

# Life, Dignity, and the Pursuit of Happiness: Human Rights and Living Standards in Africa

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The average [African] sees all around him a rapid multiplication of the artifacts of modern living. He has been encouraged, even urged, to widen his expectations but, at the same time, he sees increasing rewards channelled, not as it were, for excellence but for increasing levels of incompetence. He sees greater and greater limitations on his freedom: to earn a living curtailed by growing unemployment, to maintain his current level of living wiped out by rising inflation, to organise his life and practice his calling threatened by increasing disorder.<sup>1</sup>

## Introduction

A claim to human rights is a claim to individual autonomy, defined as the ability to frame rules that govern one's life and to organize that life in ways one chooses without outside interference.<sup>2</sup> As ethical standards that uphold the minimum thresholds individuals everywhere require to live in dignity, human rights serve as ends and means. They provide their holders with an 'argumentative threshold' against probable objections,<sup>3</sup> 'trump[ing] over some background justification for political decisions that states a goal for the community as a whole.'<sup>4</sup> Human rights not only

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<sup>1</sup> Pious Okigbo, *Essays in the Public Philosophy of Development* (1987) 30.

<sup>2</sup> See Filip Spangnoli, *Homo Democraticus: On the Universal Desirability and the Not So Universal Possibility of Democracy and Human Rights* (2003) 402.

<sup>3</sup> See David Lyons, *Utility and Rights*, in *Rights, Welfare, and Mill's Moral Theory* 147, 152 (David Lyons ed., 1994).

<sup>4</sup> Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153, 153 (Jeremy Waldron ed., 1984). Cf. Ronald Dworkin, *Taking Rights Seriously* (1977) xi (referring to rights as 'trumps,' that is, their claims take precedence over considerations about the maximizing of social utility).

protect the exercise of free choice; they also promote (some of) the rights-holders' interest and impose specific duties on others.<sup>5</sup> They create an inviolable and impregnable space of 'petty sovereignty' against the larger space of state sovereignty,<sup>6</sup> but they also serve as aids to the achievement of some goals which individuals hold as *summum bonum*.

This Article examines the right to an adequate standard of living – as a subset of the right to life, dignity, and the pursuit of happiness – and assesses the extent of its realization in Africa. It assumes the normativity of socio-economic rights – quite apart from debates on their justiciability<sup>7</sup> – in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person.<sup>8</sup> The Universal Declaration of Human Rights (UDHR)<sup>9</sup> aspires for 'a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.'<sup>10</sup> And the ideal of free human beings enjoying freedom from fear and want, according to the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>11</sup> 'can

<sup>5</sup> See Alon Harel, *Theories of Rights*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 191, 194-5 (Martin Golding & William Edmundson eds., 2005). See also 'Symposium: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor' (2006) 58 *Stan. L. Rev.* 2000, 2011 (defining a right as 'a claim, recognized by the state, of an individual or group upon other individuals, groups, or the state itself for a certain type of action'); and generally H. L. A. Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Theory* 162 (H. L. A. Hart ed., 1982); and L. W. Sumner, *The Moral Foundations of Rights* (1987).

<sup>6</sup> See Spangnoli, above n 2, 100.

<sup>7</sup> Normativity deals with questions whether a particular standard or principle is binding on members of a group and guiding and regulating acceptable behaviour in a society. Justiciability deals with questions whether courts can, and at least sometimes will, provide a remedy for aggrieved individuals claiming a violation of certain standards.

<sup>8</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, pmbl., adopted Nov. 17, 1988, entry into force Nov. 16, 1999, OASTS No. 69 [hereinafter Additional Protocol to the American Convention]. Cf. *World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Program of Action*, P5, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993); *Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* E/CN.4/Sub.2/2002/13, annex, pmbl. [hereinafter Draft Norms for TNCs] ('Acknowledging the universality, indivisibility, interdependence, and interrelatedness of human rights, including the right to development, that entitles every human person and all peoples to participate in; contribute to; and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized' (italics in the original)).

<sup>9</sup> *Universal Declaration of Human Rights* 1948, Art. 25(1), GA Res. 217A(III), UN GAOR, 3d Sess., UN Doc. A/Res/810 (1948) [hereinafter UDHR].

<sup>10</sup> *Ibid* pmbl.

<sup>11</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966, entry into force Mar. 23, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.’<sup>12</sup>

Although the Article is divided into three major parts, the first two are largely doctrinal, locating the right to an adequate living standard in the corpus of human rights and the corresponding moral and legal obligations. The third is largely recommendatory; prescriptions are made against the background of the massive poverty, unemployment, crime, homelessness and other pathologies that plague Africa and show no signs of abating. The Article challenges African states and the global community to do more to realize the right to an adequate standard of living.

### **An Adequate Standard of Living as a Human Right**

Living standards point towards a larger quality of peoples’ lives—the richness of life<sup>13</sup>—rather than merely the security of possessions. ‘Adequate’ means ‘sufficient for a special requirement,’<sup>14</sup> ‘ample,’ ‘enough,’ ‘plenty,’ or ‘satisfactory.’ An ‘adequate standard of living’ ‘impl[ies] the maintenance of a level of living which is above the poverty line of the society concerned.’<sup>15</sup> It incorporates such needs as food, health, clothing, transport, conditions of work, housing, social service and security, in short, the basic necessities that everyone needs, ‘without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people.’<sup>16</sup> Does international law recognize the right to an adequate standard of living? What are the contours of such a right and the nature of its obligations? To what extent does the non-realization of the right to adequate housing, education, health, and food affect the right to an adequate standard of living? This Part interrogates these and related issues.

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<sup>12</sup> Ibid. pmb1. Cf. *African Charter on Human and Peoples’ Rights*, pmb1., OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 59 (1981) [hereinafter *African Charter*] (‘Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.’).

<sup>13</sup> See Jean Dreze & Amartya Sen, *Hunger and Public Action* 12 (1989).

<sup>14</sup> *The New Lexican Webster’s Dictionary of the English Language* (1991) 10.

<sup>15</sup> Asbjörn Eide, *The Right to an Adequate Standard of Living Including the Right to Food, in Economic, Social and Cultural Rights: A Textbook* 89, 90 (Asbjörn Eide et al. eds., 1995).

<sup>16</sup> Ibid 89.

### Setting Standards for Living Standards

The development of international law on living standards has been effectuated primarily through conventional law, though some secondary sources of the law, including judicial decisions, have enlarged its contours.

### International Law on Living Standards

The constitutive instruments of some international institutions advance living standards as necessary ends. The language of the United Nations (UN) Charter emphasizes economic, social, and physical well-being, while its Member States pledge to promote ‘higher standards of living, full employment, and conditions of economic and social progress and development,’ all ‘[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.’<sup>17</sup> The International Labor Organization (ILO)’s ‘solemn obligation’ is to achieve ‘full employment and the raising of standards of living.’<sup>18</sup> One of the goals of the African Union (AU)<sup>19</sup> is to promote ‘co-operation in all fields of human activity to raise the living standards of African peoples.’<sup>20</sup> Even the Marrakesh Agreement Establishing the World Trade Organization (WTO)<sup>21</sup> assumes symmetries between trade, development, and human rights and provides that trade and economic relations ‘should be conducted with a view to raising standards of living.’<sup>22</sup>

The major human rights instruments, declaratory and obligatory, universal and regional, guarantee the right to an adequate standard of living. The UDHR guarantees to everyone ‘the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.’<sup>23</sup> The ICESCR is similarly worded,<sup>24</sup> though it goes beyond

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<sup>17</sup> *United Nations (UN) Charter* 1945, Art. 55(a). However, neither Article 55 nor other provisions of the Charter clearly spell out the human and economic rights it seeks to promote.

<sup>18</sup> Declaration concerning the aims and purposes of the International Labor Organization, May 10, 1944, Art. III(a), available at:

<<http://www.ilo.org/public/english/about/iloconst.htm#annex>>

<sup>19</sup> See Constitutive Act of the AU, adopted July 11, 2000, AU Doc. CAB/LEG/23.15, 479 (2000) (as amended by the Protocol on Amendments to the Constitutive Act of the AU, July 11, 2003), entry into force May 26, 2001 [hereinafter AU Act].

<sup>20</sup> *Ibid.* Art. 3(k).

<sup>21</sup> Marrakesh Agreement Establishing the WTO, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

<sup>22</sup> *Ibid.* pmb1.

<sup>23</sup> UDHR, above n 9, Art. 25(1).

the UDHR in recognizing the right ‘to the continuous improvement of living conditions,’<sup>25</sup> not merely to a stable condition of ‘well-being.’ The use of the word ‘including’ in both the UDHR and ICESCR indicates ‘that this catalogue of rights was not intended to be exhaustive.’<sup>26</sup> Indeed, the Committee on Economic, Social and Cultural Rights believes that: ‘The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.’<sup>27</sup> While ‘medical care’ is included in the UDHR’s ‘standard of living’ basket, the ICESCR protects it separately, but with a similar accent: ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’<sup>28</sup> The African Charter words it as the right of every individual ‘to enjoy the best attainable state of physical and mental health.’<sup>29</sup> The European Social Charter<sup>30</sup> provides ‘a decent standard of living’ as the object of the right to fair remuneration for workers.<sup>31</sup> The Additional Protocol to the American Convention recognizes the right to ‘adequate nutrition,’<sup>32</sup> but it does not refer to either clothing or housing.

Some human rights treaties address living standards in the context of vulnerable groups, for example the Protocol to the African Charter on the Rights of Women in Africa,<sup>33</sup> which guarantees rights to nutritious and

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<sup>24</sup> See *ICESCR*, above n 11, Art. 11(1) (‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’).

<sup>25</sup> *Ibid.*

<sup>26</sup> Committee on Economic, Social and Cultural Rights (CESCR), *The Right to Water (arts. 11 and 12 of the Covenant)*, *General Comment 15*, UN Doc. E/C.12/2002/11, para. 3, Nov. 26, 2002 [hereinafter *General Comment 15*].

<sup>27</sup> *Ibid.*

<sup>28</sup> *ICESCR*, above n 11, Art. 12(1).

