

## **Beyond the Rhetoric of Social Rights for the Poor: the Need to Promote a Methodology aimed at Reinforcing International and National Institutions\***

Lucie Lamarche\*\*

Over the last decades, but more intensely since 1995, the UN system and its agencies have been promoting different initiatives aimed at eradicating poverty around the world, mostly in countries where extreme poverty prevails<sup>1</sup>. The Poverty Agenda is often dedicated at making sure that all initiatives undertaken by the UN itself and UN agencies are submitted to an evaluation from a poverty perspective. A momentum was reached in 2000 when the UN General Assembly adopted the Millennium Report and the Millennium Goals<sup>2</sup>. The UN Millennium Assembly engaged itself in the process of promoting the "Freedom from Want" Principle<sup>3</sup> affirmed in the UN Charter and in other constitutional documents, such as the 1944 ILO Declaration of Philadelphia. The Assembly was also and still is involved in the follow-up process to the Copenhagen World Summit for Social Development (1995).

As the UN General Assembly affirmed in 1996<sup>4</sup>, eradicating poverty is an ethical, social, political and economic imperative of humankind. The goal of poverty eradication has certainly been looked at from different disciplinary perspectives: trade, social and political science and economics. From the Basic Needs Approach (BNA) of the Seventies<sup>5</sup>, to the Human face of poverty of the '90s<sup>6</sup>, and then to the Voices of the Poor Initiative of the new Millennium<sup>7</sup>, we have come a long way in acknowledging that poverty creates social exclusion because it constitutes a threat to human dignity, citizenship, individual and collective security and, in many cases, to the right to life itself. In an era of globalization, it is more and more an uncontested fact that the gap between developed and developing states as well as between income levels inside each country is widening. After a decade of experimenting without success growth theories that were supposed to contribute to poverty eradication, we are now confronted to new questions and to the issue, not only of the need and the means to eradicate poverty; but foremost of identifying rights and

---

\* Paper prepared for UNESCO, 2003.

\*\* Professor, Université du Québec à Montréal, Canada; [lamarche.lucie@uqam.ca](mailto:lamarche.lucie@uqam.ca).

<sup>1</sup> See Observance of the International Year for the Eradication of Poverty and Proclamation of the 1st United Nations Decade for the Elimination of Poverty, UNGA Res. A/Res/50/107 (1995).

<sup>2</sup> Concerning the Millennium Assembly and the Summit of the United Nations, see online: United Nations Millennium Summit, <http://www.un.org/millennium/summit.htm>. For the details of the UN Millennium goals, see: <http://www.un.org/millenniumgoals/index.shtml>. See also UNGA Res. A/RES/S-24/2, Further Initiatives for Social Development. See also UNGA Res. A/55/2, UN Millennium Declaration.

<sup>3</sup> To promote social progress and better standards of life in larger freedom: UN Charter Preamble; Poverty anywhere constitutes a danger to prosperity everywhere: ILO, Declaration of Philadelphia, Principle I ©.

<sup>4</sup> UNGA Res 51/178 (1996).

<sup>5</sup> H. Shue, *Basic Rights : Subsistence, Affluence and U.S. Foreign Policy*, 1980, Princeton University Press.

<sup>6</sup> See UNDP 1999 Development Report : Globalization needs a human face.

<sup>7</sup> See World Bank PovertyNet online: <http://www.worldbank.org/poverty/voices/index.htm>.

responsibilities in such a process. This important conceptual shift contributed to the promotion of a necessary relationship between human rights and poverty. Except for the historical work of the ILO, we cannot find in the human rights instruments, and standards, references to poverty before it got to be a political issue. The politics of poverty, as well as the conceptualization process of the right to development, silenced the language of human rights for the longest time.

As a matter of fact, contemporary stories about poverty are often stories about how the absence of respect for the rule of law as well as the rule of law itself and international financial and trade institutions, decide against the poor in a context already dominated by discrimination and economic and social exclusion. This process legitimizes a distribution of wealth where the right to equal benefit of the law nurtures a conception of human rights made for the rich and the privileged. These complex and interconnected realities tell a lot about the need to explore the idea that poverty is a human rights issue and constitutes a human rights violation.

But how is poverty a human rights issue? As Christine Chinkin asked recently, is poverty an international legal problem<sup>8</sup>? Answering positively to this question, as Chinkin does, raises interesting questions for all those engaged in the international fight against poverty and extreme poverty. If poverty is a human rights issue, the quest for the eradication of poverty must be resolved accordingly to human rights substantive and institutional standards.

Human rights can serve as a powerful qualifier for any strategy aimed at eradicating poverty. Human rights are not only about quantifying basic needs. They speak to the core of human dignity by asking for political, democratic, material and economic changes that respond and respect the standards set by human rights instruments. They call upon state and non-state actors to meet their obligations as duty-bearers to the benefit of rights-holders.

Yet, in the land of poverty eradication strategies, everybody is not pulling in the same direction. If nobody nowadays denies the relevance of a human rights framework, some are tempted to play "pick and choose" from the basket of interdependent human rights established by a set of human rights instruments, general principles of international law and *jus cogens* as well. This opportunistic approach to human rights is dangerous. First, it carries the risk that the politics of poverty prioritizes certain rights and liberties at the cost of denying the principle of interdependency, embedded in the human rights theory. Secondly, it also could move the analysis of poverty as a human rights violation over to a parallel track where political institutions and actors do not pay sufficient attention to treaty body monitoring work. Rather there is an investment in political consensus where some human rights requirements may be sacrificed in the name of the ideology of the day.

This paper wishes to emphasize the role and the importance of the rights of the poorest amongst all human rights in the context of the international campaign for the

---

<sup>8</sup> Christine Chinkin, The United Nations Decade for the Elimination of Poverty : What Role for International Law ? (2001) 54 Current Legal Problems, 553.

eradication of poverty: human economic and social rights. Social rights are often poorly understood from a substantive perspective. But in addition, only recently have we come to conceptualize the institutional requirements attached to the promotion and the realization of these rights. The work of the UN Experts’ Committee of the International Covenant on Economic, Social and Cultural Rights (ECESCR) is pioneer work in that regard and moved beyond the rhetoric by favouring the true meaning of social rights as “poverty rights”.

One could object that there is a risk at isolating a group of rights (social rights) from all human rights since it has been recognized at the Vienna Conference in 1993 that all human rights are interdependent and indivisible. We disagree. Only what is clearly understood can be enriched by an interdependent relationship. This is the case of social rights that too often are seen either as the expression of what is needed to fix material poverty or worse, as a moral but yet unreachable goal. In addition, an interdependent approach to social rights requires a better understanding of how all human rights interplay with the definition and requirements of those rights.

Part (I) will quickly survey the history (1970-2000) of the building of an institutional relationship between poverty and economic and social rights. Part (II) will illustrate how poverty and extreme poverty became a constant preoccupation of Treaty bodies’ mechanisms, which found, in case after case, reasons to state and unfold the relation between human rights violations and poverty. Part (III) proposes that economic and social rights, and more specifically the CESCR (UN International Covenant on Economic, Social and Cultural Rights), are at the core of the analysis suggesting that poverty is a human rights’ violation. It also proposes a methodological approach to economic and social rights violations, which can support the claim of the interconnection between poverty, extreme poverty with economic and social rights violations. Part (IV) will focus on the multiple institutionalization requirements of those rights at the national and international levels. Finally, Part (V) will explore the question of States’ responsibility toward non-State actors in an era of globalization and neoliberalism as far as the protection and the promotion of social rights are concerned.

This document is aimed at showing the necessity, and the promising methodology, of paying specific attention to the requirements of economic and social rights in the context of the fight to eradicate poverty. In addition, this paper hopes to contribute towards resolving the confusion between the political and the legal approaches that are nevertheless both required in order to eradicate poverty and extreme poverty.

## **Part I. The political and institutional conceptualization of poverty and extreme poverty as a human rights violation.**

### *Poverty as a Basic Needs issue.*

Before the adoption in 1986 of the Declaration on the Right to Development<sup>9</sup>, neither development or poverty was seen from a human rights perspective. Development was often described as the positive output of the NIEO<sup>10</sup> and thus poverty as the consequence of a defective implementation of such an Order. Poverty was not seen so much as a human drama but, mostly, as the consequence of unequal “nation to nation” political and economic relationships. In this context, many authors and activists promoted the need to satisfy everyone’s basic needs by relying on Chapter IX and Section 55 of the UN Charter, which establishes the duty for State members to work at strengthening, inter alia, through international cooperation, friendly and peaceful relations amongst nations. In this context, the issue of determining how certain groups of persons would be deprived of their human rights in reason of poverty or extreme poverty was highly neglected, if not rejected.

These “nation to nation” approaches of justice, as well as the Basic Needs Approach (BNA), were criticized at the end of the ‘70s<sup>11</sup>. It has to be remembered that even if the CESCR came into force in 1976, it was still seen at the time as a moral standard more than as a legal reference<sup>12</sup>. Section 11 of CESCR provides for the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The Declaration on the Right to Development, adopted in 1986, put at the centre of the development process the person, which it entitles to the benefits of development and of the right to participate actively in the process of development. Development is a human and a peoples’ right. Independent Expert Arjun Sengupta recently described the human right to development as a right that requires the respect of all other human rights (even those submitted to progressive realization) and of the right to a process of development. Development as a human right means that duties and obligations are at stake in the process<sup>13</sup>.

At the end of the ‘80s, the international scene reflected extensive confusion over the issue of the relationship between human rights and the right to development. This confusion was ideological and political: Is the right to development a right which realization should precede the realization of all other human rights or is it a different right? The confusion was also tainted by the disciplines involved in the process of development: many then attempted to evaluate mostly with quantitative tools the process of development or the failure to develop (e.g.: poverty). Obviously, the instrumental dimensions of social rights are hidden by a debate where the interdependence of all human rights was still a missing link.

---

<sup>9</sup> Declaration on the Right to Development, UNGA Res. 41/128 (December 1986).

<sup>10</sup> New International Economic Order. See UNGA Res. 3201 (VI-S) (1974).

<sup>11</sup> See Philip Alston, Human Rights and Basic Needs: A Critical Assessment, (1979) 12 *Revue des droits de l’Homme*, 19.

<sup>12</sup> For a detailed history of the adoption of the CESCR, see Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne*, Bruxelles, Bruylant, 1995.

<sup>13</sup> Arjun Sengupta, *On the Theory and Practice of the Right to Development*, (2002) 24 HRQ 837 at 848.

The work then accomplished by former Special Rapporteur Danilo Turk of the Sub Commission on the Prevention of Discrimination and Protection of Minorities clearly demonstrates this confusion<sup>14</sup>. Although very useful at describing how the poor are deprived of the exercise of their essential human rights (liberty, freedom of speech, privacy, violence and vulnerability), and at using the language of human rights in describing poverty, Special Rapporteur Turk suggested quantitative solutions aimed at bettering the situation of the poor. At the time, this scientific approach to poverty caused certain problems with the recently created Experts' Committee on Economic, Social and Cultural Rights<sup>15</sup>. The Committee was not at all convinced that poverty was first and foremost a matter of basic needs. Neither was it convinced that the respect of the CESCR by duty bearers was limited to the material satisfaction of human basic needs. This first dialogue between this Treaty Body and the Sub Commission on the Prevention of Discrimination and Protection of Minorities revealed for the first time the difference between a political and a legal conception of human social rights.

*Poverty is a human rights violation.*

The adoption, in 1993, of the Vienna Declaration on the World Conference on Human Rights is uncontested progress in the recognition of the "legal" value of all human rights, including women's' rights, the right to development, and economic and social rights. Paragraph 25 of the Declaration is worth being quoted *in extenso*:

*The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.*

The Vienna Declaration is a clear recognition of poverty as a violation of human dignity. The Declaration, though, is obviously torn between the heritage of the previous decade for the right to development and the new visibility given to the CESCR and economic and social rights. In that last regard, it does not answer the questions raised by the Experts' Committee on Economic, Social and Cultural Rights: Why address only the issue of extreme poverty? Why highlight only the duties of the states related to the procedural right to participation in development strategies? Implicitly, one may think that the Declaration is thereby acknowledging the super-value of political rights over "claim-rights" or economic and social rights, notwithstanding the terminology used in Article 2 of the CESCR.

---

<sup>14</sup> See Realization of Economic, Social and Cultural Rights, E/CN.4/Sub.2/1989/19 (1989) and E/C.12/1990/SR.21.

<sup>15</sup> For an extensive discussion about this debate, see Lucie Lamarche, *op.cit.*, p. 401 and ff. See also Work Being done Within United Nations system on Improving Quantitative and Qualitative Indicators on Social Conditions and Standard of Living, A/46/137 (1991).

The Copenhagen Declaration of 1995, which resulted from the World Summit for Social Development, contributed to the elucidation of the legal standing of economic and social rights. Specifically, the Declaration proposes the enhancement of human dignity by reliance on all human rights, including social and economic rights, and on the ratification and the implementation of the CESCRR<sup>16</sup>. This commitment of State members was reinforced regarding women's rights by the adoption of the Beijing Declaration (1995), which outlines the gendered dimension of poverty<sup>17</sup>.

Declarations aimed at establishing that poverty is a multifaceted human rights violation are welcomed. But they do not necessarily provide useful answers as to the specifics of those violations and the necessary remedies. At best, they illustrate how poverty is not only an issue of basic needs and material deprivation. This first generation of conceptual tools departed from an understanding of poverty as a material problem -putting individuals at risk - to move toward a theory where the lack of citizenship of the poor contributes to their poverty. In addition, by clearly introducing in the human rights realm the issue of poverty, it suggests an approach to the eradication of poverty based on the duties and on the obligations of state and non-state actors.

