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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on extreme poverty and human rights\***

### **Note by the Secretariat**

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, prepared pursuant to Human Rights Council resolution 26/3. In the report, the Special Rapporteur argues that treating economic and social rights as human rights is essential both for efforts to eliminate extreme poverty and to ensure a balanced and credible approach in the field of human rights as a whole. He argues that economic and social rights currently remain marginal in most contexts, thus undermining the principle of the indivisibility of the two sets of rights.

Conventional wisdom celebrates the great strides that have been made in recent years in relation to economic and social rights. At the international level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has been adopted, an impressive number of special procedures have been created to focus on these rights and bodies like the Human Rights Council spend much more time than they once did debating these issues. At the national level, economic and social rights proponents celebrate the impressive degree of constitutional recognition of some or most economic and social rights, the growing capacity of courts in many countries to enforce them, the growth of national non-governmental organizations working on economic and social rights and the emergence of a vibrant scholarly literature on the justiciability of those rights.

However, despite important recent progress, the reality is that economic and social rights remain largely invisible in the law and institutions of the great majority of States. In support of this proposition, the Special Rapporteur notes that: many of the States whose Constitutions recognize economic and social rights have not translated that recognition into a human rights-based legislative framework; the increasingly widespread constitutional

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\* The present report was submitted after the deadline in order to reflect the most recent developments.

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acceptance of the justiciability of economic and social rights contrasts with the resistance of many of the relevant courts to acting on these rights; many of the States that enjoy the world's highest living standards have specifically rejected proposals to recognize economic and social rights in legislative or constitutional form; most national-level institutional mechanisms for promoting human rights neglect economic and social rights; and national economic and social rights accountability mechanisms are generally much rarer than mainstream accounts would suggest.

The extent to which economic and social rights remain unacknowledged as human rights is the frequency with which debates about economic and social rights slide imperceptibly and almost naturally into broad discussions of development. But, in fact, development initiatives might not be rights-promoting, or even rights-protecting. In the report, the Special Rapporteur spells out why it matters that economic and social rights be treated as human rights and examines the ways in which this can be done by outlining the recognition, institutionalization and accountability (RIA) framework that focuses primary attention on ensuring recognition of the rights, institutional support for their promotion and accountability mechanisms for their implementation.

## Report of the Special Rapporteur on extreme poverty and human rights

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## I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 26/3. It is the second report submitted to the Council by Philip Alston in his capacity as Special Rapporteur on extreme poverty and human rights.<sup>1</sup>

### A. Paradoxical status of economic and social rights

2. Strategies to eliminate extreme poverty require efforts to promote the realization of all human rights, in accordance with the principle of the indivisibility of rights. While various reports submitted over the years by the Special Rapporteur have dealt with some of the civil and political rights dimensions of the equation, none has focused explicitly on the overall economic and social rights component, which is the focus of the present report. The present report is not typical of those presented to the Council. The former head of the Department of Peacekeeping Operations characterized United Nations reports as “painfully boring ... in which everything said is factually correct and yet where nothing really stimulates fresh thinking”.<sup>2</sup> Clearly, factually correct reports are crucial, but reports which additionally stimulate fresh thinking are equally important, and the present one attempts to be both. The Special Rapporteur argues that, despite a great deal of diplomatic and expert activity on the issue of economic and social rights,<sup>3</sup> as well as an emerging body of case law and abundant scholarship, those rights nevertheless remain largely invisible in the law and institutions of the great majority of States.

3. This assessment sits most uneasily with the conventional wisdom that celebrates huge strides in recent years in relation to economic and social rights, including through their widespread constitutional recognition, and in the growing capacity of courts in many countries to enforce them. Thus, for example, it has been claimed that “the global language of human rights, and of economic and social rights in particular, pervades progressive politics around the world”.<sup>4</sup> Those same authors describe how the demands of many different types of vulnerable and displaced communities are being pursued as judicial claims thanks to the opportunities opened up by the recognition of economic and social rights.

4. It is true that, in recent years, the process of including economic and social rights in constitutional provisions has proceeded apace, courts in a range of countries have generated some valuable case law, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has been adopted and some final Views have already been issued, special procedures have been created to deal with many of the economic, social and cultural rights, and international human rights bodies have devoted far more time to

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<sup>1</sup> The Special Rapporteur is very grateful to Christiaan van Veen and Varindarjit Singh for their excellent assistance with the report and to Gráinne de Búrca, Sandra Liebenberg and Nikki Reisch for their comments.

<sup>2</sup> Jean-Marie Guéhenno, *The Fog of Peace: A Memoir of International Peacekeeping in the 21st Century* (Washington, D.C., Brookings Institution Press, 2015), p. xiv.

<sup>3</sup> The present report focuses specifically on economic and social rights. While cultural rights are closely related to economic and social rights and are covered under the same Covenant, they also have a number of distinctive characteristics that warrant a somewhat different approach than the one adopted here.

<sup>4</sup> Daniel M. Brinks, Varun Gauri and Kyle Shen, “Social rights constitutionalism: negotiating the tension between the universal and the particular”, *Annual Review of Law and Social Science*, vol. 11 (November 2015), pp. 289-290.

debating such rights than they once did. But there remains a fundamental paradox because, at the same time:

- (a) Many of the States whose Constitutions recognize economic and social rights have not translated that recognition into a human rights-based legislative framework;
- (b) The increasingly widespread constitutional acceptance of the justiciability of economic and social rights stands in direct contrast to the resistance of many of the relevant courts to acting on these rights;
- (c) Many of the States that enjoy the world's highest living standards have specifically rejected proposals to recognize economic and social rights in legislative or constitutional form;
- (d) With few exceptions, the principal national-level institutional mechanisms for promoting human rights devote almost no attention to economic and social rights;
- (e) National economic and social rights accountability mechanisms are generally much rarer than mainstream accounts would suggest.