<sup>29</sup> *African Charter*, above n 12, Art. 16(1). Cf. *African Charter on the Rights and Welfare of the Child*, Art. 14(1), adopted July 11, 1990, entry into force Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 [hereinafter *African Child Charter*] (guaranteeing to every child the right ‘to enjoy the best attainable state of physical, mental and spiritual health’).

<sup>30</sup> *European Social Charter*, adopted Oct. 18, 1961, entry into force Feb. 26, 1965, 529 U.N.T.S. 89-139, 35 E.T.S. [hereinafter *ESC*].

<sup>31</sup> *Ibid.* Art. I,(4)(1).

<sup>32</sup> *Additional Protocol to the American Convention*, above n 8, Art. 12(1).

<sup>33</sup> See *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, adopted July 11, 2003 [hereinafter *Women Protocol*], available at AU website at [www.africa-union.org](http://www.africa-union.org).

adequate food,<sup>34</sup> to equal access to housing, and to acceptable living conditions in a healthy environment.<sup>35</sup> Similarly, States Parties to the Convention on the Rights of the Child (CRC)<sup>36</sup> pledge to ‘recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.’<sup>37</sup> The widespread approval of the CRC—there are 192 States Parties, except the U.S. and Somalia, thus making it the most universally ratified human rights instrument<sup>38</sup>—‘provides evidence that it is common practice for states to endeavor to protect these rights.’<sup>39</sup>

All of the above guarantees admit of no derogation in any circumstances; and almost all the instruments permit no discrimination either.<sup>40</sup> The Constitution of the World Health Organization provides, in relation to health, that ‘The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being *without distinction of race, religion, political belief, economic or social condition.*’<sup>41</sup> Though the ICESCR allows developing countries to discriminate against non-nationals, it circumscribes its boundaries to their economic rights only, providing: ‘Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’<sup>42</sup> In general, discrimination or limitations of rights must be objectively justified rather than arbitrarily imposed. They must be determined by law and must be compatible with the nature of the rights ‘and solely for the purpose of promoting the general welfare in a

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<sup>34</sup> Ibid Art. 15.

<sup>35</sup> Ibid Art. 16.

<sup>36</sup> *Convention on the Rights of the Child*, GA Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989) [hereinafter CRC].

<sup>37</sup> Ibid. Art. 27. Cf. *Declaration on the Rights of the Child*, princ. 4, GA Res. 1386, UN GAOR, 14th Sess., Supp. No. 16, Agenda Item 64, at 19, U.N. Doc. A/4354 (1959) [hereinafter DRC] (proclaiming that every child has the right ‘to enjoy the benefits of social security,’ including ‘adequate nutrition, housing, recreation and medical services.’).

<sup>38</sup> Cf. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Judgement (May 31, 2004) para 19 (holding that ‘the CRC became international customary law almost at the time of [its] entry into force’).

<sup>39</sup> Timothy J. Treanor, ‘Relief for Mandela’s Children: Street Children and the Law in the New South Africa’ (1994) 63 *Fordham L. Rev.* 883, 902-3 (footnotes omitted).

<sup>40</sup> E.g., *UDHR*, above n 9, Art. 2; *ICESCR*, above n 11, Art. 2(2); African Charter, above n 12, Art. 2.

<sup>41</sup> World Health Org., *Constitution*, July 22, 1946, pmbl. (emphasis supplied).

<sup>42</sup> *ICESCR*, above n 11, Art. 2(3).

democratic society.<sup>43</sup> The remainder of this segment interrogates some of these components of living standards, before turning to the nature of obligations entailed therein.

### The Contours of Living Standards

As a component of living standards, the *right to health* is fundamental 'to living a life in dignity'<sup>44</sup> and 'indispensable for the exercise of other human rights.'<sup>45</sup> It is, thus

closely related to and dependent upon the realization of other human rights, ... including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.<sup>46</sup>

As a normative entitlement, the right to health goes beyond being healthy or even the right to health care. It contains both freedoms and entitlements: the freedom to control one's health and body and to be free from such interferences as torture and non-consensual medical treatment and experimentation; and an entitlement to a system of health protection providing equality of opportunity for people to enjoy the highest attainable level of health.<sup>47</sup>

The drafting history of the ICESCR and the reference to 'the highest attainable standard of physical and mental health' indicate that this right extends to the underlying determinants of health. It embraces a wide range of socio-economic factors that promote conditions for healthy living, 'such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.'<sup>48</sup> The constitutions of many African states also show a variable content with regards to the right to health.<sup>49</sup> Its contours

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<sup>43</sup> Ibid. Art. 4. See also Paul Sieghart, *The International Law of Human Rights* (1983) 88 (stressing that restriction or limitation of rights 'must be shown to be necessary ... to support or protect some specified objective').

<sup>44</sup> CESCR, *The Right to the Highest Attainable Standard of Health, General Comment 14*, UN Doc. E/C.12/2000/4, para. 1 (2000) [hereinafter General Comment 14].

<sup>45</sup> Ibid.

<sup>46</sup> Ibid para. 3.

<sup>47</sup> Ibid para. 8.

<sup>48</sup> Ibid para. 4; *ibid* para. 9 ('[T]he right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.'). See also C. Shinn, 'The Right to the Highest Attainable Standard of Health: Public Health's Opportunity to Reframe a Human Rights Debate in the United States' (1999) 4 *Health & Hum. Rts.* 115, 119.

<sup>49</sup> The following constitutions guarantee the right to health: Algeria § 54; Angola, § 47; Benin, § 8; Burkina Faso, §§ 18&26; Burundi, § 39; Cape Verde, § 70; Comoros, pmb.; Congo, § 30; Cote d'Ivoire, § 7; Egypt, §§ 16&17; Equatorial Guinea, § 22;

include the fight against epidemic and endemic diseases or social plagues,<sup>50</sup> rights to medical and health care,<sup>51</sup> child, maternity, disability and old-age care,<sup>52</sup> physical and mental well being and safety,<sup>53</sup> improved environment and industrial hygiene,<sup>54</sup> improved public health,<sup>55</sup> reproductive health care,<sup>56</sup> and emergency medical treatments.<sup>57</sup>

The *right to food* 'is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.'<sup>58</sup> Some see the right to food in relative terms;<sup>59</sup> the corresponding right to be free from hunger is absolute and 'fundamental,'<sup>60</sup> probably because freedom from hunger and malnutrition is a *sine qua non* to the development and maintenance of physical and mental faculties.<sup>61</sup> It equally underscores the urgency of dealing with the problem of hunger which, unlike the concept of 'adequate food,' is concerned with survival. Thus, even during armed conflict, an Occupying Power has, to the fullest extent of the means available to it, the duty to ensure food and medical supplies of the population and should bring in the necessary foodstuffs, medical stores

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Eritrea, § 21; Ethiopia, §§ 41&90; Gambia, § 216(4); Ghana, §§ 30&38(10); Guinea, § 15; Lesotho, § 27; Liberia, § 8; Libya, § 15; Madagascar, § 19; Malawi, § 13; Mali, § 17; Mozambique, §§ 54&94; Niger, §§ 11&49; Nigeria, § 17; Sao Tome & Principe, § 49; Senegal, § 8; Seychelles, § 29; Sierra Leone, § 8(3); South Africa, § 27; Sudan, § 13; Tanzania, § 11; and Togo, § 34. See generally C Heyns (ed), *Human Rights Law in Africa vol 2*, (2004) (reprinting human rights provisions in African constitutions).

<sup>50</sup> See Algeria Constitution, § 54; Guinea Constitution, § 15; Lesotho Constitution, § 27(1)(c); and Seychelles Constitution, § 29.

<sup>51</sup> See Algeria Constitution, § 47(1); Gambia Constitution, § 216(4); Ghana Constitution, § 30; Nigeria Constitution, § 17(3)(d); and Sierra Leone Constitution, § 8(3)(d).

<sup>52</sup> See Algeria Constitution, § 47(1); Guinea Constitution, § 15; and Seychelles Constitution, § 29.

<sup>53</sup> See Burundi Constitution, § 39; Lesotho Constitution, § 27(1); Niger Constitution, § 11; Sao Tome & Principe Constitution, § 49(2); and Seychelles Constitution, § 29.

<sup>54</sup> See Lesotho Constitution, § 27(1)(b); Malawi Constitution, § 13(d)(ii); Senegal Constitution, § 8; and Sudan Constitution, § 13.

<sup>55</sup> See Lesotho Constitution, § 27(1)(e); and Sudan Constitution, § 13.

<sup>56</sup> See South Africa Constitution, § 27(1)(a).

<sup>57</sup> *Ibid* § 27(3).

<sup>58</sup> See *Social & Economic Rights Action Center v. Nigeria*, Comm. No. 155/96, para. 65, 2001-2002 African Annual Activity Report, Annex V [hereinafter SERAC].

<sup>59</sup> See Katarina Tomasevski (ed), *The Right to Food: Guide Through Applicable International Law* (1987) xviii.

<sup>60</sup> See ICESCR, above n 11, Art. 11(2).

<sup>61</sup> See *Universal Declaration on the Eradication of Hunger and Malnutrition*, para. 1, adopted Nov. 16, 1974 by the World Food Conference convened by GA Res. 3180 (XXVIII) of Dec. 17, 1973, endorsed by GA Res. 3348 (XXIX) of Dec. 17, 1974.



and other articles if the resources of the occupied territory are inadequate.<sup>62</sup>

The ICESCR speaks of 'adequate' food, meaning that, as a right, it goes beyond a mere claim to a minimum intake of calories,<sup>63</sup> but consists of adequate nutrition, which guarantees the possibility of individuals enjoying the highest level of physical, emotional and intellectual development.<sup>64</sup> Adequate nutrition is achievable through non-discriminatory access to sufficient food that is balanced and safe to meet physiological needs at all stages of life and according to gender and occupation. The right to food finds expressions not only in the ICESCR and other treaties, but also in Africa's municipal constitutions, including Ethiopia,<sup>65</sup> Gambia,<sup>66</sup> Ghana,<sup>67</sup> Malawi,<sup>68</sup> Nigeria,<sup>69</sup> Sierra Leone,<sup>70</sup> and Sudan.<sup>71</sup> Like other socio-economic guarantees, some of these provisions do not fall under the rubric of rights, but are treated as 'directive principles' to guide state policies.