The beginning of the Decade for the Eradication of poverty was supported by new conceptual propositions, although fragmented.

*Poverty, extreme poverty and human rights violations: fragmented visions of human rights.*

UN General Assembly Resolution 51/178, adopted in 1996, launched the First UN Decade for the Elimination of Poverty. It does not allude to any human rights instrument, or does it promote the need for the ratification of the CESCRR. Paragraph 1 states that the General Assembly:

*[...] reaffirms that the satisfaction of basic human needs is an essential element of poverty eradication, those needs being closely interrelated and comprising nutrition, health, water and sanitation, education, employment, housing and participation in cultural and social life;*

Paragraph 4 of Resolution 51/178 states that national and international framework conditions and policies are conducive to poverty eradication. These conditions and policies *should aim* at the social and economic integration of people living in poverty and *the promotion and protection of all human rights* and fundamental freedoms for all, *including the right to development*.

<sup>16</sup> See paras. 5, 9, 10, 28a, 26 and 26f) of the Declaration.

<sup>17</sup> See Division for the Advancement of Women, Empowerment of Women through the Life Cycle as a Transformative Strategy for Poverty Alleviation, Expert Group Meeting, New Delhi, November 2001, on line at: <http://www.un.org/womenwatch/daw/csw/empower/>. See also UNGA 23rd Special Session Report, A/S-23/10/Rev.1, para 7 and following. et Mid-Term Plan 2000-2006, E/CN.6/2000/14, Commission on the Status of Women, para. 84-91; Mayra Buvinic, Women in Poverty : A New Global Underclass, Foreign Policy (Fall 1997), p. 38; Shara Razavi, *Pauvreté et genre*, (162) International Social Science Journal vol. LIII, (1999) 543.

As in the case of the pioneer propositions related to the right to development, Resolution 51/178 leaves us under the impression that poverty eradication is a pre-condition to the enjoyment of human rights and not that poverty is, per se, a violation of those rights. The first Report on Human Rights and Extreme poverty restates the same:

*It is against this background that the Copenhagen World Summit for Social Development affirmed the absolute need to find a new balance between economic development, social development and cultural development, stressing how closely linked fundamental **human needs** are in fields as varied as health, water, education, employment, housing and participation in cultural and social life<sup>18</sup>.*

Again, the proposal does not offer a clear link between, as an example, Article 11 of CESCRR that guarantees the right to a decent standard of living, including food, housing and clothes, and fundamental human needs. This omission is less understandable than in the case of previous resolutions or reports as by then, the Experts' Committee on Economic, Social and Cultural Rights had adopted the important General Observation no 3 on the nature of State Parties obligations<sup>19</sup>. Conceptually, it is different to affirm that eliminating poverty is a pre-condition to the enjoyment of human rights; and, that poverty is a human rights violation. In the last case, there can be no poverty elimination without the respect of human rights, and the recognition of duty bearers' obligations. In the former case, it is implicit that poverty can be resolved even in the case where they neglect their duties provided for by human rights instruments.

Isn't it the kind of confusion that the UNDP (2000) Human Development Report<sup>20</sup> tried to elucidate by affirming that an individual right must involve, directly or indirectly, a claim that one person has over the others, individuals, groups, societies or state<sup>21</sup>? Claims mean responsibility and accountability and pure development accountability may fail to pick up on the vulnerability of individuals and groups in that regard<sup>22</sup>.

The World Bank in its 2000/2001 Development Report named Attacking Poverty implicitly rejected this proposal, as an example. In this Report, the Bank, slightly departing from the growth strategies promoted in the '90s, encourages initiatives aimed at securing the poor: opportunities, empowerment and security for the poor are presented as the three major objectives of poverty reduction strategies (PRS). In order to succeed, such strategies must be able to rely on: a better accountability process; on citizens' participation; on a planned fight against discriminations; and, on securing access to justice. About economic and social rights ... not a word! Inadequate governance rather than inadequate respect of human rights, which in many cases requires adequate resources (!), is presented as being directly responsible for poverty and extreme poverty. But can governance and respect for all human rights be that easily disconnected? Of course not.

---

<sup>18</sup> See United Nations Sub-Commission on Prevention of discrimination and Protection of Minorities, Report on Human Rights and extreme Poverty, Un Doc E/CN.4/Sub.2/1996/13. para. 174 .

<sup>19</sup> The nature of States parties' obligations, General comment No 3 adopted by the CESCRR Experts' Committee in 1990.

<sup>20</sup> UNDP, Human Rights and Human Development.

<sup>21</sup> Id., p. 20.

<sup>22</sup> Id., p. 22.

The World Bank's proposal illustrates the tendency to "pick and choose" from the human rights components whatever suits better a theory of development or an ideology. But by no standard can we talk here of an approach that recognizes poverty as a human rights violation, or, of one that promotes the interdependency of all human rights.

The UN Special Millennium Assembly and the UN Millennium Declaration<sup>23</sup> did not clearly resolve the case of the relation between human rights and poverty. The Declaration shows a structure that separates commitments toward poverty eradication (paras. 11 to 21) from human rights; and, democracy (paras. 24 and 25) from the protection of vulnerable populations (para. 26). Resolution A/S 24-2, providing for further initiatives for social development is a bit more consistent. Paragraph 4 reiterates the Millennium commitments but paragraph 5 reaffirms the need to promote and strive to ensure the realization of the rights set in relevant international instruments and Declarations such as the Universal Declaration of Human Rights, the CDESCR and the Declaration on the Right to Development, including those relating to education, shelter, food, employment and health.

This call for action shows a better consistency with the affirmation that poverty is a human rights violation. Recent Resolutions adopted by the Sub Commission on the Promotion and the Protection of Human Rights promote a human rights' approach to poverty, but only in the case of extreme poverty<sup>24</sup>:

(1) (a) *Extreme poverty and exclusion from society constitute a violation of human dignity and that urgent national and international action is therefore required to eliminate them;*  
[...]

(d) *The existence of widespread absolute poverty inhibits the full and effective enjoyment of human rights and renders democracy and popular participation fragile*<sup>25</sup>;

An expert Seminar called in 2001 to study the relationship between human rights and poverty agreed that :

*[...] poor people experienced violations of a large range of rights, all of which would - if they were respected or fulfilled - contribute to moving them out of poverty. Part of the problem was identified as a lack of respect for the right to an adequate standard of living, which made it more difficult for those living in poverty to take advantage of services that are being provided, or to benefit from development projects aimed at improving their situation. In that sense, poverty is a structural problem, which cannot be solved without respect for human rights. The ability to exercise one's right to food, housing, clothing, medical care and education, through the exercise of the rights to participation, expression and other civil and political rights, is vital for the development of the individual and for society to eradicate poverty. All of these rights are already part of the normative framework of international human rights law, but need to be given focus in relation to poor people.*  
<sup>26</sup>

<sup>23</sup> See UNGA A/Res/55/2.

<sup>24</sup> From 1996, the UN General Assembly will more consistently refer to extreme poverty. See for examples : A/Res/51/97, A/Res/52/193, A/Res/53/146, A/Res/54/232.

<sup>25</sup> See Resolution 2001/31, paragraph 1, Human rights and extreme poverty.

<sup>26</sup> See E/CN.4/2001/54/Add.1, para. 20.



Participants even stressed the need to respond to poverty in terms of accessibility, vulnerability and affordability of goods and services<sup>27</sup>. This language, as we will see below, has been taken from the Experts’ Committee of the CESCR General Observations.

An Ad Hoc Working Group was subsequently established to prepare a study aimed at contributing to the drafting of an international declaration on extreme poverty and human rights<sup>28</sup>. Coordinated by José Bengoa, this Working Group made what seems to us to be a strange decision by orienting its work toward the respect of four rights derived from the intangible right to life enunciated in article 3 of the Universal Declaration on Human Rights. Those four rights are: the right to adequate food, to drinkable water, to shelter and to health<sup>29</sup>. Article 11 and 12 of the CESCR guarantee those rights in all situations of violations as much as they provide for the obligation of State Parties to guarantee immediately, according to their available resources, the core content of each of these rights.

Of course, extreme poverty situations raise in many cases life-threatening situations. But the process leading millions of peoples to a death by poverty is precisely a process that has to be stopped and addressed before it reaches such dramatic endings. By focusing only on one extreme of this continuum and relying for doing so on the *jus cogens* status of the UDHR, the Working Group is itself fragmenting the logic of the full realization of all human rights. By creating a momentum and suggesting the adoption of a Declaration on extreme poverty, the Working Group wrongly limits the scope of the efficiency of social rights to extreme life threatening situations. As a result, the proposal limits the scope of State and non-state actors duties to a very specific set of facts and factors.

The way by which the Ad Hoc Working Group defines the relation between poverty and human rights is also a bit of a surprise. It is true that when proclaiming the Decade for the Elimination of Poverty, that the UN General Assembly established a connection between extreme poverty and the violation of the right to life<sup>30</sup>. It is also true that extreme poverty kills. But from an institutional perspective, the choice of the Ad Hoc Working Group to select certain core rights because of their intimacy with the right to life puts at risk the encompassing and interdependent vision of all human rights proposed by human rights instruments, such as the CESCR and the CCPR. Does that mean that political support for human rights will only be limited to poverty when it violates the right to life? Not only is it an incorrect assumption to think that extreme poverty always kill, but, in addition, this proposal unduly restricts the scope of article 11 of the CESCR that provides for the protection of a right to a decent standard of living. The CESCR Experts’ Committee already decided that the core content of this right requires in all circumstances an immediate protection<sup>31</sup>. In fact, it seems to us that the Working Group seems unduly influenced by the adoption in 1982 of General Comment No 6 by the Human Rights

---

<sup>27</sup> Id., para. 24.

<sup>28</sup> See E/CN.4/Sub.2/2002/15. June 2002.

<sup>29</sup> Id., para. 15.

<sup>30</sup> See Res. 47/134 (October 1992).

<sup>31</sup> See Supra, note 19.

Committee<sup>32</sup>, the Experts' Body responsible for the CCPR. Cynical minds would say that it illustrates even 20 years later the unwillingness of the UN political body to recognize the "legal" value of the rights guaranteed by the CESCRC .

This initiative for a Declaration on extreme poverty as a violation of human rights is not only incomplete, but also incompatible with other analysis about the relation between human rights violations and poverty. As an example, the Independent Expert Lizin presented in 2000 to the Human Rights Commission its second Report<sup>33</sup> on human rights and poverty<sup>34</sup>. Expert Lizin proposes a definition of extreme poverty that takes into account multiple violations to different human rights as defined by Experts' Treaty Bodies, including the CESCRC's Committee. She does not see the point in isolating the right to life from other human rights guaranteed by CESCRC or other human rights instruments. On the contrary, Expert Lizin puts a lot of emphasis on an interdependent understanding of the causes and of the consequences of poverty and extreme poverty, which has to do with civil and political rights (participation in development and antipoverty programs, lack of effective citizenship, inability to enjoy basic freedoms) as much as with economic, social and cultural rights.

Stating that poverty and extreme poverty are human rights issues, as well as that they express human rights violations, requires us to put an end to the dichotomy between political discourse on poverty and legal understanding of all human rights' requirements. Some agencies and institutions had been tempted to pick and choose civil and political rights as "governance rights", while others are still struggling with the operational meaning of the right to development. An obvious missing piece is the legal meaning of economic and social rights in the context of poverty. Interestingly enough, Treaty Bodies responsible for monitoring the implementation of human rights instruments spoke fluently on this issue, hereby making possible a body of principles that proposes a concrete meaning not only of the interdependence of all human rights but, as well, of the specifics of economic and social rights violations in the global context of human rights violations. Poverty and extreme poverty issues undoubtedly can largely be explained as such interdependent violations. The next Section will explore recent developments by Treaty Bodies which illustrate how and why poverty and extreme poverty are human rights violations. This relatively new theory of human rights forbids "pick and choose" approaches as much as it commands the introduction in the theory of poverty an examination and a monitoring of duty-bearers' behaviours.

## **Part II UN Treaty Bodies and Poverty as a human rights violation.**

### *The Human Rights Committee (HRC) and the CCPR.*

---

<sup>32</sup> Se Infra, note 35.

<sup>33</sup> E/CN.4/2000/52, Human rights and extreme poverty - Report submitted by the independent expert.

<sup>34</sup> See other reports : UN Doc. E/CN.4/1999/48, Report of the Independent Expert on human rights and extreme poverty; UN Doc E/CN.4/2001/54 and Corr.1, Human rights and extreme poverty - Report from the independent expert; UN Doc E/CN.4/2002/55, Human rights and extreme poverty - Report from the independent expert and UN Doc E/CN.4/2003/52, Human rights and extreme poverty - Report submitted by the independent expert.

In 1982, the HRC adopted the General Comment No 6 on the right to life<sup>35</sup>. According to the HRC, "the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures". This observation was written in the context of considerations related to infant mortality and the need for State Parties to adopt measures to eliminate malnutrition and epidemics. General Comment No 6 has been seen as the source of more recent work related to poverty as a violation of human rights<sup>36</sup>. More recently, the HRC took the opportunity to conceptualize the relation between the right to life and poverty when adopting General Comment No 28 on the equality of rights between men and women as guaranteed by Article 3 of the CCPR<sup>37</sup>. The Committee then expressed their hope to be able to collect information on the particular impact on women of poverty and deprivation, which may pose a threat to their lives<sup>38</sup>. Although the HRC scope of revision is limited by the rights guaranteed in the CCPR, it did not hesitate to use the right to life in order to explore human rights violations as a consequence of poverty and extreme poverty.