5. The paradox is deepened by the fact that, at the international level in particular, both intergovernmental bodies and civil society actors continue to generate detailed and lengthy interpretations of economic and social rights provisions (especially through general comments and general recommendations), as well as principles, guidelines, recommendations, handbooks, guiding principles, manuals and blueprints designed to help Governments and other actors to better understand the nature and scope of States' economic and social rights obligations. While this impressive and enlightening output has greatly strengthened the ability of civil society actors to advocate more effectively for economic and social rights, the question is whether, in national contexts in which economic and social rights do not enjoy legislative recognition, where national institutions do not effectively monitor and promote such rights and where meaningful accountability and participation mechanisms have not been established, conditions are such that a meaningful governmental response is likely to be triggered. The anticipated response to this critique is that the main, or at least initial, targets of the new activism are civil society actors and that they can be aided, empowered and even mobilized despite governmental inaction. But this response would be disingenuous if it implies that civil society actors alone can bring about the deep societal change that is required if economic and social rights are to be taken seriously as human rights.<sup>5</sup>

6. At the end of the day, the most telling evidence of the extent to which economic and social rights remain unacknowledged as human rights is the frequency with which debates about them slide imperceptibly and almost naturally into broad discussions of development. States challenged to explain how they respect economic and social rights will describe general development or social welfare initiatives as though they are necessarily synonymous with such rights. And development cooperation budgets often assume that, as long as an equality or poverty alleviation dimension is included, a project can be considered as promoting economic and social rights. But, in fact, development initiatives might not be rights-promoting or even rights-protecting, and even when they are both, they may well end up promoting the special interests of a targeted group rather than economic and social rights as human rights.

7. The risk of eliding two potentially very different approaches also arises when the 2030 Agenda for Sustainable Development and its Sustainable Development Goals is automatically equated with the promotion of respect for economic and social rights. While

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<sup>5</sup> Marc Verdussen, ed., *Les droits culturels et sociaux des plus défavorisés* (Bruxelles, Bruylant, 2009).

it is very much to be hoped that the 2030 Agenda will indeed lead to greater respect for economic and social rights as human rights, this is by no means guaranteed by the terms of the Agenda as adopted and much remains to be done if that aspiration is to be meaningfully promoted.

## **B. Treating economic and social rights as human rights**

8. This report emphasizes the importance of treating economic and social rights as human rights, rather than as desirable goals, development challenges, social justice concerns or any of the other formulations that are invariably preferred. The pre-eminent question is whether it really matters that we treat economic and social rights as human rights. One answer is that the use of rights terminology is avoided so assiduously by governments and others precisely because it does matter very much and makes a big difference. How so? First, the use of the human rights framework ensures that in the midst of programmes designed to ensure collective well-being, the rights of the individual and not just the overall goals of the programme and the interests of the collectivity are taken into account. Second, in contrast to generic social justice language which has no defined content or agreed meaning, human rights discourse directs policymakers and others back to the internationally agreed formulations of economic and social rights and the jurisprudence that has painstakingly evolved. Third, treating economic and social rights as human rights rather than long-term goals introduces an element of immediate salience which might otherwise not be present. Fourth, and perhaps most importantly, the language of rights recognizes and insists on the dignity and agency of all individuals (regardless of race, gender, social status, age, disability or any other distinguishing factor) and it is intentionally empowering. Whether in the home, village, school or workplace, or in the political marketplace of ideas, it makes a difference if one is calling for the realization of collectively agreed and internationally recognized and defined rights to housing or education, rather than merely making a general request or demand. Moreover, as noted earlier, the legal conception of human rights presupposes and demands accountability, whereas characterizing economic and social rights in terms of desirable goals or development challenges leaves them hostage to a great many other considerations.

## **C. Structure of the report**

9. In the present report, the Special Rapporteur identifies the problematic consequences that flow from the second-tier status of economic and social rights within both the domestic and international human rights systems. He then reflects on the ways in which economic and social rights can be treated as though they really are human rights and what that would mean. He does this primarily through the lens of the recognition, institutionalization and accountability (RIA) framework. These are the three essential components of any potentially effective strategy for promoting economic and social rights as human rights, and policies and programmes that neglect these dimensions are unlikely to be effective. Consideration is given to the extent to which the framework is reflected in some of the monitoring activities undertaken by the Human Rights Council, the Committee on Economic, Social and Cultural Rights and international non-governmental organizations (NGOs). The Special Rapporteur concludes the report by noting that the RIA framework is not a magic bullet, nor should it be seen as a substitute for other initiatives in the field, and highlighting the need to acknowledge and tackle the deeper reasons for the continuing marginalization of economic and social rights.

## II. Consequences of neglecting economic and social rights

10. During the Cold War years, deep ideological divisions ensured that economic and social rights were given very limited attention. It was not until 1987 that the Committee on Economic, Social and Cultural Rights was established by the Economic and Social Council, a development that certainly helped to trigger considerable progress. Partly as a result, 171 States proclaimed at the World Conference on Human Rights in 1993 that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>6</sup>

11. In addition to highlighting the intrinsic linkages among all rights, the principal significance of this bold assertion was to signal that economic, social and cultural rights are as important as civil and political rights and *must* be accorded equal attention. And the past quarter of a century has indeed seen a great number of important initiatives, especially in sectoral areas such as the right to housing, the right to food, the right to health and the right to water, and more consistent tribute being rendered to the principle of indivisibility. But acceptance in law and in practice of the idea that economic and social rights are actually human rights, with the set of clear legal consequences that this entails, rather than a set of concerns synonymous with development or social progress, remains marginal. This marginality manifests itself in the work of United Nations human rights bodies, in both the theory and practice of the great majority of States, in the work of many of the most prominent civil society groups focusing on human rights, in the interests and priorities of scholars and commentators and, perhaps most counter-intuitively, even in the work of most international agencies promoting poverty alleviation and social development. As a result, the principal of indivisibility continues to be honoured more in the breach than in the observance.

12. Some will contest this assessment, while others will suggest that the difference in attention and in the practical legal recognition accorded to the two sets of rights — civil and political rights on one hand, and economic, social and cultural rights on the other — does not really matter. In fact, it matters a great deal, and for a number of reasons. The most basic is philosophical, in the sense that it is agreed that the two sets of rights are indispensable elements in enabling individuals to live dignified and fulfilling lives. It is also important for doctrinal reasons. The equal status of the rights recognized in the Universal Declaration of Human Rights reflects a hard-fought ideological and political compromise, not only between capitalist and communist approaches in the 1940s, but between continuing differences in perception over what societies should value most and the terms of the social contract between the State and its inhabitants. It is the glue that has held the package together and the understanding that enables the reconciliation of otherwise starkly competing visions. It reflects the need to achieve an equilibrium among goals that will inevitably always be in tension with one another. Whether the equal importance of the two sets of rights can also be demonstrated empirically is a matter over which economists and others have long duelled, and instrumentalist arguments continue to be heavily relied upon in making the case for goals such as gender equality. But, regardless of the conclusions that might emerge from such research, the validity of the underlying principle cannot be held hostage to the uncertainties of empirical analyses.