*Adequate housing* is eminently a component of living standards.<sup>72</sup> It has received increasing attention from UN committees and other international agencies, including the UN Human Settlements Program and the Office of the High Commissioner on Human Rights.<sup>73</sup> Adequate housing also

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<sup>62</sup> See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of Aug. 12, 1949, Art. 55, 6 UST 3516, 75 UNTS 287 [hereinafter Fourth Convention]. Cf. Security Council Resolution 1472, UN Doc. S/Res/1472 (Mar. 28, 2003).

<sup>63</sup> CESCR, *The Right to Adequate Food, General Comment 12*, para. 6, (1999) [hereinafter General Comment 12].

<sup>64</sup> See *Additional Protocol to the American Convention*, above n 8, Art. 12(1).

<sup>65</sup> See Ethiopia Constitution, § 90.

<sup>66</sup> See Gambia Constitution, § 216(4).

<sup>67</sup> See Ghana Constitution, § 36(3).

<sup>68</sup> See Malawi Constitution, § 13.

<sup>69</sup> See Nigeria Constitution, § 16(2).

<sup>70</sup> See Sierra Leone Constitution, § 7.

<sup>71</sup> See Sudan Constitution, § 27.

<sup>72</sup> See CESCR, *The Right to Adequate Housing (Art. 11.1 of the Covenant), General Comment 4*, UN Doc. E/1992/23, para. 1, Dec. 13, 1991 [hereinafter General Comment 4]. See also UN Commission on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc. E/CN.4/2002/59 (Mar. 1, 2002) (prepared by Miloon Kothari) [hereinafter Special Rapporteur on Adequate Housing]; UN Commission on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Addendum: Mission to Mexico*, UN Doc. E/CN.4/2003/5/Add.3 (Mar. 27, 2003) [hereinafter Special Rapporteur on Adequate Housing, Addendum].

<sup>73</sup> See, e.g., Office of the High Comm'r for Human Rights, *UN Housing Rights Program, Housing Rights Legislation: Review of International and National Legal Instruments*,

finds expressions in Africa's municipal constitutions, including those of Burkina Faso;<sup>74</sup> Cape Verde;<sup>75</sup> Ethiopia;<sup>76</sup> Mali;<sup>77</sup> Nigeria;<sup>78</sup> Sao Tome and Principe;<sup>79</sup> Seychelles;<sup>80</sup> and South Africa.<sup>81</sup> The right to housing goes beyond having a roof over one's head, but extends to being left alone to live in peace whether or not under a roof.<sup>82</sup> Thus, 'adequacy,' in relation to housing, 'serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant.'<sup>83</sup> Factors to consider include access to electricity,<sup>84</sup> safe drinking water, energy for cooking, sanitation and washing facilities, means of food storage, refuse disposal, drainage, roads, public spaces, and emergency services, all of which must be gotten at a reasonable cost.<sup>85</sup> It also includes the right to live free from domestic violence, which is often blatantly violated in many countries.<sup>86</sup>

The right to housing protects against 'forced evictions,' defined as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or

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*Report No. 1*, 1-11, UN Doc. HS/638/01 E (2002) (describing covenants, declarations, committee general comments, and the creation in 2002 of the housing rights program, a joint program of the UN Human Settlements Program and the Office of the High Commissioner on Human Rights).

<sup>74</sup> See Burkina Faso Constitution, § 18.

<sup>75</sup> See Cape Verde Constitution, § 71.

<sup>76</sup> See Ethiopia Constitution, § 90.

<sup>77</sup> See Mali Constitution, § 17.

<sup>78</sup> See Nigeria Constitution, § 16(2).

<sup>79</sup> See Sao Tome and Principe Constitution, § 48.

<sup>80</sup> See Seychelles Constitution, § 34.

<sup>81</sup> See South Africa Constitution, § 26.

<sup>82</sup> See *General Comment 4*, above n 72, para. 7. Cf. SERAC, above n 58, para. 61.

<sup>83</sup> See *General Comment 4*, above n 72, para. 8.

<sup>84</sup> See Special Rapporteur on Adequate Housing, above n 72, paras. 35 & 46(b); Special Rapporteur on Adequate Housing, Addendum, above n 72, paras. 11, 14 & 15; and UN Housing Rights Program, *Monitoring Housing Rights: Developing a Set of Indicators to Monitor the Full and Progressive Realization of the Human Right to Adequate Housing*, Working Paper No. 1, 13, 18, (2003).

<sup>85</sup> See *General Comment 4*, above n 72, para. 8(b).

<sup>86</sup> See generally Giulia Paglione, 'Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing' (2006) 28 Hum Rts Q 120 (examining the connections between domestic violence and the right to housing).

other protection.’<sup>87</sup> (Evictions carried out by force in accordance with the law and in conformity with human rights norms are not unlawful.)<sup>88</sup> Forced evictions ‘convey a sense of arbitrariness and of illegality’<sup>89</sup> and lead to violations of other rights, including life, security of the person, non-interference with privacy, family and home, and the peaceful enjoyment of possessions.<sup>90</sup>

Economists may disagree on *social security*,<sup>91</sup> but its status as a human right is beyond doubt. The UDHR stipulates that

[e]veryone, as a member of society, has the right to social security and is entitled to realization,’ consistent with the organization and resources of their country, ‘of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.’<sup>92</sup>

Social security is the employment of social means to prevent deprivation or vulnerability to deprivation.<sup>93</sup> It includes formal (government regulated, public) and informal arrangements. Its two strands are social insurance and social assistance. The former is financed by contributions from employers and employees, with benefits accruing to contributors; the latter is financed by government revenue and targeted at those mostly in need.<sup>94</sup>

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<sup>87</sup> CESCR, *The Right to Adequate Housing (Art. 11.1 of the Covenant): Forced Evictions, General Comment 7*, UN Doc. E/1998/22, Annex IV, para. 3, May 20, 1997 [hereinafter General Comment 7].

<sup>88</sup> *Ibid.* Cf. South Africa Constitution, § 26(3) (‘No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’).

<sup>89</sup> See *SERAC*, above n 58, para. 63.

<sup>90</sup> See *General Comment 7*, above n 87, para. 4.

<sup>91</sup> E.g., Robert Whaples, *Do Economists Agree on Anything? Yes!*, 3(9) *The Economists’ Voice* (2006), available at <<http://www.bepress.com/ev/vol3/iss9/art1>> (surveying evidence suggesting that economists agree on a wide range of policy issues from free trade to educational vouchers, though climate change and social security remain areas of disagreement).

<sup>92</sup> *UDHR*, above n 9, Art. 22.

<sup>93</sup> Jean Dreze & Amartya Sen, *Public Action for Social Security: Foundations and Strategy*, in *Social Security in Developing Countries* (Ehtisham Ahmad et al. eds., 1991) 3, 5 [hereinafter *Social Security in Developing Countries*]. See also Nsongurua Udombana, ‘Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa’ (2006) 39 *Cornell Int’l L.J.* 181, 194; and R. Filali Meknassi, ‘Extending Social Security in the Developing Countries: Between Universal Entitlement and the Selectiveness of International Standards’ (2006) 27 *Comp. Lab. L. & Pol’y J.* 207.

<sup>94</sup> See International Labour Office, ILO, *Introduction to Social Security* (1984) 3 – 5. See generally ILO Constitution, Annex III(f) (2004) (recognizing the ILO’s obligation regarding ‘the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care’).

The ILO Social Security (Minimum Standards) Convention (No. 102)<sup>95</sup> sets out nine fundamental benefits that should form the substance of social security. These are medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, and survivors' benefits. Empirical research has shown that countries with the best social protection systems have extremely high levels of productivity.<sup>96</sup> An ILO report suggests that by offering good protection to their workforce, countries will further enhance the productive potential of their economies.<sup>97</sup> It may, thus, be surmised that, if properly managed, social security enhances national productivity and supports economic development.

### Moral and Legal Obligations

Human rights engender some corresponding obligations, some moral, others legal. 'Real human rights, and especially real economic rights, require both responsible governments and responsible citizens, aware of their duties and willing and able to act accordingly.'<sup>98</sup> This part interrogates the moral and legal obligations arising from the right to an adequate standard of living.

### The Test of Governmental Legitimacy

The advancement of human security—'the security of the individual in terms of satisfaction of his/her basic needs'<sup>99</sup>—is the effective test of governmental legitimacy.<sup>100</sup> The best government is that which produces the greatest degree of happiness and safety for the greatest number of its

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<sup>95</sup> Social Security (Minimum Standards) Convention, 35th Sess. Int'l Labor Conference, adopted June 28, 1952, available at

<[http://193.134.194.11/ilolex/cgi\\_lex/convde.pl?C102](http://193.134.194.11/ilolex/cgi_lex/convde.pl?C102)> [hereinafter Convention 102]

<sup>96</sup> E.g. Roman Arjona et al., 'Growth, Inequality and Social Protection' 29 *Can. Pub. Pol'y* 119 (2003).

<sup>97</sup> ILO, *World Labor Report 2000: Income Security and Social Protection in a Changing World* (2000) 51–72 [hereinafter ILO, World Labor Report 2000].

<sup>98</sup> Filip Spagnoli, *Making Human Rights Real* (2007) 54.

<sup>99</sup> AU Non-Aggression and Common Defence Pact, adopted Jan. 31, 2005 (not yet in force), Art. 1(k), AU Ass. 4th Ord. Sess., available at <<http://www.africa-union.org>> (including 'the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development'). Cf. UNDP, *Human Development Report 1994*, available at [www.undp.org/hdro/e94over.htm](http://www.undp.org/hdro/e94over.htm) ('Most people instinctively understand what security means. It means safety from the constant threats of hunger, disease, crime and repression. It also means protection from sudden and hurtful disruptions in the pattern of our daily lives—whether in our homes, in our jobs, in our communities or in our environment.').