More recently, the HRC expanded its analysis in the case of the examinations of State members' Periodic Reports by paying special attention to situations where discrimination was the basis of economic, social or cultural rights denials. Uzbekistan is an example where the situation of resettled Tails minority was a cause for concern<sup>39</sup>. In the case of Guatemala, the HRC expressed concerns about the denial of some economic and social rights to indigenous communities<sup>40</sup>. In the case of Japan, the right to education and to access higher education for the Korean population, Ainu indigenous and Buraku minorities was examined<sup>41</sup>. One of the most striking examples of the willingness of the HRC to examine in an interdependent way violations of the rights to life, to equality, and to economic and social rights that can lead to unacceptable situations of poverty is provided for by the review of the Periodic Report of Canada in 1998. In this case, the HRC concluded that the Canadian Government was putting at risk in a disproportionate fashion the right of indigenous women to housing<sup>42</sup>.

---

<sup>35</sup> The right to life (art. 6), 30/04/82. CCPR General Comment 6.

<sup>36</sup> Supra, note 28.

<sup>37</sup> CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28, March 2000, Equality of rights between men and women (article 3).

<sup>38</sup> Para. 10.

<sup>39</sup> *The Committee is deeply concerned at the information that more than 1,300 Tajiks, citizens of Uzbekistan, were resettled from their villages in the mountains to the steppes of the Sherabad region, about 250 miles away. The State party explained that the action was taken in order to improve the living conditions of the people concerned. It did not however, refute that the resettlement was enforced by military forces, that the Tajiks had to leave their homes without their belongings and that their villages were subsequently destroyed.* : CCPR/CO/71/UZB, para. 17. (April 2001)

<sup>40</sup> Even though the Committee recognizes that the State party has made efforts to improve the situation of members of indigenous communities, it regrets that it has not been possible to adopt legislation designed to guarantee the full enjoyment of all their rights under the Covenant, including the restitution of communal lands, the elimination of discrimination in employment and education and participation in other areas of the life of society. CCPR/CO/72/GTM, para. 29. (August 2001).

<sup>41</sup> See CCPR/C/79/Add.102, paras. 13 to 16.

<sup>42</sup> See CCPR/C/79/Add.105, para. 12.

Those examples illustrate the fact that the HRC now considers that, in many cases, a violation of civil and political rights is in fact a violation of economic, social and cultural rights as well; and, the fact that such violations explain the poverty in which specific groups or communities are maintained in a society. This opening of Treaty Bodies monitoring and normative work to poverty and extreme poverty issues as an interdependent exercise is not exclusive to the Human Rights Committee.

*The Committee of the Convention on the Elimination of All Forms of Discrimination (CERD).*

The Committee of the Convention on the Elimination of All Forms of Discrimination (CERD) is moving in the same direction. In 1995, CERD adopted General Recommendation no XIX on Racial Segregation and Apartheid<sup>43</sup> where it stated a clear relation between urban segregation and social exclusion. In 1997, General Recommendation XXIII on Indigenous Peoples was adopted by CERD. It then called upon State Parties to provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics<sup>44</sup>. In 2000, CERD adopted General Recommendation No XXVII about discrimination against Roma. Many paragraphs remind State Parties of their positive obligation not to discriminate in the field of education or in regard of Roma’s’ living conditions<sup>45</sup>. Recently, CERD adopted concluding Observations in regard to the United States. Without hesitation, the Committee concluded that the socio-economic marginalization of a significant part of the African-American, Hispanic and Arab populations is a violations of the USA’s commitment to CERD. It further recommended that the State party makes sure that the high incarceration rate is not a result of the economically, socially and educationally disadvantaged position of these groups<sup>46</sup>.

*CEDAW’s Experts’ Committee.*

CEDAW’s Experts’ Committee is probably the Treaty Body that hesitated least in acknowledging poverty as violation of women’s human rights. The case of Peru speaks by itself<sup>47</sup>. The case of Uganda is also striking. CEDAW’s Committee considered a direct

<sup>43</sup> Racial segregation and apartheid (Art. 3) : August 1995, CERD General recommendation no 19.

<sup>44</sup> Para. 4c).

<sup>45</sup> Discrimination against Roma, August 2000, CERD General recommendation no 27, Contained in document A/55/18, annex V , para. 17 and ff.

<sup>46</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America. August 2001. A/56/18, para. 395.

<sup>47</sup> *One of the main obstacles to full implementation of the Convention is poverty, which affects 44 per cent of Peruvian women. The situation is worsening, with 18 per cent of women living in extreme poverty. Long-term poverty as a result of structural adjustment policies divorced from social development, debt-servicing and the aftermath of terrorism has led to a serious deterioration in the quality of life of millions of women, who have no access to education, medical and hospital services, employment and the basic resources needed for subsistence. Notwithstanding the national strategy for poverty alleviation introduced by the Government, the feminization of poverty is a reality in the country, and is worsening in rural areas and indigenous settlements, as well as in areas declared emergency zones. Although the Committee notes that government macroeconomic indicators show progress, and that there has been a distinct reduction in the percentage of people classified as poor, more than half the country's population (13 million) suffer from poverty or extreme poverty. See Concluding Observations of the Committee on the Elimination of Discrimination against Women : Peru, July 1998, A/53/38/Rev.1, para. 310.*

relation between HIV infected mothers and the denial of the right to education and proper pre-school services for their children<sup>48</sup>. CEDAW does not limit to the poorest countries its analysis of the relation between women’s rights violations and poverty or extreme poverty. The recent examination of Canada’s periodic Report is in that regard a good example<sup>49</sup>. CEDAW did not hesitate in asking Canada how it justified the high levels of poverty among women when Canada is one of the wealthiest countries in the world. Neither did it hesitate in reminding to Canada that these high levels of poverty were commented on by the CEDAW Committee in 1997, by the Committee on Economic, Social and Cultural Rights in 1998, and by the Human Rights Committee in 1999; and that the CEDAW Committee recommended in 1997 that social assistance be restored to adequate levels. In the case of Uzbekistan, the Committee issued a statement that became a classic :

*173. The Committee recommends that the Government take a comprehensive and holistic approach to promoting equality between women and men in all areas, including the economic, social, political, cultural and family domains. It also recommends a shift from a welfare approach towards a human rights approach, whereby women are claimants of their rights*<sup>50</sup>.

Poverty had also been considered in CEDAW’s General Recommendations. General Recommendation No 24 on women and health establishes clear connections between the violation of women’s right to health and poor socio-economic living conditions<sup>51</sup>. General Recommendation no 21 on Equality in marriage<sup>52</sup> and family relations explains convincingly the need for women to benefit from equality in marriage in order to access to productive means and be protected from poverty.

*The Committee of the Convention on the Rights of the Child (CRC).*

The Committee of the Convention on the Rights of the Child (CRC) had been the first Treaty Body to express concern about how poverty and economic exploitation constitute a violation of children’s rights. The first General day of Discussion, hold in 1993, had been dedicated to the commodification and exploitation of the girl-child as a result of increasing vulnerability and extreme poverty. The Committee then concluded by stressing the urgency of creating awareness and raising concern at the growing number of children in situations of economic exploitation<sup>53</sup>. On the 10<sup>th</sup> Anniversary of the entry on force of the Convention, a Seminar was organized where there was an exploration of the clear connections between globalization economic policies imposed on some countries and children’s poverty. Participants took this opportunity to reiterate, being in that regard ahead of other Treaty Bodies, the need for public policies in the field of health services delivery that are essential for the protection and the promotion of children’s economic and

<sup>48</sup> See Concluding Observations of the Committee on the Elimination of Discrimination against Women : Uganda. CEDAW/C/UGA/3 , July 2000, para. 340.

<sup>49</sup> C/2003/1/CPR.3/Add.5/ Rev.1, January 31 2003, para. 33.

<sup>50</sup> Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Uzbekistan. February 2001. A/56/38, para. 173.

<sup>51</sup> Women and health : 02/02/99. CEDAW General recommendation No 24.

<sup>52</sup> Equality in marriage and family relations : 04/02/94. CEDAW General recommendation No 21.

<sup>53</sup> See CRC/C/20 (1993).

social rights<sup>54</sup>. In fact, the First General Comment adopted by the CRC in 2001 was about the aims of education and the right to education guaranteed by Article 29 of CRC. Although article 4 of the CRC differs from article 2 of the CESC<sup>55</sup>, the Committee concluded that resource constraints cannot provide a justification for a State party's failure to take any, or enough, of the measures that are required<sup>56</sup>.

Those examples, all taken from Treaty Bodies conclusions in the course of the examination of State Parties Periodic Reports, or from their "jurisprudence", sustain the statement made by the Independent Expert on Extreme Poverty, Anne Marie Lizin :

*A basic needs strategy incorporates a certain element of charity, whereas a human rights-based approach not only defines beneficiaries and the nature of their needs but recognizes beneficiaries as active subjects and claim-holders and establishes duties or obligations for those against whom a claim can be brought to ensure that needs are met. The concept of claim-holders and duty-bearers introduces an important element of accountability. Increased accountability holds the key to improved effectiveness and transparency of action and as such offers the potential for "added value" flowing from the application of rights-based approach<sup>57</sup>.*

As well, they illustrate what a former UN High Commissioner for Human Rights (HCHR) meant when describing human rights as a form of international public goods :

*Lawyers should not be the only voice in human rights and, equally, economists should not be the only voice in development. The challenge is to demonstrate how the assets represented by human rights principles, a form of international public goods, can be of value in pursuing the overarching development objectives, the eradication of poverty<sup>58</sup>.*

In 2002, the OHCHR adopted some Draft Guidelines promoting a Human Rights approach to Poverty Reduction Strategies (PRS)<sup>59</sup>. Those guidelines, although contested because of their somehow segmented application of human rights<sup>60</sup> narrowed to the PRS context, nevertheless clearly express the causal connection between human rights as normative standards and poverty and extreme poverty :

---

<sup>54</sup> See 10<sup>th</sup> Anniversary Commemorative Meeting, CRC/C/87, Annex IV (1999).

<sup>55</sup> Compare article 2(1) of CESC: *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*, with article 4 of CRC: *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.*

<sup>56</sup> The Aims of Education : April 2001. CRC/GC/2001/1, para. 28.

<sup>57</sup> UN Doc. E/CN.4/1999/48, Report of the Independent Expert on human rights and extreme poverty, para. 34.

<sup>58</sup> Mary Robinson, December 2001, Lecture at the World Bank.

<sup>59</sup> UN OHCHR, Draft Guidelines promoting a Human Rights approach to Poverty Reduction Strategies (PRS), September 2002, on line at : <http://www.unhchr.ch/development/povertyfinal.html#chapI>.

<sup>60</sup> The Guidelines select certain rights as deserving «priority monitoring» in the context of PRS : right to adequate food, to health, to education, to decent work, to adequate housing, to personal security, to appear in public without shame, to equal access to justice and right to enjoy fundamental liberties.

*In sum, the human rights approach has the potential to advance the goal of poverty reduction in a variety of ways: (a) by urging speedy adoption of a poverty reduction strategy, underpinned by human rights, as a matter of legal obligation; (b) by broadening the scope of poverty reduction strategies so as to address the structures of discrimination that generate and sustain poverty; (c) by urging the expansion of civil and political rights, which can play a crucial instrumental role in advancing the cause of poverty reduction; (d) by confirming that economic, social and cultural rights are binding international human rights, not just programmatic aspirations; (e) by adding legitimacy to the demand for ensuring meaningful participation of the poor in decision-making processes; (f) by cautioning against retrogression and non-fulfilment of minimum core obligations in the name of making trade-offs; and (g) by creating and strengthening the institutions through which policy-makers can be held accountable for their actions<sup>61</sup>.*

This proposal remains an interesting synthesis of the theory of the interdependence of all human rights in the context of poverty and of extreme poverty. In fact, it sums up most of the work already accomplished by Treaty Body mechanisms. But foremost, the Guidelines take as a starting point the juridical value of economic and social rights, as well as the core elements of General comment No 3 adopted by the CESCR Committee in 1990. In sum, it illustrates the central, although not exclusive, importance of economic and social rights in the fight for the eradication of poverty and extreme poverty. This approach carries important consequences for duty bearers, state as well as non-state actors.

### **Part III The CESCR : A coherent framework for a universal approach in eradicating poverty and extreme poverty as a human rights violation.**

Reality forced the Treaty Bodies in their exploration of the causes and consequences of poverty as a human rights issue. No human rights treaty, at least in the case of those belonging to the Universal Charter of Human Rights, refer to poverty as a specific violation of human rights. In fact, Treaty Bodies had steadily and discreetly borrowed from the CESCR fairly recent jurisprudence<sup>62</sup> in the process of monitoring situations of poverty and exclusion. Without explicit references in many cases, they acknowledged the interdependency of all human rights in the process of promoting human dignity, and assessing the consequences on human rights of poverty and extreme poverty. It had become a *lieu commun* to recall why and how the CESCR experienced trouble in finding its place amongst the basic human rights instruments. For many State Parties, social rights equated to vague moral aspirations for the longest time. One should not be surprised that the same resistance showed up in the international debate about poverty as a cause, and a consequence, of economic and social rights violations.

The unequivocal importance of the CESCR does not mean that it has a monopoly over the promotion and the implementation of economic and social rights. The case of the right to unionize speaks by itself, as it is guaranteed by article 22 of CCPR as well as by article 8 of the CESCR, in addition to ILO fundamental Conventions<sup>63</sup>. Neither does it, by itself, encompass all the specific dimensions of the full realization of economic and social rights.

---

<sup>61</sup> Para. 24.

<sup>62</sup> General Comment No 3 was adopted in 1990 by the CESCR Experts' Committee.

<sup>63</sup> See ILO Declaration on Fundamental Principles and Rights at Work, at : <http://www.ilo.org/public/english/standards/decl/index.htm>.

