent and on favourable terms, and improved co-ordination of international assistance for the achievement of the social objectives of national development plans.’⁵⁹ This was a very important development because although international aid had already become established for over 20 years in international relations, it was the first time for its inclusion in a formal UN General Assembly human rights resolution.

This was followed by another Resolution which proposed that the industrialized developed countries should allocate at least 0.7 per cent of their national income towards official development assistance to developing countries.⁶⁰ Such assistance was considered necessary to support the national initiatives of developing countries achieve economic growth and strengthen their capacity to sustain programmes for securing human rights. Perhaps the most elaborate instrument on international cooperation in this regard is the Charter of Economic Rights and Duties of States 1974.⁶¹ This resolution was intended to formulate norms relating to international economic affairs targeted to benefit developing countries as a group. The Charter’s main focus was to assert the rights of developing countries to permanent sovereignty over their wealth, better and preferential terms of international trade, access to technology and international aid and development assistance. Although it was passed by a majority of 120 members, the resolution was opposed by most donor states.⁶² Among the objections raised by developed countries was that Article 2 whilst declaring the right of host states to nationalise or take over property within its territory held by foreign investors, stated that any compensation claims by foreign investors would be resolved by reference to the domestic law of the state adopting the nationalization measures. This position was contested as being inconsistent with customary international law that ought to supersede and regulate any national expropriation legislation.

⁵⁹ Ibid, Article 23 (b), (c).

⁶⁰ UNGA Resolution 2626 (xxv) of 24th October 1970.

⁶¹ UN General Assembly Resolution 3281 (xxix) of 12th December 1974. See S.K. Chatterjee, ‘The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years’ (1991) 40 *I.C.L.Q.* 669.

⁶² The USA, UK, Denmark, Luxemburg, Belgium, and the German Federal Republic voted against the resolution while Austria, Canada, France, Ireland, the Netherlands, Israel, Italy, Japan, Norway and Spain abstained.

Secondly, Article 13 which asserted the right of developing countries to benefit from advances in science and technology was also contested by developed states on the ground that it seemed to direct commercial transfers of technology in a manner inconsistent with the established commercial practice that recognised the rights of holders of intellectual property rights to obtain compensation for loss of their legally protected monopoly rights under patent laws. The provisions relating to regulating terms of international trade with developing countries were opposed by inter alia the US and German delegations as unduly imposing artificial restrictions to the freedom of markets, would be resisted by producers and consumers and were doomed to fail. Articles 17 and 22 declare that it is the duty of every state to provide development aid and assistance to the developing countries. On this issue, some states especially the France and Germany were of the view that whilst they supported these provisions in principle, they would not regard them as legally binding but would approach international aid under bilateral and multilateral arrangements through the European Economic Community. With such concerted opposition from donor states, this resolution hailed as a grand design to herald a New International Economic Order (NIEO) totally failed to exert much influence on international relations. However, some of its ideas on international cooperation were re-stated in the Declaration on the Rights to Development 1986,⁶³ especially Article 4 which states that ‘as a complement to the efforts of developing countries effective *international cooperation* is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.”

The Millennium Declaration affirms the external human rights obligations of member states of the United Nations as follows:

We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world’s people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.⁶⁴

Adopted unanimously by the General Assembly, the Millennium Declaration specifically calls upon the industrialised countries to grant more generous development assistance to

⁶³ UNGA Resolution 41/128, G.A.O.R. 41st session supp. 53. p. 186 (1986). Article 3(3) makes reference to the NIEO.

⁶⁴ United Nations General Assembly resolution 55/2 of 8 September 2000 <http://www.un.org/millennium/declaration/ares552e.htm>, par. 2.

developing countries to support the latter's initiatives to apply their resources to poverty reduction.⁶⁵ It also reaffirms recognition of the right to development as a human right, committing member states to making the right to development a reality for everyone and to freeing the entire human race from want.⁶⁶ More specifically, the Millennium Declaration commits member states of the U.N. to encourage universal ratification and full ratification of the Child Convention and its Protocols⁶⁷ and affirms that in addition to their separate responsibilities to our individual societies, states have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.⁶⁸ In this Declaration, states pledged support for and solidarity with the vulnerable especially the children of the world, such that global challenges would be managed in accordance with the basic principles of equity and social justice.⁶⁹ Following this Declaration, the UN Secretariat formulated the Roadmap towards the Implementation of the Millennium Declaration which was approved by the General Assembly on 6th September 2001.⁷⁰ The Roadmap contains eight Millennium Development Goals, eighteen targets for these goals and 48 indicators to gauge implementation. These goals represent a partnership between the developed countries and the developing countries 'to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty' through comprehensive social and economic development.⁷¹ The goals are to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria, and other diseases, ensure environmental sustainability and develop a global partnership for development. The most crucial issue is how these goals are going to be financed to achieve results by the target deadline of 2015. Both the Millennium Declaration⁷² and its Roadmap⁷³ suggest that these goals will be financed through official development aid and assistance from the developed countries to the developing and least developed countries and their adoption by the General Assembly constitutes a commitment by the developed countries to provide the necessary assistance. More specifically the

⁶⁵ Ibid, paragraphs 15, 28.

⁶⁶ Id. Article 11.

⁶⁷ Id. Article 26.

⁶⁸ Id. Article 2.

⁶⁹ Id, Articles 2,6.

⁷⁰ General Assembly Res. A/56/326.

⁷¹ Millennium Declaration General Assembly resolution 55/2 of 8 September 2000, par. 12.

⁷² Articles 15 and 18.

⁷³ Goal 8, Target 13, Indicators 32-36. For a critical discussion of this Goal see Fukuda-Parr, Millennium Development Goal 8: Indicators for International Human Rights Obligations? (2006) 28 *Human Rights Quarterly* 966.

Roadmap recommends that the developed countries should allocate a minimum of 0.7% of their Gross National product for aid to the developing countries.⁷⁴

In an insightful commentary on the Millennium Development Goals, Fukuda-Parr pointed out that the indicators in the Millennium Development Goals for monitoring compliance with external obligations to provide aid are conceptually weak as they lack time-bound benchmarks for the rich states to fulfil their commitments.⁷⁵ Such caution is important in understanding the limitations of soft law concepts because each of the legal instruments adopted by the United Nations General Assembly taken alone would certainly be adjudged as conceptually weak. Yet such weak instruments are the main staple in daily international governance in the sphere of social and economic cooperation where opportunities for enactment of hard law through treaties are critically constrained by North-South or rich-poor polarisation. When accumulated over a period of time these soft law instruments can form the building blocks of normative standards and rules of customary international law.

The General Assembly held a Special Session on Children and adopted 'A World Fit for Children' a document containing the Assembly's resolutions in May 2002.⁷⁶ The resolution indicates that although the primary responsibility for implementing the plan of action for realizing children's rights falls on the home states where the children live, it would also require additional national and external resources that can be mobilised within a conducive system of international relations enhanced through North-South and South-South cooperation.⁷⁷ It therefore recommends that the more developed countries that have not met the target of a minimum of 0.7% of their national domestic product for official development assistance should meet this internationally agreed target.⁷⁸

In March 2002, the UN convened a conference on Financing for Development in Monterrey, Mexico. The Conference acknowledged that in the developing countries, Official Development Assistance (ODA) is the largest source of external financing and is critical to the achievement of the Millennium Development Goals and urged developed countries that had not done so to make concrete efforts towards meeting the target of 0.7%

⁷⁴ Ibid, Goal 8, indicator 32.

⁷⁵ Fukuda-Parr, 'Millennium Development Goal 8: Indicators for International Human Rights Obligations?' (2006) 28 *Human Rights Quarterly* 966.

⁷⁶ A World Fit for Children UNGA res. A-Res-S-27-2E of 10th May 2002.

⁷⁷ Ibid, Articles. 49,51.

⁷⁸ Ibid, Article. 52.

of their GDP as ODA to the developing countries.⁷⁹ The Report of this conference was in its entirety adopted by the General Assembly of the United Nations on 24th October 2005.⁸⁰

The foregoing discussion of Declarations of the General Assembly of the United Nations suggests that the concept of international cooperation in the realisation of economic and social rights has acquired the substantive legal meaning which binds the richer states to provide external aid to finance programmes for securing social and economic rights for people in the poor countries. That is to say that they contain non-binding norms of state conduct that fill in the gaps left by treaties such as the meaning of international cooperation in the international treaties on economic and social rights. This is an attempt to construe the general principle of international cooperation enacted in the Charter of the United Nations, the Economic Covenant and the Child Convention as the background norms within which these declarations can be interpreted. Andrew Clapham observes, such Declarations ‘clearly harden when conceived of as explanatory to treaty law or as principles which persuade decision makers when faced with ambiguity or as expressing the opinion of states with regard to interpretation of existing international law such as fleshing out international law obligations pertinent to treaty law.’⁸¹

4.4.2 Interpretations and approaches adopted by donor States’ parties to the Child Convention and the Economic Covenant

Legal norms on paper as in treaties, declarations and doctrines only speak one side of the story. The other side has to be decoded by examining the actual practice of states parties to come to a better understanding of the extent of compliance with the norms. Quite apart from the affirmations of the international cooperation obligations in the General Assembly of the United Nations, the emerging state practice on diagonal obligations suggests recognition and acceptance of these obligations. In this regard, the contents of states parties’ periodic reports to international monitoring expert committees are authoritative statements of how each reporting state party interprets and applies the conventions. A survey of the periodic reports of some of the leading donor states reveals that donor countries with varying degrees of clarity consider their international aid and development assistance programmes to be steps towards fulfilling their external obligations under

⁷⁹ Monterrey Consensus of the International Conference on Financing for Development (*Report of the International Conference on Financing for Development Monterrey Mexico, 18-22 March 2002*) A/CONF.198/11., par. 19,41.

⁸⁰ World Summit Outcome A/RES/60/1.

⁸¹ Andrew Clapham, *Human Rights Obligations of Non-state Actors* (OUP, Oxford, 2006) 104.

Article 4 of the Child Convention to promote and facilitate its global implementation. Sweden's initial report explains that

Simultaneously with the Swedish Government's evaluation of the situation for children in Sweden, the [Child] Convention creates a responsibility [of the State Party] *towards all the children of the world*. The great majority of those children are living under conditions far from those to which most Swedish children are accustomed.⁸²

The Canada's second periodic report submitted to the Children's Committee in May 2001 claims that:

'Canada has been a *leader in promoting the rights of children throughout the world*, the rights of children are a priority within Canada's foreign policy and Canada has effected change by creating and sustaining constructive bilateral relationships with other countries and through cooperative efforts with international agencies such as UNICEF.'⁸³

These claims are supported by evidence showing that the Canadian government through its International Development Agency (CIDA), over the period under review supported 156 projects in developing countries and countries in transition, with a direct or indirect impact on children in the areas of child and maternal health, immunization, basic education, micro nutrient deficiencies, institutional- and capacity-building for implementing the Child Convention and improved protection for children.⁸⁴ The report also explains that CIDA provides core funding to multilateral organizations such as UNICEF and the World Health Organization and maintains a Partnership Branch that supports the work of many non-governmental organizations working in the area of children's rights. This report is an affirmation of the State Party's external obligations, with detailed evidence of how Canada is approaching implementation of these through international aid in various modalities of resource transfer.

Similar pronouncements are also contained in the second periodic report submitted by United Kingdom.⁸⁵ The UK report interprets the state party's obligations under Article 4 of the Child Convention to mean binding legal obligations to contribute to the global implementation of the Convention. It reads in part:

⁸² Initial Report of State party CRC/C/3/Add.1 dated 7th September 1992 par. 8 (emphasis mine) <http://daccessdds.un.org/doc/UNDOC/GEN/G92/175/73/IMG/G9217573.pdf?OpenElement>

⁸³ Committee on the Rights of the Child Second periodic Report: Canada 12th March 2003 CRC/C/83/Add.6, paragraph 25. Emphasis mine.

⁸⁴ Ibid, paragraphs 26-27.

⁸⁵ Periodic report, dated 14th September 1999, CRC/C/83/Add.3, section 5.5.

The objective of DFID in promoting children's rights is to support international efforts to enhance children's well-being through implementation of the Convention on the Rights of the Child, promoting children's protection and participation, alongside the provision of effective and sustainable services for children's survival and development. In partnership with Governments and civil society organizations, DFID supports, and ... assists in meeting the rights set out in the Convention on the Rights of the Child. Provision of services such as health care, education, and welfare is an essential part of the United Kingdom's contribution to promoting children's rights in the countries where DFID works.⁸⁶

To substantiate these claims, the UK report enumerates details of the UK government's international assistance programmes aimed at transferring resources to sustain social and economic welfare of communities and children around the world.⁸⁷

Moreover, Germany's second periodic report indicates that the Federal Government has developed a series of activities to promote the rights enshrined in the Convention in the area of bilateral and multilateral cooperation and lists over 200 projects for German international financial and technical assistance.⁸⁸ In its third periodic report to the Children's Committee, the Danish government explains that Denmark contributes to the protection of children's rights in developing countries through projects aimed at improvement of their conditions.⁸⁹ Similar statements have been made in reports filed by France,⁹⁰ Italy⁹¹ and Japan.⁹²

In addition to the reports submitted to the Committee on the Rights of the Child, several industrialised countries have made strong affirmations of their external obligations to fulfil in their reports to the Committee on Economic, Social and Cultural Rights. Canada's fourth periodic report reiterates the commitment of the Canadian government to support sustainable development in developing countries, to reduce poverty and contribute to a more secure, equitable and prosperous world.⁹³ More details of Canada's priorities in its international cooperation activities through CIDA's programmes are contained in its foreign policy statement 'Canada and the World published in 1995'.⁹⁴ The policy sets out

⁸⁶ Id. Section 5.5.2

⁸⁷ Id.

⁸⁸ Periodic report, dated 23rd July 2001, CRC/C/83/Add.7, par. 64-77.

⁸⁹ Periodic report, dated 20th March 2003, CRC/C/129/Add.3, par.22-26.

⁹⁰ Second Periodic report, dated 1st August 2002, CRC/C/65/Add.26, par. 79-90.

⁹¹ Second Periodic report, dated 21st March 2003, CRC/C/70/Add.13, par. 73-75.

⁹² Second Periodic report, dated 15th November 2000, CRC/C/104/Add.2, par. 46-56.

⁹³ Fourth periodic report submitted by state party under Articles 16 and 17 of the Covenant E/C.12/4/Add.15 dated 4th October 2004, par. 117-122. <http://daccessdds.un.org/doc/UNDOC/GEN/G04/441/88/PDF/G0444188.pdf?OpenElement>

⁹⁴ http://www.dfait-maeci.gc.ca/foreign_policy/cnd-world/menu-en.asp

six program priorities: human rights, democratization and good governance, basic human needs, gender equality, infrastructure services, private sector development and the environment. Periodic reports submitted by France,⁹⁵ Japan⁹⁶ and Sweden⁹⁷ have also indicated similar commitments and undertakings by these states parties.

Recently, the U.S. made its maiden appearance at the Committee on the Rights of the Child upon the consideration of its initial report under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child prostitution and Child Pornography 2000.⁹⁸ In its report, the U.S. makes the observation that although Article 10 of the Protocol obligates states parties to provide appropriate arrangements for international cooperation commensurate with their capabilities, the Article does not prescribe any specific form or amount of external assistance.⁹⁹ It is significant to note that in this initial report, the U.S. does not contradict or reject the clearly enacted external obligations of states parties to the Protocol to promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.¹⁰⁰ To the contrary, the report indicates that the U.S. government is committed to discharging its legal obligations under Article 10(2), and (3) through funding and other support for international and bilateral programmes for children's vocational training, enhancement of income-generating opportunities for poor families and providing shelters and rehabilitation programmes for affected children and women in Gabon, India, Morocco and the Philippines.¹⁰¹

There is a complication in treating the statements in these reports by states parties to the Child Convention and the Economic Covenant as furnishing a basis for the argument that these states have external obligations to fulfil the social and economic rights. It may as well be that the donor countries are only expressing their political commitment to provide discretionary development assistance to poor countries without necessarily undertaking

⁹⁵ Second Periodic Report submitted by state party under Articles 16 and 17 dated 30th June 2000 E/1990/6/Add.27 par. 77-99. <http://daccessdds.un.org/doc/UNDOC/GEN/G00/453/20/PDF/G0045320.pdf?OpenElement>

⁹⁶ Second Periodic Report submitted by state party under Articles 16 and 17 dated 28th August 1998 E/1990/6/Add.21 par. 10. <http://daccessdds.un.org/doc/UNDOC/GEN/G98/186/71/PDF/G9818671.pdf?OpenElement>

⁹⁷ Fifth periodic Report of State party E/C.12/SWE/5 dated 30th June 2006, par. 34-35. <http://daccessdds.un.org/doc/UNDOC/GEN/G06/441/36/PDF/G0644136.pdf?OpenElement>

⁹⁸ Initial Report of state party CRC-C-OPSC/USA/1 dated 10th May 2007. This report was considered by the Committee on the Rights of the Child on 22nd May 2008. For Concluding Observations of the Committee see CRC/C/OPSC/USA/CO/1 dated 6th June 2008.

⁹⁹ Id., par. 93.

¹⁰⁰ Article 10 (3), (4).

¹⁰¹ Id., par. 98.

any binding legal obligations to fulfil social and economic rights of children on the developing world. The conclusion that states' parties' reports confirm that the donor states recognise and are attempting to discharge their obligations should not be rushed and in fact needs to be clarified further. However, just because a government claims to be pursuing a certain conception of human rights, its officials' statements like those made by Ugandan representatives to the U.N. in defence of the Idi Amin's government's scrupulous respect for human rights, do not, per se constitute norm-consistent conduct.¹⁰²

Writers in the field of international relations have construed external economic assistance programmes of the donor countries from realist, liberalist and Marxist perspectives.¹⁰³ For realists, in the absence of a supranational sovereign power to enforce resource transfers from the rich states, international assistance programmes are an instrument of foreign policy by which donor states pursue their own national interests.¹⁰⁴ Even on such realist accounts, the idea of promoting and supporting fulfilment of social and economic rights in poor countries through programmes for reducing global poverty can be a legitimate priority of the donor countries' global human rights agenda. This seems to be the thinking behind the establishment by the George W. Bush administration of the U.S. Millennium Challenge Corporation in 2002 to manage the U.S. Millennium Challenge Account funds for supporting realisation of the Millennium Development Goals in developing countries.¹⁰⁵

The liberalist approach regards external assistance programmes as a projection abroad of the donor states' national values and an instrument to promote international interdependence and international justice.¹⁰⁶ In this approach, donor countries with strong domestic social welfare programmes and policies tend to be more generous with external aid, measured as a percentage of their Gross National Product in an extension to other countries of their domestic solidaristic ideology.¹⁰⁷ The liberal approach is more consistent with the emerging practices of European donor countries, as reflected in their reports to the

¹⁰² Jack Donnelly, 'Human Rights and Foreign Policy' (1982) 34 *World Politics* pp. 574-595, at 585.

¹⁰³ Robert Keohane, 'International Liberalism Reconsidered' in John Dunn (ed.), *The Economic Limits to Modern Politics* (CUP, Cambridge 1990) 165.

¹⁰⁴ Hans Morgenthau, 'A Political Theory of Foreign Aid' (1962) 56 *American Political Science Review* 301; Earl Conteh-Morgan, *American Foreign Aid and Global Power Projection: The Geopolitics of Resource Allocation* (Dartmouth, Aldershot 1990).

¹⁰⁵ See Melanie Nakagawa, 'The Millennium Challenge Account: A Critical Look at the Newly Focused Development Approach and its potential Impact on the US Agency for International Development' (2005-2006) 6 *Sustainable Development Law and Policy* 13. Data on the transactions and programmes funded by the Millennium Challenge account is available on its website: <<http://www.usaid.gov/mca/>>

¹⁰⁶ For extensive discussion of this perspective, Alain Noel and Jean-Philippe Therien, 'From Domestic to International Justice: The Welfare State and Foreign Aid' (1995) 49 *International Organization* 523.

¹⁰⁷ Annika Bergman, 'Co-Constitution of Domestic and International Welfare Obligations: The case of Sweden's Democratically Inspired Internationalism' (2007) 42 *Cooperation and Conflict*, pp. 73; Mikko Kuisma, 'Social Democratic Internationalism and the Welfare State after the 'Golden Age'' (2007) 42 *Cooperation and Conflict* pp. 9-26.

UN human rights monitoring committees. This conclusion is supported by the fact that the affirmations of donor countries' diagonal human rights obligations and their implementation through aid programmes have been expressed and defended by the donor states themselves in the process of the examination of states' parties reports to the Committee on the Rights of the Child and the committee on Economic, Social and Cultural Rights. It is not intended here plunge into the debates in the international relations literature on international development assistance: it is only to show that some of the perspectives adopted by these scholars can be applied to explain the doctrine of states diagonal human rights obligations in the area of social and economic rights.

In retrospect, one finds that these periodic reports by states parties to the two treaties bodies are important statements with implications for international law. Three points can be noted pertaining to the context, process and content of the states parties periodic reports. First, these reports are submitted in the context of hard law reporting obligations under Articles 16 and 17 of the Economic Covenant and Article 44 of the Child Convention, and as we saw in the case of the U.S., Article 12 of the Optional Protocol on the Sale of Children. The *context* of mandatory reporting by states parties creates an environment that conduces to the progressive evolution and elaboration of human rights norms and helps to nurture norm-consistent state practice.

Secondly, process of compilation of data and other material for self-reporting by states under current practice implies there is risk that states might be tempted to present selective information with the intention of creating a 'correct impression' for the sake of international public image. Perhaps more rounds of periodic reports, like say fifty years might be required to support any firm conclusion on emerging consensus. However, if one closely considers the processes of preparation and submission of initial and periodic reports, a different picture clearly emerges. Unlike routine government statements to the media, preparation and submission of periodic reports and the processes of dialogue with and feedback from the monitoring committees create a special methodology for solemn communication on the interpretation and application of international human rights norms by modern states.

The states parties' periodic reports are submitted after a specified time interval for national 'stock-taking' and trying to put things in order followed by writing an official report to be examined by a standing international Committee of experts on human rights mandated to

monitor states parties compliance with the treaty obligations. States parties understand that under the Committees' working methods Non-Governmental Organizations are permitted to participate in the Committees' meetings to dissect the states parties' reports and present critical commentary or alternative reports ahead of the government delegations' own hearing at the Committee. Moreover, at each round of reporting after the initial report, states parties are required to address the issues arising from the Committees' concluding observations on the previous report. From the moment the first paragraph of the periodic report is written, state parties realise that they are entering a 'human rights zone' engaging a high-level international forum where human rights norms, obligations and practices are expounded and defended.

Thirdly, the contents of states' parties' periodic reports constitute endeavours by states to fathom the depths and lengths of the *pacta* dealt to them by the human rights treaties and translate the principles into practice. Indeed, the statements in periodic reports by states parties give substance to the dry bones of the treaty texts in a much more authoritative manner precisely because of the competence of the states parties as authors, signatories and implementers of these treaties. These periodic reports indicate not only formulations of what states regard as their legal burdens under the treaties but they also reveal the steps and measures being taken by the leading states parties to fulfil their diagonal obligations to achieve universal implementation of the social and economic rights of people around the world. It seems that the practice of preparing periodic reports inevitably draws them into interpreting their obligations under the human rights treaties and giving an account of what they are doing about those obligations. Indeed, every word counts, and is measured against the evidence of what the state is actually doing about its obligations. In this case the periodic reports of the leading donor states signify a continuing trend: the consistent affirmation of states' parties diagonal obligations.

There is a cumulative effect of the context and content of the interpretational statements in states' parties reports, the evidence of emerging state practice regarding obligations of states: the principle that states parties have diagonal obligations to *fulfil* social and economic rights seems to have been established in the emerging international law of human rights. To determine the substance of legal concepts and principles, international lawyers examine the texts of treaties signed by states and also the practice of states relating to the treaties and rules of customary international law. In trying to ascertain the substantive content of state practice, international lawyers consider the steps, action and

other conduct of states relating to the treaty texts and also listen to the words that states say.¹⁰⁸

4.4.3 Interpretation of diagonal obligations by UN Committees

The Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights have sought to clarify the legal basis and scope of external obligations of states parties to their respective treaties. Interpreting Article 4 of the Child Convention, has emphasised that the text of this Article assigns both domestic and external obligations to all states parties to ensure its universal implementation. Thus:

The second sentence of article 4 reflects a realistic acceptance that lack of resources - financial and other resources - can hamper the full implementation of economic, social and cultural rights in some States. *When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.* Article 4 emphasizes that implementation of the Convention is a cooperative exercise for the States of the world. This Article and others in the Convention highlight the need for international cooperation. The Charter of the United Nations (Articles 55 and 56) identifies the overall purposes of international economic and social cooperation, and members pledge themselves under the Charter to 'take joint and separate action in cooperation with the Organization' to achieve these purposes.¹⁰⁹

Earlier, in its interpretation of Article 2(1) of the Economic Covenant, the Committee on Economic, Social and Cultural Rights had said:

The Committee notes that the phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and *those available from the international community* through international cooperation and assistance. ...In accordance with Articles 55 and 56 of the Charter of the United Nations, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an *obligation of all States*. It is particularly *incumbent upon those States which are in a position to assist others* in this regard. ...It emphasizes that, in the absence of *an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one*, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.¹¹⁰

¹⁰⁸ Akehurst's *Modern Introduction to International Law* (Peter Malanczuk ed.) 7th edition 1997 p. 39, reprinted in Henry Steiner and Philip Alston, *International Human Rights in Context: Law Politics and Morals* (OUP, Oxford 2000) p.74.

¹⁰⁹ UN Committee on the Rights of the Child, General Comment No.5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44), pars. 4,60. (emphasis mine)

¹¹⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No.3 (1990) Nature of States Parties' Obligations paragraphs 13,14.

Two points can be made about the approaches of the two Committees from the foregoing passages. First, the Committees have interpreted their respective treaties to both domestic and external obligations to at least the states parties to these conventions, although the passages seem to imply such responsibility is not limited to states parties but attaches to all members of the United Nations. Secondly, in both passages, the Committees have invoked the provisions of the Charter of the United Nations to anchor their interpretations of the legal basis and scope of states' obligations in international cooperation in the field of economic and social rights. This is important because it is a strategy to realign both these treaties within the broader agenda of the Charter of the United Nations to secure the global protection of human beings through the idea of universal human rights. But the realisation of human rights does not just happen instantly upon declaration of rights: it is a protracted agenda to be pursued and nurtured within institutional and political frameworks whereby major political actors such as states are made to understand and to execute their respective obligations, weighted and apportioned commensurately with their capabilities.

Another General Comment attempts to set out a comprehensive formulation of diagonal obligations of states parties to the Covenant, as follows:

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.... For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical" which enable developing countries to fulfil their core and other obligations..¹¹¹

In this passage, the Committee interprets the external obligations of states so broadly as to include a legal duty of every state party under Article 12 of the Economic Covenant to respect, protect and support fulfilment of the right to health of persons in other states including an obligation, depending on capabilities to provide assistance towards providing systems for securing access to health facilities in developing countries. The Committee has

¹¹¹ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the Highest attainable standard of Health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), paras. 39,45.

also interpreted the diagonal obligations of states parties to the Economic Covenant to fulfil the right to water as follows:

Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required.... International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards... The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.¹¹²

In other General Comments, the Committee has given further clarifications of external obligations of states in specific rights themes contexts under what it calls ‘international obligations’ of states parties.¹¹³ In these interpretations of the obligations of states parties to the Economic Covenant, the Committee on Economic, Social and Cultural rights has argued that the Covenant assigns both domestic and external obligations to all states parties. The Committee tends to analyse these as ‘international obligations’ signifying their roots in the concept of international cooperation, but they are in effect diagonal obligations since their target is to establish systems and mechanisms that seek to promote the rights and well-being of human beings rather than state actors.

The use of General Comments by UN human rights monitoring Committees to interpret international human rights treaties is now a well established practice. Two points can be made about this process. First, the foregoing General Comments given by experts on the content of states parties obligations can, in keeping with Article 38(1) (d) of the Statute of the International Court of Justice be regarded as a subsidiary means of determining the meanings of rules of international human rights law. Actually, the Committees’ interpretative General Comments do not create any new rules, but breathe fresh life into the dry bones of the treaty’s rules by providing necessary expert elaboration.

Secondly, the technique of creating expert committees to supervise implementation of international human rights treaties constitutes a dynamic force in the treaty regime. In examining states parties reports, the supervising committees must first interpret the

¹¹² Committee on Economic, Social and Cultural Rights (2002) Right to Water, General Comment No. 15, 20 January 2003, E/C.12/2002/11, para.34. For analysis see M. Langford, ‘The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?’ (2005) 21 *Water Resources Development* pp. 273–282 at 280.

¹¹³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991) Right to Housing, paragraphs 10,19, General Comment No.12 (1999), Right to adequate Food (Art.11) UN/Doc E/C12/1999/5, paragraph 36, General Comment No. 13 (1999) Right to Education, paragraph 56,57.

obligations created by the convention and apply this interpretation to determine the extent of compliance by states. In this process, the Committees' Concluding Observations on states' parties reports, General Comments, General Recommendations and General Statements regarding the human rights conventions constitute a body of additional rules, that spring from the internal dynamics of applying and interpreting the provisions of the treaty itself. These additional rules that grow from such interpretational efforts of supervising committees are an integral part of the treaty itself and are known as the treaty's 'acquis,' helping to fill up some of the gaps left by the processes of negotiating and drafting human rights treaties.¹¹⁴ The acquis discussed in the foregoing interpretation of the Child Convention and the Committee on Economic, Social and Cultural Rights serves to clarify diagonal obligations created by the two treaties and is intended to enhance better protection of the economic and social rights of all the world's children. If, however, any state party believes that the acquis as pronounced by a supervising committee distorts the meaning of the treaty and/or extends legal responsibility beyond what was agreed at the time of ratifying the treaty, such a state party has the option to withdraw from the treaty and re-ratify with a reservation to avoid the acquis.¹¹⁵ So far, no state party has taken the option to contest the foregoing approaches of the two Committees, thus implying that states parties are in agreement with the emerging acquis propounded by these committees.

4.4.4 Expositions of diagonal obligations by UN Special Rapporteurs

UN Special Rapporteurs on the right to food and the right to health have, in their reports to the UN Commission of Human Rights advanced interpretations of international human rights law that recognise the external obligations of rich states to support fulfilment of these rights in poor states. The U.N. Special Rapporteur on the Right to food U.N. Jean Ziegler has argued that states parties to the Charter of the United Nations have, in addition to domestic obligations, external obligations to respect, promote and fulfil the right to food, but clarified that a distinction should be made in analysing the obligations to fulfil as a shared responsibility of both the home government and the other states. He explains:

¹¹⁴ Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Kluwer, the Hague 1995) p. 79.

¹¹⁵ Id.

The principal obligation to guarantee the right to food is incumbent on the national government, but other states, if they have available resources, have a complementary obligation to help the national State when it does not have the resources to realize the right to food of its population’¹¹⁶

According to the Special Rapporteur, the external obligations to fulfil could therefore be re-named external obligations to ‘support fulfilment’ to emphasize the secondary nature of these obligations *vis-à-vis* the vertical obligations of the domestic state. Two points can be observed from this report. First, the Rapporteur’s approach to external obligations of states to support global fulfilment of the right to food is consistent with earlier interpretations of other Special Rapporteurs on economic, social and cultural rights who had affirmed the external obligations of states parties to the Economic Covenant.¹¹⁷ Moreover, the approaches of these Rapporteurs are in concurrence with the Committee on Economic, Social and Cultural Rights’ General Comments.

Secondly, while appreciating the Rapporteur’s analysis of external obligations to fulfil, there is an apparent complication in the passage cited above in the sense that the external obligations to support fulfilment amount to obligations to assist the host state to fulfil its population’s right to food. The passage would be inaccurate if it were taken to mean that the external obligation to ‘support fulfilment’ is a horizontal obligation rich states owe to the *domestic state*, which is different from the diagonal obligations all states have to *individuals and communities* on other countries. However, it is a useful clarification because it stresses the principle that the bulk of responsibility to fulfil economic and social rights falls in the first instance, to the host state (vertical obligations) and these must be enforced to the maximum of the available domestic resources.

The UN Special Rapporteur on the Right to Health argues that international law on the right to health can be interpreted to mean the right to ‘an effective health system that is accessible to all’ and it is the joint responsibility of both North and South to take concerted measures to develop effective health systems in developing countries and countries in transition.¹¹⁸ Thus:

¹¹⁶ U.N. Commission on Human Rights ‘Report of the Special Rapporteur on the Right to Food, Jean Ziegler E/CN.4/2005/47 dated 24th January 2005, par.47.

¹¹⁷ Earlier, expert investigations by other Special Rapporteurs had adopted the same interpretation: Commission on Human Rights, Report of the Special Rapporteur on the Realization of Economic, Social and Cultural Rights, Danilo Türk UN ESCOR, UN Doc. E/CN.4/Sub.2/1991/17 (1991) and UN Sub Commission for Promotion and Protection of Human Rights, Report of Special Rapporteur on the Right to Adequate Food and to be Free from Hunger, Asbjorn Eide, UN Doc. E/CN.4/Sub.2/1999/12.

¹¹⁸ UN Commission on Human Rights, ‘Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest attainable Standard of Physical and Mental Health, Paul Hunt UN Doc. E/CN.4/2006/48, (3rd March 2006)

The right to health places an obligation on developed states to take measures that help developing countries realize the right to health and indicators are needed to measure the degree to which donor states are fulfilling this responsibility¹¹⁹

4.4.5 Contributions of academic writers

Academic writers have considered the issue of states' extraterritorial human rights obligations although a clear position on this subject is yet to be settled. Ian Brownlie points out that there is a collective duty of member states of the United Nations to take responsible action to create reasonable living standards both for their own people and for those of other states.¹²⁰ Citing Article 17 the United Nations Charter on Economic Rights and Duties of States, 1974, he suggests that international economic cooperation can be achieved through flows of *economic aid* in form of bilateral loans, grants, technical assistance and loans from United Nations / international financial institutions. However in view of the non-binding nature Charter on Economic Rights and Duties of states, Brownlie does not seem to have considered whether this "collective duty" is a legally binding obligation or is merely a moral one, that could be left to the realm of charity, voluntarism, or the free-market forces of international public debt. David Harris examines whether there is a legal obligation in Art 2(1) of the International Covenant on Economic, Social and Cultural Rights 1966 on the part of developed states to assist developing states to realize economic, social and cultural rights, in particular providing financial aid.¹²¹ Whilst not making any commitment on the point, he suggests that the 'obligation', to provide 'financial aid' can be 'considered to be satisfied' by financial contributions of developed states as member of institutions such as the International Bank for Reconstruction and Development or the European Union which are then allocated by these institutions to developing states. As these two leading works illustrate, in most text books on the general subject of public international law, the subject of states' external obligations to fulfil social and economic rights is not given detailed examination as most of the attention is given to the studying internal/vertical obligations that already pose serious complications. Such

par. 49.

¹¹⁹ Id, par. 49.

¹²⁰ Ian Brownlie, *Principles of international Law* (OUP, Oxford, 1998) p. 257. It seems Brownlie recognises external obligations only in the collective context of membership in an inter-governmental organization such as the United Nations. This is what in this thesis is referred to as 'states' international obligations.' There is a distinction between the separate corporate identity and legal status of an inter-governmental organization and the individual member states. Sometimes, states prefer to use the corporate veil of an intergovernmental organization to pursue certain objectives revert to their separate identities for other purposes. That is why this chapter deals with the states' individual external obligations as corporate citizens of the international community.

¹²¹ David Harris, *Cases and Materials on International Law* (Sweet and Maxwell, London 2004) p. 747.

investigation on diagonal or trans-national obligations is now being taken in studies by specialist writers on the subject, which are discussed below.

Writers on this subject can be categorised into two schools: those who insist on traditional statism and therefore do not endorse diagonal obligations and those who recognise diagonal obligations and therefore accept cosmopolitan statism. In a study of the nature of states' obligations under the Economic Covenant, Magdalena Sepulveda argues that 'as interpreted by the Committee on Economic, Social and Cultural Rights, the developed states are not under a general obligation to facilitate and provide for the satisfaction of the Economic Covenants rights in other states.'¹²² She further asserts that 'there is no general international obligation for developed states to provide for the satisfaction of the Covenant rights in less wealthy states,' save only 'in the context of disaster relief and humanitarian assistance.'¹²³ Although Sepulveda cites several concluding observations of the Committee on Economic, Social and Cultural Rights on the reports of donor states, her argument contradicts the position advanced by the Committee in its General Comments discussed above. Secondly, it is not clear whether there is a fundamental distinction between the obligations of rich states 'in the context of relief and humanitarian assistance' and the obligations of all states to support global fulfilment of economic and social rights. If significant sections of any society are deprived of their basic subsistence and their government is unable to guarantee their access to the basic decencies of life, it is difficult to deny that such persons do require humanitarian assistance: most cases of non-fulfilment of economic and social rights can be re-analysed to fit into the context of a legitimate need for humanitarian assistance. However, while denying the external obligations of rich states to support global fulfilment of the Covenant, Sepulveda suggests that poor states have a duty to seek international assistance and even attempts to develop a scheme of duties of poor states in international cooperation: this begs the question as to who would be the addressees of such pleas for assistance?¹²⁴ Sepulveda's argument fails to appreciate states' diagonal obligations and to consider how the UN Committee on Economic, Social and Cultural Rights has laboured, in its General Comments to educate states parties on the need to understand and address these obligations.

¹²² Magdalena Sepulveda, *The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp 2003), p. 374.

¹²³ *Id.*, p.375.

¹²⁴ *Id.*, pp. 276-377.

Wouter Vandenhoe in a recent essay, insists that ‘no general and undifferentiated legal obligation to cooperate internationally for development in particular with regard to children can be deduced from the text of the Child Convention,’ and that ‘the Committee on the Rights of the Child has paid disproportionate attention to the third states obligation to fulfil i.e. to provide development assistance through the transfer of resources from North to South,’ which he reckons to be politically more sensitive and disputed than the external obligations to respect and protect.¹²⁵ In an earlier article, Vandenhoe had also argued that ‘there is no general extra-territorial obligation of states parties to the Economic Covenant to fulfil-provide i.e. to support universal fulfilment of the rights recognised in the Economic Covenant.’¹²⁶ According to Vandenhoe, only the extraterritorial obligations to respect and protect economic and social rights have been generally accepted by states and can be regarded as being part of the hard law, whereas according legally binding status to the extraterritorial obligations to fulfil and in particular provide development assistance still meets with resistance.’¹²⁷ Vandenhoe’s arguments and interpretations of the Child Convention and the Economic Covenant are, with respect, not entirely accurate and can be challenged. First, whereas Vandenhoe asserts that external obligations to fulfil are ‘politically sensitive, disputed and resisted’ these reactions per se are not convincing grounds for concluding that such obligations are not part of international human rights law in the sphere of economic and social rights. If, as often happens in practice, some states seem reluctant to perform certain aspects of their obligations under human rights law, it does not follow that those obligations are invalidated. Once diagonal human rights obligations of all states are understood, it remains the task of the international human rights community to devise ways for re-educating all states to establish and maintain institutional structures and arrangements for mainstreaming them in international relations in a holistic manner without engaging in hair-splitting of the various typologies of such external obligations. Secondly, it is not clear what ‘dispute’ or ‘resistance’ Vandenhoe seems concerned with since there has not been any reservation by any state party to the principle of international cooperation in Article 4 of the Child Convention. Besides, a survey of the periodic reports of donor countries to the UN Committee on the Rights of the Child reveals that most of these states expressly affirm and are committed to addressing, their diagonal obligations. Since what animates the global human rights treaties is the goal of universal

¹²⁵ Wouter Vandenhoe, *Economic, Social and Cultural Rights in the CRC: Is there a Legal obligation to Cooperate internationally for Development?* (2009) 17 *International Journal of Children's Rights* 23, at 24,26.

