



## Giving Meaning to Economic, Social and Cultural Rights: A Continuing Struggle

By Kitty Arambulo

**Giving Meaning to Economic, Social and Cultural Rights**  
 edited by Isfahan Merali and Valerie Oosterveld. Philadelphia:  
 University of Pennsylvania Press (Pennsylvania Studies in  
 Human Rights), 2001. 280pp.

Following the now broadly acknowledged history of relative neglect of economic, social and cultural rights, increasing attention to these rights can be discerned in the work of practitioners, civil society organizations, academics, and diplomats in the international arena. In this context, Giving Meaning to Economic, Social and Cultural Rights is a welcome addition to the growing body of literature on these rights. The so-called mainstreaming of human rights, and in particular economic, social and cultural rights, is the subject of unprecedented levels of attention, as linkages are established with other international issues of interest and concern, such as poverty, development, security, peace-keeping and globalization. However, as economic, social and cultural rights are mainstreamed into the international human rights discourse and the language of human rights appropriated by those outside the human rights community, there is a risk of obfuscation or distortion of the very essence and meaning of economic, social and cultural rights. The imprecise use of terminology for reasons of relative ignorance or political expediency has led to the perpetuation of misunderstandings around these rights, which inevitably present new obstacles to their realization.

This collection of essays seeks to go beyond the rhetoric surrounding economic, social and cultural rights and contextualize them within a broader frame of reference, in three ways. First, the volume purports “to explore conceptualizations of human rights that assist in dissolving the traditional, category-bound approach to economic, social and cultural rights.” Second, it examines “how an integrated approach to rights produces a more meaningful analysis of individual economic, social and political (sic) rights” (in the words of one of the authors, “looking between rights”). Third, it aims to “demonstrate that these rights are justiciable and therefore tangible, whether through domestic, regional or international fora” (2).

Giving Meaning to Economic, Social and Cultural Rights is diverse and touches on a wide range of economic, social and cultural rights issues, among them labor-issues, women’s right to health, children’s adequate standard of living, and housing. The first two sections of the book risk disappointing readers with the expectations raised by both title and introduction. To be sure, each individual essay provides valuable information, constituting building blocks toward what the title

aims at, namely “giving meaning to economic, social and cultural rights.” However, the volume does not always succeed in providing the cohesion required to make the reader grasp how exactly it will reach this objective. The chapters represent a loosely collected set of essays, without a concluding chapter that summarizes the main threads of the various contributions. In my view, it was only in the third section that justice was done to the book’s stated objectives. It would also have been useful for the reader had the editors stated clearly from the outset—rather than waiting until the end—that this publication resulted from a conference, which partly explains the relative lack of coherence between the various chapters.

There are other identifiable lacunae. Without overemphasizing its importance, the “system” constituted by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its supervisory body, the Committee on Economic, Social and Cultural Rights (CESCR), is the authoritative legal framework in which economic, social and cultural rights are considered and interpreted in an independent manner and from an international legal perspective. It might be expected, therefore, that any thinking and writing with respect to economic, social and cultural rights would have an important component that relates back to this international system of the Covenant. Most of the chapters, especially those in the second section that deals with a so-called “integrated approach”, do not sufficiently link back to this system. The result is a lack of legal grounding of the publication in the main structure that deals with economic, social and cultural rights.

### **The Conceptualization of Economic, Social and Cultural Rights**

According to the editors’ introduction, “[u]ntil recently, the conceptualization of economic, social and cultural rights was wanting in both clarity and dynamism.” Depending on what “recent” means, it could be argued that considerable progress has been made over the last two decades in clarifying thinking about the legal status, scope and contents of economic, social and cultural rights, as well as the obligations that ensue from these rights. The fact that substantial change in the actual realization of economic, social and cultural rights has not been forthcoming is not due to the lack of conceptualization, but in part because of the unpredictable forces of international politics.