<sup>100</sup> James M. Burns & Stewart Burns, *A People's Charter* (1991) 41.

peoples.<sup>101</sup> The ideal law aids humanity to obtain the maximum satisfaction of reasonable expectations through the institutions of civilized society.<sup>102</sup> According to the Kantian principle of equality in freedom of will, a universal rule should be applied to each act in ways that enable the free will of the actor to co-exist along with the like free will of everyone else.<sup>103</sup>

This proposition—that happiness is man’s chief end—has its origin in natural law demonstrated by reason, dating back to Pufendorf,<sup>104</sup> Rutherford,<sup>105</sup> Burlamaqui,<sup>106</sup> and Vattel,<sup>107</sup> and beyond. Bentham’s utilitarianism added to the juristic thought with his ‘pains and pleasures’ calculus.<sup>108</sup> As a philosophical concept, happiness lacks exactitude,<sup>109</sup> arguably because there is no one path to it, though its probable parameters could be ascertained. Any plausible interpretation of the term must include an economic dimension,<sup>110</sup> embracing the attainment of such basic needs as jobs, health, education, housing, security of life and property, and dignity that is assured through the rule of law.

The 1776 American Declaration of Independence<sup>111</sup> specified ‘the pursuit of happiness’ as an unalienable right, following on Locke’s thesis that the civil state was beholden to the people and has power over them only

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<sup>101</sup> See generally Herbert Ganter, ‘Jefferson’s “Pursuit of Happiness” and Some Forgotten Men’ (1936) 16 *Wm. & Mary Q.* 422 (describing origins of the notion that the greatest happiness is the goal of government).

<sup>102</sup> See Roscoe Pound, *The Ideal Element in Law* (first published 1958, 2<sup>nd</sup> ed, 2002) 323.

<sup>103</sup> Immanuel Kant, *Metaphysische Anfangsgrunde der Rechtslehre* (2<sup>nd</sup> ed, 1798) xxv (‘Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of each and all in action according to a universal law.’).

<sup>104</sup> Samuel Pufendorf, *De iure naturae et gentium* (1672) cap. Xiii.

<sup>105</sup> Samuel Rutherford, *Institutes of Natural Law, bk. I* (1754) chap. 1, § 7.

<sup>106</sup> Jean Jacques Burlamaqui, *Principes du droit naturel, pt. I* (1747) chap. 5, § 4.

<sup>107</sup> Emerich de Vattel, *Les droit des gens, preliminaries* (1758) 5.

<sup>108</sup> See generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789).

<sup>109</sup> See, e.g. Bertrand Russell, *The Conquest of Happiness* (1930) 249, (defining happiness as ‘a profound instinctive union with the stream of life’).

<sup>110</sup> Linda M Keller, ‘The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?’ (2003) 19 *N.Y.L. Sch. J. Hum. Rts.* 557, 613 (‘While it may be impossible to provide a precise definition of happiness, it is reasonable to conclude that its pursuit requires certain basic economic conditions.’).

<sup>111</sup> *The Declaration of Independence* (U.S. 1776) para. 2.

insofar as it protects and preserves their welfare.<sup>112</sup> Thomas Jefferson's concept of 'the pursuit of happiness' contemplated a positive duty to assist the poor. In commenting on the opening words of the Declaration, Wiltse concludes:

The happiness principle is undoubtedly the most significant feature of Jefferson's theory of rights, for it raises government above the mere negative function of securing the individual against the encroachments of others. By recognizing a right to the pursuit of happiness, the state is committed to aid its citizens in the constructive task of obtaining their desires, whatever they may be. ... The state is to secure, not merely the greatest happiness of the greatest number, but so far as possible the greatest happiness of all its citizens, whatever their condition. It may well mean, therefore, that many will be restrained from achieving the maximum of happiness, that others less fortunate may obtain more than the minimum. No one will get all he wants, perhaps, but so far as the power of the state can go, everyone will get something.<sup>113</sup>

These suppositions probably explain why some of America's political leaders make the promotion of high living standards a part of their manifestos. Contemporary presidential aspirants often speak of providing universal health care for all Americans, rebuilding middle class and eliminating poverty, and creating tax fairness by rewarding work, not just wealth, all of which are euphemisms for an adequate standard of living.<sup>114</sup> The notion had been gestating for long; for example, in President Roosevelt's *Four Freedoms Speech*:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms . . . The third is the freedom from want, which, translated into world terms, means economic

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<sup>112</sup> See generally John Locke, *The Second Treatise of Civil Government* (1690). For textual parallels between the American Declaration and Locke's Second Treaties, see Ronald Hamowy, 'Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America: Jefferson's Declaration of Independence*' (1979) 16 *Wm. & Mary Q.* 503, 507-08.

<sup>113</sup> Charles M. Wiltse, *The Jeffersonian Tradition in American Democracy* (1935), quoted in Ganter, above n 101, at 559 n. 29. Cf. Nsongurua Udombana, 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' 20 *B.U. Int'l L.J.* 293, 353 (2002) ('Great sacrifices of private happiness by those who have it may be necessary in order that it may be more widely distributed; all may have to be a little hungry so that none may starve.'). Bert B. Lockwood, Jr. et al, 'Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor' (1993) 2 *Wm. & Mary Bill Rts. J.* 1, 15.

<sup>114</sup> See Nedra Pickler, John Edwards Joins Presidential Race, *Ass. Press*, Dec. 27, 2006, (highlighting Edwards' expected campaign themes) available at <[http://news.yahoo.com/s/ap/20061227/ap\\_on\\_el\\_pr/edwards2008](http://news.yahoo.com/s/ap/20061227/ap_on_el_pr/edwards2008)>

understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world.<sup>115</sup>

In 1946, President Truman established the Committee on Civil Rights,<sup>116</sup> which catalogued the rights it considers fundamental to the American tradition, including—

[t]he right to equality of opportunity... [t]he right of each individual to obtain useful employment, and to have access to services and fields of education, housing, health, recreation, and transportation, whether available free or at a price, must be provided with complete disregard for race, color [sic], creed, or national origin.<sup>117</sup>

Truman used the Committee's Report as basis for a special civil rights message to Congress and for executive orders, which led to desegregation of the armed forces and an end to discrimination in the civil service system. His 1949 "Fair Deal" was also aimed at improving the lives of people inhabiting the underdeveloped areas of the globe. In his famous Point IV Program, Truman declared:

More than half the people of the world are living in conditions approaching misery. Their food is inadequate, they are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.<sup>118</sup>

## Living Standards and Legal Obligations

Do the UDHR's guarantees confer any legal obligation on states, particularly those that are not parties to treaties implicating on the right to an adequate standard of living? Some judicial authorities consider the UDHR as reflective of customary international law;<sup>119</sup> likewise many

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<sup>115</sup> Franklin D. Roosevelt, Four Freedoms Speech (Jan. 6, 1941), in Frank Newman & David Weissbrodt, *International Human Rights: Law, Policy, and Process* 361–62 (1990). Roosevelt expanded on these freedoms in his campaign speech of Oct. 28, 1944, to wit:

The right to a useful and remunerative job; the right to earn enough to provide adequate food, clothing, and recreation; the right of every farmer to sell his produce at a return which will give him and his family a decent living; the right of every family to decent home; the right to adequate medical care and the right to achieve and enjoy good health; the right to adequate protection from economic fears of old age, sickness, accident, and unemployment; the right to a good education.

Quoted in *N.Y. Times*, Oct. 29, 1944.

<sup>116</sup> By Order 9808 of Dec. 5, 1946.

<sup>117</sup> *Report of the President's Committee on Civil Rights* (1947) 9, available at <<http://www.trumanlibrary.org/civilrights/srights1.htm>>

<sup>118</sup> Quoted in Arturo Escobar, *Encountering Development: The Making And Unmaking of the Third World* (1995) 3.

<sup>119</sup> E.g., *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 42 (treating fundamental human rights principles as defined by the UDHR as legal

publicists.<sup>120</sup> The Third Restatement also describes the UDHR as the ‘accepted general articulation of recognized rights’ in international law.<sup>121</sup> When, in 1962, the Human Rights Commission inquired about the legal status of UN declarations, the Office of Legal Affairs replied:

[I]n United Nations practice, a ‘declaration’ is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the [UDHR] ... [I]t may be considered to impart, on behalf of the organ adopting it, a strong expectation that [m]embers of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by [s]tate practice, a declaration may by custom become recognized as laying down rules binding upon [s]tates.<sup>122</sup>

Weber writes: ‘To date no state has verbally denounced the declaration’s provisions. Therefore, with regard to those provisions referring to economic rights and the right to food, it may be theorized that customary law exists.’<sup>123</sup> If these interpretations are correct, and the present writer subscribes to them—at the minimum, the UDHR remains an authoritative interpretation of the UN Charter<sup>124</sup>—, then the right to an adequate standard of living is a part of customary law entailing certain legal obligations on the global community. They imply that non-ratifying parties to subsequent human rights treaties guaranteeing this right are bound to observe their terms as customary rules.<sup>125</sup>

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norms capable of application against a sovereign state); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2<sup>nd</sup> Cir. 1980).

<sup>120</sup> E.g., J. van Aggelen, ‘The Preamble of the United Nations Declaration of Human Rights’ (2000) 28 *Denv. J. Int’l L.* 129, 132 (arguing that the UDHR has risen to the level of customary law); Richard B. Lillich, *Human Rights, in National Security Law* (J. N. Moore & R. F. Turner eds., 1990) 675, 697-98 (analysing with great care parts of the UDHR that have become customary law).

<sup>121</sup> *Restatement (Third) of the Foreign Relations Law of the United States*, § 701 rep. note 6 (1987).

<sup>122</sup> Quoted in J. Humphrey, *The United Nations Charter and the Universal Declaration of Human Rights* (1974) 37.

<sup>123</sup> Joy A. Weber, ‘Famine Aid to Africa: An International Legal Obligation’ (1989) 15 *Brook. J. Int’l L.* 369, 385 (adding: ‘There is both practice, contributing food and other resources to LDCs, and *opinio juris*, the sense that the declaration is legally binding.’).

<sup>124</sup> Louis Henkin et al., *International Law* (2<sup>nd</sup> ed, 1987) 987.

<sup>125</sup> Richard B. Lillich, *International Human Rights: Problems of Law, Policy, and Practice* (2<sup>nd</sup> ed, 1991) 89 (‘[C]ustomary international law is binding upon all states, even though its content is uncodified and therefore often is more difficult to ascertain.’). Cf. Grigory Tunkin, ‘Remarks on the Juridical Nature of Customary Norms of International Law’ (1961) 49 *Calif. L. Rev.* 419, 426-29 (stressing that once a declaration has been determined to constitute customary law, it becomes legally binding on the international legal community).