¹²⁶ Wouter Vandenhoe, ‘EU and Development: Extra-territorial Obligations Under the International Covenant on Economic, Social and Cultural Rights’ in Margot Salomon, Anne Tostensen and Wouter Vandenhoe (eds) *Castling the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp 2007) pp. 85-106, at 105.

¹²⁷ *Id.*, p. 97.

protection and fulfilment of human rights for the entire human species with states as the principal actors in this project, then, surely, territoriality cannot be a barrier or limit to states' human rights obligations under these treaties.

In the other school, writers recognise that the universal nature of human rights law necessarily entails extraterritorial obligations of states. Margot Salomon presents a persuasive argument that under the Charter of the United Nations, as well as human rights treaties and resolutions adopted by various world conferences on human rights, the emerging regime of international law entrenches the principle of international cooperation i.e. shared global obligations of states, commensurate with their respective organizational and logistical capacities to contribute to the establishment of a global order that facilitates the universal fulfilment of human rights.¹²⁸ Salomon explains that international cooperation for human rights includes ensuring an international economic system geared towards poverty reduction, participatory trading, investment and financial systems conducive to elimination of poverty, improved access to markets by least developed countries, addressing the problem of external debt faced by developing countries, providing a system for international transfer of resources such as the internationally agreed 0.7% of Gross National Income to support programmes for development in poor countries.¹²⁹

Reviewing the Economic Covenant and the Child Convention, Sigrun Skogly argues that the concept of 'international cooperation and assistance' as applied in these treaties has a wide focus and binds all states the rich and poor alike to comply with external human rights obligations in all their foreign affairs, including but not limited to trade, security cooperation, military assistance, development assistance and cultural exchange.¹³⁰ This is a very important point because by identifying the respective positive and negative external obligations of states parties it overcomes the tendency to polarise analysis of international cooperation obligations into the haves and have-nots. Skogly affirms the foregoing interpretations of the Committees calling the General Comments 'soft law' and suggesting that they assist in developing understanding of the content of human rights norms.¹³¹ While Skogly defends the position that states have diagonal obligations to respect and protect

¹²⁸ Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford 2007) p. 61.

¹²⁹ Id, pp. 102-103.

¹³⁰ Skogly Sigrun *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia Oxford 2006), p. 18, and chapter 8.

¹³¹ Ibid, chapter 6.

human rights,¹³² she makes only a tentative argument for the diagonal obligations to fulfil, noting that this is the most controversial of the three types of obligations.¹³³

However, in a later paper, Skogly and Gibney make a strong defence of diagonal obligations to fulfil and argue that if a state party to the Economic Covenant has resources to support the fulfilment of economic and social rights in another country that is poor, but either denies such obligations or otherwise fails to participate in a coordinated system for implementing the Covenant, then such a state would be in breach of its human rights obligations under international law.¹³⁴ But this notion of a coordinated system of supporting universal implementation that the authors draw from Henry Shue's thesis signals other challenges to current state-based political structure of the international community: the need to establish institutional architecture for global social and economic cooperation such as, for example a global revenue system to guarantee universal fulfilment of the internationally recognised social and economic rights.¹³⁵

Rolf Künemann argues that there is nothing in the text of Article 2(1) of the Economic Covenant or anywhere else in the treaty to suggest that the obligations of states parties to fulfil the social welfare rights in this treaties are limited to their own territories.¹³⁶ He observes that this is one of the main legal instruments sponsored by the United Nations embodying the universal human rights norms and for that reason, imports 'international obligations' of states parties to cooperate in the fulfilment of these rights for the benefit of not only rights holders in their own jurisdictions but also rights holders in other countries all over the world.¹³⁷ He applies a double threefold typology of states parties legal obligations under the Economic Covenant, demonstrating that all states parties to the Economic Covenant have internal obligations (domestic context), external obligations (bilateral dealings with other states) and international obligations (as a member of an international organization). At each of these three levels, each state party has obligations to respect, protect and fulfil economic and social rights.

¹³² Id, pp.66-70.

¹³³ Id, pp. 71,194.

¹³⁴ Sigrun Skogly and Mark Gibney, 'Economic Rights and Extraterritorial obligations' in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (CUP, Cambridge, 2007) 267, 280.

¹³⁵ Henry Shue 'Mediating Duties' (1988) 98 *Ethics* pp. 687-704. Until such mechanisms have been established, it is difficult to integrate duty-bearers in a system for social and economic cooperation. In chapters five and six, below, I attempt to construct schemes for mediating the trans-national economic and social rights duties of the international community of states and non-state actors to enhance international protection and promotion of these rights.

¹³⁶ Rolf Künemann, 'Extraterritorial application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Oxford 2004) 210.

¹³⁷ Ibid, pp. 201-202.

In an insightful essay, Arjun Sengupta argued that the concept of international cooperation entails responsibility of the more developed states for the fulfilment of the human rights of persons in poor states in a diagonal obligations paradigm:

International cooperation... implies that the international community is to cooperate with national authorities to fulfill the right to development and to eradicate poverty of the poor people in those countries. There are certain steps that the international community must adopt that enable the developing countries in general to have freer trade, better terms of investment, technology transfer, and foreign aid that directly affect all people of the developing countries. These are like the “diagonal” relationship between the developed countries and the people of the developing countries.¹³⁸

Fons Coomans argues that the issue of external obligations of states parties under the Economic Covenant has not been fully discussed by its monitoring Committee and the law on this area of economic and social rights is still in an early stage of development.¹³⁹ While accepting the Committee’s threefold typology of states’ domestic and external obligations to respect, protect and fulfil, Coomans takes the view that the ‘negative’ international obligations to respect economic and social rights stand on a stronger basis than the positive obligations to protect and fulfil.¹⁴⁰ From this review, it seems there is a broad consensus emerging among writers on this subject that all states have external human rights obligations; what seems to be in contention is the scope or extent of these obligations.

4.4.6 States’ shared obligations to protect human rights

A doctrine is emerging that whereas sovereign states have a responsibility to protect their own populations from avoidable catastrophes, such as mass murder, rape, starvation and the like, when the domestic state is unwilling or unable to do so, then such responsibility must be undertaken by the wider community of states, as a matter legal obligation.¹⁴¹ This doctrine has been affirmed and endorsed in a resolution of the UN General Assembly¹⁴²

¹³⁸ Arjun Sengupta, ‘Poverty Eradication and Human Rights’ in Thomas Pogge (ed.) *Freedom from Poverty as a Human Right* (Oxford university Press, Oxford 2007), 323 at 344.

¹³⁹ Fons Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Oxford 2004) 183, at 186,199.

¹⁴⁰ Id, p. 199.

¹⁴¹ Space constraints do not permit an extensive discussion of this doctrine. For detailed analysis of this doctrine, see Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm (2007) 101 *American Journal of International Law* 99.

¹⁴² World Summit Outcome UN General Assembly Resolution 60/1 paras. 138-139 (24th October 2005).

and three other UN documents.¹⁴³ It represents a subtle conceptual shift from the claims of the ‘right’ of third states to intervene in another state to protect and stop violations of human rights of the civilian population, to ‘the obligation’ of third states to do so. Although the doctrine seems to be applied in the context of violations of civil and political rights and situations relating to peace and security, in view of the recognition of the principle of indivisibility, interdependence and equal importance of all human rights,¹⁴⁴ it can be applied to support the thesis of states’ diagonal obligations of states in international law on economic and social rights. This can apply in relation to non-fulfilment of economic and social rights due to inability and lack of adequate technical and financial resources on the part of the domestic state: the duty of third states can be based on the obligation to reduce the suffering occasioned by the non-fulfilment of these rights by the domestic state. This obligation can also be distinguished from the duty of humanitarian assistance in the sense whereas humanitarian assistance tends to be voluntary; the duty of third states to protect human rights is part of states’ diagonal human rights obligations.

4.4.7 Perspectives of human rights NGOs

Besides being in the forefront in the processes for adoption of human rights norms, human rights NGOs have also been expressly mandated in a resolution of the General Assembly of the United Nations to re-educate the global general public, political elites of all nations and other institutions and agencies responsible for promoting and protecting human rights on the nature and scope of the internationally recognized rights and obligations.¹⁴⁵ Accordingly, human rights NGOs have recognised and attempted to advance perspectives of diagonal obligations of states. For instance the Canadian Coalition for the Rights of Children has argued that Article 4 of the Child Convention binds Canada to participate in programmes for supporting global fulfilment of children's economic and social rights, such as honouring the internationally agreed 0.7 percent of its Gross National Product on

¹⁴³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) <http://www.iciss.ca/report-en.asp>; In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General UN Doc. A/59/2005 paras. 16-22 (2005) <http://www.un.org/largerfreedom/contents.htm> and, A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, par. 201 (2004) <http://www.un.org/secureworld/report.pdf>.

¹⁴⁴ Vienna Declaration and Programme of Action on Human Rights 1993 adopted by the World Conference on Human Rights on 25th June 1993, Article 5.

¹⁴⁵ The Declaration on the Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998, UNGA RES/53/144 of 9th December 1998, Annex of 8th March 1999, Article 16. <http://daccessdds.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>

international aid.¹⁴⁶ The Coalition also maintains that Canada has a legal duty under this Article to evaluate the impact of its policies regarding Foreign Affairs and International Trade on the rights and welfare of children in developing countries.¹⁴⁷

Another human rights NGO, the Human Rights Council of Australia has interpreted the obligations of rich states in the sphere of international development assistance to include a binding obligation based on the Charter of the United Nations, to provide international assistance and cooperation necessary to secure universal realisation of internationally recognised human rights.¹⁴⁸ The Council argues that the international conventions on economic and social rights require donor countries to not only to assess the human rights impact of aid programmes but, in the first instance, to consider the provision of aid programmes as a binding obligation towards persons in the countries receiving development assistance, who are entitled to such aid as legal right since the costs of providing economic and social rights cannot be borne by the developing states.¹⁴⁹

4.5 Illustrating a threefold typology of states' diagonal obligations

As Henry Shue famously argued, all human rights involve threefold correlative duties: the duty to refrain from depriving, the duty to protect from deprivation and the duty to aid the deprived.¹⁵⁰ In the theory of economic and social rights these duties have been restated as the obligations of states to respect, protect and fulfil the realisation of economic and social rights. In view of the foregoing discussion of the obligations created by the legal concept of international cooperation, states' diagonal obligations can also be analysed into external obligations to respect, protect and fulfil. This section explores how these obligations relate to the practical context.

4.5.1 Diagonal obligations to respect social and economic rights

States' diagonal obligations to respect economic and social rights demand that states *refrain* from acts or conduct that violates or otherwise interferes with the enjoyment of

¹⁴⁶ The Canadian Coalition for the Rights of Children, 'The UN Convention on the Rights of the Child: How Does Canada Measure Up? Article 4:How Does Canada Measure Up?' <<http://www.rightsofchildren.ca/index.htm>>

¹⁴⁷ Id.

¹⁴⁸ The Human Rights Council of Australia Inc., *The Rights Way to Development: A Human Rights Approach to Development Assistance* (Human Rights Council of Australia, Maroubra 2001), p.4.

¹⁴⁹ Id, p. 5.

¹⁵⁰ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press, Princeton, N.J. 2nd edn. 1996) p. 52.

economic and social rights by people in other countries. As illustrated above in Figure 4.1, states have diagonal obligations to persons in other countries whose human rights situations can be affected by states' domestic and foreign policies. While in practice not all states' conduct will affect foreign persons in the same way, and it will ultimately depend on the respective latitudes of spheres of international interactions with each state, the obligations remain the same. At all stages, whether the spheres of interaction are distant or close, growing or declining, obligations to respect are negative injunctions that are fundamental legal obligations regulating all states' international conduct. It is possible to identify examples of cases which indicate violations of the obligations to respect the enjoyment of economic and social rights.

If State A dumps heavily subsidised beef products on markets of State B with the result that the local beef industry in State B is forced to close down, it amounts to violating the rights of local pastoralist communities to work, food and livelihood.¹⁵¹ In the same way, where a developed state implements policies that permit the export of heavily subsidised and therefore cheap sugar to poor developing states, with the result that the local sugar industry is edged out by such unfair competition, the developed state would be violating the rights to work and an adequate standard of living of the persons supported by the poor country's sugar sub-sector.¹⁵² Also, if State A permits discharge of pollutants into an upstream course of a river resulting in water poisoning it would violate the right to water and food of victims in State B downstream who rely on the river for drinking water and irrigation.

The diagonal obligations to respect are violated where State A unilaterally imposes an embargo on all exports of food, cash, and other resources from State A to State B, thereby occasioning a food crisis in State B which due to unfavourable geographical factors and other constraints relies on such imports from State A. It is also a violation of the obligation to respect where State A pursues 'unfriendly diplomatic action' against State B, interfering with existing international cooperation and assistance available to State B, urging and inciting other States to impose sanctions upon State B resulting in international isolation of

¹⁵¹ Rolf Künemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Oxford 2004) 201,219.
above, pp.219.

¹⁵² See Wouter Vandenhoe, 'Third State Obligations under the International Covenant on Economic, Social and Cultural Rights: A Case Study of EU Sugar Policy' (2007) 76 *Nordic Journal of International Law* 73.

State B and decline in social and economic rights standards in State B.¹⁵³ Another case is where State A masses armed forces and military hardware within its territory but very close to the common border with State B in a show of force. Such an act, though short of an actual attack can trigger panic in State B and disorientate that state's national budgets for social and economic rights programmes following heightened anxiety over state security.¹⁵⁴ Whereas such unfriendly acts are said to be aimed at the ruling elite in State B, their impact falls on the ordinary individuals whose economic and social rights arrangements are sidelined by priorities of state security.

The list is not closed but we can see that a state can actively violate the economic and social rights of persons in another state through such deliberate, international non-cooperation. States' diagonal legal obligations to respect demand that State A must cease and desist from interfering with the enjoyment of economic and social rights by the people of State B. Assessing states foreign affairs through lenses of states' external legal obligations to respect the social and economic rights brings in a human rights dimension that can be applied to censure international misconduct. As the UN Commission on Human Rights said, such unilateral measures undermine the social welfare the vulnerable sections of the target state and negate the expectations held out in international law of human rights.¹⁵⁵

4.5.2 Diagonal obligations to protect social and economic rights

The external obligation to protect requires a state to take measures to restrain third parties over which the state has jurisdiction, from violating the social and economic rights of persons in foreign countries. Again, as in the internal obligations to respect, the institutional arrangements in the domestic legal system can be applied to ensure that the human rights standards which their subjects are expected to comply with at home are also enforced to regulate their activities abroad. Two types of cases can illustrate this obligation. The first relates to the activities of a corporation domiciled and having a

¹⁵³ Matthew Craven, 'Human Rights and the Realm of order: Sanctions and Extraterritoriality' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Oxford 2004) pp.233-257.

¹⁵⁴ Frequent border skirmishes between the very economically less developed Horn of Africa states of Ethiopia and Eritrea are a case in point. A United Nations peacekeeping force posts updates on troop movements along the borders of the two countries on its site: <http://www.un.org/apps/news/>

¹⁵⁵ Commission on Human Rights resolution 2002/22 Human Rights and unilateral coercive measures E/2002/23-E/CN.4/2002/200: 'The Commission on Human Rights, rejects the application of such measures as tools for political or economic pressure against any country, particularly against developing countries, because of their negative effects on the realization of all human rights of vast sectors of their populations, inter alia children, women, the elderly, disabled and ill people' Paragraph 3.

registered place of business in State A, but violates human rights of the people in whose territory it is carrying on business activities. For example, on 19th August 2006, *the Probo Koala*, a ship chartered by a Dutch company Trafigura offloaded 500 tons of toxic untreated petrochemical waste, originating from Amsterdam, in the Netherlands, in Abidjan, home to 5 million people and the capital city of Cote d'Ivoire in West Africa. A few days later, thousands of people developed symptoms including nosebleeds, nausea and vomiting, headaches, skin and eye irritation, respiratory distress, dehydration and intestinal bleeding. According to the UNEP, 8 people died while 78,000 sought medical care. Many victims also sought medical advice about the potential long-term consequences on their health and that of their children. In an effort to reduce contamination of the food chain, a large number of livestock including 450 pigs were culled. On 6th December 2006, an inquiry by the city authorities in Amsterdam established that the city was guilty of negligence in permitting export of untreated chemical waste.¹⁵⁶ Although this was a single incident, it illustrates how The Netherlands violated its obligation to protect by failing to restrain a company subject to its jurisdiction from exporting untreated toxic waste.¹⁵⁷

There are also cases where foreign trans-national corporations routinely carry on activities that exacerbate environmental degradation, destroy food-crops of local communities, pollute water resources, violate workers' rights and use child labour: practices that are forbidden and punishable under the laws of their home state but which the legal system of the host state is not effective to stop. Although the host government has a legal obligation to protect, most of the developing states do not have the political will or capacity to control giant multinationals: limited domestic capital means they compete with other poor countries for foreign direct and tend to be unwilling or unable to restrain such a corporation from violating the economic and social rights. In such a case there is a legal obligation on the part of State A to restrain its corporations from violating human rights of persons resident abroad because as the home state, it retains *in personam* jurisdiction over

¹⁵⁶ Deadly toxic waste dumping in Côte d'Ivoire clearly a crime – UN environmental agency reports, <http://www.un.org/apps/news/> For additional reports, http://en.wikipedia.org/wiki/2006_C%C3%B4te_d'Ivoire_toxic_waste_spill, <http://news.bbc.co.uk/1/hi/world/africa/6134998.stm>

¹⁵⁷ Such omission by the Netherlands which has ratified the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal 1989 constitutes a violation of international environmental law, but the outrage of causing such needless death and destroying the fragile health of tens of thousands of hapless victims is a more morally compelling case for protection.

its subjects and should prevent/stop them from violating human rights: the state's jurisdiction over territory and its jurisdiction over citizens can be clearly distinguished.¹⁵⁸

The second case involves the misappropriation of national resources in State B, by officers in the public service or private sector economic criminals, and the illicit transfer, deposit and investment of the funds in State A. By depriving the people of State B of the use of their national financial resources, such activities deny millions of people in State B access to water, food, housing, health care, education and other social and economic rights arrangements that could have been resourced by the stolen funds. It is estimated that US\$400,000,000 has been looted from African economies and stashed in foreign banks.¹⁵⁹ With such funds within its territorial jurisdiction, State A has a legal duty to protect the economic and social rights of the deprived people in State B by assisting in the efforts to trace and recover such foreign public assets. In addition, the United Nations Convention Against Corruption 2003 obligates states parties to promote, facilitate and support international cooperation and technical assistance in the prevention and fight against corruption, including asset recovery.¹⁶⁰ Obligations of states under international law of human rights to protect economic and social rights of the victims impoverished by such acts of embezzlement provides a more compelling moral case for implementing the Convention Against Corruption.

Besides such reactive mechanisms, the obligation to protect could be recast to incorporate the proactive duty to forbid and prevent the state's financial services industry from providing safe havens for illicitly acquired foreign resources and to track down and break up local syndicates of trans-national economic crimes.¹⁶¹ In other words, obligations in international cooperation to implement universal human rights can be dressed into states' external obligations to respect and protect social and economic rights and properly extended to apply to these aspects of the competences and activities of states. In this context, it can be argued that if the performance of external obligations to respect and

¹⁵⁸ For an extended analysis of this argument, see Penelope Simons and R. McCorquodale, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598.

¹⁵⁹ Transparency International (2005) *Annual Report* 2005, p.7. www.transparency.org

¹⁶⁰ The Convention came in force on 14th December 2005. For a critical examination: P. Webb, The United Nations Convention Against Corruption : Global Achievement or Missed Opportunity? (2005) 8 *Journal of International economic Law*, pp. 191-229

¹⁶¹ The Convention Against Corruption, Article 14. Even without the Convention, it is a general principle of law that theft is a crime and most legal systems have legislation to forbid and punish offenders. Just like the internal obligations to protect, the external obligations to protect can be performed through application of domestic legislation.

protect is improved, then the burden for providing external assistance towards fulfilling these rights would be considerably reduced.¹⁶²

4.5.3 Diagonal obligations to fulfil economic and social rights

Glenn Mower Jnr examined the problems of resource constraints in the developing countries which undermine the enjoyment of social and economic rights and analysed the 'global efforts to make resources available.'¹⁶³ He considered four main pathways for international cooperation to support the fulfilment of social and economic rights in developing countries: official development assistance (aid) from the developed countries to the developing world, international trade and fair access for commodities from the developing countries to the global markets, the pursuit of the promotion and protection of the right to development and finally the establishment of a New International Economic Order.¹⁶⁴ Philip Alston observes¹⁶⁵ that although the call for a New International Economic Order was partly incorporated in the UN Declaration on the Right to Development 1986,¹⁶⁶ attempts to impose a formal legal obligation on the North to transfer resources to the South through this Declaration or otherwise have failed dismally, leaving only loosely stated pledges of donor countries of the North to 'strengthen their commitment to improving the lives of all people' through increasing development assistance and aid. Indeed, the donor countries approach their external obligations to support fulfilment of social and economic rights through programmes for aid/development assistance.¹⁶⁷

Since most of the developing countries experience resource constraints in their efforts to fulfil social and economic rights, these problems can be addressed by arrangements for

¹⁶² This is an extension of Henry Shue's thesis to the international plane: Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press, Princeton, N.J. 2nd edn. 1996) pp. 60-64.

¹⁶³ See Glenn Mower Jnr., *International Cooperation for Social Justice: Global and Regional protection of Economic and Social Rights* (Greenwood Press, London 1985)

¹⁶⁴ Mower observed that developing countries as a group have enough latent resource reserves to provide a better life and brighter prospects for their people. However, such resources especially agricultural and mineral resources are underdeveloped below the level necessary for an adequate standard of life and/or even where they are developed, they are diverted within a world market system on terms that are not sufficiently favourable to the developing world.

¹⁶⁵ Philip Alston, 'Revitalising United Nations work on Human rights and development' (1992), 18 *Melbourne University Law Review* 216

¹⁶⁶ UN, (1986) Declaration on the right to Development 1986, UN doc. A/41/53 GA res. 41/128, Annex 41.

Article 4 states as follows:

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development. 2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

¹⁶⁷ This point has been discussed in section 4.4.2, above.

coordinated resource transfers to these countries to reduce the financing gaps in the programmes for realising these rights. This strategy is supported by the recommendations of UN Millennium Project that argues that with adequate funding, a number of ‘quick-wins’ could be achieved in poor countries.¹⁶⁸ These include eliminating school and uniform fees to ensure that all children especially girls are not out of school because of their families’ poverty: here the lost revenues could be replaced with donor assistance. Another study that recommends international development assistance has been made by the UN Commission for Africa to meet the financing gap for investment in roads, rail, air transport, energy, communications and irrigation: the key infrastructure required to anchor the drive for the continent’s economic development.¹⁶⁹ The subject of diagonal obligations to support fulfilment as an element of the legal duties in international cooperation to realize social and economic rights requires extended examination and is discussed further in chapters five and six, below.

4.6 Conclusion

Establishing systems for securing realisation of economic and social rights can be regarded as one of the various elements of the broader functions of managing an economy.¹⁷⁰ In doing so, the fulfilment of economic and social rights entails enormous costs and risks that can only be addressed through participating in appropriate engagement with other states, inter-governmental organizations and non-state actors in the international political economy. This fact was recognised at the founding of the United Nations whose Charter prescribes international cooperation in the pursuit of higher standards of living, full employment, economic and social progress and development etc.¹⁷¹ In line with this, the Economic Covenant and the Child Convention do not apply a territorial jurisdiction clause, but make specific directives to states parties to approach their obligations to secure realisation of economic, social and cultural rights within the framework of international cooperation.

¹⁶⁸ UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* Report of the UN Secretary General (Earthscan, London, 2005).

¹⁶⁹ Commission for Africa, *Our Common Interest: The Report of the Africa Commission*. (Commission for Africa, London 2005). See also Simon Maxwell, 'Exhilarating, Exhausting, Intriguing: The Report of the Africa Commission' (2005) 23 *Development Policy Review* 483.

¹⁷⁰ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff, Leiden 2004), 189.

¹⁷¹ Charter of the United Nations 1945, Articles 1(3), 55, 56.

While the scope of states' domestic obligations to implement economic, social and cultural rights can be regarded to be part of the political responsibility of governments under the social contract theory, the existence and scope of states' diagonal obligations under this concept of international cooperation has not yet been fully explored, let alone accepted by scholars. For one scholar, 'the debate on the existence, nature and extent of such obligations has only started, and there are still more questions than answers'¹⁷² for another writer, 'international obligations to protect and fulfil are still part of the law 'under construction'¹⁷³ while a leading jurist offers a veiled denial of these external obligations.¹⁷⁴

As the discussion in this chapter illustrates, there seems to be a broad consensus that all states have common obligations to respect i.e. to refrain from conduct that is prejudicial to the enjoyment of economic and social rights of persons both within and outside their jurisdiction. However, as regards the aspects of states' diagonal obligations to protect and provide or support fulfilment of economic and social rights of persons in other states, there are conflicting perspectives of the obligations of states under the international conventions on economic and social rights. The first perspective that can be called traditional statism argues that the responsibility to implement international legal norms on economic, social and cultural rights norms falls to the national community, through domestic governments in the context of vertical human obligations of states.¹⁷⁵ On this view, states do not have a legal obligation under international human rights law to contribute to the fulfilment of these rights in other countries. This traditional statist approach offers an incomplete conception of how the international community of states has undertaken to think and act about protecting human beings and human rights. It would result in emptying the international human rights norms on economic, social and cultural rights their full promise by relieving states parties of some of their diagonal obligations and discarding the basic concepts and principles with which to meaningfully conduct international dialogue and argumentation on states' obligations to secure global fulfilment of economic and social rights. Therefore, the traditional statism perspective misrepresents and distorts the global

¹⁷² Wouter Vandenhoele, *Economic, Social and Cultural Rights in the CRC: Is there a Legal obligation to Cooperate internationally for Development?* (2009) 17 *International Journal of Children's Rights* 23, 24.

¹⁷³ Fons Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Oxford 2004) 183, 199.

¹⁷⁴ Magdalena Sepúlveda, *The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp 2003), p. 374.

¹⁷⁵ See David Miller, *National Responsibility and Global Justice* (OUP, Oxford 2007).

vision and promise formally institutionalised in international conventions on economic and social rights, including the Child Convention and must be rejected.

It has been argued in this chapter that the whole project of universal human rights as proclaimed by states in international law signals the recognition of that in order to effectively protect and promote the rights of human beings, there must be a measure of collective, shared responsibility of all states. In the field of economic and social rights, this idea of a shared responsibility has been expressed by application of the concept of international cooperation in the texts of the global treaties. This shared obligation to support universal fulfilment of these rights is the logical result of adopting the cosmopolitan agenda of universal, global protection and promotion the rights every person and trying to pursue this agenda on the Westphalian platform of the political structure of many sovereign states. It is about how to use international law to re-educate, socialise and convince states and their leadership to recognise the full scope of their human rights obligations and embrace these in a joint universal resolve to serve the human family.

Cosmopolitan statism, as presented in this chapter maintains that under international human rights law, all members of the United Nations have both domestic and diagonal obligations to respect, protect and fulfil economic and social rights. As illustrated in Figure 4.1 above, this means that every state party to the UN Charter has covenanted to hold in one hand its domestic human rights constituency and in the other, the external constituency of the human family and make contributions to the fulfilment of the rights of both these constituencies, commensurate to its capabilities.

It is significant to note that states have taken the initiative to clarify their external obligations through adopting resolutions in the General Assembly of the United Nations as well as in their periodic reports to UN human rights monitoring Committees. By these mechanisms, states have attempted to elaborate on the scope of their obligations under the general concept of ‘international cooperation’ in the Child Convention, to include both domestic and diagonal obligations. By these ‘soft law’ instruments, states have been forthright in acknowledging diagonal obligations elaborating the general concept of international cooperation, much more than they could commit themselves to in a binding legal covenant. In certain domains of international governance, the nature of issues and problems being addressed by states dictates that a medium of legalisation be chosen that would facilitate the best possible arrangement: general indeterminate concepts such as

‘international cooperation’ are specifically preferred for the reason that they are considered ideal to deliver solutions superior to any other alternatives.¹⁷⁶

Abbott and Snidal have explained how and why hard law treaty texts end up enacting concepts that lack precise definition or content, such as international cooperation.¹⁷⁷ They observe that due to irreconcilable contracting difficulties encountered in treaty law-making, such as the perceived costs on the sovereignty of states parties, ‘softness’ over one sticky problem can rescue the bigger deal from collapse.¹⁷⁸ Thus, general concepts accommodate states with different degrees of readiness for legalization and, the attainable indeterminate legalization is superior to specific obligations in hard law that cannot be agreed upon.¹⁷⁹ General obligations in a hard law treaty text may be the product of a delicate compromise between states negotiating delegations, whereby there is, in principle, consensus on the obligations of international cooperation, but some parties are reluctant to accept detailed commitments and structures to establish implementation systems. The General Assembly Resolutions and periodic reports of states parties examined in this chapter can be understood in this way: what could only be whispered in the terse texts of hard law conventions on economic and social rights can afterwards, be repeatedly and loudly confessed and proclaimed in detail on the rooftop of soft law instruments.

This line of argument regarding states’ diagonal obligations has been affirmed in the interpretational General Comments of the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child. Moreover, Special Rapporteurs on the Right to Food and the Right to Health as well as a majority of academic writers and human rights Non-Governmental Organizations have affirmed the existence of states’ diagonal obligations to support global implementation of economic and social rights. By exploring perspectives on the legal basis for and interpretations of states’ diagonal obligations to support implementation of economic and social rights, this chapter illustrates that these obligations have always been an essential part of the idea of universal protection and promotion of human rights dealt by the Charter of the United Nations and the International Bill of Human Rights. The task ahead for scholars in this field is to

¹⁷⁶ Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ (2000) 54 *International Organization* pp. 421-456; Kenneth Abbott and Duncan Snidal, ‘Pathways to International Cooperation,’ in Benvenisti, E. and Hirsch, M. (eds.) Benvenisti, E. and Hirsch, M., (eds), *The impact of International Law on International Relations* (CUP, Cambridge 2004)50-116.

¹⁷⁷ Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ (2000) 54 *International Organization* pp. 421-456.

¹⁷⁸ *Id.*, pp. 447.

¹⁷⁹ *Id.*

overcome the arid arguments about whether diagonal obligations really exist and proceed with initiatives that contribute to enhancing better understanding of these obligations and mainstreaming them in international human rights discourse and practice.

Chapter 5

Reconstructing the legal basis and scope of States' fulfil-bound diagonal obligations in economic and social rights

Introduction

It is a central theme and key argument in this study that the international conventions on economic and social rights assign to states both domestic and external (diagonal) obligations to implement these rights. There is a common responsibility of all states to contribute to the universal fulfilment of these rights through addressing their obligations in international cooperation. A general perspective of states' diagonal obligations in relation to the implementation of economic and social rights was presented in the preceding chapter. It was argued that besides the two levels of respect-bound and protect-bound diagonal obligations of states, there exists also a third category of legally recognised fulfil-bound diagonal obligations of states in this field. The proposition that states have positive legal duties in the form of fulfil-bound external obligations in effect transcends the domestic vertical human rights duties of states and adds to this, external vertical obligations that we call 'diagonal obligations'.

This thesis can be contentious because of the apparent conflict and overlap between the domestic and external dimensions of states' positive human rights obligations. Even as it seeks to bring into closer perspective the domestic and external dimensions of states' obligations to secure progressive realization of economic and social rights under the current regime of international human rights law, the perspective of states' fulfil-bound diagonal obligations is a rather complex argument, and three important issues need to be addressed. First, it is necessary to describe and examine the legal basis for states' diagonal fulfil-bound obligations and the nature of these duties. Secondly, in a study of this kind, it is necessary to discuss the scope of such diagonal fulfil-bound obligations.¹ Thirdly, after discussion of theoretical issues relating to the legal basis and scope of diagonal fulfil-bound obligations, it is imperative to explore modalities for applying these ideas to the practical context of securing implementation of these obligations under the existing global political structures as established by the current system of international law.²

¹ These two issues are discussed in the present chapter.

² This is attempted in chapter six.

Therefore, this chapter examines various aspects of the legal basis for and nature of states' diagonal obligations to support global fulfilment of economic and social rights. It is divided into four main parts. The first part describes the relevant normative legal structures created by international conventions and other legal instruments. In the second part, the main features of the operational legal framework for international social and economic cooperation are examined. Here, the objective is to explain that besides the main human rights conventions and other normative standards in international law, states have also created legal structures for operationalising their international human rights obligations through national legislation, administrative measures as well as bilateral and inter-regional cooperation agreements. The third part discusses the nature of legal duties dealt to states under the diagonal human rights theory, with regard to external fulfil-bound obligations. The fourth part presents various propositions on the legal duties of states with regard to the theory of states' fulfil-bound diagonal obligations. The aim here is demonstrate that the thesis of states' diagonal obligations to support global fulfilment of economic and social rights stands on valid legal premises and can be academically defended.

5.1 Normative legal framework for states' fulfil-bound diagonal obligations in economic and social rights

The aim of this section is to reconstruct and discuss the legal basis for the proposition that, in addition to domestic obligations, states also bear diagonal obligations to contribute to and support universal fulfilment of economic and social rights. Fulfil-bound obligations can be re-stated as follows: at the domestic national level, states have obligations to provide systems and arrangements for aiding and assisting economically deprived individuals and communities so as to re-establish a minimum standard of enjoyment of economic and social rights. The theory of states' diagonal obligations extends these domestic fulfil-bound obligations and applies them to the external plane and assigns such duties to Third States to aid and assist deprived communities and individuals in other states when the conditions of living of such rights-holders fall below a certain minimum level. In this context, states are entrusted with obligations to provide active assistance to empower rights holders at home and abroad to secure progressive universal realisation of economic and social rights. This conceptual matrix integrates both the domestic and external constituencies of the human rights community and charges states with the task of addressing the dual responsibilities. It seems that there can be competing and conflicting claims and demands on the states' capabilities, between domestic and diagonal human

rights obligations. However, such competition or conflict is part and parcel of the theory of diagonal obligations and does not negate diagonal obligations: it only points to the need for mechanisms and formulae for resolving the competing concerns.

5.1.1 States' affirmations of diagonal fulfil-bound obligations in binding treaties

Exploring the subject of states' fulfil-bound diagonal obligations to support universal realisation of economic and social rights, one finds that states have expressed this idea through undertakings and commitments made in binding international conventions. These conventions affirm states parties' obligations to render international cooperation and/or assistance' towards universal realisation of the economic and social rights. This section examines provisions of six international treaties relevant to international cooperation in the fields of economic and social rights. To entrench the idea of external and international responsibility to fulfil economic and social rights in binding legal conventions, the international community has applied several techniques. The most frequently used strategy is to enact binding obligations of states to create and maintain systems for international cooperation in the field of economic and social rights. Indeed, three hard law conventions confirm external obligations of states to support universal realisation of economic and social rights. Such general undertakings and commitments to provide international cooperation are contained in Articles 1(3),³ 55⁴ and 56⁵ of the Charter of the United Nations 1945, Articles 2 (1),⁶ 11⁷ and 23⁸ of the International Covenant on Economic,

³ Article 1 (3) :

'The purposes of the United Nations are:.....to achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for fundamental freedoms for all without distinction as to race, sex, language or religion'

⁴ Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

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

⁵ Article 56:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

⁶ Article 2 (1):

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

⁷ Article 11(1):

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of

Social and Cultural rights 1966, and Article 4⁹ the UN Convention on the Rights of the Child.¹⁰ Studies on states' external or diagonal human rights obligations typically revolve about the concept of 'international cooperation.'¹¹ Indeed, this concept is the centrepiece of attempts by the international community to recognise and enact states' global responsibility for human rights. Thus, we can argue that the undertakings and commitments to 'international cooperation' adopted in the Charter of the United Nations, the International Covenant on Economic, Social and Cultural rights and the Convention on the Rights of the Child constitute *the* core hard law basis of the proposition that there are legal obligations requiring that all states to align their international relations and policies in a manner that facilitates and promotes global fulfilment of human rights especially economic and social rights.¹²

However, the assertion that the general of concept 'international cooperation' can be extended to include not only external obligations to respect, but also diagonal obligations to protect and fulfil economic and social rights is disputed.¹³ It can be argued that if states had intended to bear such drastic external obligations with far reaching implications, then, more express words would have been applied to secure binding commitments in international conventions. Indeed, besides the foregoing treaties, states have adopted more specific terms to assign binding fulfil-bound diagonal obligations in three other legal conventions. These relate to certain practical aspects of international action for enhancing states' domestic capacities to secure fulfilment of economic and social rights. First, in Article 10 (3) and (4) of the Optional Protocol to the Convention on the Rights of the Child

living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

⁸ Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

⁹ Article 4:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

¹⁰ These have been discussed in Section 4.3 and 4.3 of chapter Four above.

¹¹ This is the approach taken in section 4.3, above. For studies taking this approach, see Philip Alston and Gerald Quinn, 'The Nature and Scope of States' obligations under the International Covenant on Economic, Social and Cultural Rights,' (1987) 9 *Human Rights Quarterly* 156; Sepulveda Magdalena, *The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp 2003), Skogly Sigrun and Mark Gibney 'Transnational Human Rights Obligations' (2002) 24 *Human Rights Quarterly* 781; Wouter Vandenhoe, 'Economic, Social and Cultural Rights in the CRC: Is there a Legal obligation to Cooperate internationally for Development?' (2009) 17 *International Journal of Children's Rights* 23.

¹² For a similar argument, see Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford, 2007) chapter 2.

¹³ See Wouter Vandenhoe, 'Economic, Social and Cultural Rights in the CRC: Is there a Legal obligation to Cooperate internationally for Development?' (2009) 17 *International Journal of Children's Rights* 23.

on the Sale of Children, Child Prostitution and Child Pornography 2000¹⁴ it is declared that as part of their obligations to strengthen international cooperation under this Article:

10 (2) States shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, and child pornography and child sex tourism.

(3) States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

In this Article, there is an commitment, in a binding protocol, by states parties ‘in a position to do so’ to maintain and establish programmes and systems for international action to secure realisation of children’s economic and social rights, without which economically deprived families and children are at risk of becoming victims of child sale and exploitation. In this context, the obligation attaches first to the more developed countries and is shared by all states parties on the basis of *de facto* logistical capabilities.

Secondly, states have made undertakings and commitments to provide assistance to each other in implementing certain aspects of economic and social rights. For example Article 8 of the ILO Convention No. 182 on the Elimination of the Worst Forms of Child Labour provides that:

Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.