13. The widespread persistence of extreme poverty, despite the progress made in recent years, serves to highlight the central importance of the struggle to achieve economic and

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<sup>6</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

social rights. Many hundreds of millions of people continue to suffer from extreme poverty, and by no means only in the poorest countries, in what is a grave affront to any notion of universal human rights. While such poverty is a phenomenon that fundamentally undermines most, if not all, civil and political rights, its most obvious and brutal manifestation is in the premature deaths and severely deprived lives that result from the denial of economic and social rights. While it is true that many developed and a few developing States have radically diminished extreme poverty without adopting a strategy based on the recognition of economic and social rights, experience more broadly suggests that the failure to take those rights seriously diminishes the prospects for eliminating extreme poverty, even in contexts where overall economic growth levels are high.

14. It is not just the world's poorest citizens who are at risk. The capitalist system, which has become the dominant global economic system, is "a tremendously powerful system ... in terms of sheer productivity, innovation and dynamism", but it is ultimately unsustainable unless the excesses and predations that are built into the way it functions are tempered by systems that ensure the basic welfare of the many who would otherwise be victims of the "uncertainty, instability and anti-social effects generated by capitalist processes".<sup>7</sup>

15. Economic and social rights are also of central importance to efforts to tackle extreme inequality and its consequences. The thoroughly documented increases in global wealth and income inequality threaten to undermine the social fabric, to turn civil and political rights into a tool that will be used predominantly to protect the rights and interests of the wealthy and to entrench forms of economic and political liberalism that ignore the needs and deny the rights of those living in poverty. In many respects, the approach currently taken by the international human rights system all but ensures the worst of all possible outcomes. On the one hand, the correct approach insists that economic and social rights are indivisible from, and of equal importance to, civil and political rights, thus suggesting that they can provide a meaningful response to extreme poverty, extreme inequality and other forms of rampant social injustice. On the other hand, the international human rights system systematically marginalizes those rights in many respects, and tolerates a situation in which the majority of States avoid the recognition, institutionalization and accountability that alone can establish solid foundations upon which to build respect for economic and social rights as full-fledged human rights and thus provide powerful and principled arguments to reduce levels of inequality.

16. More sustained and meaningful attention to economic and social rights is also increasingly recognized as an indispensable component of effective and comprehensive counter-terrorism strategies in many contexts. The Special Rapporteur on the promotion and protection of human rights while countering terrorism has consistently drawn attention to the extent to which societies characterized by economic, social, political and educational exclusion are often breeding, or recruitment, grounds for terrorism.<sup>8</sup> And the Secretary-General included in his Plan of Action to Prevent Violent Extremism a lack of socioeconomic opportunities, as well as marginalization and discrimination, among the conditions conducive to violent extremism.<sup>9</sup>

17. A strong case is also to be made for attributing the resurgence of right-wing populism, at least in some of the many countries in which it is occurring, to the growth of inequality and the widespread neglect or denial of economic and social rights.

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<sup>7</sup> For a powerful argument to this effect, see David Garland, *The Welfare State: A Very Short Introduction* (Oxford, Oxford University Press, 2016), p. 137.

<sup>8</sup> See A/HRC/20/14, para. 31; also A/HRC/6/17, para. 64

<sup>9</sup> See A/70/674, paras. 24-26.



18. There is also the question of the legitimacy of the overall human rights enterprise. The economic and social rights framework is increasingly portrayed by critics as being toothless and ineffectual and bringing small or no returns in terms of social justice. Based on such critiques, commentators have argued that only a radically different, non-human rights-based, language could meaningfully address these challenges, that economic and social rights mandates are diverting resources away from the rights that matter, that only political parties and social movements and not human rights groups have the potential to achieve social justice objectives, and that free markets and private enterprise hold the key to economic and social rights in the wake of clear governmental failures in this domain.

19. Closely linked to this loss of legitimacy is a loss of credibility in the eyes of rights holders. The second-class status of economic and social rights has deeply negative consequences for the potential of the human rights movement to gain the widespread support that it needs in order to establish its credibility in the eyes of the literally billions of people whose fundamental needs continue to be of only minor relevance to the core human rights agenda. The fact that the movement is subject to powerful challenges at the global level is due in significant part to the perception that its overriding preoccupations do little or nothing to address the most abiding and pressing challenges confronted by a large part of humanity.

### **III. Understanding and acting upon States' economic and social rights obligations**

20. States' obligations under human rights treaties are described in different ways in different treaties. In civil and political rights contexts, the obligation is to respect and to ensure, whereas economic, social and cultural rights standards reflect an obligation to recognize the rights and take steps to realize them progressively. In spelling out those obligations, international bodies and commentators have commonly identified duties to protect, respect and fulfil.

21. However, in the 50 years since the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted, extensive experience has been gained at both the international and national level, which enables us to identify the key ingredients in successful approaches to the recognition and implementation of human rights obligations. Three are of particular salience in relation to economic and social rights: (a) the need to accord legal recognition to the rights; (b) the need for appropriate institutional arrangements to promote and facilitate realization of the rights; and (c) the need for measures that promote governmental accountability. This can be termed the recognition, institutionalization and accountability framework, or the RIA framework, and its implications for economic and social rights are considered below.

#### **A. Legal recognition**

22. The International Covenant on Economic, Social and Cultural Rights contains three principal types of obligation. The first, and the most consistently ignored or underestimated, is the obligation to recognize each of the particular rights. The second is to take steps through all appropriate means, including particularly the adoption of legislative measures. The third is the obligation to "guarantee" the exercise of the relevant rights without discrimination.

23. In terms of the obligation to recognize, the Committee on Economic, Social and Cultural Rights has noted that, in many instances, legislation is highly desirable and in some cases may even be indispensable.<sup>10</sup> It subsequently added that, although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.<sup>11</sup>

24. Much of the literature on economic and social rights has focused on the extent to which these rights have actually been recognized not in legislation, but through constitutional entrenchment, which is consistently assumed to be a far more significant step. While that is important, it has not been considered by the Committee to be an indispensable element, especially because of the great variety of State constitutional traditions and approaches. In any event, constitutional recognition will generally need to be supplemented by legislation. The question that then arises is, under what circumstances would legislation not be required? In part the answer will depend on the legal system in question, so that a State that makes extensive use of decrees or regulations or some other form of instrument that is not considered to be legislative in nature might be able to demonstrate that it meets the legal recognition requirement in an appropriately formal and legally meaningful way, even in the absence of legislation. But such cases are likely to be relatively rare.