This increased understanding of what are economic, social and cultural rights may even have contributed to a greater alertness on the part of those who are not willing to place economic, social and cultural rights high (or even at all) on the international and national agendas. One example is the case of the UN Special Rapporteur mechanism regarding the right to adequate housing. In the early 1990s, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>1</sup> appointed Justice Rajindar Sachar as Special Rapporteur on the right to adequate housing. Justice Sachar produced four important papers that contributed significantly to clarifying the content of the right to housing. During approximately the same period (1991-1997), the CESCR adopted two General Comments (Numbers 4 and 7) on the right to housing as enshrined in Article 11 of the ICESCR, with particular focus on forced evictions. Efforts were made to place the right to housing on the agenda of the Commission on Human Rights, the primary UN political body addressing

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<sup>1</sup> Now known as the Sub-Commission on the Promotion and Protection of Human Rights.

human rights. These efforts were successful in that the Commission acknowledged the work done by the Sub-Commission, and decided in 2000 to mandate and appoint its own Special Rapporteur on housing as a component of the right to an adequate standard of living. A qualifier to this success is that the resolution does not speak of the “right to housing,” but “adequate housing as a component of the right to an adequate standard of living.”<sup>2</sup> Although this seems a minor detail, from a strictly legal perspective it could suggest a retrogressive move away from the full recognition of housing as a human right. This concern is in part reflected in the Special Rapporteur’s 2002 report to the Commission, which addresses the issue of housing as a distinct human right and which devotes attention to his efforts to keep housing rights on the agenda of major international events relevant to the right to housing.<sup>3</sup>

Another example of such qualified advancement is the discussion surrounding the draft Optional Protocol to the ICESCR, which would provide for a complaints procedure for individuals and groups concerning alleged violations of economic, social and cultural rights. Having been the subject of a protracted process in the Committee, and then having languished on the shelves of the Commission on Human Rights for several years, some progress seemed to have been made with the appointment of an independent expert on the subject of the draft Optional Protocol to the ICESCR in 2000. Further advancement was seen in the adoption of Commission on Human Rights resolution 2001/30, aiming to establish an open-ended working group to study this matter further.<sup>4</sup> The latest development is cautiously positive, as the Commission on Human Rights, in resolution 2003/18, decided to establish an open-ended working group with a view to considering options regarding the elaboration of an Optional Protocol to the Covenant. This working group will meet prior to the 60th session of the Commission on Human Rights.<sup>5</sup> The matter is far from resolved, however, as forces antagonistic to the notion of economic, social and cultural rights as human rights continue their efforts to oppose a complaints procedure for economic, social and cultural rights, and it may take some time before any concrete move is taken towards the actual adoption of an Optional Protocol.

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<sup>2</sup> Commission on Human Rights resolution 2000/9, para. 7(c): To appoint, for a period of three years, a special rapporteur whose mandate will focus on adequate housing as a component of the right to an adequate standard of living, as reflected in article 25, paragraph 1, of the Universal Declaration of Human Rights, article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, and article 27, paragraph 3, of the Convention on the Rights of the Child, and on the right to non-discrimination as reflected in article 14, paragraph 2 (*b*) of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (*e*) of the International Convention on the Elimination of All Forms of Racial Discrimination. The Special Rapporteur appointed is Mr. Miloon Kothari.

<sup>3</sup> UN Doc. E/CN.4/2002/59, 1 March 2002, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari to the 58<sup>th</sup> session of the Commission on Human Rights.

<sup>4</sup> The intention to establish a working group was confirmed in resolution 2002/24, paragraph 9(f), in which the Commission on Human Rights decided to “to establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights [...]”

<sup>5</sup> CHR resolution 2003/18, paras 12-13.