These general undertakings can be interpreted as creating inter-state horizontal obligations between the signatory states to create and maintain arrangements for international action to address the economic and social problems such as poverty and underdevelopment that exacerbate denial of children’s economic and social rights. Moreover, since these obligations are aimed at securing the fulfilment of the economic and social rights of individuals and communities, they can also be regarded as an extension of the vertical obligations of Third states towards deprived individuals and communities in the affected countries, and belong to the category of fulfil-bound diagonal obligations.

¹⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

Since 1945, most of the major projects in the field of international social and economic cooperation have been coordinated by the Northern developed countries, starting with the United States' sponsored Marshall Plan for the reconstruction of post-war Europe that was implemented by the Organization for European Economic Cooperation, hereinafter 'the OEEC.'¹⁵ After implementing the final phase of the Marshall Plan, the OEEC was reconstituted into the Organization for Economic Cooperation and Development, hereinafter 'the OECD' with broader mandates to oversee the international development cooperation programmes and policies of the Northern states.¹⁶ Under the convention establishing the OECD, the Member states have agreed that:

'They will, both individually and jointly... contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries....'¹⁷

It is noted that this convention was adopted in 1960 following the successful execution of the US funded Marshall Plan for the reconstruction of post-war Europe in 1960. One of its aims is to build on the established tradition of international economic assistance and cooperation to address the problems of poverty, economic deprivation and underdevelopment in the less developed parts of the world.¹⁸ It provides the legal framework and mandate for the OECD's Development Assistance Committee (DAC) comprising of donor states' representatives who determine and coordinate the policies and priorities for these countries' international economic cooperation. More specifically, Article 2(e) of this convention contains a binding undertaking by the developed states to create and participate in systematic arrangements to transfer capital and other economic resources necessary for facilitating economic development in the developing countries. The task of determining priorities, policies and benchmarks for such international cooperation has been undertaken through the OECD's Development Assistance Committee. It can be seen from the OECD convention that the developed states that are members of this organization have fully legalized their fulfil-bound diagonal obligations.

Having set out the foregoing treaty provisions, their legal status and normative content can be examined further. Since they are ordained in the texts of binding conventions, these provisions have the authority of hard law and can be treated as such. However, the precise scope and content of obligations to provide international cooperation cannot be determined

¹⁵ For discussion of the history and mandates of the OEEC and OECD, see Goran Ohlin, 'The Organization for Economic Cooperation and Development' (1968) 22 *International Organization* 231.

¹⁶ See Hugo J. Hahn, 'Continuity from OEEC to OECD' (1962) *Duke Law Journal* 522.

¹⁷ OECD Convention of 14th December 1960, Article 2(e).

¹⁸ OECD Convention of 14th December 1960, preamble, and Article 1.

from these texts. For example, obligations and commitments ‘to take appropriate steps to assist each other,’ and ‘states parties in apposition to do so’ are cast in general terms and do not point to any specific state party or any definite duties. For example, the OECD convention enacts obligations of developed states to transfer capital and other economic resources to support development of member and non-member states. Yet, the volumes and types of contribution or schedule of resource transfers are not defined in detail. Moreover, it is not indicated in the OECD Convention how these contributions should be coordinated. Therefore, the nature and scope of states’ legal obligations and, more specifically the aspect of states’ diagonal obligations to fulfil economic and social rights are not immediately clear from the reading of these treaty provisions.

Although states have in principle affirmed external fulfil-bound obligations to support universal fulfilment of economic and social rights, the terms applied to express these obligations seem deliberately imprecise. This can be problematic. Scholars have attempted to explain the legal status of obligations contained in binding conventions but expressed in general imprecise terms. Two approaches to this issue can be considered. One approach regards such obligations to be ‘soft obligations’ despite being enacted in the texts of binding treaties. Christin Chinkin has defended this approach as follows:

The use of the treaty form does not ensure that hard legal commitments have been undertaken by the parties; treaties can be entirely soft or can include specific soft provisions. Thus, even hard treaty law has soft grey areas.¹⁹

Chinkin’s argument seems to be based on the fact that the obligations in international cooperation are not clear, the treaties do not provide for structures for enforcement of such duties and states are permitted a wide discretion both to interpret and apply these obligations. According to Chinkin, there is a category of ‘legal soft law’ that creates ‘soft obligations’ in binding conventions. Under this approach, what determines the legal nature or binding authority of a provision in an international agreement is not its form such as a treaty but the precise content of the provision. Boyle defends this approach arguing that:

treaties may be either hard or soft or both.....In this category, it is the content of the treaty provision which is decisive in determining whether it is hard or soft not its form as a treaty.²⁰

¹⁹ Christine Chinkin, ‘The Challenge of International Law: Development and Change in International law (1989) 38 *International and Comparative Law Quarterly* 850, 865.

²⁰ Alan E. Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law (1999) 48 *International and Comparative Law Quarterly* 901, 902.

Although this approach correctly recognises the dilemma of lack of precision in defining obligations in international cooperation, it would be a mistake to label hard law provisions as ‘legal soft law’ or ‘soft obligations.’ When states put ideas, principles and normative standards in hard law treaty texts, and proceed to ratify them, they, surely, intend them to be binding. There is a point in taking all this trouble to negotiate, draft, enact and ratify an international human rights agreement in the form of a treaty. Provisions in such a treaty, even if not fully described are not ‘legal soft law’ or ‘soft obligations’: they are designed to be hard and binding commitments, otherwise the whole regime of international human rights law and its concepts of international action and cooperation would collapse as mere ‘soft obligations.’

The alternative approach rejects the notions of ‘legal soft law’ or ‘soft obligations in binding conventions’ and regards such imprecise treaty provisions as enacting ‘shallow’ but nevertheless binding legal obligations.²¹ Contrary to Chinkin’s argument, the deliberate choice of a treaty form of agreement signifies an intention to create binding legal obligations and it would be inaccurate to regard ‘obligations for international cooperation’ in economic and social rights conventions as soft law. As one writer argues, there is a difference between binding contracts such as those in treaty forms and non-binding pledges like those in non-binding international agreements: a distinction must be made between non-binding international agreements and binding legal conventions ratified by states, in the same way that under domestic legal systems, the imprecise nature of standards enacted in domestic legislation such as ‘good faith’, reasonable time, reasonable person, due process etc, does not alter their legal character and binding force.²² In other words, treaty clauses committing states to international cooperation in effect enact binding contractual commitments: the distinctive feature of their lack of precision is only a matter of depth not legal effect: whereas they resemble ‘shallow’ contacts, they are nevertheless, legally binding.²³

In practice, the various packages and programmes for extending international cooperation and assistance to the developing/partner states are actually initiated by the developed donor states. Trends in modern international cooperation in social and economic fields in the twentieth century indicate that the terms and modalities for such cooperation are

²¹ For an examination of this perspective see Kal Raustiala, ‘Form and Substance in International Agreements’ (2005) 99 *American Journal of International Law* 589.

²² *Id.*, p. 589.

²³ *Id.*

determined by the donor countries and the success of the different types of operational agreements for these processes depends on the sustained commitment of the richer Northern donor states.²⁴ These de facto conditions of inequality among the contracting states and a practice of donor-driven international social and economic cooperation are at the root of the current system of international economic cooperation. The texts of the relevant human rights conventions can be better appreciated when examined in the context of this practice. Thus, in the course of writing these hard law treaties both developed and developing countries negotiate and bargain the terms of their international engagement regarding apportionment of their domestic and external obligations to promote universal respect for and protection of human rights.²⁵ Therefore, when concluding binding hard law human rights conventions, a choice of terminology and concepts is made such that the donor countries retain a latitude of discretion to construe and implement their external obligations. In a way, this gives a misleading impression of ‘softness’ in the conventions: however, it is argued here that allowing states parties room for manoeuvre is part of the design of the hard law conventions, and does not any way alter the binding legal character of these provisions.

Certain legal texts such as human rights conventions present international obligations in general open-ended normative concepts such as international cooperation, whereas non-binding agreements and bilateral operational agreements for international assistance can be more specific. Kal Raustiala quite correctly argues that most of the imprecise provisions in international treaties can be better understood as enacting norms or standards rather than rules.²⁶ In this context, the use of ‘international cooperation’ clauses in human rights conventions is aimed at enacting a general principle that commits states parties to obligations of conduct.²⁷

5.1.2 Affirmations of diagonal obligations in non-binding international agreements

Besides the binding hard law conventions, states have also ‘codified’ standards and principles of international/external human rights obligations in non-binding agreements.

²⁴ See Glenn Mower Jnr., *International Cooperation for Social Justice: Global and Regional protection of Economic and Social Rights* (Greenwood Press, London 1985); Goran Ohlin, ‘The Organization for Economic Cooperation and Development’ (1968) 22 *International Organization* 231; Hugo J. Hahn, ‘Continuity from OEEC to OECD’ (1962) *Duke Law Journal* 522.

²⁵ For a study of the leading approaches to international cooperation theory from a perspective of international politics, see James Fearon, ‘Bargaining, Enforcement and International Cooperation’ (1998) 52 *International Organization* 269.

²⁶ Kal Raustiala, ‘Form and Substance in International Agreements’ (2005) 99 *American Journal of International Law* 581, 589.

²⁷ This point is further discussed in section 5.3.2 below.

For example, at the global level, such non-binding international agreements and other normative instruments have been adopted by states through resolutions of the UN General Assembly and by the world's political leaders at international conferences. The term for such non-binding international agreements is 'international soft law.' This section discusses some of the non-binding agreements relevant to states' external diagonal fulfil-bound obligations in the field of economic and social rights. For purposes of this study, soft law instruments can be categorised into two: those concluded by states and those adopted by intergovernmental human rights bodies, in particular, the UN Committees monitoring the Economic Covenant and the Child Convention.

Through resolutions and declarations of the UN General Assembly, states have undertaken and pledged to provide external assistance to the developing countries to facilitate their economic and social development and support their domestic capacities to address the obligations of economic and social rights. These resolutions can be divided into two categories: those that contain general undertakings and pledges of external assistance and support and, those that set minimum benchmarks and targets for external assistance to the developing world, typically, a percentage of the Gross National Product from the developed countries. The soft law instruments selected for purposes of this study are listed for each category in Table 5.1 and 5.2 respectively.

In Article 28 of the Universal Declaration of Human Rights 1948 members of the United Nations recognise the right of 'everyone to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' This implies that there is a universal right to an international system of governance and cooperation that facilitates the global fulfilment of the rights recognised in the Declaration. The duty to create and maintain such arrangements falls to the international community of states as the leading political actors.²⁸ This duty has the elements of both refraining from depriving persons and communities locally and abroad, and also to provide appropriate assistance to deprived individuals and communities at home and elsewhere around the world. This idea has been accorded more authoritative enactment in the international conventions that recognise states' obligations to provide international assistance in the fields of international social and economic cooperation.²⁹

²⁸ Peter Bailey, 'The Creation of the Universal Declaration of Human Rights' <http://www.universalrights.net/main/creation.htm> accessed 12th September 2009.

²⁹ These have been discussed in section 5.1.1 above.

Under the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in Accordance with the Charter of the United Nations³⁰ member states of the United Nations have undertaken ‘to cooperate in economic, social and cultural fields and to cooperate in the promotion of economic growth throughout the world, especially that of the developing countries.’ Moreover, Articles 17 and 22 of the Charter of Economic Rights and Duties of States³¹ commit all states to respond to the generally recognised or mutually agreed development needs and objectives of developing countries by promoting increased net transfers of resources to the developing countries from all sources in order to reinforce the efforts of developing countries to accelerate their economic and social development.

S/No.	Soft Law instrument	Relevant provision(s)
1.	Universal Declaration of Human Rights 1948	Article 28
2.	Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in Accordance with the Charter of the United Nations UNGA Resolution 2625 of 24th October 1970.	-
3.	Charter of Economic Rights and Duties of States UNGA Resolution No. 3281 (XXIX) of 12th December 1974.	Articles 17 and 22
4.	Declaration on the Right to Development, UN General Assembly resolution 41/128 of 4 December 1986.	Articles 3-4
5.	United Nations Millennium Declaration, UNGA Resolution 55/2 of 8 th September 2000.	Articles 2,11,12,5, 25 and 28.
6.	Johannesburg Declaration on Sustainable Development of 4th September 2002: A/Conf.199/20	Articles 18, 21 and 22.

Table 5.1 Soft Law international agreements on general commitments

Soft law instruments whereby developed states have made specific commitments to transfer resources of at least 0.7 per cent of their Gross National Product to the developing countries began with the Declaration on Social Progress and Development.³² Under Article 23(b) of this declaration, states have committed to ‘the provision of greater assistance on better terms; the implementation of the aid volume target of a minimum of 1 per cent of the gross national product at market prices of economically advanced countries; the general easing of the terms of lending to the developing countries through low interest rates on loans and long grace periods for the repayment of loans, and the assurance that the allocation of such loans will be based strictly on socioeconomic criteria free of any political considerations.’ However, the target of 1 per cent was revised downwards to 0.7 per cent in the UN General Assembly resolution on the International Development Strategy

³⁰ UNGA Resolution 2625 (XXV) of 24th October 1970.

³¹ UNGA Resolution No. 3281 (XXIX) of 12th December 1974.

³² Declaration on Social Progress and Development, General Assembly Resolution 2542 (XXIV) of 11 December 1969, Article 23(b).

for the Second United Nations Development Decade 1970.³³ Since then this target of 0.7 per cent has been retained and continues to be recited in agreements for social and economic development cooperation. For example, in Article 43 of the Doha Declaration on Financing for Development³⁴ donor countries pledged to fulfil all ODA commitments including the commitments to achieve the target of 0.7% of their GNP for ODA to least developed countries. They also committed to establish as soon as possible rolling indicative timetables that illustrate how they aim to reach their ODA goals.

S/No.	Soft Law instrument	Relevant provision(s)
1)	Declaration on Social Progress and Development, General Assembly Resolution 2542 (XXIV) of 11 December 1969	Article 23(b).
2)	International Development Strategy for the Second United Nations Development Decade UNGA Resolution 2626 (XXV) of 24 th October 1970.	Article 43
3)	UN World Summit for Social Development 6-12 march 1995 A/CONF.166/9.	Article 11(h), Article 29 (commitment No. 9) Article 88(b).
4)	Roadmap towards the Implementation of the Millennium Declaration General Assembly Resolution A/56/326 of 6th September 2001.	Goal 8, Target 13, Indicators 32-36.
5)	Monterrey Consensus of the international Conference on Financing for Development 18-22 March 2002, adopted by the UN General Assembly Resolution on the World Summit Outcome A/RES/60/1	Par. 39-43
6)	Declaration on A World Fit for Children UNGA Resolution A-Res-S-27-2E of 10th May 2002.	Article 52
7)	The Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus 29th November -2nd December 2008 A/CONF.212/L.1/Rev.1	Articles 42-43

Table 5.2 Soft Law international agreements with specific benchmarks

Besides the foregoing resolutions of the General Assembly, additional soft law relating to states' diagonal obligations can be found in the interpretational General Comments of the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child. This category of soft law is very important especially when appreciated in the context of Article 31 of the Vienna Convention on the Law of Treaties 1969 which provides that the contents of international agreements can be clarified by

³³ UNGA Resolution 2626 (XXV) of 24th October 1970. Article 43 of this resolution states: 'In recognition of the special importance of the role which can be played only by official development assistance, a major part of financial resource transfers to the developing countries should be provided in form of official development assistance. Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market value by the middle of the decade.'

³⁴ A/CONF.212/L.1/Rev.1

reference to subsequent practice. For example, in human rights conventions, there is a doctrine that the interpretation of human rights treaties by the respective monitoring committees creates additional rules that is, the *acquis*, elaborating the content of obligations under these treaties.³⁵ In a series of interpretational General Comments, the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child have affirmed states' diagonal fulfil-bound obligations to support universal realisation of the rights recognised in these conventions.³⁶ A discussion of the interactions between soft and hard law and the impact of the various non-binding norms is attempted in the next section.

S/No.	Soft Law instrument	Relevant provision(s)
i)	UN Committee on Economic, Social and Cultural Rights, General Comment No.3 (1990) Nature of States Parties' Obligations	paragraphs 13,14.
ii)	UN Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991) Right to Housing	paragraphs 10,19
iii)	UN Committee on Economic, Social and Cultural Rights, General Comment No.12 (1999), Right to adequate Food (Art.11) UN/Doc E/C12/1999/5	Paragraphs 36
iv)	UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999) Right to Education	Paragraphs 56,57
v)	UN Committee on Economic, Social and Cultural Rights, General Comment 14 (2000) Right to the Highest attainable standard of Health: U.N. Doc. E/C.12/2000/4	Paragraphs 39,45
vi)	Committee on Economic, Social and Cultural Rights (2002) Right to Water, General Comment No. 15, 20 January 2003, E/C.12/2002/11	Paragraph 34.
vii)	UN Committee on the Rights of the Child, General Comment No.5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44).	Paragraphs 4, 60.

Table 5.3 Interpretational General Comments of UN Human Rights Committees

5.1.3 How soft law is reshaping the scope of states' diagonal obligations

After setting out the various forms of soft law instruments relating to states' diagonal fulfil-bound obligations, the significance and contribution of these non-binding norms and standards to the development of international human rights law can now be examined. There are many theories from both the perspectives international law and international relations on why/when states use soft law instruments and the interaction of these norms with the wider body of international law.³⁷ Space constraints and the context of this study

³⁵ Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Kluwer, the Hague 1995) p. 79.

³⁶ Some aspects of this point has been discussed in section 4.4.3 above.

³⁷ For insightful reviews of these theories, see Gregory Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) *Minnesota Law Review* (forthcoming); Minnesota Legal Studies Research Paper No. 09-23, Available at SSRN: <http://ssrn.com/abstract=1426123> and also Andrew Guzman and Timothy Meyer, 'Explaining soft law' (2009) UC Berkeley Public Law Research Paper No. 1353444, available at SSRN: <http://ssrn.com/abstract=1353444>.

do not permit an extensive review of these theories.³⁸ The aim of this section is to consider four approaches to the functions of soft law which can be applied to explain the significance of the foregoing soft law instruments to the emerging theory of states' diagonal obligations.

(a) Elaborating hard law obligations

One of the explanations of the impact of soft law on international human rights law is that through resolutions adopted by states in the General Assembly of the UN states have sought to clarify and elaborate on the hard law obligations already undertaken under international human rights conventions and other treaties. For example, some the Universal Declaration of Human Rights 1948 can be considered to be elaborating the human rights standards referred to in the Charter of the United Nations 1945; the Resolution on a World Fit for Children 2002 can be considered to be intended to elaborate the obligations of states and other global actors to promote and secure fulfilment of the rights of the world's children recognised in the Child Convention 1989, and so on. The elaborative function of UN General Assembly resolutions can be inferred from the recitation of the hard law conventions in the texts of these soft law instruments. Therefore, by affirming external obligations of states to contribute to the mobilisation of resources for global fulfilment of economic and social rights in these resolutions, states have used such soft law instruments to clarify their obligations already assumed under the current international conventions on economic and social rights. As Sigrun Skogly has argued, such soft law mechanisms adopted by states and governments are contributing significantly to the evolution of legal principles that have clear extraterritorial implications and to extraterritorial human rights obligations.³⁹

(b) Filling the gaps in hard law

The negotiations and proceedings leading to the adoption of international conventions do not address all details necessary for achieving the purposes of these treaties. In practice, therefore, hard law treaty texts contain the broad general principles. For example, the practical aspects of international cooperation and assistance necessary to achieve global

³⁸ For detailed studies of these see Dinah Shelton, Normative hierarchy in international law (2006) 100 *American Journal of International Law* 291; Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581; Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance,' (2000) 54 *International Organization* 421; Dinah Shelton (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system* (OUP, Oxford 2000); Christine Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

³⁹ Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 143.

implementation of economic and social rights of children are not spelt out in the hard law texts. These details are found in the UN General Assembly resolutions that specify the amounts of national resources that should be committed by the more developed member states as well as in the interpretational General Comments of the UN Committee on the Rights of the Child and the UN Committee on Economic, Social and Cultural Rights. In this way, states use soft law to supply supplementary rules and standards that fill the gaps in hard law norms.

Besides the gaps in the normative systems, hard law treaties may not create procedures and structures for international action to promote fulfilment of economic and social rights. It is clear then that states do not conduct all their interaction through hard law. Operational systems and frameworks for international social and economic cooperation are provided through various phases of state practice that is facilitated through a variety of soft law instruments.⁴⁰ For example, whereas the human rights conventions do not prescribe the mechanisms for international economic and social cooperation, soft law instruments have been adopted by the UN General Assembly⁴¹ and the UN Economic and Social Council⁴² to establish the World Solidarity Fund as one of the strategies for facilitating such global cooperation. Here we find that states apply a mixture of both hard and soft law to facilitate international social and economic cooperation. In this way, as supplements to the hard law texts, soft law instruments can be appreciated as part of the wider growing system of international law.⁴³

(c) Creating alternative frameworks for international economic cooperation

Although the thrust of this discussion is based on how states use soft law to elaborate obligations in hard law conventions, there is another way that states adopt soft law instruments parallel to, and apart from hard law provisions to create alternative frameworks for international economic and social cooperation. Here states can adopt ‘non-binding’ soft law instruments that assign international obligations, instead of negotiating new hard law conventions. For example, the UN Millennium Declaration and the Roadmap contain normative standards of international social and economic cooperation, complete with goals, targets, indicators and provisions for periodic reporting. It is significant to note

⁴⁰ See Charlotte Ku and Paul F. Diehl, ‘Filling in the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System’ (2006) 12 *Global Governance* 161.

⁴¹ Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August-4 September 2002 A/CONF.199/20:Resolution 2 Plan of Implementation of the World Summit on Sustainable Development par. 7b; World Summit Outcome Resolution A/RES/60/1 of 16th September 2005, Article 23 (h).

⁴² Economic and Social Council 31st Plenary meeting 11th July 2003 resolution 2003/4 on the World Solidarity Fund, par. 1-4.

⁴³ See Paul Diehl, Charlotte Ku and Daniel Zamora, ‘The Dynamics of International Law: The Interaction of Normative and Operating Systems’ (2003) 57 *International Organization* 43.

that such soft law instruments contribute to the evolution of norms of state practice and can apply to member states of the UN that have not ratified human rights treaties. Through adoption of resolutions and declarations by consensus in the UN General Assembly, states are creating alternative systems and frameworks for international social and economic cooperation. Thus states frequently and freely deploy soft law instruments to facilitate international cooperation, thereby establishing an additional trajectory for the evolution of norms for regulating international relations and global governance, besides treaties and custom.

(d) Generating international common law

The concept of international common law has been used to describe the emerging jurisprudence developed by the decisions of international tribunals as well as quasi-judicatory decisions of human rights treaty bodies such as the Human Rights Committee established under the International Covenant on Civil and Political Rights.⁴⁴ However, this concept can also be applied to the interpretational General Comments of the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child. The point here is that states have created these Committees and mandated them to examine periodic reports of states parties. In the course of doing this, these Committees have jurisdiction to interpret the provisions of their respective hard law conventions. When preparing and presenting their periodic reports, states parties must consider and engage with the interpretations of human rights conventions being developed by the monitoring Committees. It can be argued that the General Comments of these Committees that recognise states' diagonal obligations are part of the emerging 'international common law' analogous to persuasive case law.

Thus, by elaborating hard law obligations, filling the gaps in hard law texts and generating international common law, various forms of soft law instruments can reshape and redefine conventional approaches to international law. Moreover, through widespread acceptance by states, some soft law resolutions such as the Universal Declaration of Human Rights 1948 can harden into customary international law. Yet, even as they remain soft law norms, such can be appreciated as part of the design of the international community to establish a legal order for global economic and social cooperation, through a wide variety of agreements and normative structures.

⁴⁴ See Andrew Guzman and Timothy Meyer, 'Explaining soft law' (2009) UC Berkeley Public Law Research Paper No. 1353444, available at SSRN: <http://ssrn.com/abstract=1353444>, p. 34.

The core conventions on economic and social rights and relevant soft law instruments examined in this chapter depict concerted attempts by the international community of states to create and maintain legal architecture for the implementation of domestic and diagonal human rights obligations. Here, the concept of diagonal obligations to support universal fulfilment of economic and social rights is a cardinal pillar of international protection of these rights. It underlies the relevant hard law conventions on human rights and international social and economic cooperation. Moreover, a growing list of soft law instruments has been applied to elaborate the external obligations of states, including benchmarks for implementation. By affirming diagonal obligations in soft law instruments, states have given clear indications of what direction interpretations of states' international responsibility under human rights conventions on economic and social rights should take. What we can conclude from these soft-hard law interactions is that since the emergence of the project for international protection of human rights in the mid-twentieth century, the pendulum has swung steadily away from traditional statism to a recognisable version of cosmopolitan statism.

5.2 Operational legal framework for States' fulfil-bound diagonal obligations in economic and social rights

Quite apart from the normative legal standards enacted in the foregoing binding and non-binding international agreements, states have established legal structures for implementing the principles of international social and economic cooperation. These include national legislation, administrative structures and inter-regional/trans-national agreements. These arrangements can be referred to as 'operational' systems, since they create more detailed processes and mechanisms for implementing the obligations created under the normative systems.⁴⁵ This section examines some of these structures.

5.2.1 National Legislation and administrative structures in developed countries

The practice of some donor countries indicates that government policies and commitments to external aid and international development assistance obligations have been enacted and entrenched in the national legislation and given the force of law. For example, the Canadian International Development Agency (CIDA) and its international aid programmes have been established by statute since 1968.⁴⁶ In fact, CIDA is designated as a fully-

⁴⁵ For insightful discussion of the application of international norms and agreements in the practical context of international relations see Paul Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 *International Organization* 43.

⁴⁶ The *Order-in-Council P.C. 1968-923* of May 8, 1968, and *P.C. 1968-1760* of September 12, 1968.

fledged government department, with resource allocations secured through the national budget.⁴⁷ In the US, the Millennium Corporation was created by a statute of Congress to administer the government's international development assistance programmes to support developing countries meet the Millennium Development Goals.⁴⁸ The Act seeks to 'provide US assistance for global development and to provide such assistance in a manner that promotes economic growth and the elimination of extreme poverty, and strengthens good governance, economic freedom and investments in people.'⁴⁹ Thus, in Canada and the USA, national legislation confirms the state's external obligations and even establishes administrative framework for implementation. In the UK, the Labour Party recently proposed to introduce a Bill to make the government's 0.7% international aid commitment legally binding in domestic law.⁵⁰

Besides these legislative techniques, the developed states have approached their external fulfil-bound obligations through executive mechanisms: these include the creation of government departments and agencies for international development. The Japan International Cooperation Agency (JICA), Swedish International Development Agency (SIDA), Germany's GTZ, Danish International Development Agency (DANIDA) and the UK's Department for International Development (DfID) are some of the leading government agencies of developed countries implementing programmes to support global realisation of economic and social rights in the developing world.

5.2.2 Inter-regional agreements for economic and social cooperation

Modern state practice shows that in order to coordinate international cooperation especially in social and economic fields, states make inter-regional and bilateral agreements which stipulate the operational framework for such cooperation. An example of inter-regional social and economic cooperation agreements is the 25-year arrangement for the European Union-African Caribbean Pacific (EU-ACP) cooperation under the Lome Conventions I, II, III and IV for the period between 1975 and 2000.⁵¹ This framework has been succeeded

⁴⁷ Details of the legislative mandate of CIDA and reports of its performance are posted on the government's website: <http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/ida/ida04-eng.asp>

⁴⁸ The Millennium Challenge Act of 2003, Pub.L. 108-199, Div. D. A full text of the Act can be accessed at: http://www.mcc.gov/mcc/bm.doc/mca_legislation.pdf

⁴⁹ Id, Section 602.

⁵⁰ *Sorted* magazine Wednesday 30th September 2009:

<http://www.sorted-magazine.com/news/item.htm?pid=3179>

⁵¹ See Isebill Gruhn, 'The Lome Convention: inching towards interdependence' (1976) 30 *International Organization* 214-262; Wolfgang Benedek, 'The Lome Convention and International Law of Development: a concretisation of the New International Economic Order' (1982) 26 *Journal of African Law* 74-93.

by the EU-ACP agreements under the Cotonou Convention 2000.⁵² The Cotonou Convention for ACP-EC cooperation creates a legally binding system with joint institutions in a partnership ‘centred on the objective of reducing and eventually eradicating poverty and the integration of the ACP countries into the world economy.’⁵³ Under this Convention that is scheduled to run for twenty years from March 2000,⁵⁴ the EU and its donor states have made binding commitments to transfer to ACP countries long-term financial resources including grants, risk capital for equity and quasi-equity investments, advisory and consultative services, guarantees in support of domestic and foreign private loans and investment and loans.⁵⁵ A closer look at the Cotonou Convention 2000 indicates that the states parties to the ACP-EU partnership recognise and acknowledge their domestic and international human right obligations and that the agreement and the processes/ structures it creates are designed to provide mechanisms for implementing these obligations.⁵⁶ The foregoing legally binding conventions as well as non-binding international agreements and pledges represent just some of the numerous mechanisms applied by states to engage each other in the various domains of international social and economic cooperation and coordination. Indeed, as Barbara Koremenos observes, ‘not only do states cooperate; they also codify their cooperation through countless international agreements that form a substantial body of international law.’⁵⁷

5.3 Scope of legal duties under Diagonal Fulfil-bound obligations

5.3.1 Primary and Auxiliary fulfil-bound Obligations

When the challenges and obstacles facing realisation of economic and social rights in the developing countries are considered, it is apparent that systemic poverty and underdevelopment have been so pervasive that it is not immediately clear what legal and policy responses should be applied by domestic and international actors. This section discusses the nature of duties that states have undertaken under the regimes of international

⁵² The Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000. Text of the Cotonou Agreement can be accessed at: <http://www.acpsec.org/en/conventions/cotonou/accord1.htm>; http://www.acpsec.org/en/conventions/cotonou/pdf/agr01_en.pdf; <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/>

⁵³ Id, Articles 1 and 2.

⁵⁴ Id, Article 95.

⁵⁵ Id, Article 76.

⁵⁶ Id, preamble, Article 9. Space constraints do not permit extended discussion of the economic partnership agreement and its sub-protocols in this study. For a useful review of the Cotonou Agreement see Sebastian Vollmer et al. ‘EU-ACP Economic Partnership Agreements: Empirical Evidence for Sub-Saharan Africa’ *World Development Report 2009-Development in 3D: Density, Distance, Division*, Background paper (2008) accessible at: <http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1204741572978/vollmer2.pdf>

⁵⁷ Barbara Koremenos, ‘Contracting around International Uncertainty’ (2005) 99 *American Political Science Review* 549-565, at 549..

law on economic and social cooperation examined above. A useful starting point is to recognise that the larger part of the responsibility to secure fulfilment of economic and social rights rest with the domestic state and third states' diagonal obligations are auxiliary to the domestic state's own vertical duties. In other words, each state has the *primary responsibility* to fulfil its internal obligations, while the international community only has *auxiliary obligations* to pool and remit the subsidy needed to support the fulfilment of social and economic rights in the poor states. Ultimately the system is designed to strengthen the capacities of all actors and reduce or eliminate need for or dependence on the external assistance. For instance, the UN and its members have a joint responsibility under the Charter of the UN to promote and protect human rights and the transfer of international resources can be effected through the organization or directly by any of its members on behalf of the international community.⁵⁸ The UN General Assembly has clarified the scope of external obligations as follows:

The primary responsibility for the implementation of the present Plan of Action and for ensuring an enabling environment for securing the well-being of children, in which the rights of each and every child are promoted and respected, rests with each individual country, recognizing that new and additional resources, both national and international, are required for this purpose.⁵⁹

In another resolution, the General Assembly has stated:

Each Government has the *primary role and ultimate responsibility* of ensuring the social progress and well-being of its people, of planning social development measures as part of comprehensive development plans, of encouraging and co-ordinating or integrating all national efforts towards this end and of introducing necessary changes in the social structure.....Social progress and development are the common concerns of the international community, which shall *supplement*, by concerted international action, national efforts to raise the living standards of peoples.⁶⁰

Internal obligations of states must be enforced fully prior to seeking external support because it would distort the principle of states' primary domestic responsibility for protecting and promoting fulfilment of fulfil human rights, to permit a government to neglect or refuse to perform its internal obligations just because there is a caring international community willing to assist. Regardless of the state's level of economic development, States Parties to the Economic Covenant and the Child Convention are obligated to guarantee basic subsistence for all and demonstrate that they have fully deployed their resources for this purpose.⁶¹ This issue is important because it is emerging that actually, even as they seek more external aid, some developing countries misallocate

⁵⁸ Charter of the United Nations 1945, Articles 1(3), 55 and 56.

⁵⁹ A World Fit for Children UNGA res. A-Res-S-27-2E of 10th May 2002, Article 49.

⁶⁰ Declaration on Social Progress and Development General Assembly resolution 2542 (XXIV) of 11 December 1969 Article 8,9.

⁶¹ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights :UN Document E/CN.4/1987/17 No. 25.

and misappropriate public resources meant for programmes for infrastructure development, basic social services and poverty reduction.⁶² These scarce national resources are misused on ‘classified’ military hardware transactions that are never delivered, only for the money to be secretly stashed in Western banks.⁶³ One strategy that is being applied by the UN agencies to address this concern is to set minimum benchmarks such as the 20:20 initiative that requires a minimum of twenty percent of the national resources and the same percent of external aid to be allocated to the social sectors such as health and education delivery systems.⁶⁴

The Rapporteur on the Right to Food has explained that whilst governments of rich states have a legal duty under the Economic Covenant to ‘support fulfilment’ of the right to food, the poor countries also have a responsibility first to demonstrate full compliance with their obligations under the Covenant such as the duty to mobilise maximum available national resources and seek international assistance.⁶⁵ This clearly means that there is dichotomy in the sharing of obligations for fulfilling social and economic rights whereby the every state has *primary* vertical obligations while all other states have *auxiliary* obligations to support global fulfilment. It follows that seeking external/international assistance must be preceded by maximum mobilisation of domestic resources. The significance of seeking international assistance can be appreciated not as a duty to beg, but in the sense that the domestic state has a responsibility to facilitate international cooperation by bringing to the attention of the international community the existence and extent of the need for international assistance and support. Indeed the provisions relating to the diagonal

⁶² For critical discussions of this problem, see Shedrack Agbakwa, ‘Reclaiming Humanity: Economic, social and Cultural Rights as the Cornerstone of African Human Rights’ (2001) 4 *Yale Human Rights and Development Law Journal* 177; Patrick McAuslan, ‘Good Governance and Aid in Africa’ (1996) 40 *Journal of African Law* 168; Arthur Goldsmith, ‘Donors, Dictators and Democrats in Africa’ (2001) 39 *Journal of Modern African Studies* 411.

⁶³ See Transparency International (2004) *Global Corruption Report 2004* www.globalcorruptionreport.org
In 2003, the Kenyan government appointed Kroll Associates, a U.S. private investigations firm to trace assets and monies believed to have been misappropriated by ex-president D. T. Moi and his associates. The report entitled ‘The looting of Kenya’ was finalised in February 2005 but was not released to the public until 31st August 2007 when it leaked to the press. The report indicates massive misuse of public resources by the Moi government.

<http://www.scribd.com/doc/267740/The-Kroll-Report-The-looting-of-Kenya> Xan Rice 2007 The looting of Kenya The Guardian Friday August 31, 2007 http://www.marsgroupkenya.org/pages/stories/looting_Kenya/index.php
http://wikileaks.org/wiki/The_looting_of_Kenya_under_President_Moi For links to the report:
http://www.mentalacrobatics.com/think/blogdocs/Kroll_Report_Corruption_Kenya.pdf

⁶⁴ The 20/20 Initiative is a compact between developing and industrialized countries that prescribes the for the allocation of, on average, 20 per cent of the budget in developing countries and 20 per cent of official development assistance (ODA) to basic social services. UNDP, UNESCO, UNFPA, UNICEF, WHO and the World Bank (1999) Implementing the 20/20 Initiative Achieving universal access to basic social services

http://www.unicef.org/publications/files/pub_implement2020_en.pdf This initiative was first adopted by the World Summit for Social Development in the Copenhagen Declaration on Social Development and Programme of Action of the World Summit for

Social Development 1995, A/CONF.166/9, par. 87(c).

<http://www.un.org/documents/ga/conf166/aconf166-9.htm>

⁶⁵ U.N. Commission on Human Rights Report of the Special Rapporteur on the Right to Food, Jean Ziegler E/CN.4/2005/47 dated 24th January 2005, par.47.
par. 56.

obligations to fulfil social and economic rights in Article 4 of the Child Convention and Article 11(2) (b) of the Economic Covenant suggest that such obligations are triggered by the *need* in the host state for external support. Third states come into the picture *when* they have been notified of the existence and need for support for international support and assistance. At that point diagonal human rights obligations are activated and if a third state has the resources and capacity to support fulfilment but refuses to do so, then it would be violating international law.

5.3.2 Fulfil-bound external duties as obligations of conduct

The fundamental point to make about the nature and scope of states' diagonal fulfil-bound obligations is that third states are only required to establish, maintain and participate in systems, processes and arrangements for international action for enhanced implementation of economic and social rights, but, the law does not demand precise immediate results or levels of fulfilment by such third states.⁶⁶ In a useful commentary on the scope of extraterritorial positive obligations to fulfil economic and social rights Skogly and Gibney have argued that these obligations are intended to complement rather than replace the first domestic state's own internal domestic obligations.⁶⁷ Diagonal obligations do not bind a state to single-handedly undertake comprehensive schemes for fulfil social and economic rights for their citizens and for everyone else around the world.⁶⁸ A state would be considered as having discharged diagonal obligations where it demonstrates that it is participating in a system or programme for coordinated international fulfilment of these rights in a manner commensurate with its available resources and capabilities.⁶⁹

As Margot Salomon argues, international cooperation favours obligations of conduct: process over outcome, conduct over result and assurances of best effort over guarantees of success.⁷⁰ For example, 'giving effect to the obligation of international cooperation may require arrangements for international transfers of resources, supplying technology and creating new international mechanisms to meet the needs of developing countries'.⁷¹ Once the systems, institutions and processes for such cooperation have been established and activated, it becomes more feasible to establish predictable international engagement for

⁶⁶ See Skogly Sigrun and Mark Gibney, 'Economic Rights and Extraterritorial obligations' in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, Cambridge University Press 2007) 267.

⁶⁷ Id, at 281.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ See Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford, 2007), p.102.

⁷¹ Id, p. 103.

global implementation of economic and social rights which can be further refined over a period of time.