25. In the light of what appears to be the relatively common State practice of not giving explicit legislative recognition to individual economic and social rights, the most important question is whether legislation, or an equivalent form of legal instrument, can be dispensed with altogether by a State that claims to be fulfilling its obligations through other means. In practice, the argument will usually be that legislation has been adopted in relation to the issue or sector in question, and it is unnecessary for any reference to be made in that legislation to the relevant human right. In other words, to take the example of the right to food, the argument would be that it is sufficient that there is legislation in place that addresses food safety or food security, even though it reflects no explicit rights dimension. Or, in the case of the right to education, laws dealing with the establishment of educational institutions are considered sufficient, even if there is no acknowledgement that education is a human right.

26. In support of the view that specific recognition is not required, it might be argued that if a treaty envisages such recognition, it would say so explicitly. Thus treaties dealing with torture, genocide, war crimes or crimes against humanity call not just for legislative recognition of the norm, but also for explicit criminalization of particular conduct. The Convention on the Elimination of All Forms of Discrimination against Women unequivocally requires States parties “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation” (art. 2 (a)). It further obliges them “to ensure, through law and other appropriate means, the practical realization of this principle.”

27. Nonetheless, aside from the clear position that the relevant Committee has taken in its general comments, it is difficult to understand how the obligations to “recognize” the rights, and to “guarantee” non-discrimination, could possibly be achieved in the absence of targeted legislative or equivalent measures. As stated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the general

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<sup>10</sup> See the Committee’s general comment No. 3 (1990) on the nature of States parties’ obligations, para. 3.

<sup>11</sup> See general comment No. 9 (1998) on the domestic application of the Covenant, para. 5.

principle is that States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by, inter alia, incorporating norms of international human rights law into their domestic law, or otherwise implementing them in their domestic legal system.<sup>12</sup> The key element here is the recognition of the norm itself, not merely the adoption of measures that are pertinent to the subject-matter of the norm.

## B. Obligation to establish institutions

28. Human rights are often expressed with great brevity and little or no elaboration as to their content or corresponding obligations. The relevant treaties simply recognize that there is a right to life, a right to social security or a right to recognition as a person before the law. But the assumption underpinning this approach is that institutions will be created and will help to develop the normative content of the relevant right, promote its implementation and facilitate its realization. In Spanish, the term *institucionalidad* is sometimes used to denote the institutional arrangements that are needed to underpin the rule of law and human rights. Where no institutions are designated to take the lead in implementing a particular human right, the likelihood is that little will be done to treat it as a human right per se. This is especially the case in relation to economic and social rights.

## C. Obligation to promote accountability

29. The principle of accountability provides the overarching rationale for the establishment of an international human rights regime. It operates at two levels. One involves State accountability to the international community, which has been promoted through the creation of monitoring mechanisms such as the Committee on Economic, Social and Cultural Rights and the universal periodic review process, and through regional mechanisms. The other involves ensuring that governments are accountable to their citizens and other rights holders. The right to a remedy is recognized in the Universal Declaration of Human Rights and international human rights law has attached particular importance to developing an understanding of the right to adequate, effective, prompt and appropriate remedies, including reparations. Remedies have also been highlighted in transitional justice contexts. In relation to economic, social and cultural rights, the Committee on those rights has stated in its general comment No. 9 that “appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place” (para. 2).

## IV. Applying these obligations to economic and social rights

30. In recent years, there has been great progress in the attention devoted, at both the national and international levels, to economic and social rights. In terms of scholarship, a “renaissance” of economic and social rights is said to have occurred, leading to a “burgeoning” literature.<sup>13</sup> In terms of legal developments, a typical account noted as follows:

ESC rights have gained increased acceptance in international law and comparative jurisprudence. This is evident in an array of new treaties and resolutions and the

<sup>12</sup> See General Assembly resolution 60/147, annex, para. 2.

<sup>13</sup> Courtney Jung, Ran Hirschl and Evan Rosevear, “Economic and social rights in national constitutions”, *American Journal of Comparative Law*, vol. 62, No. 4 (December 2014), p. 1043.

adoption of international complaint mechanisms that cover ESC rights.... This has been accompanied by a rise in regional and national adjudication of ESC rights.<sup>14</sup>

31. Another very positive account argues that “the broad normative framework of ESC rights has attained a high degree of specificity in terms of content as well as efficacy of implementation mechanisms, most importantly at the national level”.<sup>15</sup>

32. However, any assessment of progress made needs to begin by acknowledging that the starting point was one of essential neglect. The key question is thus not quantitative, but qualitative, in nature. Have the many developments led to economic and social rights being taken seriously in the actual practice of governments and other major actors, and have the foundations been laid for continuing strength in the future? This is where the RIA framework is central. In the next section, consideration is given to how much progress has been made at the national level in relation to each of the three dimensions of recognition, institutionalization and accountability.

## A. Legal recognition

33. It has been suggested that “countries are choosing social rights constitutionalism over other ways to promote well-being and the fulfilment of basic human needs”.<sup>16</sup> A systematic and detailed study of economic and social rights in national constitutions provides detailed evidence to support this optimistic assessment; 195 constitutions were examined with a view to identifying which of 16 separate economic and social rights were recognized and, where they were recognized, whether the constitutions classified them as justiciable or aspirational (such as directive principles of State policy). Over 90 per cent of the Constitutions recognized at least one economic and social right. In around 70 per cent of the Constitutions, at least one economic and social right was explicitly justiciable and around 25 per cent of them recognized 10 or more justiciable economic and social rights. In order of frequency, the justiciable rights concerned education, trade unions, health care, social security, child protection and environmental protection. The study found that those six rights appear in over half of all Constitutions.<sup>17</sup>

34. While the present report cannot do justice to the richness of these survey findings, it is clear that impressive levels of constitutional recognition have been achieved and that many more economic and social rights are considered to be justiciable, and in many more countries, than was previously thought to be the case. However, if it turns out that the practical consequences of such constitutional recognition have been very limited, there would be much less to celebrate and attention would need to be focused on supplementary or alternative approaches. Thus an assessment of the significance of these findings requires a careful examination of the empirical consequences of constitutional recognition in terms of enhanced accountability and improved levels of realization of economic and social

<sup>14</sup> Malcolm Langford and others, “Introduction – An emerging field,” in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Malcolm Langford and others, eds. (Cambridge, United Kingdom, Cambridge University Press, 2014), p. 7.