What is clear is that advances in thinking on and understanding of the status, scope and contents of economic, social and cultural rights, as well as their implications for States, trickle down slowly and erratically in the UN system. As with everything, and in particular the international arena, a large dose of chance, political trade-offs and other, more arcane factors are involved in this process. Ultimately, individual experts, who enter the UN system as Special Rapporteurs and individual treaty body members, and who have human rights experience and knowledge, are instrumental in advancing within the UN system a deeper and more nuanced understanding about economic, social and cultural rights, which is developed externally.<sup>6</sup>

A third example is the issue of justiciability, which continues to be the subject of extensive debate, and not necessarily always in a fruitful manner. The term “justiciability” is generally understood to refer to a right’s faculty to be subjected to the scrutiny of a court of law or another (quasi-) judicial entity. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this right’s significance.<sup>7</sup> Considerable analysis of the question of justiciability has been produced by the CESCR.<sup>8</sup> However, judging from the comments of States in response to Commission on Human Rights resolutions on the Committee’s proposals on a draft optional protocol, and despite support from various other authoritative parties, such as scholars, UN Special Rapporteurs and non-governmental organizations, this analysis has not been wholly convincing. States continue to express doubts as to whether an international treaty body is in a position to consider the application of economic, social and cultural rights at the domestic level in a manner beyond the relatively general review of State reports. Similarly, the reports of the Independent Expert on the draft Optional Protocol to the ICESCR are not reflective of the analysis and arguments concerning justiciability that have been fine-tuned over the years.

In the author’s opinion, the discussion of the justiciability of economic, social and cultural rights has moved from the strictly legal realm to join issues—such as the right to development, or the human rights dimensions of globalization—in the amorphous international political arena. The argument of non-justiciability of economic, social and cultural rights often masks other concerns, particularly those concerning financial implications for the State. There are reasons to fear that when an open-ended working group on the subject of a draft Optional Protocol to the ICESCR is established by the Commission on Human Rights, much of the discussions will be *déjà-vu* for those long interested in the justiciability debate.

## Rethinking the System: Institutional Integration

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<sup>6</sup> See for example the reports of Ms. Katarina Tomaševski, Special Rapporteur on the right to education, UN Docs. E/CN.4/2003/9 (with Add.1 and Add.2), E/CN.4/2002/60 (with Add.1 and Add.2), and E/CN.4/2001/52.

<sup>7</sup> See for example K. Arambulo, Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights-Theoretical and procedural aspects (Intersentia- Hart, Antwerpen/Groningen/Oxford, 1999): 55.

<sup>8</sup> See, *inter alia*, GC 3, submission to the PrepCom of the 1993 Vienna World Conference on Human Rights, A/CONF.157/PC/65/Add.5.

The UN human rights treaty system consists of seven major human rights instruments, and their respective supervisory bodies and the various monitoring procedures (periodic reporting procedures, inquiry procedures, and individual or inter-State complaints procedures).<sup>9</sup> The periodic reporting component of the system, in particular, has become cumbersome, as more States have become party to more instruments, resulting in increased and overlapping reporting obligations under the various treaties. Enhancing the effectiveness of the system and especially of the reporting procedures has been the subject of numerous studies and reports.<sup>10</sup>

Craig Scott's chapter on the institutional integration of the core human rights treaties deals with the "big picture" of the human rights treaty system in theory, approaching it from an essentially abstract level. As a first chapter, it takes the reader quite far from economic, social and cultural rights as such, to which it, in the end, devotes rather scant attention, as it does not state clearly how an enhanced integration of human rights treaties and their committees would contribute to giving meaning to economic, social and cultural rights, for which provisions are found in a majority of the human rights instruments. Scott also presents some possible improvements, which are academically and theoretically sound. However, Scott's analysis and suggestions fail to take full account of factors beyond what can be found in the documentation produced individually and collectively by the treaty bodies. It may be that many are not easily implementable from a practical point of view and questions of effectiveness remain unanswered.