Therefore, despite the current amounts of donor aid falling below the internationally agreed minimum of 0.7% of the Gross National Product of the donor states, such lesser amounts that are being transferred would be acceptable as sufficient to discharge the rich states' obligations if reasonable explanation is given for the shortfall. For example if the donor state is facing or anticipating an economic recession or has plans to enhance the benefits of its national systems for social and economic rights such as child allowances, pensions, jobseekers allowances etc, then a cut in the budgets for external obligations programmes would be justifiable. While acknowledging these limits, it can be argued that if the state has available resources but refuses or otherwise fails to participate in a programme for international fulfilment of social and economic rights, it would be violating international law.⁷²

The scope of diagonal obligations is actually much narrower than it first appears. Since each state has to attend to its internal domestic obligations as a primary priority, it follows that diagonal obligations are considered by each duty-bearer after the vertical/internal obligations have been addressed. In concrete terms, the share of resources that would be available for meeting diagonal obligations could be rather modest since the third state can always plead competing domestic needs as a legitimate reason for cutting back on international assistance budgets. For instance under current practice, the internationally agreed amount for international assistance is 0.7% of the Gross National Product which even the richer donor states have been unwilling to reach, with the average aid estimated at only zero decimal four percent of the Gross National Income of the richer states. These are very tiny shares below one percent but they are theoretically consistent with the approach to international cooperation that emphasises obligations of conduct whereby it is sufficient for states to create and participate in processes, systems and assurances of best effort rather than insisting on any absolute amounts of resources, outcome or guarantees of success.⁷³

5.3.3 Diagonal Human Rights Obligations as a third Level of Subsidiarity

One way of understanding states' diagonal obligations to assist and support international efforts for universal fulfilment of economic and social rights is to consider that the current

⁷² Skogly and Gibney, above, pp. 280-281.

⁷³ For a similar argument see Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford 2007) p. 102.

international conventions for international protection of these rights establish a network of legal obligations. Here obligations to fulfil economic and social rights can be seen as being cascaded from the individual, the family, the state and ‘the international community’. With individuals at the centre, the social units of the family, the state and the international community represent successive levels of higher organization, through which society can provide help, or a subsidy to facilitate the fulfilment of economic and social rights. This is the logic underlying the principle of subsidiarity. In this section, it is argued that the principle of subsidiarity can be applied to illustrate and clarify the scope and nature of states’ diagonal fulfil-bound obligations in economic and social rights.

The modern refinement of the principle of subsidiarity has been approached in the context of Catholic social theory to clarify the division of responsibility between individuals, social and political organizations within the state and the inter-state authorities.⁷⁴ However, international lawyers have begun to explore its significance to international human rights law.⁷⁵ In explaining the scope of international obligations to fulfil social and economic rights, subsidiarity can be applied to identify aspects of responsibility and competence that are reserved for smaller, lower social and political organizational units and the other duties that fall to the higher units within the scheme of social, political and economic cooperation.

The focus of the principle of subsidiarity is the lowest unit of moral concern, i.e. the individual, and it traces the fulfilment of the freedom and dignity of the human person as the main purpose that families, local, national, regional and global social and political organizations are created to serve. It begins with the proposition that every individual has the responsibility and freedom to develop his potential and faculties, and freely pursue their destiny, and as part of his destiny, to meet his basic needs through private resources and initiative.⁷⁶ This freedom of the individual to develop and utilise his capabilities without interference by external agents is at the centre of the subsidiarity principle. For this reason, the subsidiarity principle recognises the social nature of human beings and affirms the freedom of individuals to live in society and establish various units of organization to enable them address their individual concerns.⁷⁷ The purpose of the organizing units such

⁷⁴ See Pius XI, (1931) *Quadragesimo Anno Encyclical On Reconstruction of the Social Order* par. 79. For links to the document:

http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html

⁷⁵ See P.G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 38.

⁷⁶ J.F. Kenney, ‘The Principle of Subsidiarity’ (1955) 16 *American Catholic Sociological Review* pp. 31-36, at 33.

⁷⁷ Id.

as family, labour movements etc is to provide arrangements for individuals' needs to be satisfied and potential to be developed. In the hierarchy of organizational units, each unit is created by the cooperation and collaboration of the smaller units below it, with the purpose of assisting, helping and serving those constituent units fulfil their potential and capabilities, not to replace or absorb them. The functions that they are able to fulfil on their own initiative without need for external help should be left to them. This freedom from interference by the higher units of organization in matters that can be accomplished by their own capabilities forms the 'negative' dimension of the subsidiarity principle.

There is also a 'positive' dimension of the subsidiarity principle. Because of the pooling of resources, information and initiatives, the higher units of organization are in a position to accumulate a '*subsidium*' or '*subsidy*' that can be re-allocated to enable the lower units perform their own obligations and fulfil their destiny. Therefore, subsidiarity has a second function of obligating the higher units to intervene and remit the *subsidium* needed to enable the lower units fulfil themselves as responsible human societies, while preserving the freedom and autonomy of the lower units.⁷⁸

Figure 3 below illustrates the interplay between the various actors and duty-bearers at the levels of the family, the state and the international community.

⁷⁸ Some commentators argue that subsidiarity offers a competing and perhaps more useful organizing concept for international law than classical sovereignty: K. Endo, 'Subsidiarity and Its Enemies: To What Extent Is Sovereignty Contested in the Mixed Commonwealth of Europe?' (EUI Working Papers No. RSC 2001/24, 2001) http://www.iue.it/RSCAS/WP-Texts/01_24.pdf

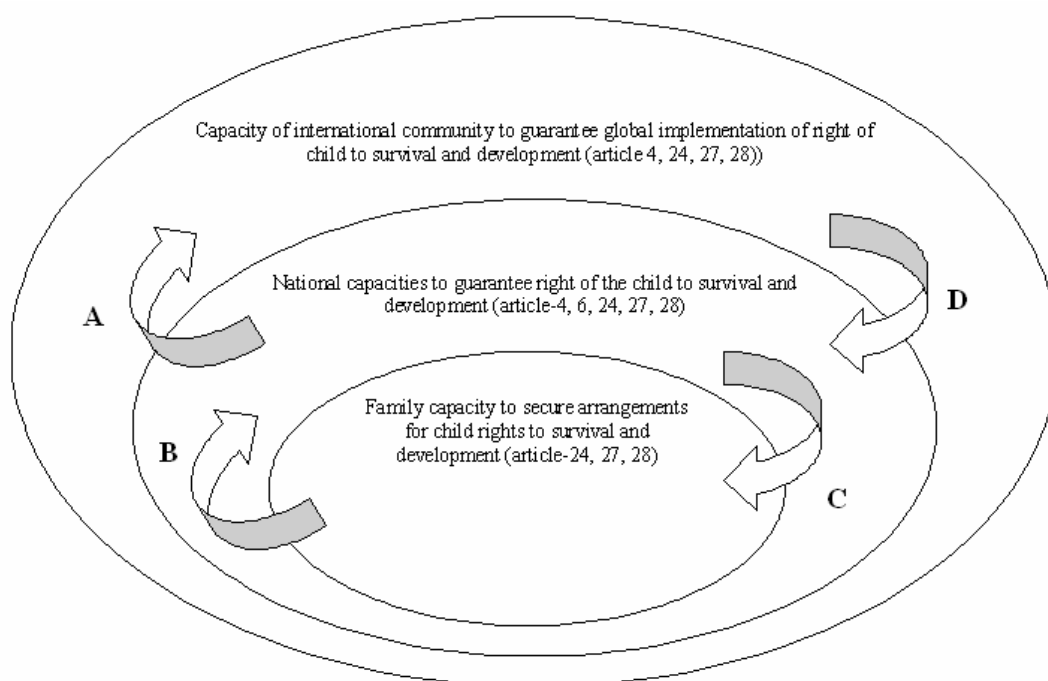


Figure 3: Framework of duty bearers for the right of child to survival and development.

Figure 3: Framework of multilayered duty-bearers in the fulfilment of children's social and economic rights

To start with, the child's immediate household has the primary responsibility to meet his basic social needs. For the majority of people in all societies, the fulfilment of social and economic rights is achieved through the use of private resources. Individuals have primary duty to fulfil their own economic and social needs through mobilising their maximum available resources in a prudent profitable manner. These personal resources include their own human resources such as personal talents, human capital such as vocational skills, professional training and qualifications and other career assets, private property, income, investment, savings etc. In this way, the individual's personal resources if not adequate are assisted and subsidised by those of his or her household such as spouses, partners, parents, guardians etc. The family or household represents the first social-unit level of subsidiarity, that exists for the purpose of enabling individuals fulfil their responsibility and realise their human rights and needs. For this reason, many models for administration of state-funded social welfare benefits apply a formula for means-testing to target real need, and determine eligibility based on the aggregate family/household income.⁷⁹

The second level of subsidiarity is the national society represented by the state. Where the aggregate of the maximum resources available to the individual and his/her family are

⁷⁹ Asbjorn Eide, 'Economic and Social Rights' in Symonidez, J. (ed.). *International Human Rights in a Historical Perspective* (Dartmouth/Ashgate: Aldershot 2000) 109,115.

insufficient to secure fulfilment of economic and social rights, then the national community through the state has an obligation to provide assistance in form of a subsidy to enable the households and families fulfil their responsibilities to individuals. In the sequence, the international community constitutes the third social-unit level of subsidiarity.

The arrows on the left, A and B represent the negative dimension of subsidiarity in the sense that the family and states have capabilities and obligations at their respective levels in the structure that should be performed fully. These arrows also indicate that accountability for children's rights and welfare and human rights generally is a matter of public concern for the state and the international community. Arrow B shows that in the discharge of their obligations to fulfil the rights of the child, families and caregivers have responsibilities and freedom to make care arrangements for children but must comply with national law regulating these matters. Arrow A shows that states Parties have a latitude of discretion to determine policies and practices relating the fulfilment of social and economic rights but these must be consistent with the applicable international human rights norms. This is regulated by the obligation of states to submit periodical reports to the UN Committee on the Rights of the Child under Article 44 of the Child Convention.

Arrows C and D represent 'positive' dimension of the subsidiarity principle. They show that the *subsidium* or subsidy in the form technical and financial assistance and other resources is designed to flow from each higher unit to the one below it: from the international community, through states right to the family, to meet any shortfalls there and enable each unit fulfil its responsibilities. Therefore, the current regimes for international protection and realisation of economic and social rights can be explained and illustrated using the principle of subsidiarity. This system is designed in such a manner that states' national capacities and resources can be 'subsidised' by the assistance of the international community acting through the agency of intergovernmental organizations or any other appropriate structures at regional and global levels. In this sense, the international community as a whole constitutes the third social-unit level of subsidiarity that can be regarded as having a common duty to assist states discharge their human rights responsibilities. Because these duties are aimed at securing the realisation of the rights of human beings rather than rights of states as such, they are diagonal human rights obligations.

5.4 Further Reflections on Legal basis of States' diagonal fulfil-bound obligations

The preceding part has attempted to explore the legal basis for and the scope of states' diagonal obligations to support global fulfilment of economic and social rights. As the foregoing discussion illustrates, in reconstructing the legal basis for states' diagonal fulfil-bound obligations, we can identify and distinguish two types of legal instruments. First, there are normative documents comprising binding hard law conventions and non-binding agreements affirming standards and norms for international/external positive (fulfil-bound) obligations. Secondly, there are operational instruments that comprise of national legislation and international/bilateral agreements which provide legal and institutional machinery and processes for implementing these arrangements.

Having described the legal framework, it is intended in this section to argue two further propositions regarding the legal basis for states external fulfil-bound obligations to support universal realization of economic and social rights. First, an assessment of the objectives and purpose of international human rights conventions suggests that their universal implementation would involve a measure of domestic and international obligations of all states. Secondly, the international human rights conventions that declare economic and social rights in universal terms can be regarded as legalising universal moral obligations and the humanitarian imperative that men and women of all nations and creed shall endeavour to secure universal fulfilment of these rights.⁸⁰

5.4.1 Diagonal fulfil-bound obligations inherent in the purpose of conventions on economic and social rights

When the purposes and objectives of international conventions on economic and social rights are dissected, the inescapable conclusion is that states have been assigned both domestic and external obligations to secure universal realization of these rights: the latter category includes diagonal fulfil-bound obligations. One approach to developing an understanding of the scope of states' obligations under the international human rights treaties is to extrapolate the objectives, purpose and agenda of these treaties. It is instructive that Article 31(1) of the Vienna Convention on the Law of Treaties 1969 provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' In this regard, an inquiry into the objects and purpose of the current regimes

⁸⁰ Early expressions of these cosmopolitan humanitarian moral obligations are contained in the Geneva Declaration of the Rights of the Child 1924,

of economic and social rights can shed some light on the intention of the treaties. Such investigation can determine whether diagonal obligations are included in the package of legal obligations created by these conventions. Since space constraints do not permit an extended elaboration of this issue, it is intended here to present four propositions that summarise theoretical arguments in this regard.

First, judicial opinion suggests that ‘unlike other multilateral agreements, in international human rights conventions, the contracting states do not pursue any partisan interests: instead they have one and all a common interest that is the common accomplishment of those high purposes which are the *raison d’être* of the convention.’⁸¹ One of these high purposes is to craft legal machinery that would provide a common universal standard of achievement of human rights for the entire human family around the world,⁸² regardless of the national or local circumstances. Thus it was the design of the founders of the universal human rights movement to ensure that there is a common universal standard for all peoples and that never again should the human family be exposed to the risks of state failure to protect human rights. A survey of the human rights conventions shows that the objectives and purposes of international human rights treaties can be gleaned from the statements of principles in the preambles of the conventions themselves. There is a consistent and unmistakable pattern of commitment and undertakings by states both to establish global human rights standards and take steps individually and in the context of international cooperation to achieve progressive universal realization of these rights.

Apart from the preambles and texts of the conventions, statements of purpose and commitment are contained in the foreign policy statements, political speeches of world leaders and other diplomatic exchanges. For example in his famous speech to Congress on 6th January 1941, on the Four Freedoms, US President F.D. Roosevelt stressed the obligation of the US and its allies to establish a system of international guarantees of the dignity, liberty and rights of all human beings not only those of the USA and its allies but ‘everywhere in the world.’⁸³ This speech was not only American political rhetoric: it also articulated a vision of universal human rights, sowing some of the seed ideas that became

⁸¹ *Reservations to the Convention on the prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951) 14 at 23. See also Chaloka Beyani, ‘The legal premises for the international protection of human rights’ in Guy S. Goodwin-Gill and Stefan Talmon, (eds.) *The reality of international law: essays in honour of Professor Brownlie* (Clarendon Press, Oxford 1999), pp. 21-36.

⁸² Universal Declaration of Human Rights 1948: UN General Assembly resolution 217 A (III) of 10 December 1948, Preamble.

⁸³ Text and audio tape of the speech can be accessed at :
<http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm>

concretized in the drafting and promulgation of the Universal Declaration of Human Rights 1948.⁸⁴ Such a universal vision of human dignity and rights necessarily implies both domestic and global obligations of the developed states. In other words, the idea of universal human rights is grounded on common obligations of all states to address these rights at domestic level, but it also necessarily demands that where there are demonstrated weaknesses at state level, third states have a common duty to provide appropriate assistance and cooperation under the concept of obligations in international cooperation.

Secondly, fundamental principles underlying international human rights law can be traced to the realization that national practices and standards can fall short of the minimum threshold required for securing the lives, dignity and rights of persons living in such countries. This implies that there is an external dimension of the obligations of the states parties to international human rights conventions: to address both their domestic obligations in the first instance and, where need arises, to render appropriate assistance towards securing fulfillment and realization of these rights in other states in the spirit of international cooperation.⁸⁵ In this manner, there is a combination of both universal ideas on the minimum standards of realization of human rights and also common obligations to provide international assistance including mobilization of resources to support universal fulfillment of human rights. The whole enterprise of creating international human rights regimes was intended to establish and entrench universal standards and principles and also to establish common and shared responsibility of the international community to secure implementation of these norms through strategies that integrate both national arrangements in the developed world and internationally supported domestic programs in the developing countries.

If the international law norms did not include any positive fulfil-bound diagonal obligations of Third states to support global fulfillment of these rights, then there would be self-contradictory consequences. For instance, it would not be necessary to promulgate international norms in legal texts since these would be purely domestic national concerns as was the case before the rise of international human rights. There would never have been any need to promulgate and project a vision of universal human rights. It can be seen here that any perspective of international protection of economic and social rights that fails to recognize the fulfil-bound diagonal obligations of Third States would in effect empty these

⁸⁴ Henry Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals* (OUP, Oxford 2000), pp. 243-244.

⁸⁵ Child Convention 1989, Article 4.

conventions of their very purpose and *raison d'être*. Moreover, if the international conventions are interpreted in such a way as to recognize only states' domestic fulfil-bound obligations, but not external and diagonal fulfil-bound obligations, then it would defeat and frustrate the objectives of the idea 'international' protection of universal human rights through international human rights law. It is self-contradictory to speak of universal human rights for all, while in practice stopping at addressing only domestic obligations as the limits of state responsibility in human rights. The critical point here is that the project for international protection of economic and social rights aims at legalizing both the human rights standards and, the moral obligations of states as the principal actors charged with the responsibility of securing universal implementation of these rights.

Thirdly, in order to appreciate the aspects of states' fulfil-bound legal duties with regard to the diagonal obligations theory, it is necessary to examine the legal architecture and design for international protection of economic and social rights. Promulgated by sovereign states, and without a global state to coordinate the necessary global tasks, this system declares norms of economic and social rights, charges states parties to secure at least domestic implementation, calls for international cooperation towards universal realisation of these rights and provides for a system of reporting by states parties and fact finding by *inter alia*, thematic rapporteurs. The only viable approach to making these international conventions fulfil their cosmopolitan global agenda of protecting the dignity and rights of all human beings around the world is to deduce that by the concept of international cooperation, these conventions are designed to assign to states parties both domestic and diagonal obligations.

Diagonal fulfil-bound obligations fall to all states parties to the Charter of the United Nations and the other human rights conventions that promulgate the vision of universal human rights under international law. These obligations are based on the understanding that the fulfilment of human rights is a shared common responsibility of all members of the international community of states and not just a domestic matter. In other words, they are essentially obligations to participate in a system that adopts, endorses and champions human rights norms and ideas and; advances the cause for the universal fulfilment of human rights through mobilisation of material, technical and financial resources to support the global implementation of economic and social rights. The key proposition here is that states' diagonal obligations are reckoned by reference to each state's resource capabilities so that in practice, these obligations are being interpreted to mean binding legal obligations of richer states to provide economic assistance and financial aid to support financing of

economic and social programmes to benefit people in the less developed countries. As the Committee on Economic Social and Cultural Rights explained, the diagonal obligations arise from the fact that the third state is ‘in a position to assist,’⁸⁶ because it commands more resources⁸⁷ and is more economically developed⁸⁸ in comparison to the situations prevailing in the domestic state. In other words, the *de jure* diagonal obligations bind all states but their activation depends on the existence of favourable de facto material conditions in the third state.

In an interdependent world, some states are more developed and more able to undertake external commitments than other states. Therefore, in the aggregate, some states have more external human rights legal obligations than others. This de facto position seems to contradict the rule of international law that stresses equality of states.⁸⁹ However, the texts of human rights treaties acknowledge de facto inequalities on the ground by including clauses that recognize the needs of developing countries.⁹⁰ This apparent inconsistency in the concepts of abstract formal equality versus real inequality of states can be moderated by application of the concept of ‘*common, but differentiated responsibilities*’ of states which has recently gained prominence particularly in but not limited to international environmental law.⁹¹ Under this concept, whereas all states share common concerns and face common risks, they bear differentiated responsibilities commensurate with their respective capabilities or damage causing propensities such as volumes of toxic emissions. It is in recognition of the concept of common but differentiated responsibilities that some intergovernmental organizations such as the World Bank and the United Nations apply a graduated formula for determining financial obligations of their members to the organizations. In line with this concept, we can conclude that the diagonal obligations of states to fulfil economic and social rights of children apply to all members of the United Nations and signatories to the Economic Covenant and the Child Convention, but the actual threshold for implementation of these external obligations is to be determined by each state’s de-facto logistical capacities. In other words, there is a collective common duty of all states to establish an international social and economic order that facilitates the

⁸⁶ Committee on Economic, Social and Cultural Rights 1990: General Comment No. 3 : The nature of States parties obligations (art. 2, para. 1 of the Covenant) par. 14.

⁸⁷ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), paras. 39,45.

⁸⁸ Committee on Economic, Social and Cultural Rights (2002) Right to Water, General Comment No. 15, 20 January 2003, E/C.12/2002/11, para.34.

⁸⁹ Charter of the United Nations 1945, Article 2(1).

⁹⁰ Child Convention Article 24(4), 28(3). See Ann van Thomas and A.J. Thomas Jr, ‘Equality of States in International Law- Fact of Fiction?’ (1951) 37 *Virginia Law Review* 791.

⁹¹ For an appraisal of this concept, see C.D. Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *American Journal of International Law* pp. 276-301.

universal realisation of, *inter alia*, economic and social rights.⁹² This involves the allocation of domestic and external obligations to all states, but in a manner that takes into account their respective capabilities. This perspective rejects a purely nationalistic and state-centric conception of human rights obligations of states and affirms the domestic-diagonal mix of states' obligations in international protection and promotion of economic and social rights.

Fourthly, the project for international protection of human rights through international law seeks to provide legal expression and authority for the fundamental moral imperative to protect the life, dignity and welfare of the human person in all nations and societies. As the main political actors on the global scene, states have been charged with the responsibility of securing universal realization of these rights. It can be argued that the territorial limits of the political jurisdiction of states do not and cannot mark the end point of the moral obligations of states to uphold and protect the life, dignity and welfare of human beings. The theory of legal obligations of states to fulfil human rights that approximates the global vision of the project for universal human rights is one that gives effect to the moral obligation of states to secure universal protection and fulfilment of the rights of human beings around the world, and not just citizens of a particular state. States fulfil-bound diagonal obligations can be appreciated in this context: that they are part and parcel of the moral obligations and principles of human rights that have been partially legalized in the current system of international protection of human rights.

5.4.2 Considerations of humanity and humanitarianism

One philosophical perspective of states' diagonal obligations to support universal fulfilment of economic and social rights is based on the principle of humanity: that the strong have a moral duty to aid the weak or deprived.⁹³ According to Tom Campbell, principle of humanity is based on the premise that if we are aware of the suffering and deprivation of some human beings, and we possess the means and capability to relieve such suffering and deprivation at minimal cost, then the suffering and deprivation of such persons is unnecessary and we should take action to alleviate it.⁹⁴ In other words, the needless suffering and deaths caused by extreme poverty and hunger in an otherwise

⁹² See the Universal Declaration of Human Rights 1948, Article 28; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1987 par. 30

⁹³ Tom Campbell 'Poverty as a Violation of Human Rights: Inhumanity of Injustice?' in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) pp. 55-74.

⁹⁴ Id, p. 67.

affluent world is the result of the *inhumanity* of those possessing resources and means to abolish global poverty but have refused or failed to act.

Henry Shue argued that the duties of distributive justice attach to individuals with the capabilities to aid the economically deprived, and these duties are mediated through the agency of political structures such as states, to secure universal fulfilment of subsistence rights.⁹⁵ Suppose, for example, that I come across two individuals in desperate need of food, and I am in a position to provide both of them with relief food. The fact that one of them is my compatriot and the other is not, should not be morally relevant to my humanitarian duties to relieve their suffering.⁹⁶ Or, if I am a trained life-saver, and I come across a child drowning in a pool of water, I do not have to ask whether the child is of my nationality, and how/why/when he got himself into the water before I act to rescue him from imminent death. These questions might be important to inform attempts to devise long-term strategies for resolving underlying factors causing the problem, but they are not urgent: on the principle of humanity, the humanitarian duty arises from the fact that the child is a fellow human being, is in danger of death, and I *can* act to stop such death at that moment.⁹⁷ Such a straightforward application of the humanitarian duties is more urgent and stringent than the duties of distributive justice that might be subjected to the political constraints of duties to compatriots.⁹⁸

In this perspective, it can be argued that the fulfil-bound obligations of the developed countries to support global realization of economic and social rights are based on considerations of humanitarianism. Whenever communities and individuals suffer extreme material deprivation that threatens their lives, dignity and basic welfare, a moral humanitarian duty arises on the part of every available state and non-state actor in a position to take appropriate action commensurate with their capabilities to relieve such deprivation. The promulgation of human rights principles in international human rights law is part of the wider global movement to promote human values by embodying norms and moral claims of rights into legal texts. Due to the intricacies of negotiating international treaties and other drafting limitations final treaty texts achieve only partial legalization of these norms and moral obligations. However, the advancement and enjoyment of human

⁹⁵ Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, New York 2nd edn. 1996) p.139.

⁹⁶ Id. See also Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* 687.

⁹⁷ See Peter Singer, 'Famine, Affluence and Morality' (1972) 1 *Philosophy and Public Affairs* 229.

⁹⁸ Tom Campbell 'Poverty as a Violation of Human Rights: Inhumanity of Injustice?' in Pogge, T. (ed.) *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) 55, 74.

rights cannot be separated from other cosmopolitan human values such as altruism, humanitarianism, caring, global solidarity, kindness and charity within which the idea of human rights has been hatched.⁹⁹ These human values are indispensable tools for conducting dialogue and communicating concerns about the universal fulfilment of economic and social rights. Moreover, they provide a wholesome philosophical atlas for realigning the perspectives and feelings of the individuals asserting claims as rights-holders and the individuals targeted by such claims as duty-bearers within domestic and global social and legal orders. Therefore, when exploring the scope of obligations of states under current regimes of international human rights law, a full understanding of states' external and diagonal obligations can be developed by recourse to the universal human values and moral duties underpinning the agenda for international protection of human rights.

5.5 Diagonal obligations and theories of global distributive justice

This section examines the connection between states' legal responsibility to support universal fulfilment of economic and social rights through trans-national transfers of resources to developing countries under the concept of diagonal obligations and the concept of global distributive justice. The arena of this debate has not been in legal studies, but in the heartland of theories global distributive justice in studies in philosophy, political theory and international relations.¹⁰⁰ There is extensive literature on theories of international and global distributive justice that deserves extended review by scholars in these fields, a task that would not be feasible in view of the space constraints of the present study. However, since a legal argument for obligations of third states to transfer resources to support fulfilment of economic and social rights in poor states entails an element of international redistribution of resources, it necessitates a brief review of some of the theories on distributive justice especially those that approach this debate from a human rights perspective.

(a) Human rights-centred theories of distributive justice

One starting point on distributive justice is to examine how the systems of resource redistribution work in the national context. The process by which governments establish

⁹⁹ See Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (CUP, Cambridge 1991, James Tully, ed.).

¹⁰⁰ For articles reviewing this literature, see Simon Caney, 'International Distributive Justice' (2001) 49 *Political Studies* 974, David Miller, 'Caney's 'International Distributive Justice': a Response' (2002) 50 *Political Studies* 204. See also Simon Caney, *Justice Beyond Borders* (OUP Oxford 2005) and Chris Brown, 'Theories of International Justice' (1997) 27 *British Journal of Political Science* 273.

such systems is essentially a redistribution of national resources to reduce the economic inequalities in the society that result in exclusion of the economically disadvantaged individuals and groups from accessing basic human needs. One justification for such redistribution is application of the duties of distributive justice. Therefore, generally all theories of distributive justice recognise that the principles of distributive justice can be applied under the political structures provided by and within the state. There are two broad approaches to distributive justice: distributive statism and distributive cosmopolitanism.¹⁰¹ According to the distributive statist theory of justice, individuals' duties of distributive justice arise from the membership and participation in a 'basic structure' i.e. a political community, which provides a framework for social and economic cooperation and determines how opportunities, rights and duties in that community are distributed among its members.¹⁰² This basic structure is the domestic community within the Westphalian state, which mediates its members' duties of justice by ensuring that resources are redistributed to mitigate the disadvantages and inequalities arising from the basic structure. From the accounts of John Rawls and David Miller, the principles of justice apply only to domestic national societies because there is no global state to provide the world with a global basic structure and mediate the duties of global distributive justice either among states or among the citizens of the world's various states.¹⁰³ However, as Charles Beitz has argued, the absence of political institutions to mediate duties of global redistributive justice does not invalidate the argument for a global application of the principles of distributive justice: it is only a practical complication facing implementation of these principles and one that can be overcome through adapting any appropriate institutional structures for this purpose.¹⁰⁴ Beitz argues that there are substantive duties of global distributive justice and that the means or apparatus for implementing these duties can be adapted from present or future political structures.¹⁰⁵

Another leading distributive statist, David Miller has argued that the problem of poverty and non-fulfilment of economic and social rights is essentially a domestic responsibility of national societies and considerations of justice apply only to the national political community.¹⁰⁶ Third states can only be obliged as a matter of justice to intervene and assist

¹⁰¹ Wilfried Hinsch, 'Global Distributive Justice' (2001) 32 *Metaphilosophy* 58, 59.

¹⁰² For a detailed defence of distributive statism, see John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge MA. 1971) p. 7; see also David Miller, *On Nationality* (Clarendon Press, Oxford 1995), chapter 3; David Miller, *National Responsibility and Global Justice* (OUP, Oxford 2007) 259-260.

¹⁰³ Id.

¹⁰⁴ Charles Beitz, *Political Theory and International Relations* (Princeton University Press Princeton 1979, 2nd edn 1999) p. 160.

¹⁰⁵ Id.

¹⁰⁶ David Miller, *On Nationality* (Clarendon Press, Oxford 1995), chapter 3.

deprived communities if, but only if, it can be shown that such third states are responsible for causing deprivation in the domestic state.¹⁰⁷ In this way, obligations of third states can be filtered and restricted to those cases where there is a connection between culpable conduct of the third state and the resulting deprivation to persons in the domestic state, that triggers the duty of justice i.e. to remedy and correct the injustice such third states have caused, on the same footing as domestic duties of justice.¹⁰⁸ In all other cases where the third states have not played any role in the deprivations of the societies in the domestic state, then any remedial responsibilities towards the world's poor would be humanitarian only, taking a second place to the third state's own domestic duties of redistributive justice.¹⁰⁹

Distributive Cosmopolitanism argues that the same principles of distributive justice that regulate systems for resource transfers and economic and social welfare in the national societies should be extended to the global context, mediated through international resource transfers to guarantee economic and social rights in the poor states and regions in the world.¹¹⁰ Charles Beitz explains that the ideas of distributive cosmopolitanism do not prescribe any particular political structure such as a global state for implementation, and any political structures such as current Westphalian states or intergovernmental bodies or other institutions can be refashioned to implement the principles of distributive justice on a global scale.¹¹¹ Beitz also argued that the world's economic production capabilities are far in excess of the requirements for meeting the basic human needs of everyone and guaranteeing the universal fulfilment of economic and social rights: what is urgently required now is a system of redistribution of the world's resources in such a manner that would end the deprivation of the global poor in an otherwise affluent world.¹¹² That Beitz's argument is very convincing is illustrated by the fact that the current world food production volumes are adequate to feed 12 billion people, twice the present world population, yet in developing countries, 6 million children under 5 are killed every year by hunger and illnesses related to malnutrition.¹¹³ This points to the problem of global distribution, rather than global production capacities.

¹⁰⁷ David Miller, *National Responsibility and Global Justice* (OUP, Oxford 2007) 259.

¹⁰⁸ Id, p. 260.

¹⁰⁹ Id, p. 261.

¹¹⁰ Charles Beitz, Social and Cosmopolitan liberalism (1999) 75 *International Affairs* 515, 520; Charles R. Beitz, *Political Theory and International Relations* (Princeton University Press, Princeton 1979) 128.

¹¹¹ See Charles Beitz, 'Social and Cosmopolitan Liberalism' (1999) 75 *International Affairs* 515.

¹¹² Charles Beitz, 'Economic Rights and Distributive Justice in developing Societies' (1981) 33 *World Politics* 321, 322.

¹¹³ UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Report of the Special Rapporteur on the Right to Food, Jean Ziegler A/HRC/7/5 10th January 2008, pg.2, citing FAO, *Right to Food in Action: Examples of how FAO Member Countries Make it Happen*, 2007

Some distributive cosmopolitan writers defend a radical thesis. For example, Hillel Steiner argued that everyone everywhere has a right to an equal share of the value of the earth's resources and that it is the responsibility of all states to enforce and implement this right through a global fund, pooling land rates payments by all land owners worldwide.¹¹⁴ In similar approach, Brian Barry has argued that the public resources managed by states are a common possession of mankind held on trust by state authorities and states as trustees have an obligation to ensure equitable sharing of these resources not only among individuals in the domestic society but also among the world's societies.¹¹⁵ Other writers present a less radical approach. For Pogge, the current international community is arranged in such a way that there is global interdependence in many fields such as international trade, investment etc, whereby the losses and benefits of these interactions are not fairly shared between rich and poor states. Under this 'global order' it is only just that the losses and gains of such interdependence should be shared fairly between the rich and poor states through mechanisms for resource redistribution from the rich to poor states.¹¹⁶ However, as Simon Caney points out, the attempt to ground a theory of international justice on the supposed economic interdependence brought about by globalisation is fundamentally defective because it does not define the exact threshold at which international economic interdependence and globalisation gives rise to a global basic structure so as to activate the application of Rawls' scheme of distributive justice.¹¹⁷

(b) Similarities and differences between diagonal obligations and global justice duties

International law seeks to address the issue of distributive justice by recognising and declaring a universal common standard of human rights and setting goals for systems and programmes for guaranteeing social and economic rights.¹¹⁸ In the sphere of economic and social rights, these rights have been interpreted as *minimum core entitlements* necessary to

¹¹⁴ Hillel Steiner, 'Territorial Justice and Global Redistribution' in Gillian Brock and Harry Brighouse (eds), *The Political Theory of Cosmopolitanism* (CUP, Cambridge 2005), 28, 35; see also Hillel Steiner, 'Just Taxation and International Redistribution' in Ian Shapiro and Lea Brilmayer (eds), *Global Justice: NOMOS XLI* (New York University Press, London 1999) 171.

¹¹⁵ Brian Barry, 'Statism and Nationalism: A Cosmopolitan Critique' in Ian Shapiro and Lea Brilmayer (eds), *Global Justice: NOMOS XLI* (New York University Press, London 1999) 12, 27.

¹¹⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity, Cambridge 1996) 215; Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) pp.11-53. For a very insightful compendium on global and cosmopolitan responsibility to abolish world poverty see Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007). For a similar argument see Allen Buchanan, 'Rawls's Law of Peoples : Rules for a Vanquished Westphalian World' (2000) 110 *Ethics* 697, 705.

¹¹⁷ Simon Caney, 'Global Interdependence and Distributive Justice' (2005) 31 *Review of International Studies* 389.

¹¹⁸ Universal Declaration of Human Rights 1948 UNGA Res. 217A (III) of 10th December 1948, Preamble, International Covenant on Economic, Social and Cultural Rights 1966 General Assembly Resolution 2200A (XXI) of 16 December 1966, preamble.

guarantee the basic decencies of life for all.¹¹⁹ Since the fulfilment of human rights is a concern of all states and their enjoyment a legitimate interest of all human beings, these rights can be implemented in multi-dimensional strategies through institutional architecture facilitated by the political systems at local, national, regional and global levels.¹²⁰ The key feature of implementing obligations to protect and fulfil social and economic rights is that it requires the establishment and maintenance of comprehensive and inclusive delivery *systems and programmes* through which access to the basic decencies of life especially for the vulnerable can be secured and improved. For instance the right to health ‘can be understood as a right to an effective and integrated health system, encompassing health care and the underlying determinants of health, which is responsive to national and local priorities, and accessible to all.’¹²¹ In the domestic context, the establishment and maintenance of systems for securing social and economic rights entails a process of resource redistribution within the state to guarantee a basic floor for everyone in that political community. It contemplates a measure of shared, collective obligations of the international society of all mankind, represented by states towards individuals in an effort to establish an international social and economic system conducive for universal enjoyment of these rights. The norms of economic and social rights relating to international cooperation and assistance obligations enjoin states to contribute to the global fulfilment of these rights. International human rights law seeks to protect and promote the rights of individuals and to ensure universal standards of enjoyment of these rights.¹²²

There is one broad similarity between human rights-centred theories of distributive cosmopolitanism and states’ external obligations to support universal fulfilment of economic and social rights (cosmopolitan statism). Where persons in wealthy societies are in a position to remedy the deprivation of the poor both in their country and others in other states, it means that their government, acting on their behalf would be one of the formal agencies through which they can perform their redistributive justice duties. In this way, the duties of states as regards external human rights obligations are primary duties of their domestic constituents, and the diagonal obligations of rich states to establish and maintain systems for global redistribution of resources to guarantee economic and social rights can

¹¹⁹ This is the approach taken by the UN Committee on Economic, Social and Cultural Rights in its General Comments, and has been discussed in chapter 2, above.

¹²⁰ J. Pikalo, ‘Economic Globalisation, Globalist theories of the state and Human Rights’ in W. Benedek and F. Marvella (eds) *Economic Globalization and Human Rights* (CUP, Cambridge 2007) 17, 33.

¹²¹ Paul Hunt, Report of the Special Rapporteur on The right of everyone to the enjoyment of the highest attainable standard of physical and mental health E/CN.4/2003/58 Commission on Human Rights 3rd March 2006 par.62.

¹²² C. Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, Oxford 2003), pp. 84-85. However, Tomuschat’s concept of ‘feeling compelled to take action’ is of little significance to rights analysis which looks at binding obligations regardless of the obligors’ feelings.

be regarded as being in pursuance of cosmopolitan duties of distributive justice. Indeed the idea of human rights is based on the cosmopolitan conception of the equal worth and dignity of every human person, and can be interpreted as implying both universal rights and universal obligations to uphold and defend these rights.

There is a subtle distinction between the theories of international justice and international protection of economic and social rights. The current international regimes of economic and social rights, whilst founded on cosmopolitan ideals manage to enact only a very weak form of distributive cosmopolitanism, assigning states obligations to participate in processes for international cooperation for universal fulfilment of these rights. It seems the principles of distributive justice operate in the national context only, but only up to securing a minimum core content of human rights and states parties are not obligated by international law to effect detailed programmes of further redistribution of national resources within the state. Veronique Zanetti argues that even if such a minimum threshold level is achieved and guaranteed for everyone on a global scale, it is nevertheless not a sufficient condition for the realisation of global justice, because it would still fall short of the requirement of the concept of equality that is inseparable with that of distributive justice.¹²³

International law of economic and social rights has a very modest mission: to secure and guarantee reasonable access to the basic necessities of life and dignity. This mission is attempted through recognising certain universal basic human needs and legislating them as rights. The urgent concern for advocacy in economic and social rights is to secure access to these social goods by everyone, especially the economically disadvantaged. When this minimum threshold has been achieved, the second stage is to continue with measures to ensure progressive improvement in the standards thus secured. There might be still inequalities in income within and among societies, but after the universal minimum has been secured for each local community, any such inequalities that would still remain are not a human rights concern of the law of economic and social rights.

From this perspective, equality per se is not the concern of economic and social rights because, there can be inequalities in a society that has secured basic social welfare for all. In other words, it is possible to secure global satisfaction of basic human needs as enacted in the current system of economic and social rights without necessarily applying some of

¹²³ Veronique Zanetti, 'Equality or a Minimal Standard in Global Justice' (2004) 6 *Eur. J.L. Reform* pp. 397-409, at 398.

the radical aspects of the principles of distributive justice. Clearly, political and moral philosophy on global justice, and the international legal protection of economic and social rights address the same basic issues and share similar concerns about the moral responsibility to address economic deprivation and the human suffering this causes. However, they part ways at some point: in this case the philosophers' prescriptions and demands are far beyond what current regimes of international law permit.