<sup>15</sup> Eibe Riedel, Gilles Giacca and Christophe Golay, “Introduction – The development of economic, social and cultural rights in international law,” in *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Eibe Riedel, Gilles Giacca and Christophe Golay, eds. (Oxford, Oxford University Press, 2014), p. 3. See also Gregor T. Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Zurich, Schulthess Verlag, 2014).

<sup>16</sup> Brinks, Gauri and Shen, “Social rights constitutionalism” (see footnote 4), p. 291.

<sup>17</sup> Jung, Hirschl and Rosevear, “Economic and social rights in national constitutions” (see footnote 13), p. 1053.

rights. The main challenges in this regard are considered in the section below on accountability.

35. Although the topic cannot be dealt with in the present report, it should also be noted that the constitutional recognition of economic and social rights may well be overshadowed or undermined by parallel and far more effective processes involving the constitutional and legal enshrinement of austerity measures.<sup>18</sup> This refers primarily to the use of regional integration, bilateral and multilateral trade and investment agreements, or international financing arrangements, to privilege competing interests that effectively trump human rights considerations.

## B. Institutionalization

36. In terms of institutions for the promotion of economic and social rights, scholars and others have focused almost all of their attention in recent years on courts. The impact of courts will be examined below, under the rubric of accountability. Judicial enforcement is not the same, however, as institutional promotion. The courts are not equipped, and are understandably not willing, to perform the roles required to promote the deeper understanding of economic and social rights and their implementation by diverse governmental and other agencies.

37. In considering which institutions are most likely to be best placed to promote knowledge and understanding of economic and social rights at the domestic level, two types of actors seem most relevant. The first being the government agencies that are responsible for making and implementing policy in the relevant sectors. Thus, government ministries dealing with education, social protection, health, nutrition and so on might be expected to take the lead in promoting a rights-based understanding. This is not to argue, as is sometimes suggested in the literature on rights-based approaches to development, that everything these ministries do should be guided by and seen through the lens of human rights.<sup>19</sup> Nonetheless, one might expect the ministry of education, for example, to acknowledge that there is a right to education and to spell out what that means in specific policy terms. While it is well beyond the scope of this report to explore how common such an approach is among sectoral ministries in most countries, it can be said by way of generalization that the phenomenon is not common. There are some indications that the health sector might be moving more in that direction under the impetus of the movement for universal health coverage. Similarly, social security is increasingly seen in terms of the right to social security as a result of the Social Protection Floor Initiative.

38. The second type of institutional actor that could be expected to play a key role in promoting economic and social rights is national human rights institutions, of which there are now almost 120. In 1998, the Committee on Economic, Social and Cultural Rights called upon national human rights institutions to take a more active role in the promotion of economic and social rights.<sup>20</sup> The most detailed scholarly study of those institutions yet

<sup>18</sup> Stephen McBride, “Constitutionalizing austerity: taking the public out of public policy”, *Global Policy*, vol. 7, No. 1 (February 2016), p. 5.

<sup>19</sup> For a powerful but nuanced argument as to how a country’s national health system “enshrines and communicates values in the overall society and is not merely a technical apparatus for the delivery of goods and services”, see Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (Philadelphia, University of Pennsylvania Press, 2016), p. 236.

<sup>20</sup> See the Committee’s general comment No. 10 (1998) on the role of national human rights institutions in the protection of economic, social and cultural rights.

undertaken concludes that, if they “can be faulted as a group for one thing, it is an insufficient challenge to the material conditions that perpetuate human rights violations”.<sup>21</sup> Specialist studies indicate that while a handful of such institutions have devoted significant attention to economic and social rights,<sup>22</sup> the vast majority have not. The reasons cited include absent or restrictive mandates, lack of expertise, lack of resources, absence of political support and the complexity of the issues. The bottom line is that few of these “institutions are producing regular, comprehensive reports on ESC rights fulfilment in their countries”.<sup>23</sup>

39. A key factor in explaining this fundamentally unbalanced approach may be the relative absence in the work of many national human rights institutions of genuinely consultative approaches that would enable the affected communities to influence priorities and approaches and participate in developing policy responses and recommendations.

### C. Accountability

40. Many books have now been written extolling the virtues of involvement by the courts in enforcing economic and social rights in various countries around the world, but justiciability is by no means the whole story. Indeed, it might be argued that the focus on justiciability has become the tail that is wagging the analytical dog. Rights holders can seek accountability through many means, including: (a) sharing information with the media; (b) using community or peer pressure; (c) collecting and publishing data; (d) complaining to an authoritative body or person; and (e) evaluating and reporting.<sup>24</sup> However, most of these methods assume that, at the end of the day, there will be a mechanism in place to which the claim can ultimately be brought for vindication in the absence of self-correction by the duty holder.<sup>25</sup>

41. All three branches of government offer potential accountability mechanisms for economic and social rights claims. The legislature is, of course, central in terms of its ability to adopt legislation that mandates attention to such rights or that responds to violations. There have also been important initiatives in terms of establishing parliamentary human rights committees and institutionalizing review of draft legislation to ensure compliance with human rights law. In terms of the executive, government officials can monitor economic and social rights realization and incorporate those rights into policymaking and implementation mechanisms. State agencies are also often a logical locus for complaints mechanisms, although they remain strongly underresearched in the economic and social rights field. While national human rights institutions are potentially

<sup>21</sup> Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia, University of Pennsylvania Press, 2014), p. 360.

<sup>22</sup> See Asia Pacific Forum for National Human Rights Institutions and the Center for Economic and Social Rights, *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights* (January 2015); and Eva Brems, Gauthier de Beco, Wouter Vandenhole, eds., *National Human Rights Institutions and Economic, Social and Cultural Rights* (Mortsel, Belgium, Intersentia, 2013).

<sup>23</sup> Alison Corkery and Duncan Wilson, “Building bridges: national human rights institutions and economic, social and cultural rights”, in *Economic, Social and Cultural Rights in International Law* (see footnote 15), pp. 473-490.

<sup>24</sup> United Nations Children’s Fund, *Accountability for Children’s Rights: A research mapping of local and informal accountability mechanisms* (December 2015), p. 7, available at [www.unicef.org/policyanalysis/rights/files/ACR-SPREADS-WEBFILE.pdf](http://www.unicef.org/policyanalysis/rights/files/ACR-SPREADS-WEBFILE.pdf).