The case of section 26 of the CCPR, which protects the right of all persons to equality before the law and to the equal protection of the law without discrimination is a good example<sup>64</sup>. Nevertheless, the CESCR is the only human rights instrument that addresses the issue of "social rights" as rights in the general framework of States' duties provided for by article 2 of CESCR. If the proprieties of each right guaranteed by the CESCR differ, they are nevertheless all submitted to article 2 as far as States Parties' duty to protect, promote and fulfil those rights is concerned. CESCR does not provide for a unique way of delivering health services to children, or education to women. Neither does it place as a priority the state delivery of health or education over non-state actors' role in such delivery. But CESCR provides universal, institutional and substantive benchmarks aimed at protecting and promoting the rights guaranteed by the CESCR.

As interpreted by the Experts' Committee of the CESCR, article 2 provides for the immediate obligation of State members to contribute, to the maximum of their available resources, to the realization of the core content of each right guaranteed by the CESCR in order to fulfil each right in a progressive manner. In addition, article 2 forbids any regression in the realization of those rights<sup>65</sup>. Finally, according to article 4 of CESCR, States may subject the rights protected by CESCR only to such limitations provided for by law and only insofar as this may be compatible with the other rights guaranteed by the CESCR.

The requirements provided for by article 2 of CESCR bring a significant contribution to the antipoverty agenda. Not only do they set specific and immediate obligations for state and non-state actors, but they also provide sufficient flexibility for policy makers to appreciate each social right in relation to all other rights guaranteed by the Covenant and other human rights instruments. In sum, CESCR gives to the State not only the role of a law-maker (in order, for example, for discrimination to be prohibited) but also the responsibility of supervising all interventions from state and non-state actors in order for social and economic rights to be respected<sup>66</sup>. Poverty being one of the most serious threats to human dignity, it is then useful to explain how CESCR provides a useful methodology aimed at monitoring the causes, and the consequences, of poverty as a human rights violation.

---

<sup>64</sup> See Montreal Principles on Women's Economic, Social and Cultural Rights (2002) at : [www.equalityrights.org](http://www.equalityrights.org).

<sup>65</sup> General comment No 3 provides for the main principles of interpretation of article 2 of the CESCR. This GC had been preceded by the adoption of the Limburg Principles and succeeded by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. See <http://shr.aaas.org/thesaurus/instrument.php?insid=95>. The literature often refers indistinctly to the GC or to the Principles. The Principles are not formally part of the CESCR jurisprudence but they provide a useful and extensive framework to interpret the concepts of State Parties duties as well as the one of violations to the rights guaranteed by the CESCR.

<sup>66</sup> *Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.* Maastricht Guidelines, para. 2.



*Respect, Protect, and Fulfil Economic, Social and Cultural Rights : an obligation incumbent to all.*

Like civil and political rights; economic, social and cultural rights impose three different types of obligations on State Parties: the obligations to respect; to protect; and, to fulfil the rights. Failure to perform any one of these obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the State and its agencies have an obligation not to make decisions that put at risk the physical and psychological security and safety of persons, thereby impairing their capacity to exercise individual and collective freedoms necessary to the promotion of their living and dignity. Arbitrary displacements of populations can here be cited as an example. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, a general *laissez-faire* atmosphere in environmental matters, or a failure to regulate access to the land (in the case of indigenous populations), violates this specific obligation. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. This obligation of the state is at the centre of CESC. It protects the right of every person to benefit from measures that are necessary for her dignity in a specific context. Such measures may as well include special or positive measures that the State can justify because of the underprivileged position of a group, in the case of women, for example.

As far as the obligation of the State to protect, promote and fulfil all rights guaranteed by the CESC, the role of the State is not interchangeable. The State carries the responsibility to monitor the action of all actors of development and to prohibit practices that are not in conformity with the CESC. Inevitably, the respect by State Parties of all obligations provided for in the CESC is a significant contribution to the eradication of poverty, described as a cause and a consequence of human rights violations.

*Obligations of conduct and obligations of result according to the CESC.*

The obligations to respect, protect and fulfil each contain elements of an obligation of conduct, and of an obligation of result. According to the Maastricht Principles and to the General Observation No 3 adopted by the ECESC, the obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. Certain rights guaranteed by CESC are regulated by the progressive realization principle stated for by article 2. In those cases, such as in regard of the right to food, to shelter or to drinkable water, legislative action would be insufficient, although necessary, for the right to be protected. The right to health, as an example, relies a mixture of public policies that contain immediate goals (core content of the right to health and public health measures), immediate legislative action (prohibition of discrimination or primary education) and planned objectives. It also relies on a general legal framework that protects the right to health in general and that prohibits measures susceptible to interfering with the realization of the right. The introduction of user's fees, as example, may be in contravention to the affirmation of every person's right to health and in contradiction with the prescriptions of the CESC if as a result, it excludes more vulnerable groups, such as

women and children, of persons belonging to minorities from its benefits. The added effect of the immediate and the progressive aspects of the state obligation of conduct provides for a legal content of the right to health, to stay with this example, notwithstanding the fact that health policies and services may be implemented very differently from one country to another and with varied resources.

The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard or to adopt specific legislative measures immediately. It is the case of the right to just and favourable conditions of work (article 7) or of the right of everyone to form and to join trade unions (article 8) and certainly, of the obligation of the State to provide for the prohibition of discrimination and the protection of equality (article 2(2) and (3)). The right to primary education (article 13(2)(a)) also contains an immediate obligation of result.

This interesting and rich combination of different obligations regarding different rights and different dimensions of the realization of each right guaranteed by the CESCR certainly can contribute to the eradication of poverty. A human rights approach to poverty, as one can see, requires more than accomplishing material progress according to an agreed-upon time frame. As example, no political agenda can delay the obligation of the State to guarantee the right to primary education immediately and without discrimination.

#### *Minimum Core Obligations.*

Millions of persons around the world, and a majority of women and children, suffer from the more basic privations of food, drinkable water and shelter. The poor are also denied access to education and health services to a point where their life and dignity are constantly at risk. This extreme vulnerability is given special attention in article 11 of the CESCR. Although article 11 had not been specifically interpreted by the CESCR Experts' Committee through the adoption of a General Comment, it obviously is the *raison d'être* and the central commitment of CESCR. Article 11 contains an immediate obligation of the State to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights<sup>67</sup>. Except in highly unusual circumstances, the State will have the burden to demonstrate that all possible and available resources had been affected to the realization of the core content of the right to decent conditions of living. Often, legislative measures will be necessary to make sure that each individual, including those belonging to the most vulnerable and excluded groups of a society, will benefit from the minimal or core content of each right guaranteed by the CESCR. The profusion of indicators and quantitative data now available make this immediate obligation easier to monitor.

The CESCR Experts' Committee never considered that its mandate was to monitor poverty per se. In fact, the Committee never worked at finding a definition of poverty. But since its creation, it relied on a framework where poverty is seen as a cause, and a consequence, of economic, social and cultural rights violations. In 2001, the Committee held a special meeting where poverty was examined as a substantive issue arising from

---

<sup>67</sup> General Observation No 3, para. 10.

the implementation of the Covenant<sup>68</sup>. As the Committee itself expressed it, this special meeting was not "sought in this statement to formulate a detailed anti-poverty programme or plan of action, but to identify concisely the distinctive contribution of international human rights to poverty eradication"<sup>69</sup>.

As the output of this Seminar, the Committee adopted five principles:

1. all rights are equally important as a means of ensuring that all people can live in freedom and dignity (para. 10);
2. non-discrimination and equality are integral elements of the international human rights normative framework (para. 11);
3. the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes. The right to participate is reflected in numerous international instruments, including [...] the Declaration on the Right to Development (para. 14);
4. rights and obligations demand accountability. Unless supported by a system of accountability, they can become no more than window dressing. Accordingly, the human rights approach to poverty emphasizes obligations and requires that all duty-bearers, including States and international organizations, are held to account for their conduct in relation to international human rights law (para. 14); and,
5. transparency and the rule of law: in respect of national traditions, standards regulating state and non-state actors are not always written. It is essential that this common law be known, disseminated and shared.

As the Committee concludes :

*International human rights provide a framework of norms or rules upon which detailed global, national and community-level poverty eradication policies can be constructed. While poverty raises complex multi-sectoral issues that are not amenable to simple solutions, the application of the international human rights normative framework to these issues helps to ensure that essential elements of anti-poverty strategies, such as non-discrimination, equality, participation and accountability, receive the sustained attention they deserve<sup>70</sup>.*

The CESCR promotes an interdependent approach to human rights as a proper normative framework aimed at eradicating poverty. When some other agencies or actors are tempted to limit the scope of the respect of human rights to the core content of some social rights (education, food, water and health) the Committee believes that a dynamic understanding of human rights requirements implies locating these needs in the broader context of a democratic governance that does not exclude access to the courts and equality.

*Learning from the thematic General Comments adopted by the CESCR Experts' Committee (1991-2002).*

---

<sup>68</sup> See E/C.12/2001/10, Poverty and the International Covenant on Economic, Social and Cultural Rights, 10/05/2001.

<sup>69</sup> Para. 3.

<sup>70</sup> Para. 9.

Since 1989, the Committee adopted 15 General Comments. Seven of those are thematic<sup>71</sup> Comments (housing, education, health and water). In all cases, the Committee developed the triple "A" requirement: each right must be accessible, affordable and available without discrimination; and, special measures are to be designed in order to guarantee the triple "A" benefit for most vulnerable populations. An adaptability criteria must be added to the precedent in so far as the CESCR also protects cultural rights<sup>72</sup>. In certain cases, a remarkable effort of cross-fertilization shall be noticed between the work of the Committee and some Special Rapporteur's work, such as the Sub-Commission Special Rapporteur Tomasevski on the right to education<sup>73</sup>.

The triple "A" guarantee must be made accessible even in the case where the only possible realization of a right in an immediate perspective concerns the core content of this right. In fact, the merits of this systematization were recently acknowledged by the participants to the Expert Seminar on Human Rights and Extreme Poverty<sup>74</sup>. Such a benchmark not only concerns the State as a service provider but any other entity (companies, donors and NGOs) as well.

#### *Economic and social rights and the right to development*

As in the case of the recent work of the UN Independent Expert on the Right to Development<sup>75</sup>, the Committee insisted throughout the adoption of the General Comments on the importance of the person's right to participate in development as much as on the right to a democratic process of development. In most cases, references were then taken from the 1986 UN Declaration on the Right to Development<sup>76</sup>.

#### *The justiciability of economic and social rights : a matter of accountability*

The ECESCR adopted in 1998 the General Comment No 9. It states that :

---

<sup>71</sup> General Comment No. 1 - Reporting by States parties (1989); General Comment No. 2 - International technical assistance measures (art. 22 of the Covenant) (1990); General Comment No. 3 - The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (1990); General Comment No. 4 - The right to adequate housing (art. 11 (1) of the Covenant) (1991); General Comment No. 5 - Persons with disabilities (1994); General Comment No. 6 - The economic, social and cultural rights of older persons (1991); General Comment No. 7 - The right to adequate housing (art. 11 (1); Forced evictions (1997); General Comment No. 8 - The relationship between economic sanctions and respect for economic, social and cultural rights (1997); General Comment No. 9 - The domestic application of the Covenant (1998); General Comment No. 10 - The role of national human rights institutions in the protection of economic, social and cultural rights (1998); General Comment No. 11 - Plans of action for primary education (art. 14) (1999); General Comment No. 12 - The right to adequate food (1999); General Comment No. 13 - The right to education (1999); General Comment No. 14 - The right to the highest attainable standard of health (2000); and, General Comment No. 15, The right to water, E/C.12/2002/11. See HRI/GEN/1/Rev.5, April 2001, Compilation of general comments and general recommendations adopted by human rights treaty bodies.

<sup>72</sup> About the normative content of cultural rights, see : Les droits culturels, Projet de déclaration, Patrice Meyer Bisch, éditeur, Éditions UNESCO et Institut interdisciplinaire d'éthique et des droits de l'Homme, 1999, Fribourg.

<sup>73</sup> See Preliminary Reports of the Special Rapporteur on the right to education at : E/CN.4/2000/6 and E/CN.4/1999/49; and Reports at : E/CN.4/2003/9, E/CN.4/2002/60 and E/CN.4/2001/52.

<sup>74</sup> Supra, note 26, para. 24 : *Participants unanimously stressed the need to respond to poverty in concrete terms, in particular in terms of accessibility, vulnerability and affordability.*

<sup>75</sup> Supra, note 13.

<sup>76</sup> Supra, note 9.

*[...] legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.[...] (para. 4)*

*[...] The need to ensure justiciability is relevant when determining the best way to give domestic legal effect to the Covenant rights (para. 7)*

These concerns lead the Committee to provide additional guidance about the justiciability of the rights guaranteed by the CDESCR :

*In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. [...] While the general approach of each legal system needs to be taken into account, there is no Covenant right, which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. (paras 10 and 14).*

More recently, the UN High Commissioner for Human Rights, when issuing the *Draft Guidelines promoting a Human Rights approach to Poverty Reduction Strategies*, felt the need to explain how justiciability and accountability lead to effective mechanisms that provide effective remedies without necessarily implying punishment:

*An accountability procedure depends on, but goes beyond, monitoring. It is a mechanism or device by which duty-bearers are answerable for their acts or omissions in relation to their duties. An accountability procedure provides right-holders with an opportunity to understand how duty-bearers have discharged, or failed to discharge, their obligations, and it also provides duty-bearers with an opportunity to explain their conduct. While accountability implies some form of remedy and reparation, it does not necessarily imply punishment.*

*Accountability mechanisms must provide remedies for human rights violations. [...] such as full restitution, compensation, rehabilitation, apologies and other forms of satisfaction, general guarantees of non-repetition and, in exceptional cases, punishment of the individual perpetrators<sup>77</sup>.*

The document proposes that accountability is a necessary consequence of monitoring in the field of human rights violations.