5.6 Conclusion

This chapter has attempted to explore the legal basis for and the scope of states' diagonal obligations to support global fulfilment of economic and social rights. In reconstructing the legal basis for states' diagonal fulfil-bound obligations, we can identify and distinguish two types of legal instruments. First, there are normative documents comprising binding hard law conventions and non-binding agreements affirming standards and norms for international/external positive (fulfil-bound) obligations. Secondly, there are operational instruments that comprise of national legislation and international/bilateral agreements which provide institutional machinery and processes for implementing these arrangements. These instruments provide legal apparatus for states' external fulfil-bound obligations and can be harnessed to create further arrangements for international action in this field. As this chapter illustrates, there is a legal basis for states' duties to support universal realisation of economic and social rights, which has been expressed in the concept of international cooperation applied in international human rights conventions. Thus, upon studying current international human rights conventions on economic and social rights and other agreements for international social and economic cooperation, it is evident that the legal basis of states' diagonal obligations and in particular, the responsibility to support global realisation of economic and social rights can be ascertained and defended. These conventions can be interpreted as the design of the international community to create an international social and legal order that facilitates universal fulfilment of human rights. In creating this order, states have been re-positioned as agencies for mediating the performance of the duties that are necessary for securing the realisation of economic and social rights at domestic and global levels. The doctrine of states' diagonal fulfil-bound obligations as explored in the present chapter presents an integrated, inclusive vision of the domestic-international human rights responsibilities of states. This theory suggests how, states, as the principal political actors on the global scene should construe their responsibility in an age of universal human rights.

Chapter 6

Securing implementation and enforcement of states' diagonal obligations to support fulfilment of economic and social rights

Introduction

After examining the theoretical aspects of states diagonal obligations to support global fulfilment of economic and social rights in the previous two chapters, attention in this chapter turns to exploring some of the approaches to implementing these obligations. Indeed some aspects of ideas in the theory of international law become clearer when traced to applications in state practice. It is through successive phases of state practice that the meaning and scope of treaty obligations can take shape. The chapter discusses the legal and political contexts of states' compliance with norms and rules of international human rights law and examines current state practice in implementing states' external human rights obligations. It concludes review of these approaches with a proposal for a human rights-based model for enhancing international social and economic cooperation.

6.1 The problem of securing compliance with external obligations

Before examining how diagonal obligations can be enforced, two preliminary points can be made. First, under current regimes for international protection of economic and social rights, the domestic and diagonal obligations of states can be regarded as an integrated package of responsibility for all states in the modern age of universal human rights. Therefore, some of the processes applied for enforcing states' domestic obligations can also be used for securing compliance with diagonal obligations, as part of integrated strategies of implementing states' legal obligations arising from international law.

For example, the *Committee's Guidelines for Preparation of States Parties' Reports* for parties to the Economic Covenant¹ and the Child Convention² require that the information on progress in performance of internal obligations and the other regarding international

¹ These are accessible at the Committee's website: <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm> Paragraph 9 of the Guidelines requires that with regard to Article 2(1) of the Covenant, states parties' reports should 'indicate the impact of international economic and technical assistance and co-operation, whether received or provided by the State party, on the full realization of each of the Covenant rights in the State party or, as the case may be, in other countries, especially developing countries'.

² The Guidelines for reporting to the Committee on the Rights of the Child also require states to present information relating to both domestic and international responsibility under Article 4 of the Child Convention. The Guidelines can be accessed at the Committee's website: <http://www2.ohchr.org/english/bodies/crc/workingmethods.htm#a2>

cooperation obligations must be provided in the same report. In other words, international human rights law enacts both internal and external obligations of states and states parties are obligated to attend to and give an account of performance of both their internal and external obligations.

Therefore, both domestic and diagonal human rights obligations to fulfil economic and social rights are derived from international human rights law and states parties are required at all times to address these two sets of obligations concurrently. However, a distinction can be drawn between the two. First, the third state's diagonal obligations to fulfil economic and social rights in other states are auxiliary and complementary to the internal obligations of domestic states. Moreover, the practical implications of these obligations can be problematic because of the limited proximity and absence of a constitutional and political nexus between rights-holders in the domestic state and the third states duty-bearers. With regard to implementing states' internal/vertical obligations, rights-holders are in a position to influence the choice of national policies for implementing economic and social rights through domestic political processes such as general elections and referenda.³ In the context of diagonal obligations, however there is an 'associational deficit' in the sense that the rights-holders are citizens of other countries 'out there' and do not have an opportunity to participate in the national politics of social and economic rights within the duty-bearer state. In view of the arguments presented in the previous chapter, it is apparent that the limited institutional interactions and lack of political proximity between the rights-holders and the duty-bearers in this diagonal obligations doctrine are factors that present a challenge to the process of asserting and enforcing external obligations.

Secondly, it follows that since the rights-holders in the diagonal obligations concept are not citizens of the third State, it would be difficult for them to pursue their rights by direct engagement with the political institutions of the third state. This seems to be a dilemma of the diagonal obligations theory. Yet such lack of capacity on the part of foreign rights-holders does not diminish the substantive content of diagonal obligations to fulfil and as it will be shown later in this section, their interests can be conveyed and championed through networks of collaborators in the third state. As Jack Goldsmith and Eric Posner have explained, the very existence of a state and actions taken in the name of the state depend on

³Diana Meyers, 'Human Rights in Pre-Affluent Societies' (1981) 31 *The Philosophical Quarterly* pp. 139-144, showing the connection between political rights and the prospects of progress in shaping public policies that can be conducive to the realisation of economic and social rights within a state.

the psychology of its citizens and ultimately on individuals' belief.⁴ All these are not set in cast iron but can be reshaped and overhauled by appropriate dialogue in human rights education to appreciate the state's international and cosmopolitan human rights obligations. Despite whatever odds, diagonal obligations of states remain part of the core of international legal protection and promotion of economic and social rights and will continue be a subject of legal and moral concern in our increasingly interdependent world community.

6.2 Theoretical approaches to state compliance

This section discusses perspectives on how states comply with obligations assigned by international law and explores how these theories can be applied to develop strategies for practical approaches to enforcement of states diagonal human rights obligations to support global fulfilment of economic and social rights. The realist theories of international relations claim that since international law lacks effective institutions for making and applying laws such as a legislature or judiciary with mandatory jurisdiction over states, it cannot be enforced and is therefore of negligible importance in international affairs.⁵ For such theorists, if states ever comply with international law, this happens only by coincidence and to the extent that international law advances the state's own selfish national interests⁶ or the contents of the international norms are already incorporated in national law so that the cost of compliance is minimal.⁷ The realist and rationalist theories are inadequate to explain the fact that states ratify and travail to interpret and comply with international human rights treaties that considerably curtail states' domestic discretions and impose additional burdens of international cooperation obligations. Recent work by international lawyers and international relations scholars has advanced various theories to explain how and why states comply with or disobey international law. I have tried to simplify the extensive literature on these approaches by analysing it into three categories: the management approach, the constructivist approach and the philosophical approach. The remaining parts of this section examine these approaches and consider how they can be applied to secure compliance with diagonal obligations.

⁴ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, OUP 2005) p. 4.

⁵ T. Nardin, 'Ethical Traditions in International Affairs' in T. Nardin, T. and D. Mapel (eds), *Traditions of International Ethics* (CUP, Cambridge 1992)13.

⁶ Louis Henkin, *How Nations Behave* (Columbia University Press, New York 1979) p.49.

⁷ W.M. Cole, 'Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999' (2005) 70 *American Sociological Review* pp. 472-495, at 475.

6.2.1 State-leadership horizontal model

This model explains that states' compliance with international law is determined by two types of interaction between states: the threat of military and economic sanctions i.e. - 'the enforcement model' and the persuasive, iterative processes facilitated by states' participation in an international treaty system i.e. 'the management model.'⁸ Chayes and Chayes argue that although in theory military and economic sanctions are provided for under Chapter VII of the Charter of the UN, treaties rarely grant such powers and the use of sanctions to enforce international law offers very limited chances of success. First, use of sanctions requires Great Power leadership, availability of which is not always assured, it entails high costs to the states taking the enforcement action and there is no guarantee of success. Although Chayes and Chayes dismiss the enforcement model as ineffective, it is important to remember that even if sanctions are not actually applied, the threat of legally permitted military and economic sanctions by other states casts a shadow on governments and can constrain state behaviour. This is particularly relevant to the enforcement of states' external obligations to *respect* and refrain from any activities that would degrade the living conditions of people in other countries, like, for example tampering with or polluting by states on the upstream section of a river.⁹

Chayes and Chayes's preferred model is the management model where the treaty system plays an active role in shaping consensus among states parties so that it is not just a system for independent interaction of independent states but it also provides a forum that actively reshapes states parties' preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the treaty system. Under the management model, states use mechanisms such as 'jawboning,' data collection and reporting, strategic interaction, reviews etc. to shape consensus and cohere into a norm-complying movement of states.¹⁰ This approach underlies three UN's Charter based

⁸ See Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge Mass 1995).

⁹ The Nile Water Agreement 1929 forbids the nine riparian states from developing any projects that reduce the volume of Nile river water reaching the Egypt without prior agreement of the Egyptian government. In December 2003, Kenya indicated its intention to withdraw from the colonial treaty. On 14th December 2003, Egypt's Minister for Water Resources and Natural Resources, Mahmoud Abu-Zeid declared that Kenya's withdrawal from the Nile Water Agreement would be a violation of international law and an act of war against Egypt that would trigger sanctions and other unspecified action. For press archives: <http://www.american.edu/TED/ice/nile.htm>
<http://www.warmafria.com/index/geo/7/cat/1/a/a/artid/435>
<http://www.ntz.info/gen/n01799.html>
<http://weekly.ahram.org.eg/2004/694/eg4.htm>

¹⁰ Abram Chayes and Antonia Chayes (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*, above, p. 229.

mechanisms for securing compliance with human rights. First, through the Human Rights Council and its Special Rapporteurs it is possible to encourage and persuade the richer states to participate in a system for resource transfers to the poor states to support fulfilment of social and economic rights. After considering the reports and recommendations of the Special Rapporteurs on human rights, the member states in the Human Rights Council have an opportunity to consider options for taking collective action to secure global fulfilment of social and economic rights through measures such as increasing the amounts of international aid, enlarging the donor network to include middle income countries and establishing a global taxation system and global funds to guarantee UN multilateral financial support for implementing economic and social rights programmes. Secondly the General Assembly serves as a forum for multilateral human rights diplomacy. It has been possible for example to reach minimum benchmarks for international development assistance of 0.7% of the Gross National Income of the richer countries through a series of General Assembly resolutions, under which the richer states have made undertakings to reach these targets. Thirdly, it is also possible to introduce a scheme either through the Economic and Social Council or the General Assembly for engaging middle income and developing countries to contribute a percentage of their Gross National Income, perhaps less than the amount recommended for the richer countries towards a global development fund. These three UN Charter-based bodies are designed to operate a management model for securing state compliance with their international cooperation obligation.

Outside the UN, two other applications of the management model can be noted. One is the Paris Declaration on Aid Effectiveness 2005. In March 2005, the OECD donor states convened a conference at its seat in Paris, bringing together over 100 finance ministers of donor states and the developing countries. The objective of the conference was to review the need for increasing both the amounts of aid funds and the effectiveness of donor financing for meeting the Millennium Development Goals. The principles contained in this declaration show consensus on the need to end certain practices by donors such as tying aid to exports from donor states and inefficient use of resources in uncoordinated activities of donor states in the developing countries.¹¹

¹¹Text of the declaration is accessible on the OECD website:
<http://www.oecd.org/dataoecd/11/41/34428351.pdf>

Another example is the African Peer Review Mechanism (APRM) that is being implemented under the New Partnership for Africa's Development (NEPAD). Under NEPAD, African states voluntarily commit themselves to mutually agreed principles and processes achieving accelerated economic and social development and participate in self-monitoring of progress in four thematic areas. These are democracy and good political governance, economic governance and management, corporate governance and socio-economic development.¹² After a state has acceded to the APRM memorandum and submitted answers to the self-assessment questionnaire, the NEPAD Country Review Team visits the country to conduct an extensive assessment of progress with its national Programme of Action and to establish whether the state's practices are in conformity with NEPAD's principles and standards. The Team produces the APRM Report on the country which is considered by the Panel of Eminent Persons and discussed by the Committee of participating Heads of State. Partnerships such as NEPAD derive their power through simultaneously excluding and incorporating, in a manner that shapes the behaviour and interests of states and state actors.¹³ This mechanism can be adapted as a management model in monitoring compliance with human rights norms and in particular social and economic rights.

6.2.2 The constructivist model

According to one version of constructivism, there is a mutually constitutive relationship between international legal structures and actors: states through their interactions help to constitute the structure of the international system, and as states repeatedly engage in the processes, principles and practices of this structure, their identities and interests are reconfigured to reflect the character and status of a party to the system.¹⁴ This means that participation in particular institutional arrangements can alter the very identity and, therefore, the interests of states. In the case of human rights, it would follow that states' participation in a human rights treaty as a party can transform it from a state that violates to one that defends and champions human rights.¹⁵ In other words, participation in trans-

¹² <<http://www.nepad.org/aprm/>> This is an autonomous mechanism, independent of the African Union's processes. See A. de Waal, 'What's New in the 'New' Partnership for Africa's Development?' (2002) 78 *International Affairs* 463; P. Chabal, 'The Quest for Good Government and Development in Africa: Is NEPAD the Answer?' (2002) 78 *International Affairs* 447.

¹³ R. Abrahamsen, 'The Power of Partnerships in Global Governance' (2004) 25 *Third World Quarterly* pp. 1453.

¹⁴ Anthony C. Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 *Virginia Journal of International Law* pp. 107-153 at p. 129.

¹⁵ Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* pp. 2599-2659; Harold Koh, 'How is International Human Rights Law Enforced' in G.M. Lyons and J. Mayall, (eds) *International Human Rights in the 21st Century* (Rowman and Littlefield Publishers, Oxford 2003) 305.

national legal process creates a normative and constitutive structure: by interpreting global norms, and internalizing them into domestic law, these processes lead to reconstruction of national interests, and eventually national identities.¹⁶

However, Arend's formulation¹⁷ does not explain the processes by which such interaction actually impacts the state identity and interests. This question is addressed more accurately by Harold Koh who has argued that states comply with international human rights law as a result of a three-fold process by which states: (a) participate in debating, enacting, declaring, adopting and ratifying the norms (interaction) and, (b) engage in procedures that determine the content of obligations created by the human rights norms and endeavour to fulfil these obligations, such as, implementation and reporting (interpretation). The third segment of this process happens when the international human rights norms are entrenched in the domestic legal system through judicial, legislative, executive and other political techniques and become incorporated in the state's own national value system (internalisation). There is a difference between the state-led model (horizontal) and the compliance constructivist model in the sense that Koh presents what he calls a vertical picture of multitude of actors that includes non-state actors beneath the state, state/governmental norm-sponsors, intergovernmental organizations, trans-national issue networks, interpretive and monitoring bodies, law-declaring forums etc. Koh places special emphasis on the role of non-state actors, in particular trans-national norm-entrepreneurs i.e. individuals and their self-appointed operational outfits- human rights NGOs, who constitute dynamic agents of legal and social change. Non-state actors pursue these objectives through mobilising public opinion within their own country and establishing global networks abroad to champion the adoption and implementation of a universal human rights norm in a bottom-up model. As he puts it:

International human rights law is enforced not just by nation states, not just by government officials... but by people like us with the courage to bring international law home through a trans-national legal process of interaction, interpretation and internalisation.¹⁸

One could take Koh's vertical picture to mean that the internalisation of international human rights law norms in domestic social and legal system largely because these norms are not alien to the aspiration of the world's diverse societies, and some of these norms

¹⁶ Harold Koh, 'Why Do Nations Obey International Law?' above, p. 2659.

¹⁷ n.14 above.

¹⁸ Harold Koh, 'How is International Human Rights Law Enforced' in Lyons G.M. and Mayall, J. (eds) *International Human Rights in the 21st Century* (Rowman and Littlefield Publishers, Oxford 2003) pp. 305, 312.

have been promoted through bottom-up approaches by global networks. However, there is need for communicating with and educating societies and leaders on the progressive approaches to universal human rights.

Risse and Sykkink have examined the processes by which international human rights norms have been interpreted and applied in several developing countries.¹⁹ According to this study, the internalisation of international human rights norms depends on the existence and effectiveness of human rights networks among domestic and trans-national actors to bring the violations to the attention of the Western public opinion and governments. In the resulting strategy, pressure to comply with international human rights norms is exerted upon the state from above i.e. the international community and below i.e. the domestic human rights coalitions. However, there are two contentious issues relating to this proposition. First, it is based on analyses of repression and violations of civil and political rights and not economic and social rights. It is not clear whether it could also apply to economic and social rights. The principles of human rights advocacy can be applied to advance the case for policy reforms towards comprehensive implementation of all human rights, especially in the area of allocating national and internationally provided resources to programmes for social and economic rights. Secondly, it is interesting to note that the Western states have been petitioned to intervene and exert pressure on developing countries to comply with human rights norms. The problem is that in the case of diagonal obligations to fulfil social and economic rights, the Western governments are themselves in default when they renege on the development assistance commitments, refuse to increase aid amounts to approximate the UN recommended minimum of 0.7% of their Gross National Product and sometimes target their aid to strategic geopolitical partner states instead of other very needy but less politically significant countries. It is not clear whether the pressure from 'below' could then be applied by Western/Northern NGOs involved in development and human rights issues to confront Western governments on these issues. If there is to be consistency and symmetry in the logic underlying Risse and Sykkink's approach, then, by the same fervour by which they champion the civil and political rights, these Western/Northern-based global issue networks should insist that the Western governments must entrench into the national law the diagonal obligations to support fulfilment of economic and social rights of people in poor countries.

¹⁹ Thomas Risse and K. Sykkink, 'The Socialization of International Human Rights Norms into Domestic practices' in Thomas Risse, S.C. Ropp and K.Sykkink, *The Power of Human Rights: International Norms and Domestic Change* (CUP, Cambridge 1999) 1.

When we apply this approach to external obligations, we find that in some donor countries, external obligations have been internalised in legislation such as the Order in Council establishing the Canadian International Development Agency, or by executive acceptance through the creation of departments and ministries for external development cooperation.²⁰ Such incorporation by legislative and executive measures can entrench processes for securing predictable compliance with diagonal obligations.

6.2.3 The philosophical model

This approach attributes states' compliance with international law to the content and substance of the international law obligations that states embrace as their fair share of burdens of distributive justice.²¹ This explanation is important in the area of international aid because it is managed by the top-down decision making paradigm since the vast majority of the general public in donor countries are more concerned with domestic national issues than foreign affairs.²² An illustration of this is the Convention on the Organisation for Economic Cooperation and Development of 14th December 1960 that established the OECD. Three points can be noted on this Convention.²³ First, the Convention recognises that 'economic strength and prosperity are essential for the attainment of the purposes of the United Nations, the preservation of individual liberty and the increase of general well-being.'²⁴ Secondly, it testifies to the states parties' conviction that the economically more advanced nations have an obligation to co-operate in assisting to the best of their ability the countries in process of economic development.²⁵ Thirdly, the Convention obligates its member states to contribute to the economic development of both member and non-member countries in the process of economic development and in particular to facilitated coordinated transfers of capital to member and non-member countries.²⁶ But Article 2(e) clarifies that these transfers are a two-way traffic, 'having regard to the importance to the recipient economies of receiving assistance and the need of the developing countries to secure expanding export markets.'²⁷ However, in view of their

²⁰ See section 5.2.1.above.

²¹ Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford 1995)

²² See G.R. Olsen, 'European Public Opinion and Aid to Africa: Is There a Link?' (2001) 39 *Journal of Modern African Studies* 645.

²³ A copy of the Convention can be accessed at the OECD website:

http://www.oecd.org/document/7/0,3343,en_2649_34483_1915847_1_1_1_1,00.html

²⁴ Id, preamble.

²⁵ Id.

²⁶ Id, article 2(e).

²⁷ Preamble, Articles 1(b), and 2(e). This indicates that the Convention offers a give and take deal for its members in a manner that seems to fairly allocate burdens and benefits to its member states. Non-member states would have to deal with the OECD on this understanding.

respective shares of international trade, the developed donor countries are the major trading nations. They stand to benefit from the opportunities offered by emerging markets in the Newly Industrialised Countries (NICs), more than the developing countries' supposed access to the global markets. Therefore, in a treaty of this kind, the donor states parties' compliance with obligations to provide aid is based on their conviction that it is in their own best interest to support capacity building and economic development of less developed countries. In this way, there is a common understanding that transfers of capital and technical resources to the developing countries would yield positive outcomes that can be shared by both the donor and partner countries.

Moreover, it is important to note that even in the donor club, there are varying degrees of internalisation of the values and vision of the OECD convention. Some Nordic countries have distinctive domestic and foreign policies which are cosmopolitan and affirm solidarity with the concerns of the developing world.²⁸ Bergman observes that Sweden, Norway and Denmark exceeded the UN recommended target for ODA of 0.7% of the GNI, allocating 0.94%, 0.94% and 0.81%, respectively for international aid programmes, mainly because 'internationalism and solidarity have acquired the status of national ideology.'²⁹ The Nordic example of best practices can be a model for both the 22 donor members of the OECD/DAC and the new emerging donors in a gradual paradigm shift towards a more cosmopolitan and solidaristic international community.³⁰

6.3 Practical applications

Diagonal obligations in the sphere of economic and social rights can be asserted and enforced through at least three strategies. These are discussed in this section.

UN Human Rights Committees

First, the advocacy and assertion of states' diagonal obligations can be advanced through the work of the UN Committee on the Rights of the Child and the UN Committee on Economic, Social and Cultural Rights. These UN Committees have the legal mandate to monitor state compliance with the Economic Covenant and the Child Convention and

²⁸ Annika Bergman, 'Co-Constitution of Domestic and International Welfare Obligations: The case of Sweden's Democratically Inspired Internationalism' (2007) 42 *Cooperation and Conflict* 73; Mikko Kuisma, 'Social Democratic Internationalism and the Welfare State after the 'Golden Age'' (2007) 42 *Cooperation and Conflict* pp. 9-26.

²⁹ Id, p. 86.

³⁰ See Richard Manning, 'Will 'Emerging Donors' Change the Face of International Co-operation?' (2006) 24 *Development Policy Review* 371.

have, in the course of their interpretational functions managed to wrest the aspect of diagonal obligations from obscurity to rest it firmly into the *pacta* of their respective treaties. The Committees can influence the practice of states parties regarding enforcement of diagonal obligations in three distinct ways. In the first place, they can revise the reporting guidelines to emphasise the premium placed on the implementation of diagonal obligations at some stage in the cycle of state reporting.

Secondly, serving at the apex of the international legal framework for protecting and promoting social and economic rights, the Committees are in a unique position to coordinate and conduct multilateral human rights diplomacy.³¹ For instance, the Committees can raise issues with the state parties at the point of consideration of states' parties' reports through questions arising from the reports and concluding observations thereon. One illustration of how seriously states parties regard the recommendations and concluding observations of the Committee on the Rights of the Child is found in Germany's Second Periodic report to the Committee on the Rights of the Child. In its observations on Germany's Initial report the Committee said:

While acknowledging the strong commitment of Germany to providing structural assistance to other countries, the Committee would like to encourage the State party in its efforts to achieve the 0.7 percent target for international assistance to developing countries, as well as to give consideration to the use of debt conversion...measures in favour of programmes to improve the situation for children.³²

In its second periodic report, the state party responds to this passage of the Children's Committee's concluding observations on Germany's initial report.³³ The report confirms that the state party has adopted these recommendations and indeed reports that Germany was taking a leading role in the Heavily Indebted Poor Countries (HIPC) initiative and had waived substantial amounts owed by poor countries in bilateral loans.³⁴

Thirdly, as experts on the subject, the Committees can generate and advance new ideas on how diagonal obligations can be mainstreamed in the international politics and ethics and through the mechanisms of General Comments, human rights publications and

³¹ For extended discussion and similar view, see S. Vogelgesang, 'Diplomacy of Human Rights' (1979) 23 *International Studies Quarterly* pp. 216, 221.

³² Committee on the Rights of the Child Concluding Observations of the Committee on the Rights of the Child on Germany's initial report dated 27th November 1995 CRC/C/15/Add.43, par. 25.

³³ Periodic report, dated 23rd July 2001, CRC/C/83/Add.7, par 79.

³⁴ *Id.*

international symposia, educate governments on fulfilling these obligations. However, whereas Committees can engage states' parties in human rights diplomacy to consider options for norm-consistent state practice, the Committees do not have any jurisdiction to direct a state party to commence or resume programmes to provide international cooperation and assistance: this matter remains a national prerogative of the states parties. Yet this apparent limitation is not uniquely applicable to diagonal obligations but an inextricable complication in the practice of economic and social rights.³⁵ In fact, as the German example shows, there are indications that states parties are receptive to the Committees' persuasive prompting to improve their performance of diagonal obligations.

Networking with national human rights institutions

Secondly, the states' own human rights commissions established under national laws can be instrumental in influencing the executive on the state's responsibility for implementing both the internal/vertical and diagonal obligations. It is a feature of modern human rights practice that many governments have national human rights commissions monitor and help improve the government's human rights practices 'from within' following the adoption of the Paris Principles relating to the Status of National Institutions 1993 by the General Assembly of the UN.³⁶ According to the Paris Principles, each member of the UN is required to establish an independent national human rights body vested with a broad constitutional or other legislative competence to promote and protect human rights.³⁷

Two crucial aspects of these national human rights institutions can be noted. First, they have a mandate to 'promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.'³⁸ This task includes encouraging ratification of the above-mentioned instruments or accession to those instruments, and to ensuring their implementation in the national law and practice.³⁹ These national human rights watchdogs have a permanent assignment to advise and assist governments to design and execute the state's human rights agenda and have access to the government's policy

³⁵ Even national courts might not necessarily direct governments to drastically reallocate domestic resources because to prove reasonable compliance with economic and social rights norms, it is sufficient to show that the state is implementing a programme to guarantee universal access to basic social and economic goods commensurate with its available resources, and that the claimants are not excluded from the programme: *Government of the Republic of South Africa and others v. Grootboom and others* 2001 (1) SA 46 (CC).

³⁶ Adopted by General Assembly resolution 48/134 of 20 December 1993

<http://www2.ohchr.org/English/law/parisprinciples.htm> For a survey Linda Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* pp. 1-69.

³⁷ Id. Articles 1,2.

³⁸ Id.

³⁹ Id.

making committees. This means that through the coordination of national human rights bodies, the state's human rights obligations under international law including diagonal obligations stand a real chance of harmonization into the national programmes for securing economic and social rights. Secondly, there is directive that the state's human rights bodies should not work in isolation but to 'cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights' in a move towards establishing a world-wide intergovernmental human rights network. If and when that happens, it would increase opportunities for intergovernmental and trans-governmental interaction, create more forums for interpretation of human rights norms and enhance prospects of internalisation and implementation of states' diagonal obligations to fulfil social and economic rights.

Coalitions of global civil society organizations

Thirdly, apart from the states' own public watchdogs, Non-Governmental Organizations involved in promoting social and economic rights which operate in the donor capitals and also maintain linked in global networks with Southern NGOs can engage governments and influence the policies of rich states towards norm-consistent practices.⁴⁰ Concerted campaigns by NGOs can educate states on the international perspectives of what was previously considered a purely domestic matter and such human rights advocacy can change the domestic and international behaviour of states.⁴¹ For instance, coalitions of human rights NGOs can push a reluctant government to ratify a human rights treaty and thereupon, insist that the government should discharge its legal obligations under these treaties.⁴² Just as in the enforcement of economic and social rights at the domestic level, the same political processes by which the states economic and social policies are determined can be applied to advance the international promotion of these rights through domestic pressure on states to fulfil their international law commitments. As Jeffrey Sachs argues, a foreign policy that contributes to reducing global poverty and improving the economic and social welfare of the world's poor helps to make the world a safer place for all of us to live: it is both in the enlightened self-interest and also genuinely altruistic for

⁴⁰ One of the leading civil society initiatives to influence public opinion in the Northern countries is the Jubilee Debt Campaign, a social movement comprising of many Northern NGOs, churches, aid agencies, Southern NGOs, independent activists. Its aim is to influence donor governments to cancel debts owed by developing countries.

⁴¹ Steve Charnovitz, 'Nongovernmental organizations and International Law (2006) 100 *American Journal of International Law* 348, 355.

⁴² Id, p. 355.

the national human rights policies to include appropriate programmes for international assistance and cooperation.⁴³

6.4 Integrating diagonal obligations in the global human rights movement

6.4.1 Features and weaknesses of conventional approaches

Emerging state practice indicates that donor states have created systems for conducting programmes for international social and economic cooperation. Three of the main modes of such international cooperation operations are delegating work to the agencies of intergovernmental organizations such as the UN specialist bodies (such as the World Bank and IMF, UNICEF etc.) drawing up bilateral arrangements with recipient states and engaging affected recipient communities directly through state aid agencies, community-based organizations and Non-Governmental Organizations.⁴⁴ As demonstrated in chapter three of this study, international aid is a vital lifeline for developing countries' fledgling programmes for securing access to universal primary education and the fulfilment of other economic and social rights.

However, the current system suffers serious shortcomings, some of which have been examined in various studies⁴⁵ and international forums.⁴⁶ First, the burden of providing international economic assistance for the fulfilment of social and economic rights in poor states seems to have been left to a handful of industrialised donor states. This can become too onerous to bear and the system can break down due to donor fatigue. It is still not clear whether and to what extent other countries such as the middle income developing countries with considerable economic capabilities have any responsibilities to contribute to international action for universal realisation of economic and social rights. As Audrey Chapman points out, whereas the UN Committee on Economic, social and Cultural Rights has attempted to elaborate the international obligations of developed states, 'the Committee

⁴³ Jeffrey Sachs, *The end of Poverty: How we can make it happen in our lifetime* (Penguin, London 2005) chapter 17, at p.331 showing that poverty and underdevelopment can lead to political instability and state collapse. Failed states then become havens for terror and organised crime which draws the rich states into costly military involvement to try to restore law and order.

⁴⁴ For a useful analysis of these see Celine Tan, 'Evolving aid modalities and their impact on delivery of essential services in low income countries' (2005) *Law, Social justice and Global development Journal (LGD)* ejournal website http://www.go.warwick.ac.uk/elj/lgd/2005_1/tan>. See also B. Martens, 'Why do Many Donor Agencies Exist?' (2005) 23 *Development and Policy Review* pp. 643-663.

⁴⁵ For a critical review see UNDP, *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World Human Development Report 2005* (New York 2005) chapter 3.

⁴⁶ For detailed analysis of the defects of the current international economic assistance programmes and strategies for addressing these agreed by representatives of both donor and partner countries see the *Paris Declaration on Aid Effectiveness 2005* accessible at <http://www.oecd.org/dataoecd/11/41/34428351.pdf>

has not defined the nature of the obligations of other states at various stages of development, to provide international assistance and cooperation.’⁴⁷ Addressing the burdens and costs involved in securing realisation of economic and social rights in the developing world requires concerted action by the international community, in a strategy that engages a wider network of state actors around the world beyond the major donor states. As the proposal presented in the next section shows, using the concept of ‘pooling’, all the world’s nations and states can be integrated in a network for global action for universal fulfilment of economic and social rights.

A second weakness in the current system of international social and economic cooperation and assistance is the uncertainty and unpredictability of the official resource flows from the donor states to the poor countries. Decisions on international aid are determined unilaterally by governments of donor states. In fact, even where donor states have pledged to provide aid, there is considerable uncertainty as to the quantity and quality of international aid or whether such aid will be delivered at all:

As one study illustrates:

International donors do not set targets for themselves. Instead, they offer broad, non-binding commitments on aid quantity most of which are subsequently ignored and even broader and vaguer commitments to improve aid quality. Unlike aid recipients, donors can break aid commitments with impunity.⁴⁸

A useful recent study confirms that under the current system of international social and economic cooperation, the decisions to provide programmes for foreign assistance are taken unilaterally by each donor state.⁴⁹ In this context, each year, donors make two crucial decisions. The first is ‘the ‘gate-keeping’ decision whereby the donor state determines which developing countries will be added or retained or dropped or kept off from the list of recipients of its aid.’⁵⁰ The second is the ‘allocating’ decision whereby the amounts of aid to be received by each partner state are determined.⁵¹ As Bethany Barratt has argued, these two decisions are reached solely at the discretion of the government of

⁴⁷ Audrey Chapman, ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’ in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, CUP 2007) 143-164 at 147.

⁴⁸ UNDP, *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World Human Development Report 2005* (New York 2005), p.9.

⁴⁹ See Bethany Barratt, *Human Rights and Foreign Aid: For Love or Money?* (Routledge, London 2008) pp. 31-32.

⁵⁰ Id, p. 31.

⁵¹ Id, p. 32.

the donor state on considerations of its national strategic interests.⁵² Thus, developing countries considered to be of high geopolitical or economic importance to the donor state will be allocated more aid than those that might be needier but with less strategic significance to the donor state. For example, developing countries that import capital goods from the donor states are allocated more aid than those without such ‘pay-back’ opportunities.⁵³ It is evident that some developing countries are treated less favourably by the donor states either at the gate-keeping state or the allocation stage of the aid-decision making process.

Thus, there is a paradox in the way in which international aid programmes are run and the way they are presented to the international human rights community. As the discussion in this section suggests, the decisions of donor states regarding foreign aid are determined by the national interests of the donor states, and not on the basis that donor states regard themselves as bearing any legal obligations to provide such aid.⁵⁴ Yet, as illustrated in the discussion of states parties reports to the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child, most of the donor states parties have made representations to these committees to the effect that their international aid programmes are steps towards fulfilment of their international obligations under the relevant conventions on economic and social rights.⁵⁵ Whether we accept this as killing two birds with one stone in the sense that international aid is a multi-purpose facility or not, there remains a cloud of uncertainty and unpredictability in the current aid-based system of international social and economic cooperation. Clearly, an alternative model is needed to anchor a human-rights based paradigm for international and global action for economic and social rights. Such a model would provide mechanisms for sharing the burden and costs of securing universal fulfilment of economic and social rights, such that contributions by each society are computed using a fair formula, collected and redistributed in a predictable manner, free from the caprices of unilateralism.

The third defect in the current system of international social and economic cooperation is the lack of coordination and absence of operational mechanisms for ‘pooling’ international

⁵² Id.

⁵³ For studies reaching this conclusion, see Javed Younas, ‘Motivation for bilateral aid allocation: Altruism or trade benefits’ (2008) 24 *European Journal of Political Economy* 661; Jean-Claude Berthélemy and Ariane Tichit, ‘Bilateral donors’ aid allocation decisions: a three-dimensional panel analysis’ (2004) 13 *International Review of Economics and Finance* 253.

⁵⁴ See Clair Apodaca and Michael Stohl, ‘The United States’ Human Rights Policy and Foreign Assistance’ (1999) 43 *International Studies Quarterly* 185.

⁵⁵ See section 4.4.2 above.

resources for this purpose at global level. Neither the UN human rights monitoring Committees nor the UNDP that is promoting the UN's development agenda in developing countries have been guaranteed funds with which to assist members and states parties address their resource constraints and all have to depend on donor funding.⁵⁶ Yet, in the processes of international development cooperation and assistance, the limits of unilateral and bilateral cooperation can be addressed through the agency of inter-governmental organizations (hereinafter IOs). Abbott and Snidal have examined the reasons why states create and maintain IOs as their preferred vehicle for international cooperation and found that states take advantage of the centralization and independence of IOs to achieve goals they could not accomplish on a decentralised basis.⁵⁷ In so doing however, the global IOs do not necessarily supplant or replace the states but serve to supplement the decentralised system of international cooperation and to *enable states* fulfil their legal obligations to the peoples of the United Nations. Thus, the centralization afforded by the United Nations and its agencies can facilitate the elaboration and coordination of international human rights norms as well as pooling of activities, assets and initiatives towards universal fulfilment of these rights especially the social and economic rights.

The problem here is that the pooling capabilities offered by existing global IOs such as the UN have been underutilised or abandoned. Instead, the major powers seem to treat multilateralism as one of their many options alongside unilateralism, bilateralism, regionalism or 'coalitions of the willing' or other non-inclusive approaches in addressing the costs and risks of securing global fulfilment of economic and social rights.⁵⁸ The results of such policies are disastrous. For example, as a consequence of missed opportunities for pooling global resources and capabilities, the current system suffers from chronic under-financing.

6.4.2 Alternatives to current practice: a modest proposal

Before discussing the proposal in this section, it is important to clarify that it is not the intention of this study to reject or dismiss international assistance and aid. This study appreciates the crucial role played by the existing systems of international social and

⁵⁶ Ruben Mendez, 'Financing the United Nations and the International Public Sector: Problems and Reform' (1997) 3 *Global Governance* 283.

⁵⁷ Kenneth Abbott and Duncan Snidal, 'Why States Act Through Formal International Organizations' (1998) 42 *The Journal of Conflict Resolution* pp.3-32.

⁵⁸ South Centre and Muchkund Dubey, *Multilateralism Besieged* (South Centre, Geneva 2004) p. 1. See also South Centre, *What UN for the 21st Century? A New North-South Divide* (South Centre, Geneva 2005)

economic cooperation through aid finance.⁵⁹ The point to make here is that besides the current system of international aid, it is necessary to develop other systems of international cooperation that can be applied to implement states' obligations in international human rights law.

Therefore, in addition to the current arrangements for international social and economic cooperation, another strategy could be applied to reconfigure the practice of international cooperation in the field of supporting global fulfilment of economic and social rights. The gist of this strategy is to design an international revenue system. Under this arrangement, all states would use their national tax legislation to raise a special fund that would be pooled and centrally administered by the UN Charter bodies responsible for social and economic development such as the Economic and Social Council, the Human Rights Council, and the UN Development Programme. For example, a tiny tax of 0.7 per cent on international trade and another 0.7 per cent of all international currency exchanges could be charged by all states under their already existing laws. No additional international treaty or protocol is required for implementing this system since national taxation laws already exist in all UN member states and only domestic adaptation by participating countries is needed.

The focus of this proposal is not on the amount of resources that can be realised but the necessity for establishing a *system* for coordinating international cooperation and assistance to support global fulfilment of economic and social rights. Once the system has been created and is operational, the amounts chargeable and other aspects of implementation can be progressively upgraded. Three advantages are likely to accrue from such an arrangement. First, it would provide a framework for broader collaboration and cooperation that would integrate not only the more developed countries but also several middle income countries and developing countries that are not participating in the current international aid programmes. This aspect can be referred to as the 'utility of inclusivity.' Secondly, since such a system would be a standing arrangement for revenue raising, it enhances the predictability or 'automaticity' of international resource capabilities and flows. This would also reduce uncertainty and transaction costs of negotiating new aid commitments. Thirdly, with centralised multi-lateral management structure, it would facilitate access to external financial support for certain states that are neglected or otherwise disadvantaged by the current system of international aid due to weak or poor

⁵⁹ This point has been discussed in chapter 3 above.

links with donor states: thus, establishing broader accessibility of arrangements for international economic assistance. Fourthly it would enhance mobilisation of maximum international resources for the purpose of guaranteeing universal fulfilment of social and economic rights, hence ‘the utility of sufficiency.’