<sup>25</sup> Varun Gauri, “Redressing grievances and complaints regarding basic service delivery”, *World Development*, vol. 41 (January 2013), p. 109.

relevant, studies indicate that they have played a very minor role, not just in terms of economic and social rights promotion, as noted above, but also in achieving accountability. The main exception in that regard relates to the role of ombuds institutions, which could be much more engaged on matters of economic and social rights than they are, even though their powers generally fall short of being able to provide direct remedies.

42. Because of the relative inactivity of these other actors, studies of economic and social rights accountability have focused overwhelmingly on the courts and on the extent to which the increasing constitutional recognition noted above has enabled them to play an active role in upholding economic and social rights. It is open to question whether this emphasis accurately reflects the main trends in economic and social rights accountability or whether it is due more to the lawyers' preference for studying courts. It might also be linked to the determination of economic and social rights proponents in the era of post-Cold War constitutional revitalization to respond to the often heard, but highly reductionist, proposition that "if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process".<sup>26</sup> In response, economic and social rights proponents have sought legitimacy by seeking to demonstrate that economic and social rights resemble civil and political rights, at least in this key respect.

43. In the limited space available in the present report, it is impossible to undertake a systematic review of the experience, to date, with justiciability, but some broad conclusions emerge from the voluminous and often excellent literature.<sup>27</sup>

44. First, constitutional recognition on its own means relatively little in practical terms. Hence the distinction drawn by Katharine Young between constitutionalizing and constituting economic and social rights, according to which the latter goes well beyond constitutional recognition, to require that the rights are actually effective within the legal system.<sup>28</sup> For example, a study on the right to health in Africa begins by celebrating the fact that "from Africa to Asia, Europe and even South America, cases relating to the violation of the right to health are constantly being brought before the courts".<sup>29</sup> Yet, in the study it is shown that, in the African context, South Africa is the only country in which there has been systematic litigation of this sort. Malcolm Langford was correct when he observed that, "the scope for formal judicial review of ESC rights is rather limited outside the use of civil rights or international mechanisms".<sup>30</sup>

45. Second, even when economic and social rights are both constitutionally recognized and justiciable, there are many factors that can limit the resulting outcomes. Lawyers might

<sup>26</sup> Aryeh Neier, "Social and economic rights: a critique", *Human Rights Brief*, vol. 13, No. 2 (2006), p. 1.

<sup>27</sup> Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, United Kingdom, Cambridge University Press, 2008); Colleen M. Flood and Aeyal Gross, eds., *The Right to Health at the Public/Private Divide: A Global Comparative Study* (Cambridge, United Kingdom, Cambridge University Press, 2014); Alicia Ely Yamin and Siri Gloppen, eds., *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, Massachusetts, Harvard University Press, 2011); Diane Roman, "La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social", *La Revue des Droits de l'Homme*, vol. 1 (2012), available at <http://revdh.revues.org/635>.

<sup>28</sup> Katharine G. Young, *Constituting Economic and Social Rights* (Oxford, Oxford University Press, 2012), p. 6.

<sup>29</sup> Ebenezer Durojaye, "Introduction – The relevance of health rights litigation in Africa", in *Litigating the Right to Health in Africa: Challenges and Prospects*, Ebenezer Durojaye, ed. (London, Routledge, 2015).

<sup>30</sup> Malcolm Langford, "Judicial review in national courts: recognition and responsiveness", in *Economic, Social and Cultural Rights in International Law* (see footnote 15), p. 423.

not invoke such rights, a lack of resources and the absence of legal aid might make it impossible for many violations of economic and social rights to be litigated and potential applicants might be denied standing to sue. Even when cases get to court, the judiciary might not be independent, the judicial culture might not be amenable to scrutinizing the sort of issues raised by economic and social rights and the remedies available might be so weak as to deter such litigation.

46. Third, the literature does not pay much attention to the existence of implementing legislation designed to promote realization of a specific right as a human right, whether or not there is constitutional recognition. In countries like South Africa, there is very extensive legislation (such as the Water Services Act, 1997) designed to promote or implement economic and social rights and this often plays a key role in constitutional litigation. But in most other countries, such legislation seems to be rare, certainly outside of the education and health sectors.

47. Fourth, although some of the databases of economic and social rights case law around the world are impressive, the total number of cases is still rather limited. While individual cases have arisen in many jurisdictions, the reality is that in only a handful of jurisdictions have the courts generated a body of significant case law. Among the most notable of these are Colombia, India, Kenya, South Africa and state-level courts in the United States of America (in relation to the right to education).

48. Fifth, the implementation of positive judicial outcomes and the search for more creative remedies have been “an analytical and practical blind spot”.<sup>31</sup>

## **V. International monitoring of economic and social rights recognition, institutionalization and accountability**

49. In monitoring civil and political rights, both the Human Rights Council and the treaty bodies have played a crucial role in encouraging States to focus on the recognition, institutionalization and accountability dimensions of those rights. It is much less clear, however, that they have played a comparable role in relation to economic and social rights. While the Council addresses economic and social rights in many different contexts, and especially through the work of its special procedures, perhaps the best indication of its approach can be gleaned from the universal periodic review process. In terms of the work of the treaty bodies, the most important in this context is the Committee on Economic, Social and Cultural Rights. The approach adopted with regard to recognition, institutionalization and accountability in each of these settings is examined briefly below.

### **A. Universal periodic review**

50. Because of its universality and its integrated approach to the human rights agenda, the universal periodic review process is an especially important indicator of governmental concerns and priorities. A thorough review of the operation of the process since its inception raises concern about both the quantity and quality of economic, social and cultural rights-related recommendations. Only one out of five recommendations adopted have been specifically concerned with economic, social and cultural rights. Only 11 per cent of the recommendations put forward by the regional group that have made, by far, the

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<sup>31</sup> César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge, United Kingdom, Cambridge University Press, 2015), p. 8.



most recommendations overall dealt with economic, social and cultural rights. For other regions, the figures were 20 to 30 per cent. Even more problematic, two thirds of the recommendations relating to economic, social and cultural rights called for only general action, as opposed to any specific outcome.<sup>32</sup> These results are consistent with the Special Rapporteur's own survey, which indicated that up and including the twenty-second session of the Human Rights Council, 1,031 economic and social rights-related recommendations had been made. Of these, over 20 per cent called for ratification of the Covenant or the Optional Protocol, or withdrawal of reservations made at the time of ratification. Thirty-three recommendations called for greater cooperation with United Nations bodies working on economic, social and cultural rights; 182 called for legislative action on one or more specific economic and social rights, but almost none of these focused on specific legislative recognition of economic and social rights as human rights. Only 13, or 1.26 per cent, of the relevant recommendations specifically requested a State to take measures to guarantee the status of economic, social and cultural rights through constitutional amendments, enactment of legislation or by giving national courts jurisdiction to provide remedies for economic and social rights violations.