The fact that the global community made the right to an adequate standard of living a subject of treaty obligations confirms that states protect the right from a sense of legal obligation. However, ratifying states are additionally bound by customary rules where they diverge from treaty rules, since all customary and treaty rules are not necessarily identical, according to the International Court of Justice (ICJ) in the *Nicaragua* case.<sup>126</sup>

### Obligations of Conduct and Results

The ICESCR obligates its States Parties 'to take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized [therein],'<sup>127</sup> a provision that has 'a dynamic relationship with all of the other provisions of the Covenant.'<sup>128</sup> According to the ICESCR Committee, taking step should not be 'qualified or limited by other considerations' and that '[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'<sup>129</sup> The phrase 'to the maximum of its available resources' is 'intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.'<sup>130</sup> Article 23 in particular specifically identifies 'the furnishing of technical assistance' and other activities as being among the means of 'international action for the achievement of the rights recognized.' Lastly, progressive realization implies moving 'as expeditiously as possible'<sup>131</sup> towards the particular human rights goal, in this case an adequate standard of living for citizens.

The CRC enjoins its States Parties to provide needy children with 'material assistance and support programmes, particularly with regard to

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<sup>126</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 1986 I.C.J. Rep. 14, para. 175 [hereinafter *Nicaragua* case] ('On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.').

<sup>127</sup> ICESCR, above n 11, Art. 2(1).

<sup>128</sup> CESCR, *The Nature of State Parties' Obligations (art. 2, para. 1, of the Covenant)*, General Comment 3, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2001) 18, para. 1 [hereinafter General Comment 3].

<sup>129</sup> *Ibid* para 2.

<sup>130</sup> *Ibid* para 13 (stressing that the essential role of international cooperation in facilitating the full realization of socio-economic rights is further underlined by the specific provisions in ICESCR, including articles 11, 15, 22 and 23).

<sup>131</sup> *General Comment 12*, above n 63, para. 14.

nutrition, clothing and housing.<sup>132</sup> The CRC also contemplates the availability of foster care, adoption and the creation of institutions for the care of needy children.<sup>133</sup> The African Child Charter similarly commands its States Parties, in relation to the health and health services, to reduce infant and child mortality rate; to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to ensure the provision of adequate nutrition and safe drinking water; and to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology.<sup>134</sup>

The African Child Charter further obliges its States Parties to ensure appropriate health care for expectant and nursing mothers; to develop preventive health care and family life education and provision of service; to integrate basic health service programs in national development plans; and to ensure that all sectors of society are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents.<sup>135</sup> Finally, they are obliged to ensure the meaningful participation of NGOs, local communities and the beneficiary population in the planning and management of a basic service program for children; and to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.<sup>136</sup>

The African Charter enjoins its States Parties to recognize the rights enshrined therein, to 'adopt legislative or other measures to give effect to them,'<sup>137</sup> 'to promote and ensure through teaching, education and publications, the respect' of the rights guaranteed in the Charter and to see to it that the rights and its corresponding obligations 'are understood.'<sup>138</sup> These undertakings entail negative and positive obligations, meaning that a state should omit and commit, prevent and

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<sup>132</sup> See CRC, above n 36, Art. 27(3).

<sup>133</sup> *Ibid.* Art. 20(3). See generally Jaap E. Doek, 'What Does the Children's Convention Require?' (2006) 20 *Emory Int'l L. Rev.* 199 (discussing actions required from States Parties for implementation of the CRC, including responsibilities of parents and the family).

<sup>134</sup> *African Child Charter*, above n 29, Art. 14(2).

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *African Charter*, above n 12, Art. 1.

<sup>138</sup> *Ibid.* Art. 25.

provide, and protect and produce.<sup>139</sup> Municipal constitutions also oblige states to respect, protect, promote and fulfill human rights.<sup>140</sup> All of this entails, first, a non-interventionist conduct from the state, such as refraining from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.<sup>141</sup> They entail, second,

a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights ... It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).<sup>142</sup>

Beyond these vertical obligations, states also have diagonal obligations to ensure that private actors abide by human rights standards. In agreeing 'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,' pursuant to the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>143</sup> States Parties undertake, *inter alia*, 'to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.'<sup>144</sup>

How do these obligations of conduct and results play out in relation to the right to an adequate standard of living? Answering this question requires interrogating states obligations on those components of living standards, in particular food, housing and health. The *right to food* entails the improvement of methods of production, conservation and distribution of food on the part of states,

by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; to protect and improve existing food sources and to ensure access to adequate food for all citizens.<sup>145</sup>

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<sup>139</sup> See generally Nsongurua Udombana, 'Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter' (2004) 40 *Stan. J. Int'l L.* 105.

<sup>140</sup> E.g. South Africa Constitution, § 7(2).

<sup>141</sup> *SERAC*, above n 58, para 52.

<sup>142</sup> *Ibid* para 47.

<sup>143</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature Mar. 1, 1980, Art. 2(e) 27 U.S.T. 1909, T.I.A.S. No. 8289, 1249 U.N.T.S. 14 [hereinafter CEDAW].

<sup>144</sup> *Ibid*. See also generally Jan Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Hum. Rts L. Rev.* 21.

<sup>145</sup> *ICESCR*, above n 11, Art. 11(2)(a).

It requires states to make adequate food available and accessible to everybody in sufficient quality and quantity. Availability requires that food is either produced locally on farmable land or is transported from the site of production to places of demand.<sup>146</sup> It also entails accessibility, both economically and physically. Economic accessibility 'requires that a suitable diet be affordable for everyone. Food pricing, appropriate minimum wages and state subsidies are all factors involved to allow for a life of dignity.' Physical accessibility 'requires that the physically disadvantaged, such as the elderly, the disabled, children, and people in disaster-prone areas have access to adequate food, too.'<sup>147</sup>

At the minimum, the right to food obliges states to desist from destroying or contaminating food sources or from allowing private actors to contaminate food sources or to prevent people's efforts to feed themselves.<sup>148</sup> It implies, according to van Hoof,

that a government may not expropriate land from people for whom access to control over that land constitutes the only or main asset by which they satisfy their food needs, unless appropriate alternative measures are taken.<sup>149</sup>

The *right to housing* requires abstention by a state from certain practices and a commitment to facilitating 'self-help' by affected groups.<sup>150</sup> Thus, a state is prohibited from destroying its citizens' houses or obstructing efforts by individuals or communities to rebuild lost homes.<sup>151</sup> This prohibition includes any action that will make it more difficult for an individual to gain access to existing housing.<sup>152</sup> It requires a state and its agents to refrain from carrying out, sponsoring, or tolerating any practice, policy or legal measure that violate the integrity of individuals or that infringe upon their freedom or the freedom of families and communities (as group rights) to use available resources to satisfy their housing needs. It obliges a state to prevent violations of housing rights by any non-state

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<sup>146</sup> See *General Comment 12*, above n 63, para. 12.

<sup>147</sup> Peter Straub, 'Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries' (2006) 29 *Hastings Int'l & Comp. L. Rev.* 187, 194. Cf. *General Comment 12*, above n 63, para. 13.

<sup>148</sup> See *SERAC*, above n 58, para. 65.

<sup>149</sup> G. J. H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in *The Right to Food* (Philip Alston & Katarina Tomasevski eds., 1984) 97, 107.

<sup>150</sup> See *General Comment 4*, above n 72, para. 10.

<sup>151</sup> See *SERAC*, above n 58, para. 61.

<sup>152</sup> See Pierre de Vos, *The Right to Housing*, in *Socio-Economic Rights in South Africa* (D. Brand & C. Heyns eds., 2005) 85, 92.

actor, such as landlords, property developers, landowners, and transnationals.<sup>153</sup>

The right to housing also entails positive obligations. The South Africa Constitution enjoins the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'<sup>154</sup> The Constitution of Cape Verde similarly provides that, '[i]n order to guarantee the right to housing, public authorities shall ... promote the creation of adequate economic, judicial, institutional and infrastructure conditions, within the framework of territorial distribution and urbanisation.'<sup>155</sup> The Constitution further calls on public authorities to 'promote and encourage private initiative for the supply of housing and to guarantee the participation of interested parties in the elaboration of urban planning instruments.'<sup>156</sup>

For the *right to health and healthy environment*, treaty obligations entail regulating private health care provision to protect citizens against exploitation by private institutions and providing effective remedy where such exploitation occurs.<sup>157</sup> They 'require the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'<sup>158</sup> They demand that states periodically arrange for independent scientific monitoring of threatened environments. Governments themselves must undertake environmental and social impact assessments prior to major industrial developments and must publicize such studies. In the case of projects undertaken by third parties, governments must monitor and provide information to communities exposed to hazardous materials and activities, while also offering meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>159</sup>

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<sup>153</sup> *SERAC*, above n 58, para. 61.

<sup>154</sup> South Africa Constitution, § 26(2).

<sup>155</sup> Cape Verde Constitution, § 71(2)(a).

<sup>156</sup> *Ibid* § 71(2)(b).

<sup>157</sup> Brand, *Introduction to socio-economic rights in the South African Constitution, in Socio-Economic Rights in South Africa*, above n 152, 1, 10. Cf. *General Comment 14*, above n 44, para. 33 ('The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees.') (Italics in the original).

<sup>158</sup> *SERAC*, above n 58, para. 52.

<sup>159</sup> *Ibid* para. 53.

The realization of the right to health ‘may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.’<sup>160</sup> The Human Rights Committee also maintains that the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner. It insists that the protection of this right requires states to adopt positive measures, including ‘all possible measures to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’<sup>161</sup> Such an interpretation re-enforces the interconnectivity of all human rights. It makes inordinately good sense in Africa, where average life expectancy is 45 years, where infant mortality per 1,000 live births is 103, and where over 25 million people live with HIV/AIDS<sup>162</sup>—statistics of despair!

### **Benchmarks for Measuring Obligations on Living Standards**

The obligation to promote human rights may extend to the development of coherent indicators and benchmarks for measuring the effectiveness of a state’s policies and measures in realizing rights. Some important quantifying and qualifying tools have also been designed for monitoring program service delivery. The General Guidelines on the Form and Contents of States’ Reports under the ICESCR enjoin a state to ‘supply information on the current standard of living of [the] population, in respect of both the aggregate and different socio-economic, cultural, and other groups within the society.’<sup>163</sup> A state must also indicate the per capita Gross National Product (GNP) for the poorest forty percent of its population and if a “poverty line” exist in the country and the basis for this line,<sup>164</sup> a tough test for majority of African countries where there is hardly any ‘line’ for measuring poverty. A state must then proceed to report sectorally.