Illustration

In order to visualise how such a system might work in practice, we can illustrate some of its aspects. One of the ways in which an international revenue system can be approached is to require all members of the United Nations to levy and remit to the UN a special extra Value Added Tax on all services and products currently chargeable under their national tax laws. Using the estimates for 2002, the total national incomes of all the nations of the world was valued at USD 32 trillion.⁶⁰ This figure can be taken to represent the gross value of the goods and services produced and consumed to realise the income. If a tiny rate of Value Added Tax of only zero decimal zero two five per cent (0.025%) is levied on half of this amount, say USD 16 trillion, this would realize an astounding figure of USD 400 billion. This new money, USD 400 billion, is five times the combined gross annual aid budget of donor states (USD 80 billion) and almost thrice the amount needed to achieve the poverty-related Millennium Development Goals, estimated at USD 150 billion per year.⁶¹

Another suggestion is to apply the so called Tobin Tax, whereby all states would apply a special levy on all international currency exchanges on the money markets and international capital market transactions.⁶² It is estimated that every day, currency speculators trade over 1.8 trillion dollars across state borders.⁶³ This is enormous wealth. A small Tobin tax of zero decimal one per cent (0.1%) to zero decimal two five per cent (0.25%) would realise over USD 400 billion per year. In both these options, states would

⁶⁰ Michael Todaro and Stephen Smith, *Economic Development* (Pearson Addison Wesley, London 2006) p. 50.

⁶¹ For estimates of the cost of meeting the UN’s MDGs see UNDP, *Millennium Development Goals: A compact among nations to end human poverty* Human Development Report (OUP, New York 2003) p. 162; Ernesto Zedillo and others, 2001, *Recommendations of the High-Level Panel on Financing for Development* New York: United Nations <http://www.un.org/reports/financing/recommendations.htm>; Jeffrey Sachs, *The End of poverty: How we can make it Happen in our Lifetime* (Penguin, London 2005), 296-301.

⁶² See James Tobin, ‘A proposal for International Monetary Reform’ (1978) 4 *Eastern Economic Journal* 153. See also Mahbub ul Haq, Inge Kaul, and Isabelle Grunberg (eds) *The Tobin Tax: Coping with Financial Volatility* (OUP, London 1996); Alex C. Michalos, *Good Taxes: The case for taxing foreign currency exchange and other financial transactions* (Duncan Press, New York 1997)

⁶³ For other statistics see a campaign network’s website: <http://www.ceedweb.org/iirp/factsheet.htm>.

apply national legislation and machinery to charge, enforce and pool the collected amounts in a fund centrally administered through a UN specialised agency.⁶⁴

From these examples, one point is very clear. By establishing such a system of international social and economic cooperation, this proposal opens a new opportunity for harnessing the four advantages of inclusivity, automaticity, accessibility and sufficiency. It is important to note that proposals similar to this have been made in previous studies and a brief review of some of these would be helpful to put it in perspective. Proposals for an international fund have been recommended by five high-level forums. The Brandt Commission report published in 1980 presented an extensive survey of the global economic problems and challenges for the 1980s and 1990s and recommended among a range of other measures an international taxation system to feed into a multilateral World Development Fund to finance Third World Development.⁶⁵ Another proposal for global taxation was made in 1995 by the UN Commission on Global Governance.⁶⁶ A more concrete decision was taken at the Johannesburg Summit on Sustainable Development that recommended the establishment of a World Solidarity Fund sustained by voluntary contribution of governments and non-state actors.⁶⁷ This recommendation was subsequently endorsed by the General Assembly⁶⁸ and the Economic and Social Council.⁶⁹ The resolution of the Economic and Social Council encourages Member States, international organizations, the private sector, relevant institutions, foundations and individuals to contribute to the World Solidarity Fund and authorises the Administrator of the UNDP to inaugurate the World Solidarity Fund.⁷⁰

Therefore the proposal for an international revenue system recommended in this part has the benefit of these precedents. However, it can be distinguished from these earlier approaches in two respects. First, it is arrived at from a narrow legalistic route based on

⁶⁴ For analysis of the practical aspects of implementing the Tobin tax, see Helmut Reisen, Tobin tax: could it work? *OECD Observer* (2002) No 231/232 May 2002:
http://www.oecdobserver.org/news/fullstory.php/aid/664/Tobin_tax:_could_it_work_.html

⁶⁵ *North-South: a Programme for Survival* Report of the Independent Commission on International Development Issues (Pan Books, London 1980)

⁶⁶ *Our Global Neighbourhood* Report of the Commission on Global Governance (OUP, Oxford, 1995).

⁶⁷ Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August-4 September 2002 A/CONF.199/20:Resolution 2 Plan of Implementation of the World Summit on Sustainable Development par. 7b.

⁶⁸ World Summit Outcome Resolution A/RES/60/1 of 16th September 2005, Article 23 (h).

‘We resolve to operationalize the World Solidarity Fund established by the General Assembly and invite those countries in a position to do so to make voluntary contributions to the Fund.’

⁶⁹ Economic and Social Council 31st Plenary meeting 11th July 2003 resolution 2003/4 on the World Solidarity Fund, par. 1-4.

⁷⁰ *Id.*, par. 5-7.

the binding external obligations of states under international law of human rights. Since member states of the UN and signatories of the Economic Covenant and the Child Convention are obligated to participate in a system for global implementation of economic and social rights, such an international revenue system provides an alternative process for fulfilling these obligations. It would be a contravention of international law for any state party having capacity to do so, to fail or refuse to participate in such a system. Secondly, since it is based on binding legal obligations, the proposal outlined above is capable of enforcement along the lines discussed in this chapter and is distinguishable from the entirely voluntary nature of the General Assembly's approach. Whereas states' obligations to ratify human rights treaties are voluntary, when a human rights norm has become part of customary international law, it becomes binding upon all members of the international community regardless of consent.

The design for internalisation of states' diagonal obligations is illustrated in Figure 6.1 below.

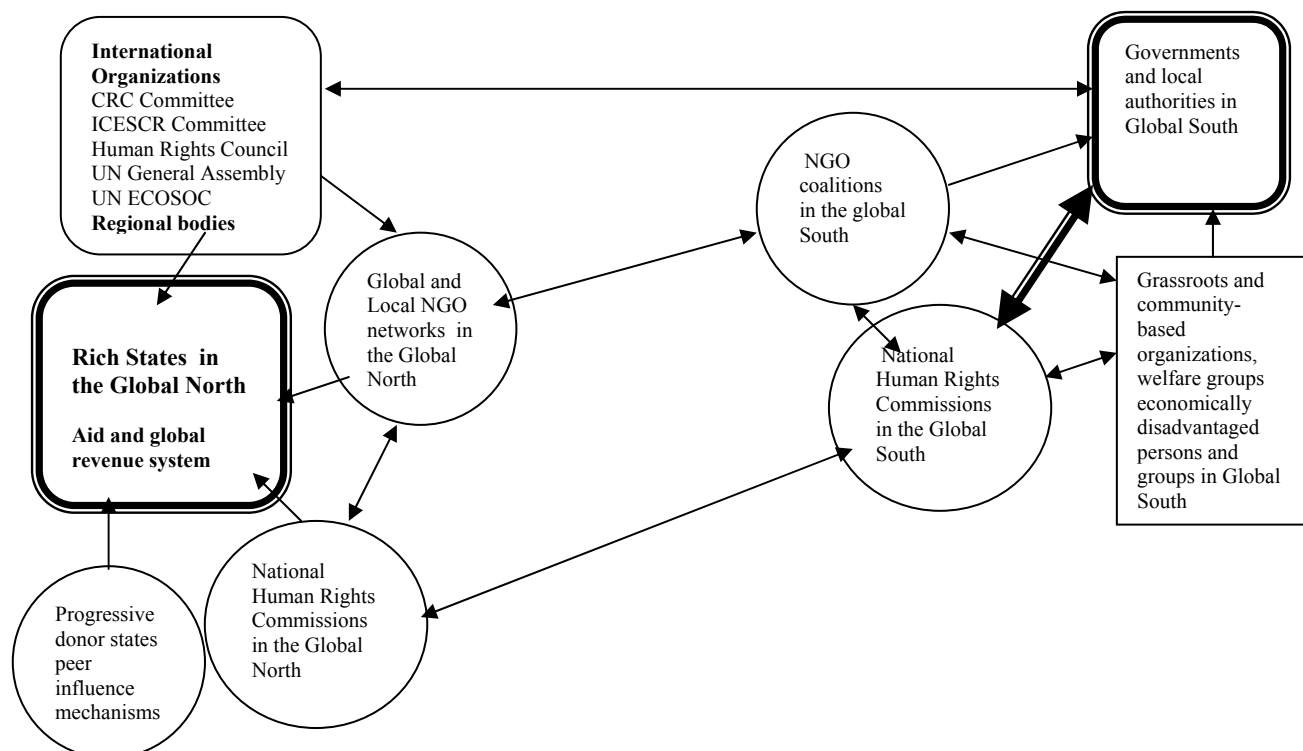


Figure 6.1 Structure of networks and actors in enforcement of diagonal obligations in social and economic rights

As this diagram illustrates, the main agencies for driving the agenda for change and compliance are non-state actors in the rich states because the political leadership is responsible to its national electorate that put it in office to serve the national common good. The critical necessary step would be for domestic and global human rights movement and NGOs to explain and clarify the scope of domestic and diagonal obligations of states under international human rights law and mobilise popular voter support for international taxation. In this regard, the advocacy and networking capabilities of the international civil society organizations comes in as vital option for both the duty-bearer states and rights-holders.⁷¹ International law has now moved to the point where NGOs are now recognised as competent to represent constituencies of human rights concerns and being accorded legal status as actors in international human rights law.⁷² Figure 6.1 shows how this representation works to facilitate discourse in diagonal obligations.⁷³ It indicates that Northern NGOs can influence donor governments' aid policies, and can also help to ventilate Southern social and economic rights concerns in the Northern public policy debates.

In effect a combination of domestic civil society actors and coalition of similar civil society movements around the world would be mobilised to exert pressure on governments to adopt policies that ensure that the state complies with its external human rights obligations under international law. National human rights institutions can also be engaged into networks with similar bodies in both developing and developed countries to encourage and advise governments from within to understand and participate in the agenda for international cooperation in implementing economic and social rights in the developing world. Intergovernmental organizations such as the supervising committees can also persuade the rich states through the processes of examining their periodic reports to fulfil their external obligations under the Child Convention, the Protocol on the Sale of Children and the Economic Covenant.

Besides this vertical model, the horizontal mechanisms can also be applied through persuasion by other progressive states to develop international consensus for a global

⁷¹ For detailed examination of this point see Degnbol-Martinussen and Poul Engberg-Pedersen, *Aid: Understanding International Development cooperation* (Zed Books Ltd, London 2005) Chapter 8; D.C. Korten, *Getting to the 21st Century: Voluntary Action and the Global Agenda* (Kumarian Press, West Hartford 1990).

⁷² The Working methods of the Committee on the Rights of the Child and the Committee on Economic, Social and Economic Rights permit participation of accredited NGOs. See Guidelines for the participation of partners (NGOs and individual experts) in the pre-sessional working group of the Committee on the Rights of the Child, (CRC/C/90, Annex VIII) <http://www2.ohchr.org/english/bodies/crc/workingmethods.htm> for the Committee on Economic, Social and Cultural rights see <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm>

⁷³ This figure is adapted from J. Degnbol-Martinussen and Poul Engberg-Pedersen, n. 88 above, p. 147, with variations.

financing system for guaranteeing the fulfilment of economic and social rights in developing world.

6.5 Conclusion

The burden of this and the preceding two chapters is threefold. First, it has been demonstrated that there is a legal basis for the doctrine of states' diagonal obligations to support the fulfilment of economic and social rights. Secondly it has been shown that the scope of such obligations can be clearly ascertained. Thirdly, this doctrine can be applied with advantage to the practical arena to reshape approaches to international cooperation in the global implementation of social and economic rights. The point here is that the doctrine of states' diagonal human rights obligations to support universal fulfilment of economic and social rights is a useful organising concept that can be deployed for mobilising the international community of states to establish and maintain a global revenue system. Such a system can, over a period of time harness the capacities and resources of the international community, that can be redistributed equitably across all the regions of the world to guarantee universal fulfilment of economic and social rights. Indeed, as this chapter suggests, some of the findings emerging from the present study are not only germane for academic investigations into the theories of states' responsibility but they also signal opportunities and additional apparatus for reviewing international institutional architecture for promoting universal realisation of economic and social rights.

Chapter 7

Beneath and beyond States: exploring global obligations of non-state actors to fulfil children's economic and social rights

7.1 Introduction

This chapter explores the perspective that international law on the protection and promotion of the social and economic rights recognises non-state actors such as individuals, NGOs and the business sector as bearers of legal responsibility for securing the realisation of the rights and welfare of children, separately from states and intergovernmental organizations. Like the ripples caused by a pebble dropped in a pond, the analysis of the obligations created by human rights norms reveals that these obligations come not singly but in interconnected waves that they can ideally be mediated by a multiplicity of sub-state, state, regional and global actors.¹ The daily lives of children can be affected constructively or adversely by decisions, actions and policies adopted by men and women of flesh and blood, within and outside the formal matrix of local and global government. Whereas international law on children's social and economic rights is framed in terms of obligations of states, in practice, its interpretation and implementation is such that states alone would not fully deliver and performance gaps are bound to remain: in the various international legal instruments surveyed in this chapter, states are turning to non-state actors to enlist them, to help reduce these gaps, in a grand partnership designed to establish a world fit for children.²

The first part of the chapter discusses the legal instruments by which by states have sought to engage non-state actors as duty-bearers in the area of promoting and implementing the social and economic rights of children. The second part explores the practical ways in which the obligations of non-state actors can be re-structured in human rights discourse. The third part reviews efforts by states to implement the Millennium Development Goals and considers how non-state actor engagement models can be harnessed to support the fulfilment of these goals which have a positive impact on the social and economic rights of the world's children.

¹ The metaphor of interconnected waves has been suggested by Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503-519, at 509-512. It is a useful tool for illustrating some of the aspects of fulfilling economic and social rights through programmatic action that integrates both government and non-state actors locally and globally.

² UN General Assembly Resolution on A World fit for Children UNGA/A/S-27/2 Annex of 10th May 2002, Article 32.

PART I: THE THEORETICAL CONTEXT: TRACING THE RESPONSIBILITY OF THE GLOBAL GENERAL PUBLIC

7.2.1 Revival of the spirit of the Geneva Declaration of the Rights of the Child 1924

The movement for the international protection and promotion of children's social rights and welfare can be traced to private civil society initiatives relying entirely on the capacities and goodwill of non-state actors. Long before governments could develop child welfare programmes and departments or negotiate the text of the Child Convention, voluntary agencies including individuals, non-governmental organizations, churches and charities had established facilities and arrangements for promoting the welfare of children whose needs could not be secured by their families.³ These included privately run foundling hospitals, foster homes, orphanages and other philanthropic initiatives to save abandoned and vulnerable children.⁴ Indeed, from its inception international legal protection of the rights and welfare of children has taken the position that guaranteeing the social and economic rights of the world's children remains a moral and legal responsibility of 'men and women of all nations' and it is the duty of states, intergovernmental organizations and other political structures to facilitate the performance of this responsibility. Thus, the preamble to the Geneva Declaration of the rights of the Child of 1924 addressed not only states but:

By the present Declaration of the Rights of the Child.... *men and women of all nations*, recognizing that *mankind* owes to the Child the best that it has to give, declare and accept it as *their duty* that, *beyond and above all considerations of race, nationality or creed*.⁵

It appears from this text that the pioneer 'norm entrepreneurs'⁶ of international protection of children's social rights understood that the (moral and financial) burden of securing social and economic rights of the world's children fell squarely upon the global community of men and women of all nations. In the same vein these obligations were

³ Hugh Cunningham, *Children and Childhood in Western Society since 1500* (Longman, London 1995) pp. 134-137, arguing that it was only in the 1880s that governments realised the need for state intervention to secure the welfare of children and began to take over from philanthropy the key role in so doing.

⁴ Id.

⁵ Adopted by the General Assembly of the League of Nations resolution O.J. Spec. Supp. 21 of Sept. 26, 1924.

⁶ For extended analysis of this concept see E.A. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 *International Organization* pp. 479-526; Cass Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* pp. 903-968. For a useful study of efforts to define human rights obligations of non-state actors, see John Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1-47. It is noted that Knox reaches a conclusion that is different from the thesis of this chapter, partly because our two studies examine the same problem but from different perspectives.

owed to all the world's children, beyond all considerations of race, nationality and creed. It is significant to note that in 1919, just after the World War I, the British charity Save the Children Fund whose founder Eglantyne Jebb drafted the Geneva Declaration was the first organization in this country to send financial aid to communities and children in Germany, a gesture that, with fresh memories of the war, was considered taboo.⁷ The belief of the global civil society working in the child welfare sector was that the moral obligation to secure the social and economic interests of the world's children fell on the men and women of all nations and it was the responsibility of League of Nations and its members to translate these moral duties into enforceable legal obligations.⁸ The Geneva Declaration did not create any binding obligations on states but the duty to provide the child with the best it has to give was placed by the League of Nations on men and women of all nations i.e. the global general public.⁹

Two important observations can be made from this Declaration. First, it marked the beginning of recognition in a legal instrument by the international community, of the moral obligations to fulfil the social and economic interests of children.¹⁰ At least, to the member states of the League of Nations the cosmopolitan obligations of individuals towards the world's children had now been proclaimed. What remained was for the states to fulfil their task of creating the necessary institutional structures and arrangements to enable the global community perform these obligations effectively. The Geneva Declaration sought to entrench cosmopolitan moral duties to the world's children in the international public opinion and, mobilize states to translate these moral duties to the child into enforceable legal rules and arrangements. It has an educational function that these statements of the obligations to the world's children have been recognised and given the imprimatur of the then leading international organization.

Secondly, although the Geneva Declaration was not a binding treaty and even its sponsor organization is now defunct, its spirit lives on. As this discussion suggests, the Declaration

⁷ http://www.uoguelph.ca/research/news/articles/2004/May/forgotten_heroine.shtml

⁸ UNICEF, the UN's lead agency on the welfare of children has adopted the same approach: 'It is the duty of each one of us-not just parents, guardians and relatives, educators and governments-to guarantee that the terms of childhood laid out in the Children's Convention which our governments have endorsed on our behalf, are upheld for every child. States and societies, communities and families, individuals and international agencies and children and young people themselves are all duty-bound to fulfil children's rights.' UNICEF, *State of the World's Children 2005: Childhood Under Threat* (UNICEF, New York 2004) p. 88

⁹ See Geraldine Van Bueren, *International Law on the Rights of the Child* (Kluwer Academic Publishers, Dordrecht 1995) p. 7.

¹⁰ See Dominique Marshall, 'The construction of children as an object of international Relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900-1924' (1999) 7 *International Journal of Children's Rights* pp. 103-147.

has not lost its normative value and is relevant to current discourse on international protection of the social rights of children. Its appeal, in recognition that mankind owes the child the best it can give, to the global community to rally towards addressing the social and economic needs of the world's children is a timeless moral imperative. Besides, this Declaration has been endorsed by the international community as evidenced in the fact that it has been recited in the preambles of both the United Nations Declaration on the Rights of the Child of 1959 and the Child Convention. When the General Assembly repeatedly recites a previous resolution in its declarations and other formal instruments, it is not by sheer coincidence: such recitation reinforces the declaration's normative value and can entrench it as a general principle of international law.¹¹

It is a basic feature of the Charter of the United Nations that it is promulgated in cosmopolitan terms by 'we the *peoples* of the United Nations.'¹² Moreover, it is aimed at affirming faith in the human rights, dignity and worth of the human person and the equal rights of *men and women and of nations* large and small.¹³ The Charter is designed to employ international machinery for the promotion of the economic and social advancement of all *peoples*.¹⁴ In placing the ownership of the human rights agenda of the United Nations in the hands of 'we the peoples of the United Nations,' the Charter of the United Nations regards individuals as the primary subjects of universal moral concern. It can be argued that the Charter of the United Nations contemplates that the global general public have a collective responsibility to respect and uphold the Charter's human rights principles and purposes.

The Universal Declaration of Human Rights 1948 suggests that the enjoyment of the rights and freedoms it declares depends on the existence of a favourable social and international order.¹⁵ This order does not just happen: it has to be established and maintained. Deliberate and coordinated effort is required to construct mechanisms and systems of social and economic cooperation at both local and global levels, necessary to facilitate the enjoyment of these universal human rights. So, whose duty is it to get this task done? The Universal Declaration of Human Rights suggests quite appropriately that the obligation to establish and sustain systems for national and international social

¹¹ See S.A. Bleicher, 'The legal significance of re-citation of General Assembly Resolutions' (1969) 63 *American Journal of International Law* pp. 444-478, arguing that the General Assembly of the United Nations does in effect create principles of international law through its practice of adopting and reciting norm-setting resolutions.

¹² Preamble.

¹³ Id.

¹⁴ Id.

¹⁵ General Assembly Resolution 217 A (III) of 10 December 1948, Article 28.

cooperation to facilitate implementation of international human rights norms is a basic international civic responsibility of ‘everyone.’¹⁶

In subsequent resolutions, the General Assembly of the United Nations has attempted to clarify the concept of the legal obligations of individuals and non-state actors in international law of human rights. The UN Declaration on the Rights of the Child of 1959 addresses the obligations to fulfil the right of children in very wide terms to include both governments and non-state actors:¹⁷

The General Assembly.....calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures

Van Bueren has argued that since this declaration was adopted unanimously by the General Assembly, the consensus with which it was adopted gives it special weight and added moral force because its principles and ideas have been approved by all the members of the United Nations.¹⁸ This declaration follows the precedent of the Geneva Declaration by addressing non-state actors as duty-bearers with responsibility to protect and fulfil the rights of children.

The Declaration on the Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998¹⁹ lays down basic principles for guiding conceptions of the respective responsibilities and duties of the various actors in the domestic and global contexts. This declaration was adopted on the fiftieth anniversary of the Universal Declaration of Human Rights by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation, and some states are increasingly considering adopting the Declaration as binding national legislation.²⁰ According to the Special Rapporteur on the situation of Human Rights Defenders this declaration testifies to the existence of ‘a global human rights movement that calls for the active participation of all of us.’²¹ It confirms the view that individuals, non-governmental organizations and other

¹⁶ Id. Article 29(1).

¹⁷ Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959, preamble.

¹⁸ Geraldine Van Bueren, *International Law on the Rights of the Child* (Kluwer Academic Publishers, Dordrecht 1995) 12.

¹⁹ UNGA RES/53/144 of 9th December 1998, Annex of 8th March 1999

<<http://daccessdds.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>>

²⁰ UN Special Rapporteur on the situation of Human Rights Defenders, Declaration on Human Rights Defenders <http://www2.ohchr.org/english/issues/defenders/declaration.htm>

²¹ Id.

relevant institutions are key stakeholders and duty-bearers in the practical application and implementation of international human rights norms.²² The declaration reiterates the provisions of the Universal Declaration of human Rights on the right of everyone to a human rights-friendly social and international order and insists that individuals, groups, institutions and non-governmental organizations have a responsibility to contribute to the establishment of such an order.²³ Quite interestingly, this historic declaration reads like a worksheet for a cosmopolitan model of human rights obligations, with suggestions of the rights and responsibilities of the various sub-state, state and supra-state actors and institutions.

Article 16 of this Declaration underscores the point that the issues raised by human rights norms cannot be taken as a given: considerable energy needs to be invested in efforts to re-educate the global general public, political elites of all nations and other institutions and agencies responsible for promoting and protecting human rights on the nature and scope of the internationally recognized rights and obligations. The Declaration confirms that individuals and non-governmental organizations have an important role to play in these matters including the responsibility to develop and advance new human rights ideas and principles as well as exploring mechanisms for progressive implementation of the international human rights norms.²⁴ It can be argued that Article 18(2) recognizes the legal obligation of individuals, groups, institutions and non-governmental organizations to contribute to the creation, establishment and maintenance of institutions and /or organizational arrangements through which the performance of human rights obligations can be secured.

At a special session on children in May 2002, the General Assembly adopted resolution on a World Fit for Children.²⁵ In this Resolution the General Assembly rallies ‘all members of society’ to join the United Nations in a ‘global movement’ that aims to help build a world fit for children.²⁶ The resolution recognizes the importance of identifying stakeholders who can make a contribution to the implementation of the international legal norms on the rights of the child and creating frameworks for engaging them in a global partnership with states. Article 32 sets out a list of state and non-state actors that includes children, families, local authorities, legislators, non-governmental organizations,

²² Id, Articles 16 and 18.

²³ Id, Article 19(3).

²⁴ Id, Article 7.

²⁵ A World fit for Children UNGA/A/S-27/2 Annex of 10th May 2002.

²⁶ Id, Article 7.

community-based organizations, the commercial private sector, religious, spiritual and cultural leaders, the mass media, inter-governmental organizations and individuals working with children.²⁷

Leaving aside the Universal Declaration of Human Rights for a moment, the approach taken in the Declaration on the Rights of the Child 1959 and the Declaration on a World Fit for Children 2002 indicates that there has been a revival of the spirit of the Geneva Declaration by the General Assembly of the UN. However, this approach raises a serious theoretical and normative question for international law, a regime of law that is designed to govern the conduct of states rather than sub-state/non-state actors such as individuals and NGOs who can be addressed by national laws. The question is whether by these resolutions, the UN general Assembly has recognised any obligations of non-state actors to fulfil the economic and social rights of the world's children quite independently of whatever duties they discharge through their respective states. The same question can also apply to Article 28 of the Universal Declaration of Human Rights 1948. In the Westphalian world in which the UN political system is embedded, international law and obligations are attributed to states and international affairs and obligations are to be carried out through the agency of states. If states are to pass on these obligations to their own citizens, then the medium for doing so is the systems of national law, not international law.

It seems rather unusual and unsettling to an international lawyer to have to contemplate that the General Assembly of the UN is adopting language similar to the Geneva Declaration on the Rights of the Child 1924. This represents a major shift from the classical conceptions of state responsibility in the sense that through these declarations, states are placing the obligations to defend, promote and fulfil human rights on non-state actors including the global general public. Indeed, international law has grown towards expanding the number of actors, the forms of decision making and the forums and modes of implementation.²⁸ As a result of this expansion, the participants in the international legal process include states and governments, intergovernmental organizations and elements of the private sector such as multinational corporations, networks of individuals and Non-governmental Organizations.²⁹ The resolutions of the UN General Assembly

²⁷ This article is further examined in section 6.4, below.

²⁸ See Paul Diehl, Charlotte Ku and Daniel Zamora, 'The Dynamics of International Law: The interaction of normative and Operating Systems' (2003) 57 *International Organization* 43.

²⁹ *Id.*

recognizing the human rights responsibilities of individuals and other non-state actors can be regarded as affirmations of the already existing political landscape in the international community.

It should be noted that two regional human rights treaties; the African Charter on Human and Peoples' Rights 1981 (hereinafter the Banjul Charter)³⁰ and the African Charter on the Rights and Welfare of the Child 1990 (hereinafter the African Children's Charter)³¹ contain provisions that expressly address duties and responsibilities to individuals. These include duties to the family, the society, the state and the international African community. In a commentary on the Banjul Charter, Mutua argues that the duties in Articles 27-29 represent the Charter's rejection of an egotistical individual whose only concern is fulfilling self and raise the minimum level of care that individuals owe neighbours and the community.³² Mutua makes the observation that the state-centred conception of duties in classical international human rights treaties can be traced to the historical setting of the evolution of human rights law in Western societies: the rise of the modern state in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state. Following political struggles between the people and their oppressive rulers, a constitutional settlement was made whereby each individual, together with his compatriots transferred his individual rights to implement the law of nature to a public authority, on the condition that the state would guarantee the protection of individual rights and freedoms and protect them from invasion.³³ This historical setting explains why 'in the West, the language of rights primarily developed along the trajectory of claims against the state; entitlements which imply the right to seek an individual remedy for a wrong whereas the African language of duty offers a different meaning for individual/state-society relations: while people had rights, they also bore duties.'³⁴ The problems which afflict both the Banjul Charter and the African Children's Charter are the absence of precise dimensions and content of the duties contemplated in the Charters, the issue as to whether these are moral obligations of individuals or legal obligations of states and perhaps more seriously, whether the duties of individuals are to be enforced by national or international legal

³⁰ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Article 27, 28 and 29.

³¹ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, Article 31.

³² Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* pp. 344-345, at 369.

³³ Mutua, above, p. 342; John Locke, *Two Treatises of Government* (Peter Laslett Ed.) (CUP, Cambridge 1960).

³⁴ Mutua, above, p. 345.

processes.³⁵ However, as Mutua acknowledges, the language of duties of individuals is not a unique innovation of the African Charter as it is entrenched in Article 29 of the Universal Declaration of Human Rights.³⁶ In the next section an attempt is made to explain that the conception of obligations of individuals and non-state actors under international law is not unprecedented and builds on the already growing recognition that individuals and non-state actors can have personality under international law.

7.2.2 Individuals, states and human rights duties: philosophical and theoretical perspectives

This section examines some theoretical distinctions between the position of individuals and the state in relation to the obligations created by international law on social and economic rights. International law approaches the issue of social justice by declaring regimes of human rights and therein setting supposedly universal minimum standards and expectations that can be asserted for all persons. The legal obligations to fulfil social and economic rights contained in international treaties can be interpreted as being addressed to both the states parties and the peoples of the countries represented by those states. From the experience of the human rights law making in the United Nations, the process of enacting human rights norms into binding legal treaties and other instruments remains a function of states. In this perspective, states are signatories to these legal instruments, and the legal obligations thus enacted are addressed to them. As a result of the dominance of states in the international political economy of the twentieth century, the main thrust of studies in human rights obligations tends to stop at the level of understanding the legal obligations of states.³⁷ For instance, whereas the Child Convention allocates responsibility for guaranteeing the fulfilment of the rights of the child to the states' parties to the Convention³⁸ this offers little comfort to the one billion children in developing countries,

³⁵ Mutua, above p. 375, suggesting that the Commission established under Article 45 of the Banjul Charter could elaborate on this; U.O. Umozurike, U.O. 'The African charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* pp. 902-912, at 907, suggesting that States have a legal obligation under Article 25 of the Banjul Charter to educate people on their rights and duties under the Charter. For a discussion of the African Children's Charter's provisions on the duties of the child see D.M. Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* pp. 157-177, at 169, noting that some of the duties of the child might be misconstrued to justify violation of the rights of the child.

³⁶ Id. These issues are discussed further below.

³⁷ See generally Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Oxford 2006); UN Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties' Obligations' (Art. 2, par.1): 14/12/90, General comment No. 3; Philip Alston and Gerald Quinn, 'The Nature and Scope of States' obligations under the International Covenant on Economic, Social and Cultural Rights,' (1987) 9 *Human Rights Quarterly* 156.

³⁸ Article 4.

whose resource-weak families and governments have so far failed to establish systems and programmes for securing the realisation of economic and social rights.³⁹

If the analysis stopped at the responsibility of states the reality of allocation of duties and actual incidence of these duties would not be appreciated. Political and moral philosophers have suggested that a fuller understanding of just who is responsible for securing social and economic rights of the world's children requires that the analysis must go *beneath* the state, examine the internal structure of the obligations entailed in the human rights norms and identify the actual agents and bearers of the ultimate social rights obligations. One of the approaches to this issue is to clarify the legal position regarding the respective obligations that assumed by states on the one hand and those that fall to the individuals and other sub-state agents within the state. Onora O'Neill draws a distinction between 'first-order' obligations and 'second order' obligations created by human rights law. The states parties to these treaties assume second-order obligations to ensure that others-both individuals and institutions carry out the obligations that correspond to those rights.⁴⁰ In other words, the second-order obligations assumed by states mean the obligations to determine, assign and enforce first order obligations within their respective jurisdictions. Here, it is evident that the first-order obligations that will be determined by states fall to sub-state actors: persons, individuals and bodies corporate that are subject to the internal jurisdiction of the state.

The reason why second-order obligations are assigned to states is the belief that states and only states have the coercive power necessary to carry out the second order obligations to prescribe and allocate first-order obligations and rights to individuals and institutions. O'Neill argues that the assumption that states and states alone should hold all the relevant obligations may reflect the extraordinary dominance of state power in the late twentieth century rather than an ideal solution to the problem of allocating obligations to provide goods and services.⁴¹ Having regard to the many cases of failing and failed states as well as quasi-states and powerful but rogue states and the consequences of lack of and misuse of state power, O'Neill suggests a pluralistic scheme of secondary agents of justice, and bearers of second-order obligations alongside states to include voluntary associations of

³⁹ A leading UN agency on the rights of the child puts it this way: "Childhood remains under threat. The powerful vision of children's rights set forth in the Convention on the Rights of the Child 1989... contrasts starkly with the actual childhood of most of the world's children. The lives of over 1 billion children are blighted by poverty, despite the wealth of nations" UNICEF *The State of the World's Children 2005: Childhood Under Threat* (UNICEF, New York 2004) 9.

⁴⁰ Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* pp. 427-439, at 433.

⁴¹ *Id* at p. 435.

individuals in the form of non-state actors such as Multinational Corporations (MNCs) Nongovernmental Organizations or major religious, cultural or professional and educational bodies.⁴²

Henry Shue argues that whereas negative human rights duties fall to everyone in the sense that they direct the duty-bearers to refrain from conduct that is prejudicial to the interests of the rights-holder, the allocation of positive duties in effect targets those individuals with the economic capabilities to effect resource transfers and redistribution.⁴³ Since social and economic rights entail positive duties especially in the sense that obligations to fulfil these rights involve the expenditure of resources that are by and large in private ownership, the positive duties need to be divided up and assigned among duty-bearers on the basis of the financial capabilities of each liable person.⁴⁴ One of the principles of allocating positive duties is the ability to pay i.e. the financial capabilities.⁴⁵ In other words, the actual duty-bearers are those who are most able to fulfil those rights and their duties are proportional to the extent of their ability to pay.⁴⁶ There is need to establish institutional structures to link the duty-bearers with the rights holders locally within the state, and globally beyond individual states.

Since isolated efforts of duty-bearers would not deliver an effective impact, Shue argues that there is need for organizational structures that can coordinate the activities of individuals performing their legal duties and individuals claiming their rights. He presents a two-fold scheme of obligations of individuals in the international protection and promotion of social and economic rights. The first is the indirect duty to design, create and maintain institutions through which the positive duties of individuals and the holders of positive rights can be mediated or coordinated. The second is the duty to secure fulfilment or enforcement of the positive duties as allocated within the framework of these mediating institutions. Like O'Neill, Shue recognises the need to establish institutions that would perform 'second order' obligations. He argues that these institutions can be trans-national

⁴²Id. Earlier, O'Neill had used the dichotomy of primary and secondary agents of justice. Primary agents of justice have the specific competencies to assign duties and powers to individuals, exert legitimate coercive powers to control and limit the activities of secondary agents of justice. The secondary agents of justice contribute to justice mainly by meeting the demands/ prescriptions of the primary agents: Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* pp. 180-195. Despite its illuminating insights, O'Neill's approach takes a strict legalistic view by insisting that until institutional and legal structures to allocate and enforce these positive duties are established it is not accurate to say that any obligations exist. This is technically correct but conceptually flawed since it implies that the law creates rights yet legal rules are enacted to affirm, recognise and provide a system for promoting and protecting already existing rights.

⁴³ Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* pp. 687-704.

⁴⁴ Id., p. 690 and 703.

⁴⁵ Id., p. 703.

⁴⁶ Id.

and global and while states have traditionally performed this role in the domestic national context, he considers that states are not the only ones: institutions to mediate individuals' duties in human rights and social justice can be established within and across national borders.

In sum, the fulfilment of positive rights entails obligations of individuals to establish and maintain enabling institutions and also to perform their respective positive obligations within the framework facilitated by these institutions. Shue presents a cosmopolitan defence to the legal obligations of individuals in the universal promotion and fulfilment of social and economic human rights. National and international political structures and legal institutions that fail to integrate the peoples of the world into a harmonious scheme for social cooperation necessary for fulfilment of social rights can be modified, transformed or even overhauled and replaced with more appropriate organizational systems. National and state boundaries are not the limits of the positive duties of individuals, but merely some of the existing institutional structures whose effectiveness in mediating the positive duties of individuals can be evaluated. The presence and efficiency of these institutions makes it possible for individuals to appreciate and perform their respective direct obligations.

Defending a utilitarian account of the cosmopolitan positive duties imposed by human rights, Elizabeth Ashford has argued that when human rights norms address states and other institutions as bearers of positive duties, such institutions are regarded as facilitators of the performance of the duties of the individuals in a position to fulfil the corresponding rights claims.⁴⁷ States and other institutions addressed by human rights norms are not the ultimate bearers of the duties entailed in fulfilling those rights: these obligations actually fall to individuals who own the means and resources needed to fulfil these rights.⁴⁸ She writes:

Since utilitarianism takes justice to be grounded in the protection of basic interests, it holds that responsibility for fulfilling the positive duties imposed by the human right to basic necessities ultimately lies with any individual who is in a position to protect the interests at stake at a reasonable personal cost. This includes most citizens of affluent countries. Ideally such individuals ought to implement these duties via institutions, since this would be far more efficient

⁴⁷ Elizabeth Ashford, 'The Duties Imposed by the Human Right to Basic Necessities' in Pogge, T. (ed.) *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) pp. 183-218.

⁴⁸ *Id.*, p. 208.

than if they act individually. They therefore ought to endeavour to create and support such institutions. In the meantime, they are in a position to protect the basic interests of the chronically poor by donating to aid agencies, and according to utilitarianism, they have a duty of justice to do so.⁴⁹

The view that emerges from this discussion is that for all their supposed dominance in international human rights, states are after all no more than a political community through which the primary obligations of the citizens of the various countries of the world can be defined, mediated and implemented. The duties to fulfil social and economic rights of the world's children, though expressed as falling to states are actually borne by individuals in the various countries of the world. The Declaration on a World Fit for Children endorses a broad-based cosmopolitan paradigm of human rights obligations that engages a multiplicity of actors at local and global levels. Jack Donnelly identified various paradigms in the theory and practice of human rights.⁵⁰ The statist model regards human rights as principally a matter of sovereign national jurisdiction and should remain so.⁵¹ In this scheme, the state reserves discretion to interpret and apply human rights norms and standards within its territory. The cosmopolitan model recognises the central position of individuals as the holders of human rights claims and also bearers of human rights duties. In this model, the state is answerable to stakeholders below it such as individuals, non-governmental organizations, and other organs of society as well as actors above the state such as intergovernmental organizations, groupings of states that have a legal duty to apply pressure on the state. The pattern of practice signified by these resolutions of the United Nations indicates that the official doctrine seems to be moving away from the statist model to the embrace the model of cosmopolitan human rights obligations of the global general public.

PART II: EXPLORING PRACTICAL PERSPECTIVES

7.3.1 Obligations to Respect

One way of appreciating the ultimate incidence of the obligations to fulfil economic and social rights is to explore some practical aspects of realising the promises held out in international human rights law. The first point to make is that we can use the threefold

⁴⁹ Id. Ashford presents this argument in more detail in her earlier paper: Elizabeth Ashford, 'The Inadequacy of our traditional conception of the duties imposed by Human Rights' (2006) 19 *Canadian Journal of Law and Jurisprudence* 217.

⁵⁰ Jack Donnelly, *International Human Rights* (Westview Press Oxford 1998) p. 28.

⁵¹ Id.

typology of human rights obligations i.e. obligations to respect, obligations to protect and obligations to respect to consider how these are parcelled out between individuals, other organs of society and the state. The obligations to respect human rights fall on everyone, universally, as they bind all to refrain from interfering with other persons' liberties, property and depriving them of their resources and livelihood. These obligations are essentially negative duties and universally apply to secure the realisation of both civil and political rights as well as economic, social and cultural rights.