51. The main conclusion to be drawn for the purposes of the present report is that, insofar as the universal periodic review is an accurate indicator, States attach very limited importance to the recognition, institutionalization and accountability dimensions of economic and social rights.

## **B. Committee on Economic, Social and Cultural Rights**

52. The Special Rapporteur has surveyed the Committee's work since the beginning of 2014 to evaluate how it has approached the three elements in the RIA framework. This included State party reports, the relevant lists of issues and the concluding observations relating to 32 States parties, drawn more or less evenly from the different regional groups.

53. In one third of the 32 lists of issues considered, the Committee requested information about the status of the Covenant within the State's domestic legal system. In almost all the lists, examples of cases in which domestic courts had considered or applied the Covenant were requested. In a little over half of the lists, States parties were asked about legislative measures taken to implement one or more of the rights.

54. The reports by States were consistent with the finding of widespread domestic recognition of economic and social rights. In 13 State party reports addressing the issue of the domestic law status of the Covenant, a range of statuses were reported: in some States, the Covenant applied directly, in others, it prevailed in cases of inconsistency, benefited from a "presumption of compatibility" or could be invoked as a persuasive authority. Half of the States indicated that the economic and social rights recognized in legislation or constitutional provisions were justiciable and one third of the States provided some examples of cases.

55. Despite these impressive reporting figures, in half of the concluding observations the Committee recommended that measures be taken to ensure the "direct applicability" of the Covenant in the domestic legal order. In slightly less than half of the concluding observations, the Committee also recommended that the State concerned seek to raise awareness of the justiciability of the rights. And in almost every concluding observation

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<sup>32</sup> See Center for Economic and Social Rights, "The universal periodic review: a skewed agenda?" (2016).

(27), the Committee recommended that legislation be enacted or amended in order to implement Covenant obligations.

### C. Non-governmental organizations

56. One of the most encouraging developments in recent years in relation to economic and social rights has been the growth of specialist NGOs at the international, national and, especially, local levels working to promote either economic and social rights in general or specific rights such as those relating to health, housing, education, water, gender equality, disability and ageing.

57. Nevertheless, some of the major international NGOs continue to approach economic and social rights in ways that do very little to change the marginality of those rights within the field. This is especially problematic because these organizations still disproportionately influence the overall shape of the non-governmental agenda, especially at the international level. Good faith efforts in recent years to develop a more positive and proactive approach to economic and social rights have succeeded in moving the field forward in relation to several issues that are important, even though they represent a rather narrow slice of the overall economic and social rights pie. Reporting on issues such as forced evictions, maternal mortality, discrimination in access to schooling, access to palliative care and to HIV/AIDS drugs, and sexual and reproductive health, has contributed significantly in these areas, but the approaches adopted have too often relied almost entirely on using a discrimination lens and avoided reliance on the economic and social rights framework. When combined with policies that eschew issues that involve redistributing resources or require significant budgetary allocations, the approach can amount to a self-denying ordinance that effectively maintains the status quo and ensures that the core economic and social rights issues will not be adequately addressed.

58. When constitutions are being rewritten, the major NGOs are vocal in calling for the inclusion of civil and political rights, but rarely mention economic and social rights. When transitional justice mechanisms are being shaped, their concerns focus overwhelmingly on civil and political rights, even though many such violations go hand in hand with economic and social rights violations, and the measures required to bring reconciliation and justice would need to incorporate economic and social rights dimensions if they are to be comprehensive as well as designed to avoid non-repetition. Instead, those issues are most likely to be characterized as development concerns.

59. One of the biggest economic and social rights challenges confronted by civil society organizations has been to identify a methodology for monitoring these rights. This has gone hand in hand with questions about who bears responsibility for economic and social rights violations, to whom demands for action should be addressed, how judgments can be made as to the acceptability of trade-offs between one social right and another and what remedies are appropriate. These dilemmas are especially problematic in the absence of the RIA framework at the national level, but many of the NGOs have either consciously or otherwise not directed their attention to these dimensions. Others have dismissed them as issues in relation to which international NGOs are poorly placed to advocate.<sup>33</sup>

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<sup>33</sup> “International human rights organizations might press governments to adopt the legislation — the statutory rights — needed to make litigation a meaningful tool to enforce ESC rights. That is inevitably useful, but it is a procedural device that still falls significantly short of actual implementation.” See Kenneth Roth, “Defending economic, social and cultural rights: practical issues faced by an international human rights organization”, *Human Rights Quarterly*, vol. 26, No. 1 (February 2004), p. 63.

60. If the recognition, institutionalization and accountability building blocks were solidly in place in many countries, it would follow that the main focus of advocacy efforts to promote a higher level of real-life enjoyment of economic and social rights should be elsewhere. It may be that this assumption explains why so many of those working to promote economic and social rights, whether through the United Nations or regional organizations or at the national level, have now turned their attention to matters such as developing new methodologies for measuring compliance with the Covenant, exploring new and much more detailed indicators, working out how such indicators can be disaggregated to take account of a wide range of specific factors — such as gender, age, ethnicity and social origin —, identifying means by which to ensure that decision-making processes are transparent and participatory, and developing more detailed normative guidelines, recommendations, principles and other such instruments that elaborate upon or seek to operationalize governmental obligations in relation to economic and social rights.

61. The problem is that, unless the basic building blocks of recognition, institutionalization and accountability are in place, it is highly unlikely that other more sophisticated techniques are going to be effective. It is difficult to imagine less fertile ground for many such initiatives than contexts in which economic and social rights remain unrecognized as rights, where the relevant institutions are not working effectively to promote economic and social rights as rights and where there is little or no concept of economic and social rights accountability in place. It is hoped, of course, that these new techniques, developed and promoted externally, can compensate for, or even overcome, the inhospitable domestic environment within which they will eventually have to be implemented. But again, there would seem to be a strong element of wishful thinking in the expectation that States that have not been able or willing to put the foundations of economic and social rights in place, will be likely to implement even more demanding and sophisticated techniques for monitoring and promoting economic and social rights.

62. None of this is to suggest that these other endeavours are not of major importance, but the argument is that they will have far less impact where the RIA framework is not in place.