### *Identifying economic and social rights violations.*

Taken from the theory of human rights, and the General Comments adopted by different Treaty Bodies, the following Box proposes 13 questions aimed at identifying economic and social rights violations:

#### **Identifying economic and social rights violations**

<sup>77</sup> See Draft Guidelines promoting a Human Rights approach to Poverty Reduction Strategies, Supra, note 59, Guidelines 16 and 17, paras. 225 and 236.

- 1) Is the right economically accessible for all (immediate obligation)?
- 2) Is the right geographically accessible for all (immediate obligation)?
- 3) Is the right physically accessible (prohibition of discrimination)?
- 4) Is the content of the right culturally adapted (interdependence with cultural rights)?
- 5) Is the right, in general, accessible without discrimination (protection of the fundamental right to non discrimination as an immediate obligation)?
- 6) Is the right accessible without state/private violence (protection of the right to life and physical integrity in the enjoyment of a social right)?
- 7) Are positive, special or urgent measures made available for vulnerable groups (as an expression of the right to equality)?
- 8) Is the capacity to organize and join in order to claim a right legally protected (protection of fundamental freedom as a condition of enjoyment of a social right)?
- 9) Are progress realized in regard of one right causing setback in the realization of the core content of another right ?
- 10) Is the capacity to determine the content and the delivery of the right recognized to collectivities (right to participate in the implementation of the right to development)?
- 11) Is the right legally proclaimed and organized (content, goals, discrimination, remedies) ?
- 12) Are all rights made binding on ALL actors of development?
- 13) Are remedies accessible (accountability)?

This model shows the necessity of an intersectoral understanding of economic and social rights violations. In fact, and as far as effective access to judicial or quasi judicial justice mechanisms are available, one will realize that often claims issued from economic and social rights violations are often the result of the violation of: the right to equality; of a breach of the due process principle; and, even of a violation of the right to property. The justiciability of economic and social rights requires effective justice providing mechanisms because they are "legal rights" often violated in consequence of an interdependent relation with other fundamental rights. So is poverty. It is usually the result of the violation of many rights. If it would be ill advised to select a "group" of rights to be promoted in order to eradicate poverty, it would as well be wrong to limit the debate to civil and political rights in the name of the uncertain nature of economic and social rights. In fact, theory, as well as jurisprudence issued from international treaty bodies, shows an effective practice of interdependence in the process of identifying the causes and the consequences of poverty and extreme poverty. This international practice now has to translate at the national and local levels. In order to make such progress treaty bodies, as well as domestic practices, offer numerous possibilities to translate human rights standards, including standards relevant to economic and social rights, as effective tools to fight against poverty and eradicate it.

## **Part IV      Translating human rights in national contexts.**

As stated in CESCR General Comment No 9, Covenant norms must be recognized in appropriate ways within the domestic legal order. Ensuring the monitoring and the accountability of economic and social rights in the domestic order requires numerous and different institutional strategies and institutions. The following section offers a survey of

the most important strategies in that regard - as far as they are essential in many cases in order to support all other efforts aimed at eradicating poverty and extreme poverty.

*Incorporating economic and social rights in the domestic legal order.*

The CESCR does not provide for an obligation of State Parties to implement through the adoption of legislation the rights it guarantees. In some cases, legislation will be the most appropriate vehicle to this end, such as in the case of the prohibition of discrimination (article 2(3)). In legal systems that are not purely monist, this particularity of the CESCR causes major problems. Judges will have a tendency to address economic programmatic rights (right to ...) as moral rights and not to look for implicit incorporation in regular legislation<sup>78</sup>. Governments, as well as judges, will also see in this non-incorporation requirement an opportunity not to apply the principle of interpretation aimed at looking for compatible interpretation of domestic legislations with international standards<sup>79</sup>. Social rights are then limited to social policies submitted to political dynamics. If we consider that the benefit of a right includes the benefit to participate in the implementation strategy of this right, as well as the right to look for remedies in the case of violations, the adoption of topical legislation is encouraged. Even if aimed at organizing the scope of a right, such legislation also confirms its legal proprieties and gives to rights-holders access to justiciable mechanisms<sup>80</sup>. General Observation no 9 adopted by the CESCR Experts' Committee addresses this issue. The Committee strongly suggests an explicit legal incorporation, if not direct, of the CESCR standards, in order for programmatic rights to gain a legal status as human rights. In the context of poverty, such legislation also emphasizes the role and the responsibilities of different duty-bearers.

*Constitutional recognition of economic and social rights.*

Constitutions should reflect the fact that all human rights are interdependent and indivisible. The reality is different even in countries where the constitution has been

---

<sup>78</sup> See Karen Knop, *Here and There : International Law in Domestic Courts*, (2000) 32 *International Law and Politics*, 501; Lucie Lamarche, *La Fédération canadienne et le phénomène de l'internationalisation des droits de la personne : le Canada est-il encore un État «provincial» ?* in *Inter-American Commission of Human Rights, Working Session on the Implementation of International Human Rights Obligations And Standards in the Inter-American System*, March 2003, available at : [International Justice Project](http://www.internationaljusticeproject.org), at : <http://www.internationaljusticeproject.org> ; Gavan Griffith and Carolyn Evans, *Teoh and Vision of International Law*, U. of Melbourne Faculty of Law, Public Law and Legal Theory Research Paper no 34, 2002 online at : <http://ssrn.com/abstract?id=364820>; Dianne Otto, *Addressing Homelessness : Does Australia's Indirect Implementation of Human Rights comply with its International Obligations ?* U. of Melbourne Faculty of Law, Public Law and Legal Theory Research Paper no 46, 2003, Id., at id=423321.

<sup>79</sup> For a recent example, see the decision of the Canada Supreme Court in *Gosselin v. A.G. Québec*, December 19<sup>th</sup> 2002 at : <http://www.lexum.umontreal.ca/csc-scc>.

<sup>80</sup> In the case of the right to food, for example : *In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.* The right to adequate food (Art.11): CESCR General Comment No 12 , para. 29.

recently revised or adopted<sup>81</sup>. There are notable exceptions, such as in the case of South Africa’s 1996 Constitution. An examination of the decisions by the South Africa Constitutional Court easily convinces us that economic and social rights are justiciable. The SA Constitution is one the 30 constitutions around the world where the right to housing is protected.<sup>82</sup> In the Grootboom decision<sup>83</sup>, the Court did not hesitate in taking inspiration from the CESCR in order to grant an order forcing the state to revise its housing policies. The issue was the exclusion of the poorest from the benefit of the national housing policy. The Grootboom decision introduced the notion that a State, although its resources are limited, can nevertheless, violate in “good faith” the standards established by the international law of human rights<sup>84</sup>.

In some other contexts where the constitutional practice is inspired by the Anglo-Saxon tradition, the absence of an explicit constitutional protection of programmatic social rights nevertheless leads constitutional courts to some recognition of the legal value of such rights. Courts then took interpretative guidance from The Preamble of the relevant Constitution (Kenya, Botswana, Tanzania) or from the recognition of civil and political rights (prohibition of discrimination, right to life). In the case of India’s Supreme Court, the interdependent lecture of articles 21 (right to life and liberty) and 51 (commitment of the State to foster respect for international law and treaty obligations in the dealings of organised people with one another) of the Constitution led the court to grant an order that stopped massive displacements of populations, or to declare mandatory the right to education. Such indirect incorporation of the CESCR standards has limits. As explained by Special Rapporteur on the right to housing, M. Kothari, the same Supreme Court recently refused to invalidate the Government’s decision to displace tribal populations in the case of the Narmada Dam<sup>85</sup>.

In the Canadian context, where the Charter of Rights and Freedoms is totally silent about economic and social rights, the Supreme Court refused to see in a workfare program scheme designed for beneficiaries of less than 30 years of age, either a violation of their right to security, or a violation of their right to equality, even if numerous interveners presented to the Court arguments issued from the CESCR requirements.<sup>86</sup>

---

<sup>81</sup> Tom Allen, *Commonwealth Constitutions and Implied Social and Economic Rights*, 6 RADIC (1994) 555; Etienne Mureinik, *Beyond a Charter of Luxuries : Economic Rights in the Constitution*, 8 South African Journal of Human Rights (1992) 464.

<sup>82</sup> See section 26 of the SA Constitution.

<sup>83</sup> *Grootboom and others v Government of the Republic of South Africa and others*, Constitutional Court - CCT38/00, 21 September 2000, at : [http://www.concourt.gov.za/judgment.php?case\\_id=11987](http://www.concourt.gov.za/judgment.php?case_id=11987). See Sandra Lidenberg, *The Grootboom Principles*, in U. of Western Cape Socio Economic Rights Project, 2002, at : [http://www.communitylawcentre.org.za/ser/esr2002/2002july\\_courts.php](http://www.communitylawcentre.org.za/ser/esr2002/2002july_courts.php). See also South Africa Human Rights, 4<sup>th</sup> Annual Report on Socio-Economic Rights (2000-2002), Chapter 2, at : <http://www.sahrc.org.za/publications.htm>.

<sup>84</sup> Sandra Lidenberg, *Grootboom for Policy Reform in South Africa*, (2001) 17 :2 South African Journal of Human Rights.

<sup>85</sup> See E/CN.4/2001/51, para. 81.

<sup>86</sup> *Gosselin vs. Attorney General of Québec*, *Supra*, note 79.



There is actually an ongoing debate amongst constitutional experts about the phenomena of judicial transnationalism<sup>87</sup>. Supreme Courts decision would cross-fertilize each other, which would serve the case of all human rights, but mostly of programmatic human rights, such as social rights<sup>88</sup>. But good news may not be good enough. The Australian Supreme Court refused to follow the Supreme Court of Canada in the case of the right of four Canadian children to benefit from the presence in Canada of their mother who had no residency status<sup>89</sup>. This decision evokes the phenomena of asymmetrical incorporation of the "ideology of human rights" in domestic tribunals. As a matter of fact, the Canadian Supreme Court in *Gosselin* refused the influence of the South Africa Constitutional Court that could have been taken from the *Grootboom* decision.

### *Equality, Discrimination and Access to Remedies.*

Section 2(2) of ICESCR stipulates that States Parties to the CESCRC undertake to guarantee that the rights enunciated will be exercised without discrimination of any kind. Section 26 of ICCPR provides for an equality protection that reads: *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.*

It is true that Treaty Bodies are experiencing difficulties in agreeing upon what is a *de facto* equality standard and upon what are the appropriate remedies aimed at correcting discriminatory practices. This complex debate is not beyond influencing the ability of the most deprived to enjoy their social rights. As an example, does substantive or *de facto* equality mean that resources can be differently allocated in the name of structural or systemic discrimination in order for the most vulnerable to enjoy their rights? On the other hand, are such measures to be seen as special or temporary or as a particular remedy instead of the expression of the substance of the right to equality<sup>90</sup> ?

The relation between poverty and equality is obvious. As equality does not mean sameness, a standard of substantive or *de facto* equality must be reflected in different allocations of resources for different groups according to their deficit in accessing basic resources.

Without doubt, all states must consider the constitutional protection of equality, including the right to equal protection and benefit of the law, and the legal prohibition of discrimination. But such protection can only make sense if violations are to be handled by an appropriate mechanism that can help victims searching appropriate remedies.

---

<sup>87</sup> Philip Alston et Craig Scott, *Adjudicating Constitutional Priorities in a Transnational Context : A Comment on Soobramoney's Legacy and Grootboom's Promise*, (2000) 16 South African Human Rights Review 206-268.

<sup>88</sup> See *The Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level*, adopted on 11 September 2003.

<sup>89</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>90</sup> For a more complete debate, see: Marc Bossuyt, *The Concept and Practice of Affirmative Action*, E/CN.4/Sub.2/2000/11 and 2001/15.

### *National Human Rights Machineries.*

The poor, and certainly the poorest, cannot access the courts on their own. As economic and social rights violations are often the result of multiple violations of rights (discrimination in housing, as an example), human rights national machineries are to be able to address different kinds of human rights violations; civil and political, as well as economic, social and cultural. In addition, human rights commissions are to be authorized to work on systemic discrimination cases and search, again, for collective appropriate remedies. At this point in time, many recently created national human rights commissions cannot receive individual complaints or cannot look for systemic remedies in the case of massive violations of human rights. As stated in General Observation No 10 adopted by the Committee on economic social and cultural rights in 1998<sup>91</sup> : *The Committee calls upon States parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights and requests States parties to include details of both the mandates and the principal relevant activities of such institutions in their reports submitted to the Committee*<sup>92</sup>.

Such a call pushes ahead the Paris Principles Relating to the Status of National Human Rights Institutions, which was adopted by the UN General Assembly in 1993<sup>93</sup>.

The institution of the Ombudsman must also be considered. An Ombudsman is usually empowered by the law to receive complaints lodged by citizens against the public administration. In order to accomplish its mandate, the Ombudsman is guaranteed a strong independence status and submitted to the duty to report annually to a democratically elected legislative assembly. In some recent cases, the Ombudsman was given the authority to initiate on its own inquiries related to systematic violations of human rights (such as in the case of La Defensora de los Derechos Humanos from Bolivia).

Where access to justice is not effectively guaranteed and where resources are scarce, the institution of the Ombudsman can reveal itself to be an effective tool to redress situations contributing to poverty. The Ombudsman Office usually will largely rely not only on inquiries but also on mediation or alternate dispute resolution in order to promote solutions aimed at promoting the respect of human rights. Usually free of charge, the Ombudsman office, is sufficiently independent; and although it is not a substitute to the courts, it can be seen as an effective complementary mean to redress injustices. This institution is slowly moving toward the examination of economic and social rights violations precisely because poverty, vulnerability and abuses are not only about civil and political rights violations.