In order to understand the negative obligation to respect, we need to ask one simple question: who violates human rights? In this thesis we can ask specifically: who violates children's social and economic rights? It emerges that the list of violators of children's social and economic rights has both state and non-state actors. These range from government officers and international financial institutions whose structural adjustment policies exclude children of poor families from accessing basic education and primary health care⁵² to mothers who employ and underpay and underage child-minders and domestic workers that should be receiving universal primary education,⁵³ self-aggrandising business elites that use child labour where child-workers below the legal minimum employment age are overworked, underpaid and exploited at the expense of receiving basic or secondary education,⁵⁴ operators of child sale and human trafficking networks including traffickers and final abusers.⁵⁵ With so much danger around us at the hands of human beings, it would be a grave mistake to imagine that the obligations that are the corollary of human rights are borne solely by states: the obligations to respect bind not only state actors but every person, organ of society to refrain from violating the rights of others.⁵⁶ Since violations of internationally recognised human rights norms are committed by human persons of flesh and blood, unless liability for such violations is imputed and attached to persons of flesh and blood, it might rest with no one.⁵⁷

⁵² For a UNICEF sponsored documentation of the negative impact of SAP on the social and economic welfare of marginalised and economically vulnerable communities in developing countries, see G.A. Cornia, R. Jolly and F. Stewart (Eds), *Adjustment with a human face: protecting the vulnerable and promoting growth* ((OUP, Oxford 1987)

⁵³ International Labour Organization *Emerging Good Practices on Child Domestic Labour in Kenya, Tanzania, Uganda and Zambia* (ILO, Geneva 2006). The report notes that employers of child domestic workers prefer to hire child workers because they are less likely to demand better conditions, are perceived to be easier to control, and willing to work for lower wages. Such employers use their vulnerability as a way to keeping their cost lower, p. 8.

⁵⁴ Weiner, M. *The Child and the State in India* (Princeton University Press, Princeton 1991)

William E. Myers 'Appreciating Diverse Approaches To Child Labour' 2001

<http://www.childlabor.org/symposium/myers.htm>; ILO and UNICEF, *Addressing Child Labour in the Bangladesh Garment Industry 1995-2001* (UNICEF, New York 2004). UNICEF and ILO signed memoranda with employers to remove the child workers from the factories and recruit them in special schools for rehabilitation.

⁵⁵ International Labour Organization *Rapid Assessment on Trafficking in Children for Exploitative Employment in Bangladesh* (ILO, Dhaka 2003).

⁵⁶ Julia Häusermann, 'The Realisation and Implementation of Economic, Social and cultural Rights' in R. Beppard and D.M. Hill (eds), *Economic, Social and Cultural Rights: Progress and Achievement* (Macmillan, London 1992)

⁵⁷ H. Lauterpacht, *International Law and Human Rights* (Archon Books, Hamden 1968) p. 40.

7.3.2 Obligations to protect

The obligation to protect requires that positive steps be taken to enforce the duty of others to respect and refrain from interfering with the enjoyment of the claimants' rights. This entails the obligations to enact legislation that forbids and restrains other parties from interfering with the rights of the claimant and procedures to secure compliance including punishment for contravention. The standard mechanism used by states to protect human rights is by criminal law that is applied to enforce the obligations to respect, with the states' coercive machinery supposedly being regarded as the means for guaranteeing compliance. However, legal rules provide only the normative framework for regulating society and on their own cannot bring about changes required to reduce and prevent violations of human rights: retrogressive practices and attitudes such as racism, sexism, intolerance and profiteering that cause people to violate the rights of others can only be tackled through comprehensive programmes integrating both law reform and human rights education/awareness.⁵⁸

The processes of re-shaping societies' worldviews and cultivating a culture that is compatible with universally recognised human rights requires collaboration of both non-state actors and governments. It is in recognition of the fact that governments do not have a monopoly of ideas and other resources, and in appreciation of the contribution of international human rights NGOs that the Charter of the United Nations directs the Economic and Social Council to make suitable arrangements for consultation with national and international non-governmental organizations which are concerned with matters within its competence.⁵⁹ For similar reasons, the Child Convention gives its monitoring Committee a broad mandate to invite to its formal sessions for consideration of states' parties reports, not only the specialized agencies and the United Nations Children's Fund but also *other competent bodies* that it may consider appropriate to provide expert advice on the implementation of the Convention.⁶⁰ It is in the light of this shared responsibility to change our world to be a safer place to live through nurturing a culture of universal respect for and protection of human rights that the General Assembly resolutions on the rights and obligations can be appreciated: the individuals and other non-state actors

⁵⁸ Ellen Messer, 'Pluralist Approaches to Human Rights' (1997) 53 *Journal of Anthropological Research* 293, 311, arguing that beyond the legal rhetoric, there is need to include a programme of human rights education to correct the distortions caused by some intolerant cultures that define the 'other' as less than human.

⁵⁹ Article 71.

⁶⁰ Article 45(1).

are both agents of this change and also candidates for the necessary ideological transformation.

There is so much to be said on how NGOs have fostered the internalisation of international human rights norms in domestic legal systems and also the bottom-up approaches to the evolution of various regimes of international law of human rights.⁶¹ Due to space constraints, I will not dwell on these. What is urgent is to explain that even in this function of protecting human rights, the traditional legal apparatus of criminal sanctions are not effective and states' capacities to confront modern threats to the fulfilment of social and economic rights posed by some activities of multi-national corporations (MNCs) cannot be said to be adequate. In the emerging political landscape of the 21st century, the state has become just one of the sources of authority and with limited powers and resources, among several global and national actors.⁶² Here, states' obligations to protect social and economic rights can be approached in *collaboration* with NGOs, without whose 'informal power' influence states solo efforts would be ineffective. Two examples can illustrate this point.

The Pharmaceutical Manufacturers Association (PMA) case

In 1997, the South African government enacted the Medicines and Related Substances Control Amendment Act (No. 90 of 1997) with the aim of implementing a programme to make medicines especially antiretroviral drugs for the treatment of HIV-AIDS related complications more affordable. This was to be achieved vesting executive powers to the minister to authorise the manufacture of generics of off-patent medicines, facilitate the procurement of cheaper generics through parallel importation, and issue compulsory licenses to enable local manufacture of generics of patented drugs in a unilateral variation of the monopoly rights granted by patent laws. The Pharmaceutical Manufacturers Association PMA brought an application to the Constitutional Court in Pretoria challenging the validity of this amendment on the ground that it violated its members' rights to property i.e. intellectual property rights protected by patent law that is recognised

⁶¹ For recent surveys of how NGOs are promoting the evolution of legal norms at international level, see Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law*, 348-372; Zoe Pearson, Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law (2006), *Cornell International Law Journal* 243; Kjell E. Kjellman, 'Norms, Persuasion and Practice: landmine Monitor and Civil Society' (2003) 24 *Third World Quarterly* 955.

⁶² Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (CUP, Cambridge 1996) p. 73.

by chapter two of the constitution.⁶³ Upon filing the suit, the implementation of the law was stayed pending the court's determination. In addition to blocking the new legislation, the PMA and its affiliate companies claimed that South Africa was in breach of its legal obligations under the WTO-TRIPS agreement of 1994 that required member states to accord equal protection of intellectual property rights granted by laws of other member countries and lobbied the international community particularly the government of the U.S. to intervene.

The response of the U.S. government was to offer support for the PMA and suspend economic cooperation with South Africa until the contentious law has been repealed or shelved. On 30th April 1999, TAC representatives met with the then Minister of Health, Dr Nkosazana Zuma who rallied the TAC to fight on the side of the people by actively supporting measures taken by the government to lower the price of essential medicines.⁶⁴ Meanwhile, the TAC linked up with global NGOs including OXFAM, ACT-UP and Medicins Sans Frontieres and other lobby groups around the world. When the case came up for hearing on 5th March 2001, TAC applied to be joined as *amicus curiae*. The PMA attempt to block TAC's entry in the case was overruled by the court that said it was necessary to consider information presented by representatives of the HIV/AIDS patients which the two parties had not addressed. For instance, whereas the thrust of PMA's main claim was that they had incurred huge costs in research to develop the AIDS drugs, TAC tabled evidence that all the AIDS anti-retroviral drugs had been developed with public funding in the U.S. and UK including grants by cancer research charities. In a tactic to buy more time, PMA applied for a four-month adjournment to reply to TAC's but the court permitted only six weeks due to the public interest to have the matter promptly determined.

On 5th March 2001, when hearing commenced, protests erupted simultaneously in five continents to rally up support for the South African government and TAC to fight against the pharmaceutical multinationals' medical apartheid.⁶⁵ TAC and its coalition networks staged protest rallies outside the Pretoria Courts and the U.S. embassy in South Africa.⁶⁶ The London-based Action for South Africa (ACTSA) led street protests from South Africa

⁶³ *Pharmaceutical Manufacturers' Association and others v. President of the Republic of South Africa and others* (1998), Case No. 4183/98 (filed 18 Feb. 1998).

⁶⁴ http://www.healthgap.org/press_releases/01/030501_TAC_PS_SA_lawsuit.html

⁶⁵ Krista Johnson, "Framing AIDS Mobilization and Human Rights in Post-apartheid South Africa" (2006) 4 *Perspectives on Politics* 663. The campaign networks had set 5th March 2001 as the global day of protest to condemn PMA's suit. For more campaign reports see <http://www.actupny.org/reports/march5.html>

⁶⁶ http://www.healthgap.org/press_releases/00/042700_AU_PR_PF_NYCMTG.html

House on Trafalgar Square to the Association of the British Pharmaceutical Industry in Whitehall.⁶⁷ Oxfam, the National AIDS Trust and Unison staged protests at the Glaxo SmithKline plant in London and at several places in Birmingham and Manchester as more demonstrations were held in New York, Copenhagen, and Manila.⁶⁸

While the court case adjourned for six weeks, more campaign action went on this time through a world-wide online petition led by Medicins Sans Frontieres and Oxfam asking the PMA to drop its case. The petition highlighted the enormous profits made by the PMA's global operations and also the estimated 400,000 AIDS deaths in South Africa in the three years the PMA suit had blocked health rights legislation. The U.S. campaigns targeted shareholders meetings where mail, posters and other media were used to remind investors that by 'placing profits before lives' the drug multinationals had become 'AIDS profiteers, deadlier than the virus': Pfizer and Warner-Lambert shareholders were informed that Pfizer was responsible for millions of preventable deaths in the world.

When the matter resumed for further hearing on 18th April 2001, it could not proceed: the PMA withdrew the case unconditionally.⁶⁹ For the people and government of South Africa, the first round of the fight had been won but there was more fighting to do on the international front, about the rich countries' threats of economic sanctions. While the matter was being contested in court, the South African government began to lobby other developing countries in the WTO to support a review of the WTO-TRIPS agreement. This move was also supported by a coalition of international and national NGOs that lobbied the World Health Organization, the UNDP, the World Bank and the EU to consider life and health instead of the huge profits earned by the pharmaceutical MNCs from the AIDS drugs trade.⁷⁰ After considering the campaign messages, the EU and US withdrew their support for PMA's court case. More global campaigns by health NGOs directed at the WTO resulted in the inclusion of the TRIPS Agreement on the agenda at the Ministerial Conference in November 2001 which culminated in the Doha Declaration 2001.⁷¹ This

⁶⁷ 'Protest in Britain as drug companies sue South African government' The Independent, London 5th march 2001 <http://www.independent.co.uk/news/business/news/>

⁶⁸ <http://www.twinside.org.sg/title/pretoria.htm>

⁶⁹ BBC News Drugs firms drop Aids case' Thursday, 19 April, 2001 <http://news.bbc.co.uk/1/hi/world/africa/1284633.stm>

⁷⁰ Baogang He and Hannah Murphy 'Global Social Justice at the WTO? The Role of NGOs in constructing Global Social Contracts' (2007) 83 *International Affairs* pp. 707-727, at 721.

⁷¹ WTO, Doha Ministerial Declaration on the TRIPS Agreement and Public Health, para. 4, WTO doc. No. WT/MIN(01)/DEC/2(2001). For discussion of this development see Ellen F. M. 't Hoen, 'TRIPS, pharmaceutical patents and access to essential medicines: a long way from Seattle to Doha' (2002) 3 *Chicago Journal of International Law* pp. 27-46, N. Ford, 'Patents, access to medicines and the role of non-governmental organizations' (2004) 1 *Journal of Generic Medicines* pp. 137-45; K.C. Shadlen, 'Patents and pills, power and procedure: the North-South politics of public health in the WTO' (2004) 39 *Studies in Comparative International Development* pp.76-108.

declaration significantly moderated the obligations of states parties to the WTO-TRIPPS Agreement and affirmed the right of developing countries to issue compulsory licences for the manufacture of generics of patented essential medicines. He and Murphy have argued that since the WTO responded to the demands of NGOs in this matter and the NGO campaigns were bringing such damaging publicity to the South African pharmaceutical companies that they dropped their case against the government, this case indicates that NGOs can challenge both intergovernmental organizations such as the WTO to revise their economic agreements to meet social demands and also the international business community to implement universal human rights principles.⁷²

What we can learn from this case is that the protection of social and economic rights from threats posed by the business sector is becoming so complicated that it cannot be left to states alone. NGOs engaged in human rights advocacy working with states can forge a formidable alliance to tame the apparently lawful but harmful profiteering practices of MNCs. Here we see that attempts by the state to fulfil the right to access basic medicines and health care was resisted and for a while blocked by a powerful business group that has superpower support.

The Starbucks dispute

Another case is the recent attempts by the Ethiopian government to register trademarks for its premium coffee beans to enable the beans fetch a higher and fairer price for Ethiopia's 15 million growers. Starbucks, the world's largest coffee chain opposed the move arguing that the names had been of general use in the coffee trade and no valid trade mark would be assigned to anyone. However, Oxfam and its more than 100,000 supporters around the world petitioned Starbucks asking the coffee chain to withdraw its objection to the trademark application. Such concerted advocacy forced Starbucks to drop its objection and in June 2007 the company signed an agreement to participate in a government supported marketing arrangement that recognises the right of the producers of the trademark beans to earn an enhanced price.⁷³

The Declaration on the Responsibility of Individuals, underscores the duties of individuals, NGOs and other human rights groups as follows:

⁷² Above, p. 722.

⁷³ http://www.oxfam.org.uk/oxfam_in_action/issues/private_sector.html

Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas...⁷⁴

From the perspective of obligations to protect human rights, the foregoing statement is intended to speak directly to both non-state actors and state actors for two important reasons. First, it reminds individuals and groups as rights-holders that they have the responsibility to assert and claim their rights at all times i.e. to get up, stand up for your rights. Protecting rights must begin with rights-holders themselves who have a duty to stand up for their rights, give no space to violators and become active participants in the global human rights movement rather than passive recipients of governments' freebies. To be able to effectively participate in a human rights movement especially where the interests of the claimants converge as in the case of social and economic rights, there is need for coordination, and this is how NGOs and their networks come in to provide a platform for collective action. This is the reason why individuals have both the right and duty to establish and/or mobilise collaborative coalitions for defending and protecting human rights. Secondly, the declaration on Human Rights Defenders suggests that there is a legal duty on the part of states both to recognise the responsibilities of human rights NGOs and allocate financial and other resources to support their activities. Defending and protecting social and economic rights is therefore both a private concern of the rights holders and also a public duty being shared with states for the common good.⁷⁵ To maintain visibility in human rights campaigns, conducting programmes for human rights education and actively defending and protecting human rights as we could see in the South African example are both public and private operations whose budgets should be a shared responsibility of both states and the NGOs. This reinforces the key role that advocacy plays in protecting and defending human rights.

In other words, the duty to protect human rights is becoming recognised as a shared one and states are obligated to recognise and facilitate the fulfilment of NGOs mandate to defend and protect human rights. It can be observed that international law of human rights intends to mobilise a global human rights movement. If the movement is to advance, then it is necessary to seek out all the troops and integrate and mobilise all available actors.

⁷⁴ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RES/53/144 of 8 March 1999, Article 16.

⁷⁵ N.H. Hart and L. Thetaz-Bergman, 'The Role of Nongovernmental organizations in Implementing the Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* pp. 373-392, at 381; Eckhardt Fucks, 'Children's Rights and Global Civil Society', (2007) 43 *Comparative Education* 393,394.

7.3.3 Obligations to fulfil

The focus of this part is on the issue as to whether under international law on the protection and promotion of children's social and economic rights obligates non-state actors to fulfil children's social and economic rights. This refers to the obligations to assist children and families whose conditions of life have fallen below the basic minimum subsistence due to poverty, economic deprivation, natural disasters, old age etc, to enable them [re]-establish that standard. This is a more extensive duty in the sense that it requires programmes and facilities that guarantee basic entitlements, beyond merely respecting and protecting already established standards. As an introduction to this discussion, it is noted that the traditional doctrine had been that since international law is intended to regulate the relations of states and inter-state affairs, only states are the proper subjects of its obligations, powers and privileges. Although this doctrine persisted before the establishment of the United Nations in 1945 and its human rights principles, it never enjoyed universal acceptance. Even before the rise of universal human rights under the United Nations, scholars had demonstrated that that the denial of legal personality to individuals in international law was based on premises that are inconsistent and untenable: both private individuals and states had personality in international law although the 'the different legal qualifications of the state and the private individual give rise to characteristic differences in their legal status in international law.'⁷⁶

The law on the subjects of international law has undergone profound transformation from exclusion of personality of individuals under international law to a phase where the individual is now gaining increasing visibility as a subject of international legal and moral concern. The impetus for this tide has been provided by the rise of international law of human rights especially the human rights treaties that are concerned with setting universal standards for the protection and promotion of the rights and freedoms of individuals.⁷⁷ The Statute of the International Criminal Court now codifies customary international humanitarian law relating to war crimes and also consolidates international criminal law; and it directly confronts individuals with consequences of their acts that are enforceable at

⁷⁶ See H. Aufricht, 'Personality in International Law' (1943) 37 *American Political Science Review* pp. 217-243, at 243. See also Marek St. Korowicz 'The Problem of International Personality of Individuals' (1956) 50 *American Journal of International Law* pp. 533-562.

⁷⁷ Besides the traditional domains of human rights law, international investment treaties between capital-importing and capital-exporting states now recognize and expressly secure the right of private investors to bring an international investment claim in an international arbitration tribunal against the host state. This is a significant development to 'cosmopolitanize' international private capital and its owners. See generally G. Van Harten, G., 'Private authority and Transnational Governance: the contours of the international system of investor protection' (2005) 12 *Review of International Political Economy* pp. 600-625.

international legal process especially through prosecution in the International Criminal Court, whether they acted as private individuals or as state agents.⁷⁸

However, it should be noted that apart from the spheres of international humanitarian law and international criminal law, and the special responsibilities of parents under the Child Convention,⁷⁹ international law has not reached the stage where it assigns obligations to fulfil human rights to non-state actors. Yet, the Declaration on a World Fit for Children suggests a role for the business sector that includes the obligation to mobilise resources:

The private sector and corporate entities have a special contribution to make, from adopting and adhering to practices that demonstrate social responsibility to providing resources, including innovative sources of financing and community improvement schemes that benefit children, such as micro-credit.⁸⁰

A closer reading of this passage indicates that the General Assembly Declaration on a World Fit for Children (hereinafter the WFC) suggests that the private business sector might have a moral or perhaps legal responsibility ‘to provide resources’ to fulfil the rights of the world’s children, over and above what the business community is obligated to do under the applicable national laws such as the duty to pay taxes. This is a very important point. The next section re-examines the nature and scope of obligation.

7.4 Normative content of Article 32 of the WFC: moral or legal obligations?

7.4.1 A budding internationally accepted custom binding non-state actors

It is noted here that as a declaration of the UN General Assembly, the WFC is not a legal treaty that binds states but it has the status of soft law instrument with considerable normative content. Indeed, there is a technical point that can clarify this proposition: states can adopt a declaration that seems non-binding on states, but loaded with considerable binding force more than mere moral appeal to the non-state actors at whom it is targeted. The WFC echoes a longstanding practice recognised in the Geneva Declaration that *mankind* owes the child the best it can give, and business firms can be enlisted to support this humanitarian cause. This signifies a moral obligation on the part of the citizens of all nations to contribute to the cause of securing the basic social and economic rights and

⁷⁸ A. Casese, P. Gaeta and R.J.W. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002).

⁷⁹ Child Convention, Articles 5, 18, 27.

⁸⁰ World Fit for Children Article 32.

welfare of the world's children or in other words, a duty of humanity.⁸¹ But, in putting it down another time in a formal declaration on a WFC, surely, there is a clear intention here to cross the line, towards recognising a practice that could be in the advanced stage of becoming a custom. The moral duty in this context stems from what Pufendorf called 'common duties of humanity'⁸² or Tom Campbell's 'principle of humanity.'⁸³ According to Campbell, the positive duty to relieve great suffering at a small cost is more stringent than the negative obligation to refrain from causing less suffering at greater cost.⁸⁴ Campbell argues that:

Subsistence rights are grounded primarily in the universal humanitarian obligation to participate in the relief of extreme suffering. The universality of this obligation is relative to the capacity of the person or collective to contribute to the reduction of extreme poverty, in that the duty of relieving world poverty falls on everybody in proportion to their capacity to do so....To effectively institutionalise this moral relationship requires that mechanisms be put in place to operationalise the causal connections between obligations and rights, but the moral basis for creating such mechanisms is an uncomplicated duty of humanity.⁸⁵

What triggers the moral obligation is the extreme poverty that persons are afflicted by and the fact that the addressees are in a position to relieve that affliction at a small cost. Campbell argues that the principle of humanity can be applied as an alternative to the principles of justice, in the sense that it can be an underlying justification for creating a means of dealing systematically with poverty and establishing mandatory duties to aid and a range of possible remedies. In particular he suggests that a Global Humanitarian Levy involving nationally administered 2% tax on all personal incomes over US\$ 50,000 per year, a levy of 2% on personal wealth above US\$500,000 and equivalent corporate levies relating to both tax and levies.⁸⁶ These sums would then be re-distributed to abolish global poverty. In a world that has enormous resources to guarantee everyone an adequate standard of life as promised by Article 25 (1) of the Universal Declaration of Human Rights 1948, it constitutes a violation to right to freedom from poverty when those with the capacity to eliminate poverty fail or refuse to respond.⁸⁷

⁸¹ Tom Campbell 'Poverty as a Violation of Human Rights: Inhumanity of Injustice?' in Pogge, T. (ed.) *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) pp. 55-74.

⁸² Samuel Pufendorf *On the Duty of Man and Citizen According to Natural Law* (CUP, Cambridge 1991, James Tully, ed.), chapter 8.

⁸³ Tom Campbell 'Poverty as a Violation of Human Rights: Inhumanity of Injustice?' in Pogge, T. (ed.) *Freedom from Poverty as a Human Right: Who owes What to the very Poor?* (Oxford University Press/UNESCO, Oxford 2007) pp. 55-74, arguing quite convincingly that violations to the rights of the poor to basic subsistence occur as a result of the culpable conduct of other people who cause the poverty in issue and/or as a consequence of the refusal to act by those who are in a position to take steps to effectively end the poverty.

⁸⁴ *Id.*, p. 66.

⁸⁵ *Id.*, p. 67.

⁸⁶ *Id.*

⁸⁷ *Id.*, p. 68.

Hodgson traces the historical origins of the principle of individual duty from the Greco-Roman era up to modern times and observes that most of the world's major religions also carry teachings that emphasise individual duties including charity and aid to those in need, suggesting that such humanitarian obligations are embedded in most cultures of the world.⁸⁸ Alston and Steiner suggest that some of the moral and ethical aspects of human rights obligations can be compared with the teachings of the main religions and belief-systems of the world all of which endorse the moral obligations to provide assistance to relieve the suffering of those in need.⁸⁹

7.4.2 A soft law instrument capturing what could not be enacted in a treaty

The WFC reinforces the proposition that not all certain aspects of human rights such as moral obligations to aid those in extreme poverty find a place in the legal world of treaty texts. In other words, there are many ethical and moral considerations of the practical side of human rights that are not captured in the law. More specifically, the technique of international treaty-making is such that international human rights treaty texts represent, not all that properly required to be included, but only a delicate compromise reached by negotiating committees constituted by states parties. Seeing these limits to the entrenchment of moral obligations and claims in hard law texts, there is a 'leakage' in the structure of hard law norms that seem to have excluded non-state actors from the scheme of duty-bearers with regard to obligations to fulfil.

While conceding that such a soft law norm that directs the corporate sector to provide resources for building a world fit for children is conceptually weak, the moral content its humanitarian appeal can be expanded further through the advocacy of human rights networks. As I will demonstrate below, despite its soft law character the declaration on a WFC represents a significant international consensus on the subject and furnishes sufficient normative basis to mobilise the global general public into a movement for global social and economic cooperation. Ann Clark has argued that the 'small steps' represented by soft law instruments like General Assembly resolutions have been invoked by human rights NGOs such as Amnesty International as important rallying points in human rights campaigns.⁹⁰ Once the General Assembly has pronounced itself on how actors must

⁸⁸ Douglas Hodgson *Individual Duty Within a Human Rights Discourse* (Ashgate, Aldershot 2003).

⁸⁹ Henry Steiner and Philip Alston, *International Human Rights in Context* (OUP, Oxford 2000), pp. 263-264.

⁹⁰ Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001) p. 69

henceforth approach their obligations, trans-national human rights and civil society networks can take up the mantle and through advocacy, civic education and other mechanisms, help to institutionalise these initially weak norms.⁹¹ As Thomas Risse and Stephen Ropp explain, when engaging actors in human rights discourse, human rights activists must find the words to use to build up arguments that can socialise these actors to understand the need to change: internationally endorsed soft law resolutions such as these provide some good normative words ‘from above’ to use.⁹² What seems undeniable is that a seed for developing legal norms on the positive legal duties of the business sector has already been sown and we have crossed the line. Whether it aborts or flowers will be determined by the manner in which the human rights community will nurture it to establish systems for integrating non-state actors in global social and economic cooperation to build a world fit for children.

7.4.3 A pragmatic strategy of states to engage non-state actors

The declaration on a WFC can also be appreciated from the context two important connected facts. First, whereas states have both internal and external legal obligations to fulfil social and economic rights of the world’s children, they realise that there are limits to what they can do to effectively make these rights a reality for children in the poor parts of the world. There are political controls to states’ national taxation powers in terms of how much of private wealth they can exact by taxes as well as limits to how much of government resources they can transfer towards international assistance programmes. In this context there are constraints on what states can achieve to fulfil their international obligations as dictated by what is politically feasible from the perspective of the domestic community. Susan Strange cautioned us that the words of good intention and resolve contained by states’ resolutions in the General Assembly are to be interpreted subject to their own domestic priorities:

Since the Declaration of the United Nations, Western political leaders have been making ritual gestures toward ‘the world community.’ They have been drafting symbolic declarations of solidarity with, and deep concern for, poorer people that have been almost totally at odds with the

⁹¹ For studies that demonstrate the entrenchment of weak norms through human rights activism, see Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights and the Demise of Communism* (Princeton: Princeton University Press, 2001); Thomas Risse, Stephen Ropp, and Kathryn Sikkink, *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999). Susan Burgerman, *Moral Victories: How Activists Provoke Multilateral Action* (Ithaca, N.Y.: Cornell University Press, 2001)

⁹² Thomas Risse, Stephen Ropp, ‘International human rights norms and domestic change’ in Thomas Risse, Stephen Ropp, and Kathryn Sikkink, *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999), 235 at 276.

policies and behaviour dictated by their electoral responsibility to particularistic, uncaring voters. From the Charter of the United Nations to the Charter of the Economic Rights and Duties of States, they have been for ever saying things they did not mean, repeating creeds they did not really believe (or only believed in some deep corner of their minds).⁹³

The persistent reluctance by the rich donor states to raise the amounts of Official Development Assistance to the agreed level of 0.7% of their Gross National Income despite repeated commitments in the General Assembly resolutions to do so confirms Strange's observation. Due to the reality of these limits, it seems that states themselves acknowledge that on their own, they would not be able to fulfil the vision of building a world fit for children and that this process requires the additional input of the non-state actors to help reduce the resources gap. One way of doing this is to open a window of opportunity for non-state actors in the declaration on a WFC.

Secondly, the declaration on a WFC has been made in the context of an international community that includes not only states but also giant MNCs some of which control and wield financial resources and annual turnover in the region of billions of dollars. In 2002, the UN Conference on Trade and Development reported that of the world's top 100 economic entities, 29 were companies while 71 were states, measured in terms of companies' annual sales and Gross Domestic Product of countries in a comparison that demonstrates the rising importance of corporate businesses in the world economy.⁹⁴ What we see in the WFC declaration is that states have reached the stage where they recognise the capabilities of the global business sector and seek to engage these non-state actors in attempt to harness their potential to supplement the efforts of states to mobilise resources for implementing the rights of children.

An attempt to establish a global movement for building a world fit for children that omits to rally the MNC sector would be too restrictive and ineffective as it would leave out actors who have the means to make a real difference in the lives of the world's children. Besides, as the Global Alliance for Vaccines and Immunizations initiative indicates, the corporate business sector has demonstrated both capacity and willingness to partner with states and NGOs to facilitate resource mobilisation for children's welfare programmes. The WFC aims at according formal recognition of ongoing de-facto collaboration with the corporate sector. In my view, the obligations of the business sector under Article 32 of the

⁹³ Susan Strange, 'Reactions to Brandt: Popular Acclaim and Academic Attack' (1981) 25 *International Studies Quarterly* 328, 340.

⁹⁴ http://www.unwire.org/unwire/20020813/28302_story.asp

declaration on WFC can be analysed into two paradigms: one that regards the MNC as being liable to make voluntary, charitable contributions – the donor model and the other that regards the MNC as facilitators to enable the consumer community contribute to a global solidarity fund- the coordinator model.

The donor model

The private businesses are liable to pay all statutory taxes charged under the national laws in which they have set up businesses and it is through the mechanism of national tax laws that the duty of the business sector, like any other citizen to contribute resources for child rights programmes can be enforced. In other words, the only way we can legally ask for money from the private sector is by using tax legislation, which is applied by national laws rather than international law. An examination of the business operations of modern companies shows that they work under difficult conditions, fraught with risks, from fair as well as unfair competition that threaten to push them out of business, to industrial unrest fuelled by hard-line trade union demands, inflation, rising costs of production due to fluctuations in the international oil prices etc. It is a very difficult activity, pursuing profit. Despite all these pressures business managers must show that not only are they surviving, but that they have made a return on the shareholders' investment in form of a profit to take home when the financial year ends.

From their own private resources especially profits, corporations can make donations to various charitable causes some of which may include setting up foundations, funds and offerings that may be used to promote the rights and welfare of children. There are many corporate-sector driven initiatives already in existence, the most recent major one of which is the Global Alliance for Vaccines and Immunizations (GAVI) launched in January 2000 at the conclusion of the World Economic Forum in Switzerland.⁹⁵ The purpose of the GAVI is to coordinate a multi-stakeholder initiative for securing funding for essential vaccines and immunizations for children in developing countries. The launch of the GAVI was spurred by a donation of US\$750 million by Bill and Melinda Gates Foundation to start the GAVI Fund.⁹⁶

⁹⁵ <http://www.who.int/inf-pr-2000/en/pr2000-GAVI.html>

⁹⁶ <http://www.gavialliance.org/>

GAVI's partners include UN agencies and institutions (UNICEF, WHO, the World Bank), civil society organisations (International Pediatric Association), public health institutes (The Johns Hopkins Bloomberg School of Public Health), donor and implementing country governments, the Bill & Melinda Gates Foundation, other private philanthropists, vaccine industry representatives and the financial community.

If we use the donor model, the General Assembly would not have said anything new beyond only confirming what already exists, that is to rally and encourage corporate donors to give and enlist philanthropist business persons to the cause of children's social and economic rights. It is important to note that in the resolution that formally authorises the UNDP to launch and administer the World Solidarity Fund, the Economic and Social Council invites voluntary contributions from the entire international community including non-state actors.⁹⁷ In my view, the WFC can be construed as endorsing the donor model, but, it does not exclude other innovative mechanisms for engaging non-state actors in mobilising resources for guaranteeing social and economic rights delivery systems. This leads us to consider the coordinator model.

The coordinator model

Under this model, directive in the Resolution on a World Fit for Children to the private sector to provide resources does not necessarily ask companies and business to *give* any of their private funds. The idea of the business sector as coordinators, as I understand it is that corporations have been assigned a new role to mobilise the funds, not from their private resources but in another completely different and innovative trajectory. The coordinator model does not ask companies to pay out any of their private money but only *repositions* them to act as *mediators* of human rights duties of the global general public and *tributaries*, not the sources, of channelling the solidarity contributions the global consumer community into a global solidarity fund. This model only demands that the corporate sector takes on its proper role to coordinate the efforts of the global general public to contribute to the global fulfilment of social and economic rights.

Putting this model into practice involves a *structured collaboration* between NGOs, the corporate sector and an intergovernmental agency such as the UNDP that would be the link between non-state actors and states. With the assistance of NGOs, the MNCs would, at the beginning of each calendar year, pay a global solidarity contribution, assessed as a fixed percentage of their previous year's gross sales revenue. The corporate businesses must remit this amount *in advance* to the UNDP-managed Global Solidarity Fund but, the sums are to be fully recovered through adjustments in prices of the new year's sales. This sum is passed on to be ultimately paid by the global consumer community. There is a distinction between being asked to donate money and being requested to connect your

⁹⁷ 'The Economic and Social Council encourages Member States, International organizations, the private sector, relevant institutions, foundations and individuals to contribute to the World Solidarity Fund.' Economic and Social Council Resolution 2003/4 on the World Solidarity Fund, 31st Plenary meeting 11th July 2003: E/2003/INF/2/Add.4 par.5.

business transactions to a global network as a conduit for enabling consumers remit their contribution to the global solidarity fund.

Position	Corporation	Gross sales FY 2007 Millions USD	Profit /Loss millions USD (Loss indicated in brackets)
1.	Wal-Mart Stores	378,799	12,731
2.	Exxon Mobil	372,824	40,610
3.	Royal Dutch Shell	355,782	31,331
4.	BP	291,438	20,845
5.	Toyota Motor	230,201	15,042
6.	Chevron	210,783	18,688
7.	ING Group	201,516	12,649
8.	Total	187,280	18,042
9.	General Motors	182,347	(-38,732)
10.	ConocoPhillips	178,558	11,891
11.	Daimler	177,167	5,446
12.	General Electric	176,656	22,208
13.	Ford Motor	172,468	(-2,723)
14.	Fortis	164,877	5,467
15.	AXA	162,762	7,755
16.	Sinopec	159,260	4,166
17.	Citigroup	159,229	3,617
18.	Volkswagen	149,054	5,639
19.	Dexia Group	147,648	3,467
20.	HSBC Holdings	146,500	19,133

Table 7.1 Top 20 largest corporations 2008

Source: Fortune Magazine http://money.cnn.com/magazines/fortune/global500/2008/full_list/

As Table 7.1 indicates, many large trans-national corporations handle annual sales turnovers and profits that run into hundreds of billions of dollars.⁹⁸ What is of interest to us here is not the profits earned by the MNCs but the volume of wealth that passes through their accounts in terms of gross annual sales revenues. This means that despite the hype about MNC power, what actually drives global markets are not the supposed capitalisations of the business sector but the disposable incomes and consumption propensities of the global general public especially those of us who live in the affluent Global North. This ‘consumer power’ is at the root of the coordinator model for an MNC brokered global revenue system assessed, collected and supervised by non-state actors and managed jointly with the assistance of the Intergovernmental Organizations such as the UNDP in a tri-partite partnership.⁹⁹ Under this scheme, even loss making corporations that

⁹⁸ http://money.cnn.com/magazines/fortune/global500/2008/full_list/

⁹⁹ There is growing literature on tri-sectoral collaboration between NGOs, MNCs and Intergovernmental global organizations especially the UN agencies. See Wolfgang H. Reinicke, ‘The Other World Wide Web: Global Public Policy Networks’ (1999-2000) 117 *Foreign Policy* 44, Wolfgang H. Reinicke and Francis Deng (Eds) *Critical Choices. The United Nations, Networks, and the Future of Global Governance* (International Development Research Centre, Ottawa, 2000); Jan Martin Witte, Wolfgang H. Reinicke and Thornsten Benner, *Beyond Multilateralism: Global Public Policy Networks* : <http://library.fes.de/pdf-files/ipg/ipg-2000-2/artwitte-reinicke-benner.pdf>

would not pay income tax would still be assessable to pay the global solidarity contribution since it is their duty to channel consumers' money for the fund. For instance, despite making a loss of \$38,732 million, General Motors still had a sales turnover of \$ 182,347 million.

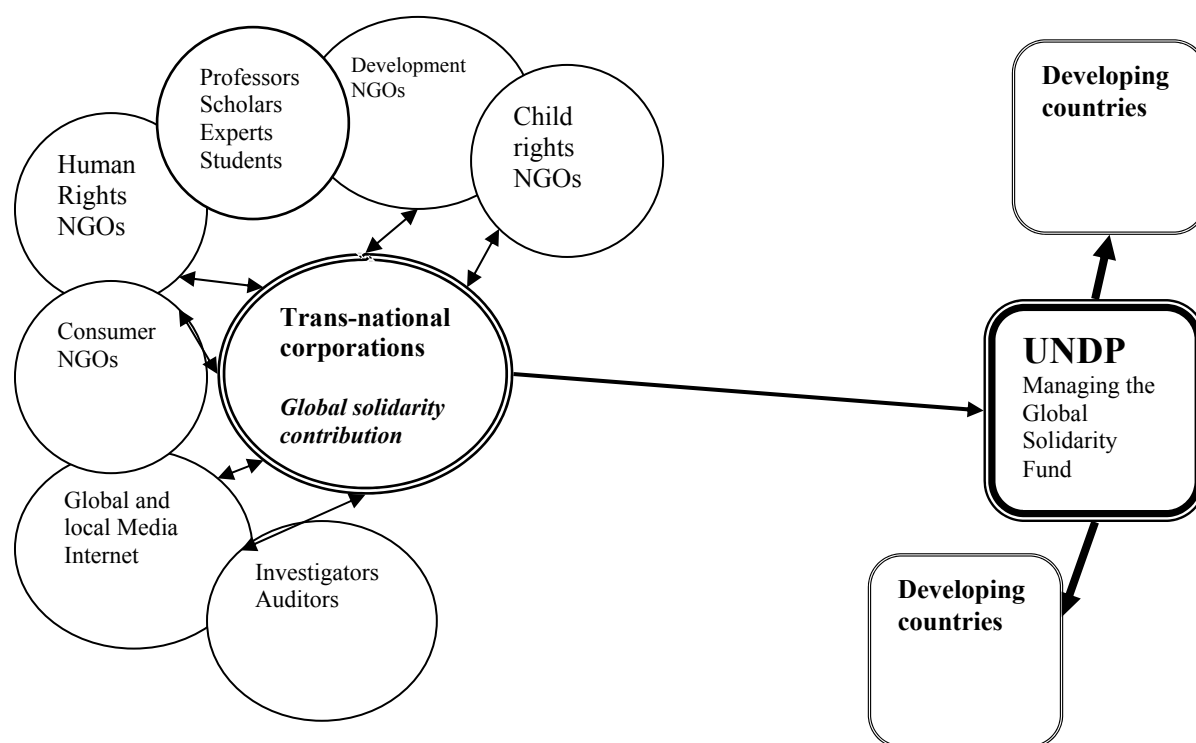


Figure7.1 Model for a privately coordinated Global solidarity contribution

Figure7.1 illustrates how this model would work in practice. It underscores the concept that the interpretation of human rights obligations and norms can be a bottom-up people driven initiative, coordinated by NGOs and norm-entrepreneurs. Here, in the context of de-regulated free markets, the agency of global business enterprises can be harnessed to facilitate global cosmopolitan social and economic cooperation, which would complement the inter-state international cooperation.¹⁰⁰ The UNDP representing the UN and its member states would in consultation with the Economic and Social Council manage redistribution of the Global Solidarity fund to administer a sustainable programme for coordinated fulfilment of the internationally recognised social and economic rights.