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<sup>160</sup> *General Comment 14*, above n 44, para. 1.

<sup>161</sup> Hum. Rts. Committee, *The Right to Life (art. 6)*, *General Comment 6*, para. 5, Apr. 30, 1982.

<sup>162</sup> World Bank, *Africa: Human Development (Quick Facts)*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:20266824~menuPK:538117~pagePK:146736~piPK:226340~theSitePK:258644,00.html>> (last updated Sept. 2004).

<sup>163</sup> Revised General Guidelines Regarding the Form and Contents of Reports to be submitted by States Parties under Articles 16 and 17 of the ICESCR, June 17, 1991, available at: <<http://www1.umn.edu/humanrts/esc/revisedguidelines1991.html>>.

<sup>164</sup> *Ibid.*

For the *right to food*, a state must ‘provide detailed information (including statistical data broken down in terms of different geographical areas) on the extent to which hunger and/or malnutrition exists in [the] country.’<sup>165</sup> The state must also indicate measures taken to guarantee access to adequate food for each of the vulnerable or disadvantaged groups—landless and marginalized peasants, rural workers, rural and urban unemployed, urban poor, migrant workers, indigenous peoples, children, and the elderly. The state must specify time-related goals and nutritional bench-marks for measuring achievements in this regard.<sup>166</sup>

For the *right to housing*, a state must furnish detailed statistical information about the housing situation in its country, including information on vulnerable and disadvantaged groups.<sup>167</sup> It must also provide information on laws affecting the realization of the right to housing, including laws giving substance to the right in terms of defining its content; laws relevant to land use, distribution, allocation, zoning, ceilings, expropriations (including provisions for compensation), and planning (including procedures for community participation).<sup>168</sup> It must indicate laws concerning rights of tenants to security of tenure; to protection from eviction; to housing finance and rental control (or subsidy), and housing affordability. To be included are laws concerning building codes, building regulations and standards and the provision of infrastructure; laws prohibiting any and all forms of discrimination in the housing sector, including groups not traditionally protected; laws prohibiting any form of eviction; laws repealing or reforming existing laws that detracts from the fulfillment of the right to housing; laws restricting speculation on housing or property, particularly when such speculation has a negative impact on the fulfillment of housing rights for all sectors of society; laws conferring legal title to those living in the ‘illegal’ sector; and laws concerning environmental planning and health in housing and human settlements.<sup>169</sup>

### Local Remedies

Since ‘the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

human rights and fundamental freedoms at the national level,<sup>170</sup> it is necessary that redress for human right violations should be available to victims within their own states. The obligation to provide domestic remedies reinforces the right to an adequate standard of living. The UDHR provides: 'Everyone has the right to an effective remedy ... for acts violating the fundamental rights granted him by the constitution or by law,'<sup>171</sup> which may include international law. The African Charter requires effective domestic remedy for violations of human and peoples' rights 'as recognised and guaranteed by conventions'<sup>172</sup> and those recognized by 'laws, regulations and customs in force.'<sup>173</sup> The Charter also enjoins states

to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.<sup>174</sup>

All of this implies an expectation that the Charter's provisions should be directly enforceable within the domestic forum.<sup>175</sup> Regarding the nature of that forum, the Charter refers to 'competent national organs' supported by 'appropriate national institutions.'<sup>176</sup> The UDHR specify 'the competent national tribunals.'<sup>177</sup>

The nature of domestic remedies will obviously depend on the nature of rights and their violations. In relation to the *right to housing*, for example, domestic remedies might include, but not limited to, legal appeals to prevent planned evictions or demolitions through the issuance of court-ordered injunctions; legal procedures for compensation for an illegal eviction; complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; allegations of any form of discrimination in the allocation and availability of access to

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<sup>170</sup> Nsongurua Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *Am. J. Int'l L.* 1, 9 (adding: 'Rights, like charity, must begin at home.').

<sup>171</sup> *UDHR*, above n 9, Art. 8.

<sup>172</sup> *African Charter*, above n 12, Art. 7(1)(a).

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid* Art. 25.

<sup>175</sup> Sieghart, above n 43, at 69.

<sup>176</sup> *African Charter*, above n 12, Arts. 7(1)(a) & 26.

<sup>177</sup> *UDHR*, above n 9, Art. 8.



housing; and complaints against landlords concerning unhealthy or inadequate housing conditions.<sup>178</sup>

### **Making Real the Promise of a Better Life for Africans**

Africa's governments have a first 'obligation' to respect, protect, promote, and fulfill the human rights of its peoples.<sup>179</sup> The international community has a secondary 'responsibility' to work towards improving living standards in Africa. This Part calls on all institutions of governance, global and local, to unite efforts towards lifting Africans out of poverty by enhancing their living standards. Systems of government do not exist in the abstract, but in their consequences on peoples in the present and future.

### **African States Must Fulfil Their Primary Obligations**

There is a groundswell of public demand to lift living standards in Africa; and the reason, as Soyinka stated, is that—

there should be no beggars in society, that it is the responsibility of the state, the community, to look after its less fortunate, either create a means of livelihood for them or else house and feed them in some kind of commune, not leave them on the streets, dependent on the uncertain generosity of others.<sup>180</sup>

Few African states have adopted measures towards bettering their peoples' lots, at least in principle. Kenya's effort is reflected, *inter alia*, in the short-term Poverty Reduction Strategy Paper and the long-term National Poverty Eradication Plan.<sup>181</sup> The strategy seeks to reduce the incidence of poverty by 50 percent by 2015; empower the poor to earn income; reduce most major forms of inequalities; and increase productivity through human capital development, by investing in education and health.<sup>182</sup> In Ghana, youths are employed in afforestation and urban sanitation programs.<sup>183</sup>

At the continental level, the AU Act contains very ambitious goals, many of which implicate on living standards. Among these goals are the acceleration of political and socio-economic integration; promotion of

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<sup>178</sup> See *General Comment 4*, above n 72, para. 17.

<sup>179</sup> Larry Diamond, *Developing Democracy: Toward Consolidation* (1999) 4.

<sup>180</sup> Wole Soyinka, *You Must Set Forth At Dawn: A Memoir* (2006) 324.

<sup>181</sup> See Ministry of Finance and Planning, Government of Kenya, *Interim Poverty Reduction Strategy Paper* (2000).

<sup>182</sup> See *ibid.* at paras 5.1–7.2.

<sup>183</sup> See Kasirim Nwuke, *Youth Employment Summit, Economic Commission for Africa, Youth Employment in Africa* (2002).

peace, security, and stability; promotion of democratic principles and institutions, popular participation and good governance; promotion of sustainable development at the economic, social and cultural levels; promotion of cooperation in all fields of human activity to raise the living standards of African peoples; and working with relevant international partners in the eradication of preventable diseases and the promotion of good health in Africa.<sup>184</sup> The Act establishes an avalanche of institutions to implement these objectives, including the AU Assembly; the Executive Council; the Pan-African Parliament; the Commission; the Specialized Technical Committees; the Economic, Social and Cultural Council; and the Financial Institutions.<sup>185</sup>

In the New Partnership for Africa's Development (NEPAD), Africa's leaders took a further step by pledging to place their countries, individually and collectively, on path of sustainable development and by participating equally and actively in the world economy and body politic, all aimed at eradicating poverty.<sup>186</sup> The AU describes NEPAD as 'a programme ... for strengthening inter-African cooperation and integration in a globalising world and to overcome the prevalence of poverty and strive for a better quality of life for all the peoples of Africa.'<sup>187</sup> The Declaration on Democracy, Political, Economic and Corporate Governance of 2002<sup>188</sup> enumerates the conditions for tackling poverty, including promoting democracy, good governance, peace and security; developing human and physical resources; promoting gender equality; openness to international trade and investment; allocation of appropriate funds to social sector; and new partnership between governments and the private sector, and with civil society.<sup>189</sup>

The African Peer Review Mechanism (APRM) seeks to advance the commitments in NEPAD and the Declaration on Democracy.<sup>190</sup> Peer

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<sup>184</sup> See *AU Act*, above n 19, Art. 3.

<sup>185</sup> See *ibid.* Art. 5(1).

<sup>186</sup> See New Partnership for Africa's Development, para. 1 (Oct. 2001), available at <[http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/oau/keydocs/NEPAD.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf)> [hereinafter NEPAD].

<sup>187</sup> *The Durban Declaration in Tribute to the Organization of African Unity and the Launching of the AU*, AU Assembly 1st Ord. Sess. para. 15, AU Doc. ASS/AU/Decl. 2 (1) (July 2002) [hereinafter Durban Declaration].

<sup>188</sup> See *Declaration on Democracy, Political, Economic and Corporate Governance*, AU Assembly Doc. AHG/235(XXXVIII), June 18, 2002 [hereinafter Declaration on Democracy].

<sup>189</sup> *Ibid.* para 20.

<sup>190</sup> *Ibid.* para 28.

review generally relies on 'peer pressure;' and as a means of soft persuasion, it can become an important driving force stimulating change in a state, achieving goals, meeting standards, and generally providing effective qualitative and quantitative assessments of performance.<sup>191</sup> Thus, the APRM seeks—

to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies, and assessing the needs for capacity building of participating countries.<sup>192</sup>

In general, the AU Act represents Africa's new vision; NEPAD represents its mission, but salvation from humiliating poverty is still a far cry in Africa. Justice Chaskalson's observation on the crisis of poverty in South Africa is true of much of Africa; in *Soobramoney v. Minister of Health*,<sup>193</sup> he lamented: 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.'<sup>194</sup> Africa's health conditions remain the worst in the world, with the HIV/AIDS scourge wreaking incalculable havoc on the Continent's peoples and productivity; likewise the resurgence of malaria due to rising drug resistance and inefficient public health systems. More than half of Africa needs urgent food assistance.<sup>195</sup> Africa's food crises jeopardize the most fundamental principles and values associated with the rights to life and dignity. The crises result,

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<sup>191</sup> See Fabricio Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' (2002) 11 *Afr. Sec. Rev.* available at <[www.iss.org.za/Pubs/ASR/11No4/Feature2.html](http://www.iss.org.za/Pubs/ASR/11No4/Feature2.html)> See generally Niels Blokker & Sam Muller (eds), *Towards More Effective Supervision by International Organisations: Essays in Honour of Henry G. Schermers I* (1994) (discussing mechanisms of follow up and compliance in international organizations); and George W. Downs, 'Enforcement and the Evolution of Co-operation' (1988) 19 *Mich. J. Int'l L.* 319.