### *Access to justice and poverty issues.*

In order to be effectively guaranteed, internationally recognized and accepted, human rights need to be supported by effective judicial remedies at the domestic level. Even

---

<sup>91</sup> The role of national human rights institutions in the protection of economic, social and cultural rights (1998).

<sup>92</sup> Para. 4.

<sup>93</sup> See UN Doc. A/RES/48/134. National Institutions for the Promotion and Protection of Human Rights.

when it is the case, proper legislation do not by themselves solve the issue of the access to the judicial system. Legal aid or legal assistance schemes can of course contribute to solving this problem. A survey of most legal aid schemes in developed countries shows nevertheless, that in too many cases, such schemes present limits in regards to eligible cases. In all cases, the rights of the accused to be represented by counsel will be covered and protected. But, when the issue is opposing the poor to the State, most models will exclude such potential litigation from the benefit of legal aid.

These limitations are of course the result of a conservative vision of the duty of the state not to interfere without proper respect for the fundamental justice principles in a person’s life and with his liberty. As a matter of fact, what the poor indeed need are public interventions aimed at promoting their right to basic dignity and security. In matters related to economic and social rights, public authority and the State are, as provided for by human rights instruments themselves, central actors with proactive duties.

The interdependence of all human rights as well as their role in the fight against poverty calls for legal assistance patterns where the dichotomy between civil and political, and economic and social rights is fought. All social policies, even if adopted in good faith, are not good policies when scrutinized according to human rights standards. Decisions like *Gosselin* in Canada or *Grootboom* in South Africa are virtually impossible without some legal aid assistance. Access to justice, and legal aid or assistance, then go hand in hand in order to facilitate the contribution of justice mechanisms in the fight against poverty.

*Land reform, access to the land and ownership of the land.*

CESCR does not protect the right to property. Neither does the ICCPR. But looking for the protection of property rights per se is a much too narrow approach when considering how closely persons are related to the earth for their subsistence. Lands are part of a global ecosystem and protection of, and access to, land are a prerequisite to the enjoyment of the right to feed oneself, and to contribute to the development of the community. Land is an essential element of the right to life. The World Food Summit (1996) contributed to a better understanding of how the question of the access to the land cannot be limited to an issue of property. In 1999, CESCR Experts’ Committee adopted General Comment No 12 on the right to adequate food. This Comment underlines the different ways to implement the right to adequate food by insisting on some basic principles: food and access to land in order to feed oneself must be accessible without discrimination.

The Beijing Declaration adopted at the 4<sup>th</sup> International Conference on Women in 1995 emphasized the crucial role of women as well as their fundamental needs and rights in the process of developing food security strategies. As the Beijing Declaration states, legal, cultural, political and customary obstacles and barriers violate women’s right to access food and land. Those violations seriously contribute to women’s extreme poverty all over the world.

The recognition in domestic law of every person’s right to food pursues three important objectives: restitution of lands (as in the case of internal or armed conflicts, big energy

projects or corporations' aggressive and systemic buying of the land); equal distribution of lands without discrimination or segregation; and, securing land titles and facilitating the acquisition of the land in the respect of cultural tradition and aboriginal titles. Additionally, in all cases, an appropriate Family Code protecting the legal capacity and equality in marriage of men and women, as well as efficient antidiscrimination legislation, will serve as necessary supports to a land reform or restitution process.

*Antipoverty domestic legislation and practices, and participatory strategies.*

In 1996, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities issued the Despouy Report on Human Rights and Extreme Poverty<sup>94</sup>. According to Rapporteur Despouy, in order to pin down the links between extreme poverty and human rights, it was first necessary to examine some of the fundamental principles of human rights in the light of the experiences of very poor people.

The insistence of the Despouy Report on the participation of the poor in development strategies is closely connected to Nobel Prize Amartya Sen's theory about human capabilities<sup>95</sup>. For Sen, poverty is a deprivation of human capacities, that is, the transformation of a person into a being incapable of satisfying his minimum needs for survival and of exercising their liberty to make free choices in all dignity. Poverty is a phenomenon that transcends persons as individual human beings. Human beings cannot develop their abilities, and often-great potential, because they live in certain economic, social or cultural conditions. What has now become the "Voice for the Poor" initiative of the World Bank<sup>96</sup> is also rooted in some NGOs campaign to emphasize the need to hear the poor themselves in the process of implementing development strategies. A good example can be taken from ATD QuartMonde campaign, which started back in 1954 with Father Wrésinski action for the poor<sup>97</sup>. "Quart Monde" is an expression that was used in the context of the États généraux that preceded the French Revolution of 1789. It refers to the situation of those who were excluded from the process of the revolution because they were poor.

The Despouy '96 Report found an echo in another mandate given to Independent Expert Anne Marie Lizin by the UN Sub Commission. Expert Lizin, so far, has published five Reports on extreme poverty<sup>98</sup>, which promote the need for national minimum income

---

<sup>94</sup> Supra, note 18.

<sup>95</sup> Amartya SEN, *Inequality Reexamined*, Oxford, 1994 and *Development as Freedom* (1999).

<sup>96</sup> See the World Bank PovertyNet online: <http://www.worldbank.org/poverty/voices/index.htm>.

<sup>97</sup> Est-ce ainsi que les familles vivent ? online ATD Quart Monde: <http://www.atd-quartmonde.org/irfirh/livres/droit02txt.htm>. (date accessed : July 14<sup>th</sup> 2003).

<sup>98</sup> See UN Doc. E/CN.4/1999/48, Report of the Independent Expert on human rights and extreme poverty; UN Doc E/CN.4/2000/52, Human rights and extreme poverty - Report submitted by the independent expert; UN Doc E/CN.4/2001/54 and Corr.1, Human rights and extreme poverty - Report from the independent expert; UN Doc E/CN.4/2002/55, Human rights and extreme poverty - Report from the independent expert and UN Doc E/CN.4/2003/52, Human rights and extreme poverty - Report submitted by the independent expert.

legislation as a mean to combat extreme poverty,<sup>99</sup> and insist on the benefits of participatory budget procedures<sup>100</sup>.

In her 2000 Report, Independent Expert Lizin reported on a preliminary survey (40 countries) about national best practices aimed at reducing poverty and extreme poverty. Many of such practices show concerns for the participation of the poor in antipoverty measures’ designing process. Some others protect the right of every person to a minimal income, or, in the case of least developed countries, the right to a specific allowance dedicated to essential expenses related to housing, health, education or food. Such national best practices contribute to the promotion of the right to a decent living guaranteed by article 11 of the CDESCR.

Independent Expert Lizin’s survey shows an equal interest in national experiences for the procedural right to be consulted as for the substantive right to a decent living.

Participatory governance aimed at reducing extreme poverty is not exclusively promoted for the poorest countries of the world. Within the OECD, as an example, participatory governance is a way of introducing a stronger political economy dimension in the debate and practice of poverty reduction<sup>101</sup>.

The Council of Europe created the European Committee for Social Cohesion (CDSC) that is looking for approaches to combat poverty and social exclusion in the context of developed as well as transitional countries<sup>102</sup>. The creation of the CDSC followed a major initiative that ended in 1998 with the production of the Human Dignity and Social Exclusion Report (HDSE)<sup>103</sup>. This initiative took inspiration and guidance from the regional social rights instruments such as the *European Social Charter*<sup>104</sup>, the *European Code on Social Security*<sup>105</sup> and the *Additional Protocol to the European Social Charter*

---

<sup>99</sup> See *Id.*, UN Doc E/CN.4/ 1999/48, para. 131 and UN Doc E/CN.4/2000/52, para 98 : minimum income legislation.

<sup>100</sup> On the process of participatory budget, see : International Budget Project (IBP), Transparency and Participation in the Budget Process: The South African Case Report, presented to the Second International Budget Project Conference IDASA - February 1999, online International Budget Project: <http://www.internationalbudget.org/conference/2nd/papers.htm>. and Sérgio Baierle, Transformation and empowerment through the Participatory Budget, Centro de Assessoria e Estudos Urbanos, Porto Alegre, Brazil.

<sup>101</sup> OECD, Participatory governance : the missing link for poverty reduction, Hartmut Schneider, Policy Brief no 19, 1999, p. 6 . In the province of Québec (Canada) the Act respecting income support, employment assistance and social solidarity, L.R.Q. ch. S-32.001 was adopted in December 2002. See Lucie Lamarche, «The «Made in Québec» Act to Combat Poverty and Social Exclusion: exploring the complex relationship between poverty and human rights» in *Poverty is a Human Rights Violation*, Gwen Brodsky and Susan Boyd (eds.), U. of British Columbia Press, forthcoming, 2004.

<sup>102</sup> Council of Europe, CDSC, Matti Heikkilä and Susan Kuivalainen, Using social benefits to combat poverty and social exclusion : opportunities and problems from a comparative perspective, Trends in social cohesion Report no 3, 2002, pp. 23 and ff. about minimum income management. See also Social Cohesion Development Division of the Council of Europe, online Council of Europe: [http://www.coe.int/t/e/Social\\_Cohesion/Analysis\\_and\\_Research/](http://www.coe.int/t/e/Social_Cohesion/Analysis_and_Research/).

<sup>103</sup> See Katherine Duffy, “Risk and Opportunity : Lessons from the Human Dignity and Social Exclusion (HDSE) Initiative for Trends in social Policy”, (2001) 16 Canadian Journal of Law and Society, 17. See also K. Duffy, Human Dignity and Social Exclusion : Opportunity and risk : trends of social Exclusion in Europe, Council of Europe, HDSE (1998).

<sup>104</sup> ETS no 35.

<sup>105</sup> ETS no 48.

*Providing for a System of Collective Complaints*<sup>106</sup>. As a result, ongoing research and experiences about social inclusion are designed in a human rights framework. The Council of Europe Development Bank (CEDB) has been, since 1997, giving priority to the strengthening of social cohesion. It granted 53% of total loans to projects for housing, education infrastructures and employment<sup>107</sup>.

Because of this particular richness of regional instruments aimed at protecting social rights, it may be easier in the European context to make sure that antipoverty strategies contribute to the promotion of human rights in their multiple dimensions: equality, minority rights, social security measures, housing, education, employment training, and so on. Nevertheless, experience shows the necessity and the usefulness to rely on legislative action and democratic participation to fight against poverty and extreme poverty in a human rights framework.

### *Are Domestic Institutions Enough?*

Human rights exist in order for each human being to benefit day after day from them. In the case of social rights violations as well as in other cases, the best scenario, is the existence of effective national complaints, monitoring and inquiry mechanisms. But we know that such legal and political tools are just starting to be considered seriously by some constitutions and governments, such as in the case of the South Africa Republic. In fact, older "democracies" consistently resist the idea of guaranteeing the justiciable aspect of programmatic social rights. Because this 'category' of social rights requires "pro-active" intervention by the State in order to be implemented - as opposed to other social rights more closely connected to civil liberties (freedom of association, as an example). The specific difficulty related to the "nature" of some social rights adds to the more general problem of all human rights effective justiciability at the national level.

This is why there is an urgent need to adopt international and regional instruments aimed at providing effective complaints mechanisms and remedies to the victims of social rights violations. The UN regime of human rights instruments provides no direct answer to this need and indirect answers still have to be tested and explored. Indeed, one can wonder why the Human Rights Committee (HRC), responsible for complaints lodged according to the Optional Protocol to the Covenant on Civil and Political Rights (CCPR), was never seized by cases denouncing systemic and discriminatory violations of any right protected by any UN human rights instrument that has as a consequence poverty<sup>108</sup>. Article 26 of the CCPR guaranteeing the right to equality was interpreted by the HRC as providing a blanket protection for all human rights enunciated in all UN instruments. It seems to us that the intimate relation between equality and poverty could receive urgent attention for the HRC, if appropriate complaints were designed and submitted to this end.

---

<sup>106</sup> ETS no 158.

<sup>107</sup> See Council of Europe Development Bank activities online : <http://www.coebank.org/en/presentation/home.htm>.

<sup>108</sup> For an extensive analysis of this question about women's economic rights, see Margaret Murray, *Le Pacte international relatif aux droits civils et politiques, un atout méconnu et mal utilisé en vue de la promotion des droits des femmes et de leur droit à l'égalité*, 2000, on line: <http://www.cedim.uqam.ca/murray.htm>.

In the same uncertain manner, the recent coming into force of CEDAW's Optional Protocol does not permit a serious assessment of its potential in regards to violations of women's rights that contribute to their poverty or extreme poverty. Considering the explicit reference to women's poverty as an obstacle to the enjoyment of their human rights in Paragraph 8 the CEDAW's Preamble, one can hope that the Optional Protocol to CEDAW will be an appropriate tool to address women's poverty as a cause and a consequence of the violation of their human rights. CEDAW, though, nurtures an equivocal relation with economic and social rights as justiciable rights<sup>109</sup>. In addition, CEDAW's Experts Committee still has to adopt a General Recommendation about women's right to equality. Such a Recommendation will have a tremendous impact on issues related to social rights and resource allocations. Finally, it is hard to assess exactly how CEDAW's Experts Committee is willing to integrate in its analysis of women's rights the justiciability framework developed by the CESCR's Experts Committee.