## VI. Conclusions

63. **A conception of human rights that implicitly accepts a radical hierarchical distinction between the two sets of rights — civil and political rights, and economic, social and cultural rights — is one that is fundamentally incompatible with international human rights law. Just as importantly, it offers no solution to the increasingly urgent challenges posed by radical and growing inequality and widespread material deprivation in a world of plenty. The economic and social rights agenda is thus too important, and its neglect has too many powerfully negative implications for the overall human rights enterprise, for it to be marginalized by mainstream actors and left to a handful of specialist groups to struggle to give it the place that law and justice demand.**

64. **It is essential for the proponents of economic and social rights to acknowledge the deeply rooted nature of the continuing strong resistance to the very concept of economic and social rights as human rights. The adoption of more resolutions and the holding of more meetings should not be permitted to conceal this fact. The reality is that governments have not accidentally overlooked the significance of the recognition, institutionalization and accountability (RIA) framework. On the contrary, the widespread failure to ensure that these three building blocks are in place in relation to economic and social rights is the principal symptom of the resistance. Proponents of economic and social rights need to acknowledge and tackle this deeper political reality rather than sailing merrily along as though there is widespread and basic agreement on economic and social rights.**

65. Despite the rhetoric of indivisibility, both national and international endeavours to promote and protect economic and social rights are overshadowed by the assumption that while economic and social rights are desirable long-term social goals, they should not be treated as full-fledged human rights. The present report is not the place to review in detail the familiar arguments that have been invoked in support of this approach, which include claims that economic and social rights are too expensive, too vague, too empowering of the State, are potentially limitless, reward and encourage laziness, penalize wealth creation, undermine economic growth and are inimical to international competitiveness. These arguments, traditionally associated with those who might describe themselves as libertarians, neo-conservatives, free-marketeters or small government advocates, have triumphed in many countries in the twenty-first century and have been actively promoted by the most influential international organizations in the fields of development, finance and trade. While compelling counter-arguments have been put forward in response to each of the critiques, the biggest challenge by far is essentially ideological. The economic and political power of entrenched elites is best protected by policies that marginalize economic and social rights.

66. Many human rights proponents seem to prefer not to engage in these debates for fear that doing so would be a lost cause and that economic and social rights would be discredited or disowned rather than just marginalized or neglected. But that strategy leads to the same result in practical terms, except that the illusion is maintained that economic and social rights are an integral, even indivisible, part of the overall human rights framework.

67. The framework of legal recognition that underpins the approach adopted in the present report by no means exhausts the range of approaches that are and should be used in the promotion of economic and social rights. Campaigns to educate both rights holders and professionals, empower community groups, facilitate local-level activism or enable monitoring are all part of the expansive toolbox for economic and social rights activism.<sup>34</sup> As has been cautioned:

Unless all participants in [economic and social rights] litigation are conscious of the institutional limitations of the courts and consider the possibility that the particular claim may be more effectively addressed through another forum such as advocacy or community mobilisation, there will be the ever-present danger of untimely or inappropriate resort to litigation, and judgments that impede rather than facilitate transformation.<sup>35</sup>

68. The legal framework will influence all of these other dimensions and avenues and it is one of the dimensions that can most meaningfully be promoted and monitored through United Nations and related mechanisms. Put succinctly:

Contemporary movements for social change cannot avoid working in the legal medium. There are no “law-free” zones in modern societies to which activists can repair so as to avoid entanglement with law and system. ... Legal entitlements (including those formulated as “rights”) strongly influence the distribution of wealth and power and partially construct identities. Social change movements cannot avoid engagement on this terrain, and it is difficult

<sup>34</sup> Peter Houtzager and Lucie E. White, “The long arc of pragmatic economic and social rights advocacy”, in *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Lucie E. White and Jeremy Perelman, eds. (Stanford, California, Stanford University Press, 2011), p. 172.

<sup>35</sup> See Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont, Juta, 2010), pp. 77-78.

to see how they can do this effectively without some type of “higher law” discourse of the kind captured in the idiom of fundamental rights.<sup>36</sup>

69. In other words, even when it appears to be marginal and best ignored, the legal framework of recognition or non-recognition will, in practice, wield significant influence in terms of how economic and social rights are perceived and what advocacy opportunities are closed down or opened up. The legal framework can, at least partially, empower or disempower and legitimize or delegitimize those who advocate respect for economic and social rights. Thus, even those who argue that the battle over economic and social rights will inevitably be won or lost in the political arena would be well advised not to neglect the recognition, institutionalization and accountability dimensions. This is not for a moment to suggest that the many other dimensions of economic and social rights-related advocacy are unimportant. The argument is that most, if not all, of them will be less effective if the RIA framework is not in place as a matter of State policy.

70. The RIA framework is no magic bullet. There are all too many examples of situations in which clearly recognized economic and social rights, to which meaningful accountability mechanisms attach in principle, have done little or nothing to improve the situation. But this generally reflects a failure of will, competence or capacity, rather than a flawed framework. Nor is the report arguing that these three steps are all that is required or that the many other approaches that are currently being pursued are not potentially very important.

71. It is important to recognize that the promotion of economic and social rights as human rights, including a particular emphasis on the elements of the RIA framework, does not imply that there is a universal one-size-fits-all approach that will secure the realization of economic and social rights in countries with very different histories, legal systems, traditions and cultures. Nor does it assume that everything needs to be done at once, or that a maximalist approach is indispensable. Strong arguments in favour of an incremental approach to economic and social rights adjudication in contexts in which the notion is relatively novel holds lessons for moving progressively, and with all appropriate speed, in relation to other elements of the overall package.<sup>37</sup> There is immense space for the processes of “vernacularization”, or translation into languages and forms, that are meaningful at the local level and about which various authors have written with great insight.<sup>38</sup>

72. One of the challenges that emerges most clearly from this analysis is that more research is needed in order to generate a better understanding of what works and what does not, in terms of the overall agenda for the promotion of economic and social rights. The focus needs to be less on what governments, civil society groups and scholars think they are best placed to do and more on what objectively needs to be done to ensure the progressive recognition and realization of economic and social rights.

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<sup>36</sup> See Karl Klare, “Critical perspectives on social and economic rights, democracy and separation of powers,” in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Helena Alviar García, Karl Klare and Lucy A. Williams, eds. (London, Routledge, 2015), p. 3.

<sup>37</sup> See Jeff King, *Judging Social Rights* (Cambridge, United Kingdom, Cambridge University Press, 2016).

<sup>38</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press, 2006).