<sup>192</sup> *Memorandum or Understanding on the African Peer Review Mechanism*, para 8, NEPAD/HSGIC/03-2003/APRM/MOU (2003) [hereinafter APRM MOU]. Cf. *Declaration on the Implementation of [NEPAD]*, AU Assembly 2d Ord. Sess. pmb., Assembly/AU/Decl.8 (II) (2003) [hereinafter Declaration on NEPAD].

<sup>193</sup> *Soobramoney v. Minister of Health* (1997) 12 BCLR 1696 (CC).

<sup>194</sup> *Ibid* para 8.

<sup>195</sup> E.g., Martin Plaut, *Africa's Hunger – A Systemic Crisis*, BBC News Online, Jan. 31, 2006, available at <<http://news.bbc.co.uk/2/hi/africa/4662232.stm>> (referencing the UN's Food and Agriculture Organization (FAO), which warns that 27 countries in sub-Saharan Africa need help).

partly, from a rising food demand due to demographic pressure, speculation, and a shortage of, and increased costs for, essential agricultural inputs.

There are several reasons why Africa's legal and policy measures for sustainable development and poverty eradication remain tinkling cymbals. Africa's poverty is the sum total of its wars, its despotism, its corruption, its poor governance, its low foreign trade, its drought, its failing infrastructures, and its everyday violence. Models of power consolidation still masquerade as democracies in Africa, allowing men (and women) of power over purpose to steal unconscionably, poaching from within and out of sight, insensitive or indifferent to the lives, dignity, and happiness of ordinary citizens implicated in their disgusting acts. Government has become the biggest business in Africa, as 'big men' (and women)<sup>196</sup> treat their countries as prostrate victims to be ravished, metaphorically snatching food, shelter, and healthcare from the poor, homeless, sick, widows, orphans, children, and the aged. In Mwai Kibaki's Kenya, where corruption accounts for about eight percent of its Gross Domestic Product (GDP), the names of honest ministers and senior government officials 'would fit on the back of a postage stamp.'<sup>197</sup> Corruption at the top translates into hardship at the bottom.

The conflicting forces currently at play in Africa—high rate of economic growth and high rate of poverty—portend disastrous consequences for development and freedom, but these consequences could be arrested by adopting measures informed by local realities. Africa's copy-cat approach to governance and development flies in the face of Africa's realities. As a development agenda, NEPAD 'falls short of challenging and dismantling the structures sustaining inequality, poverty, and hierarchy, both within and without the African state, that stand in the way of Africa's sustainable development.'<sup>198</sup> A recent report by NEPAD's APRM—on the social, political and economic gains and challenges in Kenya—

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<sup>196</sup> Reuben Abati, *The Pruning of Federal Ministries*, The Guardian [Nig.], Dec. 17, 2006, available at <[http://www.guardiannewsngr.com/editorial\\_opinion/article02](http://www.guardiannewsngr.com/editorial_opinion/article02)> (noting the existence of 'big men who cannot receive phone calls or read newspapers (someone else is employed to read the papers and then prepare a summary for the big man!) They can no longer drive a car or change a bulb, for every function that they have to perform, someone has to be employed and paid huge fees').

<sup>197</sup> Martin Meredith, *The State of Africa: A History of Fifty Years of Independence* (2006) 688 (quoting Edward Clay, the British High Commissioner in Kenya).

<sup>198</sup> James Gathii, 'A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development' (2003)13 *Transnat'l L. & Contemp. Probs.* 179, 180-81.

indicates that more Kenyans cannot access proper housing, nutrition, clean water and services that would stimulate economic growth.<sup>199</sup> Poverty is severest among the landless, subsistence farmers, unskilled workers, women headed households and pastoralists in both arid and semi-arid areas, while high taxation is driving small traders out of business.<sup>200</sup>

Governments should create and maintain a framework conducive to the effective interplay of laws and regulations, so that individuals can freely realize their rights and freedoms. They should scale up external and internal resources to finance extensive public investments in basic infrastructures (including water and electricity), given the failure of privatization in many parts of Africa. Such a policy is consistent with the current priority of adopting more ambitious development strategies based on the Millennium Development Goals (MDG).<sup>201</sup> Governments should undertake serious legal reforms, so that rights of social security can be made to stand as guarantees of minimal protection and survival.<sup>202</sup> Tackling hunger and malnutrition require agrarian, tax, credit, and investment policy reforms. It requires reorganizing rural structures, including conditions of ownership, encouragement of producer and consumer co-operatives, mobilization of the full human potentials for an integrated rural development and the involvement of small farmers, fishermen and landless workers in attaining the required food production and employment.<sup>203</sup>

Raising living standards also demands that governments establish a metaphysic that embodies a shared identity and social harmony, one that shapes, mediates, and stimulates the capabilities of citizens and communities. Politics or public choice that discounts the people is unsustainable; in the end, the conditions lead to cleavages that provoke

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<sup>199</sup> *Kenyans Still Poor, Says Nepad Report*, The Nation (Nairobi), June 7, 2007, available at <<http://allafrica.com/stories/200706070280.html>> (last visited June 19, 2007).

<sup>200</sup> Ibid.

<sup>201</sup> A major achievement of the MDG is in making developing countries frame their policies around specific intended outcomes rather than policy inputs and in galvanizing unprecedented efforts to meet the needs of the world's poorest people. See Kofi Annan, 'Foreword', in *UN Development Program [UNDP], The Millennium Development Goals Report 2005* (2005) 3 [hereinafter MDG Report 2005]. Allocations of aid, targets for budget deficits and other policy settings are increasingly being tested against the final goals. *Recasting the Case for Aid*, The Economist, Jan. 22, 2005, at 67.

<sup>202</sup> Dreze & Sen, *Hunger and Public Action* above n 13, 20.

<sup>203</sup> Cf. *Universal Declaration on the Eradication of Hunger and Malnutrition*, above n 61, para. 4.

social collapse. Governments must design a holistic methodology that address the people's rights over their natural resources<sup>204</sup> that often lead to gross anti-social behaviors when violated. Poverty, unemployment, and despair often provide necessary fuels for violent conflict in many resource-rich states. Nigeria's Niger Delta is a poster child for the paradox of suffering in the midst of plenty, with transnational oil corporations—Shell, Chevron, Mobil (part of ExxonMobil), Texaco (part of Chevron), Total and Elf (part of Total)—carting away billions of dollars every year at the expense of the human rights of the people.<sup>205</sup> There can be no peace in the absence of justice; and peace and justice encompass an economic dimension.

Courts, as agents of governments, should make socio-economic rights to work, given the great disparities in wealth in most countries. There are precedents for courts to develop incidences of the right to adequate living standards in Africa. The South African Constitutional Court has enforced a number of guaranteed socio-economic rights without deference to legislative judgment. One notable example was *Minister of Health v. Treatment Action Campaign*,<sup>206</sup> alleging that the Government violated the Constitution's right to health care by not widely providing Nevirapine that could prevent the spread of HIV/AIDS from pregnant women to their fetuses and babies.<sup>207</sup> The Government responded that its pilot programme was reasonable<sup>208</sup> and that separation of powers demand that courts stay out of such issues. In a unanimous decision, the Constitutional Court ordered the Government to provide free Navirapine, maintaining that '[t]he State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society.'<sup>209</sup> The Court stressed that the Government's inaction was

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<sup>204</sup> Cf. African Charter, above n 12, Art. 21(1) ('All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.');

ICESCR, above n 11, Art. 1(2) (similarly worded).

<sup>205</sup> Cf. SERAC, above n 58, para. 55 (holding: 'The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21 [of the African Charter].')

<sup>206</sup> See *Minister of Health v. Treatment Action Campaign* [2002] 5 SALR 721 (CC).

<sup>207</sup> *Ibid* para. 1.

<sup>208</sup> The South African Government had embarked upon a pilot program for the distribution of Nevirapine at two public health centers in each province. The Government argued that a broader program was not feasible as Nevirapine only worked when infected mothers used formula to feed their newborns and that it lacked the capacity to ensure that women all over the country used formula to feed their babies. *Ibid* paras. 14-15.

<sup>209</sup> *Ibid* paras. 35-6.

unreasonable because it 'fail[ed] to address the needs of mothers and their newborn children who do not have access to these [pilot] sites.'<sup>210</sup>

The *Treatment Action Campaign* case was a sequel to earlier judicial pronouncements on socio-economic rights in South Africa. The *Government of the Republic of South Africa v. Grootboom*<sup>211</sup> has become the *locus classicus* in this regard. The case involved the plight of desperately poor people in South Africa, who originally lived in terrible housing conditions in one of South Africa's shantytowns.<sup>212</sup> The group subsequently moved to privately-owned but unoccupied land that was included in an existing plan for the construction of low-cost housing.<sup>213</sup> The landlord obtained an order evicting them from the land, which led to demolition of the shacks they had built.<sup>214</sup> The evictees then occupied a public football stadium, though this lacked even the minimum, albeit inadequate, facilities that their shacks provided.<sup>215</sup>

In giving effect to the rights of access to adequate housing and the child's right to basic nutrition, shelter, and basic health care services, the Constitutional Court held that part of the State's positive obligations imposed by section 26(2) of the South African Constitution is to devise a comprehensive and workable plan for meeting them. This obligation is not absolute, but involves taking 'reasonable legislative and other measures ... to achieve the progressive realisation of the right ... within available resources.'<sup>216</sup> Progressive realization means making housing accessible not only to a larger number of people over time, but to a wider range as well. Availability of resources is an important factor in determining reasonableness.