¹⁰⁰ Discussed in chapters 5 and 6 above.

The proposal in this chapter is not unprecedented. The UK National Committee of the UNICEF already operates a scheme whereby a number of companies have made standing commitments to raise money for UNICEF's work.¹⁰¹ Starwood Hotels & Resorts' operates a 'Check out for Children' programme whereby a dollar or its equivalent is added to the customer's bill on check out, to fund UNICEF's vital immunisation work. IKEA worldwide stores operate a sales' system whereby a percentage of toy sales is given to UNICEF.¹⁰²

However, the distinction between this proposal and UNICEF's corporate partners' initiative is that whereas UNICEF's model is an entirely voluntary philanthropic initiative relying mainly on the contributions of the corporate donors, the proposal here is arrived at via a narrow legalistic route, showing that norms of international law on social and economic rights obligate the global community of non-state actors to contribute to the universal fulfilment of these rights. In this proposal the idea is to build up on the General Assembly's resolution on establishing a global movement that is committed to building a world fit for children: it aims at utilising of the global corporate actors' links to global markets and through these links, directly engage the global consumer community.¹⁰³

This approach to the WFC takes us a step forward in the sense that whereas the focus of academic concern has been on the negative obligations of MNCs to respect human rights and refrain from violations¹⁰⁴ the coordinator model applies positive duties to facilitate resource mobilisation is aimed at utilising the organizational capabilities of MNCs to function as a global revenue agency. Conventional approaches to the corporate business sector have been centred on three aspects of corporate responsibility: corporate

¹⁰¹ <http://www.unicef.org.uk/corporatepartnerships/ocp.asp?nodeid=ourpartners§ion=4>

Seventeen companies are participating in the UNICEF partnership scheme: Amway, Barclays, British Airways, BT, EMI, FTSE, IKEA, Kodak, Manchester United, Orange, Pampers, Starwood Hotels, The Pier, TNS, Turner, UIP and Vodafone.

¹⁰² <http://www.unicef.org.uk/corporatepartnerships/ocp.asp?nodeid=ourpartners§ion=4>

¹⁰³ Michele Micheletti and Dietlind Stolle 'Mobilizing Consumers to take Responsibility for Global Social Justice' (2007) 611 *Annals of the American Academy of Political and Social Science* 157, arguing that the global corporate business sector is sensitive to consumer concerns and demands and threats of consumer boycotts and damage to reputation can cause business managers to review their practices. In this coordinator model, if new obligations such as coordinating a global solidarity contribution are agreed as properly within their responsibility, the same moral pressure to collaborate will apply to ensure compliance of the corporate business sector. Baogang He and Hannah Murphy 'Global Social Justice at the WTO? The Role of NGOs in constructing Global Social Contracts' (2007) 83 *International Affairs* pp. 707-727, at 721, arguing that NGOs can play a key role in forging global consensus on human rights norms-consistent business practices.

¹⁰⁴ UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and transnational Corporations and other Business Enterprises, John Ruggie A/HRC/8/5 Eighth Session 7th April 2008, paragraph 9: The Special Representative identifies the State duty to protect against human rights violations by third parties, including businesses, and the corporate responsibility to respect human rights as the key obligations of these two actors. See *Beyond Voluntarism: human rights and the developing international legal obligations of companies* 2002, International Council on Human Rights Policy, Versoix, Switzerland http://www.ichrp.org/files/reports/7/107_-_Business_and_Human_Rights_-_Main_Report.pdf

citizenship, corporate governance and corporate social responsibility. The first two relate to complying with the relevant national laws and, internal due diligence procedures respectively while the third relates to the voluntary contributions the business sector can make to enhance the welfare of members of the society in which it operates. The duty to provide resources as indicated in the WFC is an aspect of corporate social responsibility, and the coordinator model directs the entire corporate business sector to act only as agents for resource redistribution with binding duty to collect and remit the funds to a central global fund, leaving no room for voluntarism.

7.4.4 Enforcement and legal framework

As Figure 7.1 indicates, to set the obligations of non-state actors in motion requires the three-party-partnership of civil society networks to operate a ‘bottom-up’ strategy and coordinate compliance and cooperation by the business sector.¹⁰⁵ On the other side, a global intergovernmental agency particularly the UNDP which is mandated to coordinate the Millennium Development Goals and other matters relating to development in the UN would administer the Global Solidarity fund that has already been established by authority of the Economic and Social Council. The institutional structures required for anchoring programmes for global implementation of children’s social and economic rights can be created within the existing legal regimes. States have already made general resolutions regarding this matter, non-state actors should not again wait for governments to come and show them how to move forward. A simple scheme of brief, uncomplicated memoranda of understanding between the parties would be sufficient to set up rules of participation, procedures and coordinating taskforces at various levels. Since this would be a market-based indirect tax system, rules of participation can provide for monitoring by requiring that all participating corporations submit monthly statements for independent audit by partnership monitoring taskforces. It is based on the realisation that the global civil society can exert moral pressure on the business sector to comply with human rights norms.¹⁰⁶ The tax is actually paid by the consumer public and because the amounts would generally be small percentages of their shopping, many would actually not notice or mind. In big corporate sales between MNCs themselves, the extra amounts are transferred to their customers in the chain.

¹⁰⁵ For extensive analysis of bottom-up approaches to international law see Rajagopal, Balakrishnan *International Law from Below: Development, Social Movements and Third World Resistance* (CUP, Cambridge 2003).

¹⁰⁶ Micheletti and Stolle, n. 103, above.

7.5.1 The challenge of financing programmes for realising economic and social rights

The implementation of economic and social rights of children goes hand in hand with the level of the countries' economic development which determines the levels of families' and governments' disposable incomes. The main challenge undermining the fulfilment of the social and economic rights of children around the world, threatening their survival and development has been identified in Article 10 (3) of Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2002 as the twin problem of poverty and underdevelopment.¹⁰⁷ From the perspective of this Protocol, extreme poverty in the developing world is a key supply factor, as it pushes families and children to the ignominy of dehumanising children as objects for sale, child prostitution, child pornography and child sex tourism.

That poverty and underdevelopment are serious hindrances to the enjoyment of social and economic rights is not new: this is recognised in the Child Convention which calls upon states parties to address the special problems facing children and families in the developing world.¹⁰⁸ This concern for the severe poverty in developing countries is not to say that there is no incidence of child poverty in rich countries. Indeed, studies have shown that there are significant percentages of children and families affected by economic deprivation in the backyards of many cities in developed countries.¹⁰⁹ However, this quickly pales away in comparison with the extent of extreme poverty, hunger and poverty-related deaths in the global South.¹¹⁰ It is of credit to the U.N. that the organization has, from the dawn of the millennium been concerned with developing mechanisms for translating rights claims accumulated in international legal instruments over the twentieth century into measurable results for rights-holders. In particular, the U.N. General Assembly recognises that with more than one billion people world-wide under the stranglehold of the dehumanising conditions of extreme poverty, to which more than a billion of them are currently subjected, the need for poverty eradication is urgent but it can be best confronted through a comprehensive programme of social and economic

¹⁰⁷ U.N. General Assembly resolution A/RES/54/263 of 25 May 2000.

¹⁰⁸ Preamble, eleventh paragraph, Articles 23(4), 24(4) and 28(3).

¹⁰⁹ Jan Hesselberg 'Poverty in the South and in the North' (1997) 79 *Geografiska Annaler. Series B, Human Geography* 227, Lars Osberg 'Poverty in Canada and the United States: measurement, trends and Implications' (2000) 33 *Canadian Journal of Economics* 847.

¹¹⁰ See Thomas Pogge, *World Poverty and Human Rights* (Polity Press, Cambridge 2002), Ingrid Robeyns 'Assessing Global Poverty and inequality: Income, Resources and capabilities' (2005) 36 *Metaphilosophy* 30; Timothy Besley and Robin Burgess 'Halving Global Poverty' (2003) 17 *Journal of Economic Perspectives* 3.

development that integrates the broad North-South interests.¹¹¹ The thrust of discussion in the remainder of this chapter is on how the concept of cosmopolitan obligations of non-state actors can be applied in strategies for pursuing the vision of the Millennium Declaration and its Roadmap. It is necessary here to explain some assumptions I have made and clarify some relevant points.

7.5.2 Human rights implications of the Millennium Development Goals

First, the Millennium Declaration attempts to bring together in one instrument the imperative to prioritise the right to development that had been recognised fourteen years earlier¹¹² and the urgent need for world-scale implementation of social and economic rights.¹¹³ The Declaration specifically directs the global community to ratify and implement the Child convention and its Protocols.¹¹⁴ After the adoption of this Declaration, the UN Secretariat formulated the Roadmap towards the Implementation of the Millennium Declaration which was approved by the General Assembly on 6th September 2001.¹¹⁵ The MDG Roadmap is not expressed in a language of rights, but it has been explained that it is the technical handbook for implementing the vision of the Millennium Declaration.¹¹⁶ It provides substance to the rights claims of the Millennium Declaration by prescribing priorities for development programmes, specific targets and indicators. To illustrate, Goal 1- to eradicate extreme poverty and hunger fits into the scope of Article 11 of the Economic Covenant and Article 27 of the Child Convention on the right to an adequate standard of life. Goal 2-to achieve universal primary education matches Article 14 of the Economic Covenant and Article 28 of the Child Convention. Goals 4-to reduce child mortality and 5-to improve maternal health correspond with Articles 11 and 12 of the Economic Covenant and Articles 6, 24 and 27 of the Child Convention. However it is important to clarify that the legal obligations of states and non-state actors to fulfil social and economic rights would not lapse with the MDG Roadmap's deadline on 2015 or even be discharged upon the achievement of the goals and targets earlier or later than that date.

¹¹¹ United Nations Millennium Declaration: General Assembly Resolution 55/2 of 8 September 2000, par. 11.

¹¹² United Nations Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986

¹¹³ United Nations Millennium Declaration: Article 11.

¹¹⁴ Id, Article 46.

¹¹⁵ Road map towards the implementation of the United Nations Millennium Declaration Report of the Secretary General; General Assembly Res. A/56/326 of 6th September 2001.

¹¹⁶ Road map' of Millennium Summit Goals sets out blueprint, timetable for future implementation : Secretary-General's Report Signposts Road Ahead dated 19th September 2001 <http://www.un.org/News/Press/docs/2001/pi1380.doc.htm>

The Millennium Development Goals

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality
5. Improve maternal health
6. Combat HIV/AIDS, malaria and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development

Table 7.2 The United Nations Millennium Development Goals

In a more prosperous society with full employment and reasonably decent incomes, the obligations to fulfil still stand but are less urgent in view of the enhanced capabilities of society to meet its needs using private resources. However, the concept of progressive implementation of economic and social rights recognised in Articles 2 and 11 of the Economic Covenant and Article 4 of the Child Convention commits states to ensure the continuous improvement of living conditions at all times. This means that the achievement and surpassing of the Millennium Development Goals would not exhaust the states' legal obligations to fulfil. Moreover, the obligations to guard the peoples' gains (protect) and refrain from degrading their established living standards (respect) remain urgent priorities for the human rights community at all stages of social and economic development. It can be argued therefore that pursuing and fulfilling the agenda of the Millennium Declaration and its MDG Roadmap even beyond its timelines would yield outcomes that considerably advance and secure the social and economic rights of the world's children and their families.

7.5.3 Addressing the MDG Roadmap's financing gap

Since the Millennium Declaration and its MDG Roadmap did not establish any funds to finance the project, this issue was deferred to the International Conference on Financing for Development held in Monterrey, Mexico in March 2002. On 22nd March 2002 the Conference adopted the Monterrey Consensus on Financing for Development.¹¹⁷ The resolutions of the Monterrey Conference were adopted by the General Assembly of the U.N. in the Declaration on the World Summit Outcome 2005.¹¹⁸ The gist of this resolution is that financing for the Millennium Development Goals would be obtained through domestic resource mobilisation in the developing countries incorporating Public-Private sector partnerships, local domestic savings for investment and aid from multilateral and

¹¹⁷ Monterrey Consensus of the international conference on financing for development, UN doc. A/CONF./ 198/11.

¹¹⁸ World Summit Outcome, UN GA res. No. A/60/L.1

bilateral external donors including debt relief. Further financing for development would be harnessed through foreign direct investment by multi-national corporations and net-gains from increased international trade with developing countries benefiting from enhanced access to Northern markets.

Despite its potential to resolve the twin issues of poverty and underdevelopment in poor countries, the Millennium Development Goals Achilles' heel has been its failure to secure adequate financing to provide the resources needed for realising the goals. A UNDP study has found that rapid and significant economic growth is required in order to anchor the Millennium Development Goal of global poverty reduction, but developing countries have limited resources, face structural barriers such as lack of infrastructure and cannot achieve the target thresholds for economic growth on their own: as a matter of dire necessity, they require external assistance.¹¹⁹ Another study on the MDG Roadmap's Goals related to health and education has established that besides the shortage of funds for infrastructure development, developing countries have constraints on funding for expenditure in health, education and social welfare. Another study by the World Health Organisation shows that while developing countries can and should increase allocations for the health sector by at least 1% of the GNP by 2007, progressing to at least 2% in 2015, even with such increases a major financing gap will remain.¹²⁰ The critical point in the WHO report is that even current levels of donor funding and enhanced mobilisation of domestic resources of the developing countries, the resources that would be realised would still be inadequate to deliver the MDG on schedule or at all. A discussion of financing gaps would be unhelpful to clarify this issue unless we understand how much it would cost to deliver the MDG.¹²¹ Three points can be noted. Although global targets have been set in the MDG Roadmap, these are only framework guidelines and each country has to develop concrete projections. Therefore, the exact financing needs and levels would vary from country to country and it is difficult to determine a global financing budget for the MDG. With such caution in mind, three useful attempts have been made to estimate the global cost of financing the MDG. The UNDP estimates that if the current annual levels of aid from the OECD donor countries of USD 79billion are maintained, it leaves a shortfall of USD50 billion required

¹¹⁹ UNDP, *Millennium Development Goals: A compact among nations to end human poverty* Human Development Report (Oxford University Press New York 2003) chapter 8. <http://hdr.undp.org/reports/global/2003/>

¹²⁰ World Health Organisation (2001), *Report of the Commission on Macroeconomics and health Macroeconomics and Health: investing in Health for Economic Development* Geneva, World Health Organisation.

¹²¹ For a detailed discussion of the various techniques of costing see Vandemoortele, J. and Roy Rathin (2004) *Making sense of MDG Costing* <http://www.undp.org/poverty/docs/prm/MakingsenseofMDGcosting-August.pdf>

each year to achieve the MDG.¹²² The World Bank estimates that the global short-fall of financing needed to meet the MDG after the donor country's aid commitments have been paid is between USD40- USD60 annually.¹²³ In a study prepared for the International Conference on Financing for Development, the Zedillo Commission estimated that in addition to the pledged ODA of 0.7% of the Gross national income of the donor countries, a further USD50 billion would be required for the achieving the MDG globally.¹²⁴ Jeffrey Sachs estimates that the financing gap for meeting MDG would be at least USD 48 billion.¹²⁵ Therefore a rough figure of USD50 can be taken to represent the net financing shortfall for meeting the MDG globally.

Secondly, it is important to consider that the long term goals and targets can actually be broken down to short-term annual estimates. Most activities such as creating economic and social infrastructure e.g. construction of roads, railways, seaports and airports, power generation plants, telecommunications etc are high-cost one-off projects, but upon completion begin yielding economic returns over a long period of time. Once the key infrastructure has been established by 2015, the cost of new investments required to end remaining poverty would be much less than during the earlier Roadmap phase.¹²⁶ Recent reports now indicate considerable improvements in social and economic development throughout the developing world with data on poverty reduction showing that the achievement of the MDG in East Asia especially in China is ahead of schedule.¹²⁷ It seems that viewed in this perspective, whatever estimates are made of the cost of achieving the MDG Roadmap, the actual cost would most probably be less.

7.5.4 Some assumptions about meeting the MDG

In order to develop some points for this discussion, it would be necessary to make some assumptions that can be more fully dissected in other disciplines. First, that there are institutional frameworks at the national level in the developing countries to implement the MDG and all that is needed is financing for development. Indeed, with the assistance of the World Bank and IMF, most of the developing countries have prepared Poverty

¹²² UNDP, *Millennium Development Goals: A compact among nations to end human poverty* Human Development Report (OUP, New York 2003) p. 162.

¹²³ <http://www.worldbank.org/html/extdr/mdgassessment.pdf> For UK government estimates see Wroe, M and Doney M (2003) *Rough Guide to a Better World* (Rough Guides London 2003) adopting the estimate of USD 50 billion. <http://www.dfid.gov.uk/pubs/files/rough-guide/better-world.pdf>

¹²⁴ Ernesto Zedillo and others, 2001, *Recommendations of the High-Level Panel on Financing for Development* New York: United Nations <http://www.un.org/reports/financing/recommendations.htm>

¹²⁵ Jeffrey Sachs, *The End of poverty: How we can make it Happen in our Lifetime* (Penguin, London 2005), 296-301.

¹²⁶ Id, p. 303.

¹²⁷ UNDP (2005), *Human Development Report 2005, International Cooperation at Crossroads: Aid, Trade and Security in an Unequal World* (United Nations New York 2005) chapter 3, pp. 73-109.

Reduction Strategy Papers and are at various implementation stages.¹²⁸ Moreover, the UNDP, the UN agency that coordinates development issues has a network of 166 country offices and teams in developing countries around the world that work with governments to develop national action plans, policies and budgets for meeting the MDG.¹²⁹ Now that national poverty reduction strategy papers, development policies and MDG plans are already in place and with international technical assistance through coordination by the UNDP assured, all that is required to meet the MDG is the injection of the needed funding to close the estimated annual financing gap of USD 50 billion. The engagement of non-state actors as suggested in the preceding section of this chapter can unlock their additional potential to contribute to reducing this financing gap albeit in a small way. For example, in a rough estimate using the figures in Table 7.1, charge of 1% of the annual sales turnover of the top 20 firms alone would yield over USD 40 billion annually. If this is extended to the top 200 firms, it is possible to close the financing gap and even create a reserve fund.

7.6 Conclusion: the justification for engaging non-state actors

The question that sums up this chapter is this: why bring in non-state actors? There are two answers that have been at the heart of this chapter. First, a study of the history, practice and legal norms relating to the international protection and promotion of the social and economic rights of children suggests that non-state actors have been recognised and assigned roles and obligations. In the first and second parts of this chapter, an attempt has been made to explore the theoretical and practical aspects of the obligations of non-state actors, showing that obligations of non-state actors to respect, protect and fulfil the social and economic rights of the world's children are part of international law on the protection of these rights. In theory it is possible to operationalise the performance of these obligations at the national and global level through various institutional paradigms. Some of these models are already in operation and further mechanisms can be devised to gradually build up on the existing practice, especially to move towards more coordinated and structured delivery systems. Therefore, these obligations deserve academic attention, study and exposition for scholarship's sake as part of training in human rights law.

¹²⁸ Country reports and poverty reduction strategy papers are accessible at the IMF website:
<http://www.imf.org/external/NP/prsp/prsp.asp>

¹²⁹ <http://www.undp.org/about>

The second reason for examining the legal obligations of non-state actors is that with regard to the obligations of non-state actors to fulfil, these obligations constitute an extra burden beyond that which the individuals and corporations are doing through their respective governments. It is a residual, safeguard, such that there must be justification for asking taxpayers to dip further into their bank accounts. The justification for asking for additional commitment is that a threshold condition at which private/family and government-mediated measures are no longer adequate and the lives of the affected persons are at risk has been reached. The third part of this chapter has sought to show that although the international community of states has made progress in developing strategies for guaranteeing the fulfilment of social and economic rights in all countries around the world through the MDG, there is clear evidence that these efforts by states alone are not adequate and considerable financing gaps remain. As a result of this, the lives of over 1 billion children are threatened by poverty-related death and other hardships that stalk childhood in the developing world today. Therefore the threshold conditions asking non-state actors to intervene and complement the efforts being made through states seems to have been reached.

This is not a claim that the non-state actors resolve all the shortcomings in the government programmes. Neither is it a grand plan to devise a multi-billion fund or anything of that kind to fix the complicated social, political and economic problems of the developing world. It is a modest effort to connect the theory of internationally recognised legal obligations of non-state actors with the some of the contemporary social and economic problems that regimes of economic and social rights have been fashioned to address.¹³⁰ As discussed in chapters three, four, five and six above, state actors are doing their part. However, such international action still falls short of what is required to (re)establish an adequate minimum standard of life for children and poor families in the developing world. In this regard NGOs and the business sector themselves can take up their internationally recognised human rights obligations and establish implementation mechanisms such as the structures proposed in this chapter so as to open another front in global social and economic cooperation to fulfil the rights of the world's children.

¹³⁰ For a useful examination of this point see Daniel Aguirre, 'Multinational Corporations and the realisation of economic, social and cultural rights' (2004-2005) 35 Cal. W. Int'l L.J. 53.

Chapter 8

Conclusion and further reflections

8.1 A legacy of legalisation of global human rights norms

One of the dominant features of the 20th century international law-making is the proliferation of legal regimes entrenching global human rights norms into texts of human rights conventions under the auspices of the United Nations. In the sphere of economic and social rights, these conventions attempt to secure access to basic human needs by declaring them as human rights and clothing them with the authority of legally binding treaties. This process of legalisation of human rights ideas and standards seems set to continue into the millennium.¹ When the actual implementation of economic and social rights is analysed, it is clear that these rights entail costs that must be met by the mobilisation of private and public resources, thereby underscoring the decisive role of the macro-economic capabilities of the state. In the high income economies, both the governments and the private sectors possess considerably adequate resources to absorb the costs and risks of delivering systems and programmes for securing fulfilment of economic and social rights. However, in the developing countries, lack of adequate technical and financial capabilities have hindered the universal implementation of economic and social rights in these regions.

The issue that is at the heart of this study is how developing countries can implement internationally recognised norms on economic and social rights, in view of the problems of poverty and underdevelopment. As the material reviewed in chapter three illustrates, the developing countries can establish systems for fulfilling children's economic and social rights and for the society generally through increased mobilisation of their maximum domestic resources and drawing external support of other states through arrangements for international cooperation and assistance. It is evident from the case studies reviewed in chapter three that there is a system of international cooperation and assistance in the sphere of economic and social rights through international aid finance. Here, the developed states are providing international support to the developing states through aid finance in sector-wide approaches to development assistance. This evidence of

¹ See Makau Mutua 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 547.

inter-state collaboration is significant in interpreting how international cooperation in economic and social rights can be approached in the practical context.

While appreciating the progress made under these *de facto* international cooperation arrangements, the main theoretical problem in this study is to determine the existence and scope states external obligations under the Economic Covenant and the Child Convention. This has been attempted in chapter four. In this chapter, an attempt is made to interpret the scope of states' domestic and external obligations under these treaties. It has been argued that the traditional statist paradigm that denies responsibility of states to support fulfilment of human rights of non-citizens and persons in other states would be incompatible with the project for universal human rights under international law. In declaring universal human rights, states have always had in mind responsibility for both their own domestic constituencies and also the external constituency of the global human family, for whose well-being the universal human rights project has been promulgated. In this study, the external aspects of states' human rights obligations in the field of economic and social rights have been labelled 'diagonal' obligations. The casting of these obligations as diagonal obligations disentangles them from the wider external obligations in the international relations that are at risk of polarisation by inter-state politics on the horizontal plane. This means that apart from the domestic state, other actors such as third states, inter-governmental organisations and human rights NGOs can act on behalf of rights-holders to pursue enforcement of diagonal obligations.

As the discussion in chapters three and four illustrates, by creating and participating in these arrangements for international cooperation to implement economic and social rights, the developed states are addressing their external obligations under international conventions on economic and social rights. The surveys of periodic reports of developing states in chapter three and those of developed states in chapter four, to the Child Convention point to a trend whereby developing states and developed states are participating in a system of international cooperation and assistance to support fulfilment of economic and social rights under Article 4 of the Child Convention. In their reports, the developed states have explained to the Committee that they consider their international development assistance programmes to be a step towards fulfilling some aspects of their obligations in international cooperation under Article 4 of the Child Convention. A growing body of resolutions of the UN General Assembly tends to the same conviction that in an interdependent world such as this, the obligations of states to respect, protect

and support fulfilment of internationally recognised human rights in developing countries can be best approached as shared obligations of the international community of states collaborating with the domestic states in the developing world. An attempt to explore approaches of the supervising expert committees under the Child Convention and the Economic Covenant as well as the interpretations of the UN Special rapporteurs on the right to food and the right to health confirms that there is considerable support for the dual responsibility of states to address both domestic and diagonal human rights obligations.

There is now an almost unanimous consensus by scholars in this field that the external obligations of states to respect economic and social rights i.e. to refrain from depriving societies living in other countries and degrading their standards of economic and social well being is part of the hard law obligations and should be enforceable on an equal footing with third states' domestic obligations. The central idea on this issue is that it is morally wrong to export harm and deprivation. To lesser extent external obligations to protect i.e. to restrain others from depriving and harming societies living in other countries has also been recognised as being part of the obligations of states under the international conventions on economic and social rights. The aspect of external obligations that seems disputed and contentious is the external obligations to fulfil i.e. to aid the deprived and re-establish conditions necessary for the enjoyment of their minimum core content of economic and social rights. There is a concern that accepting and enforcing such diagonal obligations to fulfil economic and social rights might lock rich states in a binding commitment to transfer their national resources to developing countries, and this might be a serious encroachment to their exclusive rights to their national resources under traditional conceptions of sovereignty.

There is a tension between the hard law treaty norms that entrench the rights of states to exclusive sovereignty over national resources and the other hard law treaty texts which assign external burdens to states, demanding that states must render international cooperation in the fulfilment of economic and social rights. This tension in hard law is evidence for the need for reform of international law that might result in a clarification of the position that in an age of universal human rights, the obligations of shared state responsibility for fulfilment of economic and social rights warrants express incorporation of the obligation of states to establish and maintain institutional arrangements for systems and processes for facilitating resource transfers necessary for guaranteeing universal fulfilment of these rights for all human beings. In the meantime, soft law instruments

including resolutions of the UN General Assembly, interpretations of states parties to the Child Convention and the emerging *acquis* developing from the application of the Child Convention and the Economic Covenant can be regarded as initiatives to reconcile the tension in the hard law texts to reflect the changing external responsibilities of states under the human rights regimes. Through these soft law instruments, states have accepted external obligations to support universal fulfilment of economic and social rights and as the discussion in chapter five illustrates, states have established a world solidarity fund, fed by contributions of members of the United Nations and administered by the United Nations Development Programme.²

The theoretical exposition of states' international obligations in relation to the fulfilment of economic and social rights is extended to chapter five where various perspectives are considered. It is argued in chapter five that third states' obligations to support fulfilment of economic and social rights are an aspect of the collective responsibility of the international community of states, supplementary to the domestic state's own obligations, intended to be invoked only when the domestic state's capabilities have fallen below a minimum threshold level. This approach is consistent with the social theory of subsidiarity, whereby the larger social and political units of society are created and entrusted with the responsibility of applying their pooled capabilities to assist and support their member units to enable the latter fulfil their basic functions. Intergovernmental organisations like the United Nations and its members collectively have a responsibility to pool their collective capacities and use these to assist and support weaker individual members fulfil their human rights obligations. As Salomon Margot argues, external obligations of states can be analysed into both the separate obligations of each third state and the joint obligations of states as members of intergovernmental obligations such as the United Nations.³

In chapter six, an attempt is made to survey various models for implementing states' diagonal fulfil-bound obligations in economic and social rights. One of the arguments in chapter six is that it is possible under the current regime of international human rights law to improve and strengthen existing state practice by integrating these obligations in the

² Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August-4 September 2002 A/CONF.199/20:Resolution 2 Plan of Implementation of the World Summit on Sustainable Development par. 7b; World Summit Outcome Resolution A/RES/60/1 of 16th September 2005, Article 23 (h); Economic and Social Council 31st Plenary meeting 11th July 2003 resolution 2003/4 on the World Solidarity Fund, par. 1-4.

³ Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford 2007) p. 182.

general framework of enforcing states' human rights obligations by the various domestic and international mechanisms. In this regard, apart from the traditional donor countries, more states especially the middle income countries can be integrated in a coordinated system for global mobilisation of resources to establish an international revenue system to underwrite the processes and programmes for universal implementation of the Child Convention.

In the course of approaching their domestic and diagonal obligations states have had to reckon with both the enormity of the tasks and the magnitude of the costs involved in implementing social and economic rights globally and in developing states. There are political limitations to what states can accomplish in international cooperation projects including global action for promoting human rights. In the wake of increasing concern for failure of developing states to secure economic and social rights for children, a special session of the UN General Assembly was convened in May 2002 where a resolution on a World Fit for Children was adopted. In this resolution there is an attempt to forge a tri-sectoral partnership that incorporates Intergovernmental organisations, non-governmental organisations and the corporate sector to collaborate in efforts to secure universal fulfilment of the economic and social rights of the world's children. By charging non-state actors with the task of mobilising resources for global implementation of economic and social rights of children, the international community of states seems to have crossed a frontier whereby the traditional agency roles of states have been delegated to non-state actors. In the seventh chapter of this study, an attempt is made to demonstrate that the responsibility of the global general public on whose behalf governments act, can be integrated in a system for establishing a global revenue system to enable developing states reduce financing gaps in their systems and programmes for fulfilling economic and social rights. It is important to note that states have political and financial limits to their capabilities to perform the obligations to fulfil economic and social rights. For example, some of the traditional state powers to regulate access to basic human needs through price controls have been ceded to the private sector actors through privatisation and liberalisation, giving such non-state actors considerable power to determine access to these essential services and goods. Moreover the universal human rights project, whilst promulgated by states and addressing states as the main bearers of obligations correlative to these rights, is subject to the wider ownership of the global community of many other actors including the global civil society, human rights NGOs and the global general public who are both rights-holders and duty-bearers. A completely state-centric focus of human

rights obligations that fails to recognise and harness the capabilities of non-state actors to support and supplement state action in this field would be inadequate to understand the realities of the 21st century international political economy.

8.2 Alternative perspectives

What is presented in this study is an attempt to interpret and describe the domestic and diagonal human rights obligations of states contained in the texts of current international conventions on economic and social rights. The main objective of this study is to clarify states' external human rights obligations as an aspect of international human rights law which transcends the traditional state-centric world-views of states' human rights responsibility. Another contribution this study makes is to show that it is possible to put into practice models for engaging global non-state actors in the promotion and protection of economic and social rights, using the universal obligations to implement the UN Convention on the Rights of the Child 1989 as one of the key rallying themes. As this study comes to a close, it is useful to comment briefly on some of the alternative approaches to the problems and issues discussed in this work. Due to space constraints, only three perspectives are examined: radical cosmopolitanism, pessimistic despair and infantilization and civilization of the developing world.

Radical cosmopolitanism

Radical cosmopolitan political theorists argue that both the very small amounts of aid given by the rich countries, less than the UN norm of 0.7% of the donor state's Gross National Product and the hard law norms that stipulate national sovereignty over natural resources seem to tilt in favour of traditional statism.⁴ According to this perspective, the current system of international protection of economic and social rights, even when recast under cosmopolitan statism (complete with diagonal obligations thrown in) falls short of what is required to establish a system of global redistribution of the world's resources in a manner that is fair to all societies and secures universal fulfilment of human rights. What is required is to subject all national resources held and/or hoarded by states to a regime of ownership that treats such resources as a common possession of mankind, held on trust for

⁴ Peter Jones 'International Human Rights: Philosophical or Political?' in Simon Caney, Davis George and Peter Jones (eds.) *National Rights, International Obligations* (Westview Press, Boulder, Colorado 1996) 126.

and on behalf of the entire human family.⁵ Under such a system, it would not matter anymore which part of the planet one lived since an equitable system of global redistribution would guarantee universal access to such resources.⁶ Indeed, the protection of economic and social rights under current international human rights law is based on the enactment of norms that apply only a very weak typology of cosmopolitanism. Therefore, the criticism of current international human rights law is very important as it identifies some fundamental defects and dilemmas of current international regimes on economic and social rights. In this regard, Barry's thesis can be appreciated as an important criticism of the current regime of international law on economic and social rights described in this study and one that presents options for its reform.

Pessimistic despair

For some writers, the problems relating to poverty and development and how they frustrate efforts to establish systems for guaranteeing economic and social rights are so deeply rooted in the history of these regions that it would not be possible to address them through current initiatives under international human rights law. The statistics of the global poor, child mortality, wasting and stunting and myriads of social and economic problems of developing countries can be depressing if not frightening to consider.⁷ Over two hundred years of dislocations caused by slavery and slave trade, colonial exploitation, an international political and economic system slanted in favour of the developed states, global inequalities and other historical injustices inflicted upon less developed societies by avaricious imperial states and their agents mark a fundamentally new stage in human history⁸ that some scholars consider to be irreversible.⁹ Perhaps the situation is just hopelessly irredeemable. This historical worldview is an important reminder of some the causes of the current global problems facing less developed countries. However, in a study of these issues, one must not dwell too much on the past but, attend to the more urgent imperative to try to navigate a feasible roadmap out of the current global social and economic problems. There is a duty that scholarship must discharge to the human rights

⁵ Brian Barry, 'Statism and Nationalism: A Cosmopolitan Critique' in Ian Shapiro and Lea Brilmayer (eds.) *Global Justice* (New York University Press, New York 1999) 12.

⁶ *Id.*, 27.

⁷ United Nations Children's Fund, *State of the World's children 2005: Childhood under Threat* (UNICEF, New York), p. 10.

⁸ For critical analysis of the economic consequences of colonial rule in the developing world, see Daron Acemoglu, Simon Johnson and James A. Robinson, 'The colonial origins of comparative development: An empirical investigation' (2001) 91 *American Economic Review* 1369.

⁹ See David Christian, *Maps of Time: An Introduction to Big History* (University of California Press, Berkeley, CA, 2004), pp. 334-449, Walter Rodney, *How Europe Underdeveloped Africa* (Heinemann, London, 1992).

community: to explore and develop new ideas and solutions to current social, economic and political problems confronting society. This task cannot be fulfilled by resignation in pessimism over the painful injustices of the past, but by developing perspectives of whether and how current regimes of international human rights law can be more effectively applied to confront current problems such as child poverty in the developing world.

Infantilization and civilization of the developing world

Some scholars have argued that studies on the realisation of economic and social rights in the developing countries have a tendency of depicting such societies and their governments as having failed in the performance of their internationally recognised obligations, leaving children in the those societies as victims of such failure.¹⁰ The ‘victims’ of such failed societies and states therefore need a saviour from outside, typically the Global North, to rescue them with many interventions such as economic aid and so on. In view of the discussion in chapter four, it is clear that the fulfilment of economic and social rights can be approached as a shared responsibility of all members of the international community of states to uphold the equal worth and dignity of every human being, without necessarily condemning or condescending towards societies in the developing world. Therefore, academic writers’ claims of infantilization and civilization of ‘savage’ practices of the developing world are unconvincing, divert attention from the main issues such as the need to strengthen international cooperation, and are unhelpful in the search for a breakthrough in dealing with the problems of global poverty and underdevelopment that have impeded efforts to secure realisation of human rights in the developing world.

8.3 Plotting further steps

In trying to sketch steps for further steps, it is evident that non-state actors especially NGOs working in the fields of human rights and development can be engaged as the prime movers of the changes required to advance the agenda and progress for the realisation of social and economic rights in poor regions of the world. Yet, in the face of indifference by states, NGOs’ successes can be rather modest and far from the kind of tasks that this study

¹⁰ See Makau Mutua, ‘Savages, Victims, and Saviors: the Metaphor of Human Rights,’ (2001) 42 *Harvard International Law Journal* 201; Vanessa Pupavac, ‘The Infantilization of the South and the UN Convention on the Rights of the Child’ (1998) *Human Rights Law Review* 3.

seems to be content to assign to them. Moreover, most of the well established global NGOs tend to have Northern roots¹¹ and their decision to take up a cause depends on whether it resonates with their support base in the Northern societies. Some of the propositions of this study would have to be moderated by various practical difficulties, such as the possibility that the richer Northern societies might not be keen ending poverty in the Global South, at the expense of their own domestic concerns. However, coalitions of NGOs have won famous victories such as the campaign for the abolition of the Trans-Atlantic slave trade, by exerting pressure on legislators to adopt an anti-slavery agenda in British domestic politics.¹²

There is a link between the ideas investigated and developed in this thesis and the practical concerns of current problems in international policy and advocacy on economic and social rights. An elaborate normative structure for international protection and promotion of economic and social rights comprising of a mix of hard law conventions and soft law instruments is already in place. However, there are gaps in the operating systems leading to inadequate implementation of economic and social rights in the developing world. The adoption of human rights conventions on economic and social rights and their application in human rights discourse exert pressure on states and the international community to implement the norms and claims held out in the conventions, pointing to the need for change of approaches to implementation. For some, the need for change can be approached by adopting new norms such as the recently adopted Optional protocol to the International Covenant on Economic, Social and Cultural Rights relating to the competence of the Committee to receive and consider communications or complaints.¹³

In this study, the approach to change is focussed not on advancing new rules and norms but to sharpen understanding of existing normative system and devise ways to improve its functioning in the practical context in what would be an attempt to ‘strengthen’ international and global cooperation in this area. As the diagrammatic presentations in Figure 6.1 and 7.1 illustrate, the agents to push the change agenda forward can be both international actors at the top as well as non-state actors pushing governments of rich and middle income states from below. In these ways, the ideas advanced in this study can be

¹¹ Peter Uvin, ‘Scaling up the Grass Roots and Scaling down the Summit: The Relations between Third World Nongovernmental Organisations and the United Nations’ (1995) 16 *Third World Quarterly*, pp. 495-512, at 497.

¹² See Chaim Kaufmann and Robert Pape, ‘Explaining Costly Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade’ (1999) 53 *International Organization* 631,

¹³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights UN General Assembly Resolution A/RES/63/117 of 10th December 2008. Article 14(3) of this Protocol provides for the creation of a Trust Fund that will be applied to contribute to building national capacities to fulfil economic, social and cultural rights.

immediately applied to plot some possible next steps such as the establishment of an international revenue system and a global solidarity fund through trans-national networks that advocate and promote these causes. Such approaches bring into focus the legal dimensions of the ongoing international moral action for enhancing realisation of the social and economic rights and welfare of the world's children.

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