In light of those questions, there is no doubt about the urgent need for the adoption of an Optional Protocol to CESCR. A draft of such a Protocol was submitted to the Sub Commission in 1997<sup>110</sup> but the follow up to this proposal is submitted to numerous obstacles and the issue remains largely uncertain. Such a Protocol is not anymore of unusual design. When adopting the Amending Protocol (to the European Social Charter<sup>111</sup>) of 1995 providing for a system of collective complaints<sup>112</sup>, the Council of Europe was well aware of the potential of treating as justiciable the social rights enunciated in the Charter. Since its coming in force in 1998, the European Social Rights Committee received as of September 2003, 21 collective complaints. Complaint No 15 (*European Roma Rights Centre v. Greece*) alleges that there is widespread discrimination both in law and in practice against Roma in the field of housing. Complaint No 14 (*International Federation for Human Rights (IFHR) v. France*) relates to Articles 13 (the right to social and medical assistance), 17 (the right of children and young persons to social, legal and economic protection) as well as Article E of the Revised European Social Charter<sup>113</sup> (prohibition of all forms of discrimination in the application of the rights guaranteed by the treaty). It alleges that recent reforms of the « Aide médicale de l'Etat » (State medical assistance) and to the « Couverture maladie universelle » (Universal sickness cover) deprive a large number of adults and children with insufficient resources of the right to medical assistance<sup>114</sup>, especially in the case of undocumented migrants. Both complaints were declared admissible by the Committee in 2003.

Recent developments in relation with the Inter-American Human Rights machinery also demonstrate that social rights are justiciable rights, directly or indirectly. In addition to an access to the Inter-American Commission for the purpose of lodging a complaint against

---

<sup>109</sup> Mainly because of the political context of its adoption where a certain conception of the right to development dominated.

<sup>110</sup> See E/CN.4/1997/105/Annex.

<sup>111</sup> E.T.S. 45.

<sup>112</sup> E.T.S. 158.

<sup>113</sup> E.T.S. 163.

<sup>114</sup>

For more information, see : [http://www.coe.int/T/E/Human%5FRights/Esc/5%5FCollective%5Fcomplaints/List\\_of\\_collective\\_complaints/01List%20of%20complaints.asp#TopOfPage](http://www.coe.int/T/E/Human%5FRights/Esc/5%5FCollective%5Fcomplaints/List_of_collective_complaints/01List%20of%20complaints.asp#TopOfPage).

a State member, the Commission can also ultimately submit such complaints to the Inter-American Court, if the State member had recognized its jurisdiction<sup>115</sup>.

The protection of social rights in the Inter-American system depends on a variety of instruments : article 11 of the American Declaration on the Rights and Duties of Man resembles article 11 of the CESR. Article 26 of the American Convention on Human Rights provides for the progressive implementation by State members of social rights and echoes article 2 of CDESCR<sup>116</sup>. More recently, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) came into force. It provides for the direct justiciability of the violation of the right to education, and the right to freedom of association (articles 8 and 13).

Latin America is experiencing severe violations of social rights as well as extreme situations of poverty. Latin American NGOs are increasingly relying on the Inter-American human rights system and on the Court to denounce and potentially redress such violations<sup>117</sup>. Interestingly, the Court is adopting creative and useful approaches that reach such goals. Its recent Advisory Opinions in the case of undocumented migrants and of children are remarkable examples of an interdependent lecture of all human rights that address issues related to poverty and extreme poverty<sup>118</sup>.

Obviously, the issue of the justiciability of some social rights is less and less a legal issue and more and more a political and economic issue. Human rights Courts are well aware of the potential of social rights as a contributing factor to the eradication of poverty. Coincidentally, Regional human rights Courts are more and more assertive about the justiciability of social rights as well as their interdependent relation with all their human

---

<sup>115</sup> The following countries are subject to the Inter-American Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

<sup>116</sup> Consider the Torres Benvenuto et al. Case (no 12.034, December 2001) where the Inter-American Commission submitted the case for consideration by the Court in respect of the modification made by the Peruvian State to the pension system governing payments in accordance with Peruvian legislation up to 1992 and of failure to comply with judgments of the Supreme Court of Justice of Peru and of the Peruvian Constitutional Tribunal ordering that they be paid a pension calculated in the manner established by law when they began to receive payments under a specific pension system. It was also indicated that that modification constituted for the pensioners a violation of the right to judicial protection, the right to property, and the right to progressive development with respect to economic, social, and cultural standards, established in Articles 25, 21, and 26 of the American Convention, in conjunction with the obligations established in Articles 1.1 and 2 of the same Convention.

<sup>117</sup> See From Needs to Rights: Recognizing the Right to Health in Ecuador, July 1998, at: [www.cesr.org](http://www.cesr.org). and Daniel Tarantola, Building on the Synergy between Health and Human Rights: A Global Perspective, Working Paper No. 8 (2000), at: [www.cesr.org](http://www.cesr.org). See also : Chris Jochnick, The Human Rights Challenge to Global Poverty, 1999, Id., and Quito Declaration on the Enforcement and a Realization of Economic and Social Rights in Latin America and the Caribbean, juillet 1998, at: [www.cesr.org](http://www.cesr.org). See as well, Marianne Mollmann and Lucie Lamarche, La promotion des droits économiques et sociaux de la personne et l'obligation positive d'agir des États : considérations générales et regard particulier sur les Amériques in Georges LeBel (ed.), L'obligation d'agir de l'État et les droits sociaux de la personne, Éditions Wilson, Montreal, Canada, forthcoming, 2004.

<sup>118</sup> See Serie A No. 17.Corte I.D.H.,Condición Jurídica y Derechos Humanos del Niño. Opinión Consultiva OC-17/02 de 28 de agosto de 2002 and Serie A No 18. Corte I.D.H,Condición Jurídica y Derechos de los Migrantes Indocumentados. Opinión Consultiva OC-18/03. de 17 de Septiembre de 2003. On line at : <http://www.corteidh.or.cr>.



rights. Accordingly, the blockage of the Optional Protocol the CESCER is getting to be less and less a legal issue.

The urgent need to consider the adoption of this Protocol is even greater now that the volatile economic and political forces at play at the international level need to be counterbalanced by effective human rights regimes<sup>119</sup>. Indeed, many scholars are noticing an increased constitutionalization of the WTO trade regime<sup>120</sup> as well as an affirmation of the WTO Dispute Settlement Mechanism's jurisdiction over "non trade issues"<sup>121</sup>. Other are advocating for description of the WTO trade law as one element of law in the general domain of international law, hereby opening the door to "non trade considerations" by the Dispute Settlement Bodies provided for by the WTO treaty<sup>122</sup>. No one can contest that the WTO trade law cannot be seen anymore as an isolated trade regime. Issues in the field of environment and health, and probably soon in regard of fundamental worker's rights as well<sup>123</sup>, are already contemplated by the WTO Dispute Settlement Mechanisms. But as some authors remind us, trade panels may be sensitive to their jurisdictional capacity to reject a trade complaint on the basis of non-trade issues imperatives. They cannot, however, address environment or human rights issues *per se*. This obvious statement shows with great intensity the need for a counterbalancing effective regime in the field of human rights in general, but more specifically in regards to social rights. As far as poverty is concerned, the answer is even more disconcerting as trade dispute mechanisms were not designed to redistribute wealth; but on the contrary, to confirm, organize and stabilize business and investors' rights<sup>124</sup>.

---

<sup>119</sup> See E/CN.4/2001/62/add. 2 : Report of the High Commissioner for Human Rights, Addendum, Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, para. 29. See also Un Secretary General Report E/CN.4/2000/49.

<sup>120</sup> See inter alia, Deborah Cass, The 'Constitutionalization of International Trade Law': Judicial Norm Generation as the Engine of Constitutional Development in International Trade (2001) 12 European Journal of International Law, no 1, 39. See also the Petersman/Alston debate about the Trade Global Governance domination in the European Journal of International Law : Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, (2002) 13 European Journal of International Law, no 4, 815 : "*Petersmann's proposal for the enforcement of human rights through the WTO is presented as though it were simply a logical development of existing policies, rather than representing a radical break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe something which is in between a Hayekian and an ordoliberal agenda. It is one which has a fundamentally different ideological underpinning from human rights law and would have extremely negative consequences for that body of law*".

<sup>121</sup> See inter alia, Steve Charnovitz, WTO Dispute Settlement as a Model for International Governance, at : <http://www.gets.org/pages/steve.charnovitz.cfm> : "*Several years ago, Ernst-Ulrich Petersmann made the observation that the trading system was adjudicating more environmental disputes than the environmental regime was. That may not be true anymore, but the WTO continues to issue decisions that have environmental and health implications -- for example, in 2001, there were decisions regarding asbestos and the shrimp-turtle dispute*". See also Joel Trachtman, Decisions of the Appellate Body of the World Trade Organization , (2001) 12 European Journal of International Law, no 4, 793.

<sup>122</sup> See Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 AJIL 535 (2001).

<sup>123</sup> No doubt as a result of the adoption in 1998 by the ILO of the Declaration on Fundamental principles and Rights at Work.

<sup>124</sup> Robert Wei, Countering, Branding, Dealing: Using Social Rights in and around the International Trade Regime , 14 (2003) European Journal of International Law, no 1, 35.

This reminder expresses a profound disquiet as it underlines the venue of new "rights-holders": corporate actors, who now find themselves in the interesting position of being at the same time "rights-holders" and "duty-bearers" in the field of human rights. One nuance though is important. As far as human rights are concerned, and even more in the case of social rights, those actors are still under the responsibility of the State, as far as States bear the ultimate responsibility to protect and promote all human rights. Under the trade regime, States can defend themselves against a trade claim by defending their human rights responsibilities in relationship to their trade commitments. But this sophisticated device can at best indirectly contribute to the destiny of human rights' first beneficiaries: human beings. Only a better integration and judicialization of the human rights regime can address directly this issue, crucial in the fight against poverty and extreme poverty.

**Part V. Poverty, extreme poverty and the primacy of human rights<sup>125</sup> including social rights in the context of globalized trade and structural adjustment policies: the need to bring back the State in.**

In a globalized era, the role and the function of the State are revisited. Many scholars as well as civil society's representatives question the normative, regulatory and political power of the State<sup>126</sup>. Nevertheless, States are still the essential ingredient of international law and of international relations as well. They created a system of international human rights protection as much as they created an international trade regime, at least, from a formal perspective. The relation between State and non-state actors, as duty-bearers in regards to human rights, is complex. But it is an essential relation. Is globalization putting non-state actors beyond reach in that regard? Are corporate citizens autonomous in the name of their "property rights" in a globalized world? Is there a conflict between corporate citizens being at the same time "old" duty-bearers and "new" rights-holders? Shall the issue of corporate citizens' responsibility in regards to human rights' respect be conceptualized as creating direct or horizontal responsibility in international law, hence bypassing the State as the first entity responsible from a normative human rights perspective<sup>127</sup>?

Trade globalization and liberalization are not the only issues raising such questions. Other international institutions, and especially financial institutions, as well as international donor agencies, obviously influence State capacity to make decisions that are aimed at promoting and protecting human and social rights. In many cases such

---

<sup>125</sup> The concept of «primacy», although highly contested from a legal perspective, refers to two ideas: (1) only fair trade meets the requirements of human rights and (2) no trade can harm persons and peoples. It accepts the idea that trade is good and necessary, but not at any price and not in the name of the sole promotion of economic growth. See Diana Bronson and Lucie Lamarche, *A Human Rights Framework for Trade in the Americas*, 2001, Rights and Democracy and Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, 2000, Rights and Democracy. Both on line at: <http://www.ichrdd.ca>.

<sup>126</sup> See F.C. Turner, *Changing Roles of the State*, 163 (2000) *International Social Science Journal*, vol. LII, 119.

<sup>127</sup> See Marco Sassoli, *L'effet horizontal de l'indivisibilité des droits humains dans le contexte de la mondialisation*, dans M. Borgui et P. Meyer Bisch, *Société civile et indivisibilité des droits de l'homme*, Actes du XI<sup>ème</sup> Colloque interdisciplinaire sur les droits de l'homme, Université de Fribourg, Fribourg, 2000, 341.

agencies and institutions will pretend that their interventions contribute to the eradication of poverty, although this is a highly contested statement by many. Certainly, the sole fact of talking about external interventions and pressures on domestic policies raises the point about the responsibility of State and non-state actors toward the promotion and respect of social rights. Are some of those actors legitimately pursuing economic objectives notwithstanding the parameters of development prescribed by social rights’ international and regional standards ? If it is the case, shall we still talk about the central role of the state in the field of social rights ? Considering the intimate relation between social rights violations and poverty this painful and complex question cannot be avoided. It has been in fact addressed in recent years by different United Nations Treaty and Charter bodies.

In a series of Reports, the High Commissioner for Human Rights recently established in a convincing manner the negative consequences of the actual trade rules on human rights<sup>128</sup>. The Sub Commission on the Promotion and Protection of Human Rights also produced Reports about the impact of globalization on the full enjoyment of human rights<sup>129</sup>. In both cases, considerations and conclusions lead to the affirmation of the need for States to assert and affirm their domestic regulatory power in order for human rights to be protected and promoted. The Sub Commission, in adopting Resolution 2001/21 (Intellectual Property and Human Rights), clearly calls upon States to respect CESCR when committing themselves toward trade agreements. According to the Sub Commission, States could be doing so by inserting in those agreements the principle of the primacy of human rights over trade. This Resolution was followed by the Human Rights Commission Resolution 2001/33 that concerned specifically TRIPS and HIV/AIDS<sup>130</sup>. This conclusion implies a two-fold reality: (1) domestic regulatory function can contradict trade rules and (2) such a conflict must be resolved in favour of States and domestic regulation aimed at protecting social rights and human rights in general. To put it very simply: non-state actors rights (although in most cases they would be defended by states) can be superseded by human rights of persons at the national level.