The African Commission has adjudicated on few socio-economic rights related violations; for example, the now famous *SERAC case*, where the Commission held Nigeria liable for failing to exercise due diligence over Shell's activities in the Niger Delta.<sup>217</sup> In *Purohit & Moore v. Gambia*,<sup>218</sup>

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<sup>210</sup> *Ibid* paras. 67.

<sup>211</sup> *Government of the Republic of South Africa v. Grootboom* [2000] 11 BCLR 1169 (CC).

<sup>212</sup> *Ibid* paras 2-3.

<sup>213</sup> *Ibid* para 8.

<sup>214</sup> *Ibid* paras 9-10.

<sup>215</sup> *Ibid* para 11.

<sup>216</sup> *Ibid* para 38.

<sup>217</sup> *SERAC*, above n 58.

<sup>218</sup> *Purohit & Moore v. The Gambia*, Comm. No. 241/2001, 2002-2003 Afr. Ann. Act. Rep., Annex VII.

the Respondent State disclosed, in the course of analysing the adequacy of mental health care in Gambia, that it actually had a sufficient supply of medicines for mental health patients, but that they had not been distributed. The Commission justifiably ordered the Respondent State to provide those medicines to those in need, though acknowledging the State's severe resource constraints. The case illustrates the principle that a general lack of resources is not synonymous with the ability to realise a specific obligation.

Like these admirable holdings, Africa's human rights implementing institutions should develop appropriate enforcement apparatus for each human right. Strong and effective judiciaries are vital not only to the rule of law but also to economic development. Socio-economic rights are integral and necessary part of the workings of Africa's constitutions. There is no monolithic model of judicial enforcement for all rights, however classified and regardless of local context;<sup>219</sup> even 'directive principles' need not be interpreted as mere affirmations and declarations of common beliefs.<sup>220</sup> Rather, they embody a social contract and establish a different juristic relationship between the individual and society than that represented by the limited-government paradigm. Africans deserve institutions that are flexible and responsive to changing demands. These institutions, in turn, deserve the respect and support of Africans only to the extent they contribute meaningfully to realize all human rights.

For Africa's human rights practitioners, the challenge is to vary their scope and dynamics of litigation from one context to another instead of becoming settled in one methodology. Litigation and adjudication of socio-economic rights should be seen as a process, not an event.<sup>221</sup> Wine can vary with every valley and every vineyard.

### **International Solidarity to Advance an Adequate Standard of Living**

International cooperation will remain vital for development and for the realization of socio-economic rights;<sup>222</sup> and if the term 'international

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<sup>219</sup> Abdullahi A. An-Na'im, *To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights, in Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Y. Ghai & J. Cottrell eds., 2004) 7.

<sup>220</sup> B.O. Nwabueze, *Ideas and Facts in Constitution Making* (1993) 260.

<sup>221</sup> An-Na'im, above n 219, 16.

<sup>222</sup> For legal and moral arguments for international cooperation to realize socio-economic rights, see Udombana, 'The Summer Has Ended and We are Not Saved! Towards a



community' must have meaning, it must find practical expression in Africa. No region can succeed with levels of human development as low as those in Africa, given the prevalence of low-income economies—*The Bottom Billion*<sup>223</sup>—in the Continent. The elimination of hunger and related pathologies and their causes must remain the common concern of all nations. Global actors should look beyond some of Africa's 'invalids in public positions'<sup>224</sup> to individuals who are the ultimate units of moral concern.<sup>225</sup> They should supplement, 'by concerted international action, national efforts to raise the living standards of peoples,'<sup>226</sup> mindful that external factors can and do affect the continuous improvement of living standards. Fortunately, the ICESCR contains no provision specifying its jurisdictional scope of application, making extraterritorial application of its provisions both necessary and possible.

It is only by securing socio-economic rights that the international community can consolidate the democratic representative form of government in Africa and the right of its peoples to development, self-determination, and free disposal of their wealth and natural resources.<sup>227</sup> Similarly, the well-being of the peoples of the world largely depends on the adequate production and distribution of food and the establishment of a world food security system that ensures adequate availability of, and reasonable prices for, food at all times, irrespective of periodic fluctuations and vagaries of weather. All of this entails facilitating the development process of developing countries.<sup>228</sup>

Employee community engagement can be an effective tool for meeting corporate, NGO, and government goals and for lifting living standards. Some companies have used the skills, energy, talents and experience of

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Transformative Agenda for Africa's Development' (2005) 7 *San Diego Int'l L.J.* 5, 25 et seq.

<sup>223</sup> See passim Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2007) (asserting that about fifty failed states, most of them in Africa, pose the central challenge of the developing world in the twenty-first century).

<sup>224</sup> Abati, above n 196.

<sup>225</sup> See Udombana, *The Summer Has Ended*, above n 222, 34. Cf. Chris Brown, *International Relations Theory: New Normative Approaches* (1992) 24 (arguing, 'what is crucial to a cosmopolitan attitude is the refusal to regard existing political structures as the source of ultimate value.').

<sup>226</sup> *Declaration on Social Progress and Development 1969*, para. 9, UN Doc. GA Res/2542 (XXIV), Dec. 11, 1969.

<sup>227</sup> Cf. *Additional Protocol to the American Convention*, above n 8, pmb.

<sup>228</sup> See *Universal Declaration on the Eradication of Hunger and Malnutrition*, above n 61, pmb. para. (g).

employees in ways that have worked in some African communities. Examples include Abbott staff help, which modernize public health services in Tanzania; Nestle partnership with UNHCR to provide clean water in eastern Ethiopia; and Shell's help to flood-hit villages in Senegal.<sup>229</sup> Donor agencies could also play a significant role in assisting African farmers to increase productivity and improve their living standards. Agriculture provides food, employment, income and foreign exchange in many countries, but developments in this vital sector has deteriorated over the years due to inadequate funding, lack of adequate water control and management, poor rural infrastructure, neglect of research, and lack of economies of scale.<sup>230</sup> Development haulers can make a great difference by tackling some of these pathologies.

There have been repeated calls on the WTO to mainstream human rights in its trade policies, given the linkages between trade, development, and living standards, but these calls have so far yielded little successes, if at all. There have been no meaningful measures to mitigate the negative effects of trade liberalization on health and food security. Some argue that the WTO does not place any restrictions on its Members' latitude to set their health policies, but certain provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>231</sup> limit Members' access to essential drugs. Before the Uruguay Round, countries had various approaches to drug patents that were suited to their needs, and many did not grant patents for pharmaceutical products per se.<sup>232</sup> Some drugs essential to the treatment of HIV/AIDS, resistant tuberculosis, and malaria are now being patented and brought under TRIPS. Developments in the context of Article 27.3(b) of the TRIPS Agreement also limit access to traditional medicine, which plays an important role in health care in Africa and other developing countries.

The WTO and other actors that shape international trade policy—the Group of Eight (G8) Industrial Countries, European Union (EU), Organization for Economic Cooperation and Development (OECD), International Chamber of Commerce, World Economic Forum, etcetera—

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<sup>229</sup> Int'l Bus. Leaders Forum, *Regional Employee Engagement Approaches to Meet Regional Challenges: Africa*, Feb. 22, 2007.

<sup>230</sup> Cf. *Declaration on Agriculture and Food Security in Africa*, AU Assembly, 2d Ord. Sess. pmb., AU Doc. Assembly/AU/Decl.5 (II) (July 2003).

<sup>231</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C [hereinafter TRIPS Agreement].

<sup>232</sup> See Caroline Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24 *Hum. Rts Q* 1, 24.

need to shift from 'a single-minded free trade perspective'<sup>233</sup> and construct complementary structures on non-trade, social goals. All stakeholders should be concerned with abuses of labor rights and the protection of the health and safety of indigenous populations, including trade restrictions aimed at preserving the natural resources on which their future relies.<sup>234</sup> As the present author expressed elsewhere, 'Those who pursue trade at the expense of justice, human rights, and development must realize that there is more to life than profit and GDP.'<sup>235</sup>

## Conclusion

Meeting basic needs remains a critical challenge in Africa and emergent democracies must rise to this challenge in accordance with their treaty and constitutional obligations. Africa's salvation lies in the courage and imagination with which it achieves economic efficiency, social justice, and individual freedom. Governments should be sensitive to the root causes of social unrest and dislocations and should correct observed anomalies, especially those relating to better opportunities, justice and equity. No society can flourish and be happy when the greater parts of its members are poor and miserable. Extreme or abject poverty—the 'poverty that kills'—violates the sacred right to life, and the supreme value of human dignity. Extremely poor individuals are the very embodiment of deprivations of socio-economic rights, because '[t]hey are chronically hungry, unable to get health care, lack safe drinking water and sanitation, cannot afford education for their children and perhaps lack rudimentary shelter ... and basic articles of clothing, like shoes.'<sup>236</sup> Such persons are incapable of pursuing happiness.

The global community has a moral responsibility, if not a legal obligation, to assist Africa's efforts at raising its peoples' living standards. Human rights do not only limit the way we relate to people; they provoke the way we relate to them and provide possibilities for the global community to create a commonwealth in a common world. The

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<sup>233</sup> Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000) 11.

<sup>234</sup> Nsongurua Udombana, 'A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations' (2005) 38 *John Marsh. L. Rev.* 1153, 1202.

<sup>235</sup> *Ibid.* (stressing: 'Life is primarily about promoting human dignity, happiness, and values; profit and GDP are means to these ends.')

<sup>236</sup> Jeffrey D. Sachs, *The End of Poverty*, *Time*, Mar. 14, 2005, at 47. See generally Jeffrey Sachs, *The End of Poverty: How We Can Make It Happen in Our Lifetime* (2005) (reflecting on the problem of poverty and calling for the redistribution of wealth through development).

biblical command to love our neighbors as ourselves<sup>237</sup> translates into two broad obligations: first, a negative, legal, obligation not to injure our neighbors;<sup>238</sup> second, a positive, moral, responsibility to share a part of our resources with a neighbor in need. This positive act of love distinguishes a Good Samaritan from a pharisaic Levite or priest.

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<sup>237</sup> See Matthew 22:37-39; Luke 10:25-37.

<sup>238</sup> Cf. *Donoghue v. Stevenson* [1932] AC 562. Under the English common law, the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances that prevent the distributor or ultimate consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. This principle, which establishes the common law duty of care, was captured by Lord Atkin thus: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'; *Atkins* LJ at 580.