By extension, this rule applies as well to non-corporate non-state actors: IFIs, as an example. Considering that structural adjustments programs (SAP) are often aimed at promoting growth and development by promoting free trade (exports and imports), one has to recognize as well potential conflicts between the best means to promote social rights at the domestic level and the best means to promote economic growth and trade. From a human rights perspective, there is not such a thing as “transitional poverty” as in the SAP perspective.

One has to acknowledge that the CESCR Experts’ Committee had been slow at enunciating such principles. Only when it started to adopt General Observations in regards to the so-called programmatic rights (health, education, housing and more

---

<sup>128</sup> See E/CN.4/Sub.2/2001/13 (Intellectual property rights); E/CN.4/Sub.2/2002/54 (Agricultural trade); E/CN.4/Sub.2/2002/9 (Services) and recently, E/CN.4/Sub.2/2003/9 (investments).

<sup>129</sup> See E/CN.4/Sub.2/2001/10 and E/CN.4/Sub.2/2003/14 (Final Report), Globalization and its Impacts on the full Enjoyment of Human Rights, submitted by J. Oloka-Onyango et Deepika Udagama.

<sup>130</sup> Respect of the right to health requires access to medication without exclusion or discrimination (para. 1). See also Audrey Chapman, *Approaching Intellectual Property as a Human Right : Core Obligations Related to Article 15(1) of the Covenant*, American Association for the Advancement of Science, WIPO, 1998.

recently, water) did it realize the competing interests of state and non-state actors in circumstances where poverty and extreme poverty dominate the agenda<sup>131</sup>. Loan policies of IFIs, SAPs, World Bank Poverty Reduction Strategies (PRS) and trade were rapidly at the hearth of the ECESR' preoccupations.

In its 2001 Declaration on Poverty<sup>132</sup>, the CESCR Committee worked at defining its role and the scope of CESCR in order to improve the analysis of poverty as a cause and a consequence of economic and social rights violations. Clearly, the ECESCR puts at the centre of the responsibility system, the State that is described as having the main duty to monitor non-state actors' behaviours, as well as its own behaviour. For this purpose, the ECESCR recognizes the need for a more precise definition of social rights themselves but also, of implementation requirements attached to those rights. In that regard, General Observations 12, 13, 14 and 15 constitute a good start. In addition, they had been supported by the rich work of the Human Rights Commission's Special Rapporteurs<sup>133</sup>. For example, Special Rapporteur Tomasevski in her 1999 Report explored the absence of consideration of the normative content of the right to education in the process of the implementation by the World Bank or other Donor Agencies about education programs. As a result, privatized primary education models are flourishing all around the world, increasing social exclusion and poverty, especially in the case of girls. Rapporteur Tomasevski underlined the non-ambiguous standard provided for by the CESCR in the case of free primary education. In her 2000 Report, the Rapporteur denounced the targeted policy approach of financial institutions in the field of education which constitutes a violation of the right to primary education. In her 2001 Report, she focused on PRSs in order to demonstrate the contradiction between the right to free and universal primary education; and, the imposition on countries where extreme poverty prevails of PRS plans that must produce such quick results that they cannot even consider the proper implementation of such a right.

This contradiction was also underlined by the Special Rapporteur on the right to housing which demonstrated the impact of PRSs on women's right to housing. A micro economic approach to housing constitutes a violation of their right to housing, by excluding them from the benefit of market oriented policies<sup>134</sup>.

Such a analysis is also supported by the work of the Independent Expert Fantu Cheru about the impact of SAPs on human rights<sup>135</sup>. For Rapporteur Cheru, SAP's strategies

---

<sup>131</sup> See for example, General Observation 12 on the right to food, para. 41; General Observation 13 on the right to education, para. 60; General Observation 14 on the right to health, para. 64.

<sup>132</sup> Supra, note 68.

<sup>133</sup> Right to education (see E/CN.4/1999/9; E/CN.4/2000/6;E/CN.4/2001/52); right to housing (see E/CN.4/2001/51) and right to food (see E/CN.4/2001/53).

<sup>134</sup> See E/CN.4/1999/50 and Anne Orford, *Contesting globalization : A Feminist Perspective on the Future of Human Rights*, 8 *Transnational Law and Contemporary Problems* (1998) 171.

<sup>135</sup> See for example : E/CN.4/1999/50. See also Overseas Development Institute, J. Farrington, *Sustainable Livelihoods, rights and the New Architecture of Aid*, 69 ODI, juillet 2001; *Politique africaine, Figures de la réussite et imaginaires politiques, Lutte contre la pauvreté et enjeux d'un slogan*, no 82, juillet 2001; Haut Conseil de la coopération Internationale, République française, *Séminaire de Dourdan, août 2000, Le développement : pour un débat politique sur la lutte contre la pauvreté et la bonne gouvernance*; and Michel Lucas, *The International Monetary*

are aimed at attaining an “acceptable” level of poverty in a family unit’ and not at promoting social rights as human rights<sup>136</sup>. The triple “A” strategy<sup>137</sup> is totally ignored in such strategies, and it denies to states the necessary autonomy to design anti poverty plans in a human rights framework<sup>138</sup>. Finally, Independent Expert Cheru concludes that no development is possible without the respect of state as well as non-state actors responsibilities in accordance with international human rights rules<sup>139</sup>.

The two fold argument about on one hand, the primacy of human rights over trade and adjustment policies and; on the other hand, the central role of the state in the protection, implementation and monitoring of social and economic rights at the domestic level brings us back to the issue of asymmetrical international regimes and of the potential hegemony of trade regimes. It is more and more obvious that trade dispute settlement mechanisms won’t be able to escape from considering non-trade issues. In some cases, as in the one of basic health services and of access to medication, States will plainly defend their trade “misbehaviours” with the reality of extreme deprivation and the imperatives of urgent basic needs of their population. The story, yet, does not tell if they will justify their decision by referring to their human rights commitments. The strategy, in all cases, needs to be supported by a much deeper-rooted understanding of what constitute social rights and social rights violations. This requirement puts on the CESCR Experts’ Committee an urgent pressure for addressing those issues in a detailed manner.

Treaty monitoring body cannot by themselves, considering the incomplete state of the international human rights regime, accomplish such a task. Their work, as well as the situation of rights’ beneficiaries, needs to be supported by more sophisticated complaint mechanisms at the international level. The idea that a State experiencing a very low level of autonomy in regards to the design of social and antipoverty policies and strategies could be “blamed” for not ensuring the core of social rights in an inclusive manner to the benefit of all members of the population, is important. Indeed, the influence of nearly constitutionalized trade panels needs to be counterbalanced by competing judicial or quasi-judicial decisions in the field of social rights. In all other cases, the outcome is highly predictable: trade panels as well as non-state actors will be given the privilege to unilaterally decide what constitutes the share of wealth that the poor should benefit from in order to avoid chaos and market disruptions. As well, the difficult dialogue between financial institutions and human rights bodies can be enhanced by the intervention of more “legal” or “judicial” reminders in regards to social rights violations.

Social rights are to be implemented and monitored above all at the national level. We explored in this paper different means, some being essential, of ensuring such a function.

---

Fund’s Conditionality and the International Covenant on Economic Social and Cultural rights : an Attempt to Define the Relation, (1991-2) *Revue belge de droit international*, 104.

<sup>136</sup> *Id.*, para. 12 and ff.

<sup>137</sup> *Supra*, note 72 and ff. See also Santosh Mehrotra, Jan Vandermoortele et Enrike Delamonica, *Basic Services for All? Public Spending and the Social Dimensions of Poverty*, Florence, UNICEF Innocenti Research Institute, 2000 and Santosh Mehrotra, *The Rhetoric of International Development Targets and the Reality of Official Development Assistance*, *Id.*, 2001.

<sup>138</sup> E/CN.4/1999/50, para. 23.

<sup>139</sup> *Id.*, para. 47.

The problem is that actually, globalized trade is moving faster than the creation of domestic democratic institutions. Of course, this is not a reason to relax in efforts to developing democratic institutions at the domestic level. One may wonder though about the relation between democracy and social rights in the actual context of governance promoted by financial and trade institutions. Again, only international effective monitoring of social rights by appropriate human rights bodies can promote the venue of local democratic institutions closely connected to social rights, as an essential ingredient of the eradication of extreme poverty and poverty. The need for institutions is much larger than only the need for an appropriate legal system. In fact, even in democratic and developed countries, research shows that citizens, and more particularly poor citizens, access less and less the courts. They rely more on other institutions. Such models urgently need to be promoted and strongly suggested at the international level by human rights monitoring and quasi-judicial bodies.

Non-state actors, in general, but corporate ones in particular, would prefer the avenue of self-monitoring<sup>140</sup>. Self-monitoring and State monitoring are not per se incompatible. What’s at stake, in fact, is the normative content of social rights; and, not the allegation that corporate citizens cannot be responsible, or in certain cases, accountable at the international level<sup>141</sup>.

In the case of international financial institutions, the question is the same. The case of the World Bank speaks by itself. The Voice of the Poor initiative<sup>142</sup>, although a good start and an interesting departure from previous strategies, nevertheless neglects the normative content of social rights to the benefit of certain civil and political rights.

As a matter of fact, human rights judicial monitoring bodies would be the only ones who could properly answer to the check list of social rights violations proposed in section III of this paper and follow up on appropriate remedies. Poverty and extreme poverty are the cause and the consequence of human rights violations. Are they ready to take on this task?

## **Conclusion.**

Amongst the eight UN Millennium Development Goals (MDG), eradication of extreme poverty and hunger comes first. As Arjun Sengupta suggests<sup>143</sup>, attaining these goals, while respecting the right to development, is as much a question of substance as it is about the process of development itself. Social rights are aimed at guaranteeing every person’ right to benefit from a decent standard of living, and in particular every person’s right to food, shelter and clothing. In the last decade, it became very clear that such “legal goals” must be read in conjunction with the right to basic health, to drinkable water and to primary universal education. Such essential needs, expressed as rights, put specific

---

<sup>140</sup> See E/CN.4/Sub.2/2003/13. Report of the sessional working group on the working methods and activities of transnational corporations (Chairperson-Rapporteur El-H. Guissé).

<sup>141</sup> Supra, note 126.

<sup>142</sup> Supra, note 7.

<sup>143</sup> Supra, note 13.

demands of all political and economic actors. Otherwise, there is no need to move beyond the rhetoric of social rights.

The most obvious and tangible expression of the evolution of the "basic needs" doctrine toward a "social rights" one can be found in the violations' framework provided for first by the Maastricht Principles<sup>144</sup>. We illustrated this framework in Part III. The close connection between the violations' framework and the potential for justiciability of social rights does not mean that all "claims" have to be settled in courts, at the national or at the international level. Like in the case of any other legal standard, the acknowledgment of social rights as rights, that are too often violated, implies a specific methodology of development that concerns all actors, state as well as non-state ones. This methodology cuts across different economic and political ideologies. In fact, a social right's framework is not so concerned, as an example, in knowing why a housing policy mainly targets the poor, only if they have savings, even if small. Instead it serves at putting pressure on policy makers and governments so that all poor benefit from the right to housing. In the same manner there is not, in the social rights framework, 'good' and 'bad' poor, as too often the ideology of social policy suggests. Moving the social rights debate beyond its rhetoric means that all actors of development have to consider poverty as a cause and a consequence of human rights violations, including social rights. This is why the revolution of social rights carries with it a significant redistributive effect in increasing accountability in all levels of decisions concerning the poor and the extremely poor.

The task of the Treaty Bodies directly or indirectly responsible for monitoring the respect by States of their commitments in regard of social rights is incredibly complex. In most cases, it requires a multidisciplinary understanding of poverty; and, in general also of trends and practices in economic and social policy making process. The CESCR Experts Committee is in that regard in a precarious shape. Lack of resources and of time makes its mandate nearly impossible to accomplish. State parties attitudes do not help either. In the case of developed countries, they literally "flood" the Committee with abundant, but not always relevant information, or, in the case of least developed countries, they quite simply do not report or benefit from a very weak domestic institutional capacity to do so. Least developed countries also complain about the fact that their general reporting obligations are so demanding that they take away resources from more important and urgent needs. International institutions are expert agencies that can now work with significant data about poverty. But how do they use it? Would not it be more logical for all actors of development to "respect the law" of social human rights, and to share a methodology to that end? In fact, sharing data does not mean all actors agree about the purpose of the exercise. This question is of interest in developed as well as in least developed countries. As developing countries have lost control over poverty issues to the benefit of different international actors, developed countries deny more and more the fact that social rights are rights, and instead prefer the "engineering approach" to unacceptable levels of poverty. Both groups have to be reminded that poverty and extreme poverty are not only economic issues. The social rights framework is very useful in that regard.

---

<sup>144</sup> Supra, note 64.

This paper also explored the complex relation between state and non-state actors in cases where either trade agreements, or patterns or policies of structural adjustments, constitute a major cause of social rights violations. In the case of trade, it came to the conclusion that there is an urgency to counterbalance trade dispute settlements mechanisms rapid growth (and inescapable hegemony over non-trade issues it seems) by effective human rights violations' remedies solutions. In the case of international financial interferences over state sovereignty in matters related to social rights, it showed that the legal aspects of social rights requires the reinforcement of the domestic capacity to allocate resources. Such capacity, of course, has to be submitted to the first and superseding commitment of sovereign states toward human rights and social rights.

Often, papers conclude with a call for more research on one or another issue. As far as social rights are concerned, the last decade witnessed such important progress (definition of rights, monitoring of violations, development of jurisprudence), that the call shall probably be more about the politics of social rights. Indeed, educating about the requirements of social rights, as well as increasing the pressure on all actors in order to make them more accountable in regard of such rights, is probably the best way for the poor to question, in a reasoned manner, the negative consequences of uncontrolled neoliberalism and the trade liberalization process.