Nevertheless, some of Scott's suggestions are interesting and worthy of further consideration. One example relates to his assessment of the annual meeting of chairpersons of treaty bodies, which according to Scott "is clearly starting to play a kind of clearinghouse role whereby developments and suggestions from each committee are conveyed by that committee's chairperson to the chairpersons of the other five committees" (13). In fact, after fourteen meetings, the chairpersons of treaty bodies have made limited progress on cooperation,<sup>11</sup> and if any could be discerned, it could not be

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<sup>9</sup> The ICESCR, the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC), and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC).

<sup>10</sup> See, for example, the reports of Philip Alston, independent expert on possible long term approaches to enhancing the effective operation of UN human rights treaty bodies (A/44/68, A/CONF.157/PC/62/Add.11/Rev.1, and E/CN.4/1997/74). Other sources of proposals are an independent academic study of the treaty bodies by Professor Anne Bayefsky, The UN Human Rights Treaty System: Universality at the Crossroads (Transnational Publishers, 2000), and other academic writings and NGO comments, such as: P. Alston & J. Crawford (eds.), The Future of UN Human Rights Treaty Monitoring (Cambridge University Press, 2001); A. Bayefsky (ed.), The UN Human Rights Treaty System in the 21<sup>st</sup> Century (Kluwer, 2002); Fédération Internationale des ligues des droits de l'homme, Treaty monitoring bodies: mechanisms to be supported (2003); C. Heyns and F. Viljoen, The Impact of the United Nations Human Rights Treaties at the Domestic Level (Kluwer Law International, 2002); and Heli Niemi and Martin Scheinin, Reform of the United Nations Human Rights Treaty Body System Seen from a Developing Country Perspective (Institute for Human Rights, Turku: Abo Akademi University, June 2002).

<sup>11</sup> See, for example, the most recent reports of the meetings of chairpersons. The 13<sup>th</sup> meeting of chairpersons made several recommendations, the majority of which are repetitions of earlier meetings. The document on follow-up on these

attributable wholly or significantly to these meetings. As long as the chairpersons are not empowered with any decision-making authority during these meetings, and as long as the committees in plenary continue to devote sparse attention to the recommendations of the chairpersons, any potential of the existing human rights treaty system will never be realized.

A more promising development may be the recently instituted inter-Committee meeting, which was held for the first time in 2002. Together with the chairpersons, two members of each of the six committees met for two and a half days to discuss issues of common interest and concern, and focused in particular on the procedural aspects of considering State party reports.<sup>12</sup> The recommendations of this mechanism are genuine attempts to move towards a more “holistic” functioning of the treaty body system, rather than a collection of individual fiefdoms.

What might prove to be a further catalyst for change is the UN Secretary-General’s second reform report of September 2002, which explicitly targets the human rights treaty system as an object in need of reform, with particular focus on reducing the reporting burden upon States, mentioned above.<sup>13</sup> This report has reinvigorated a long-standing discussion about the possibility of having a consolidated report to the treaty bodies. The report’s suggestions coincided with the arrival of a new High Commissioner for Human Rights, who had been tasked to seek improvement of the system and to report on the results of measures undertaken by September 2003, undertaken by the Office of the High Commissioner for Human Rights (OHCHR) in preparation of the report to the UN Secretary-General.

Scott’s proposal to move towards changing the name of the Human Rights Committee into “Committee on Civil and Political Rights,” in order to bring it in line with those of other Committees, whose names derive from the respective instruments they supervise, is both logical and relevant to the purpose of the book. I agree with Scott’s assertion that “a politics of language is an important way to help dislodge systemic biases” (18). However, his suggestion of “trying to convey to the world at large that, within the current (undesirable) fragmented logic of the multiple treaty system, the ‘Human Rights Committee’ is actually the ‘Civil and Political Rights Committee’ [...]” (19), although simple *prima facie*, would in fact require a considerable investment of resources and diplomatic and bureaucratic activity for an outcome that is far from certain. Apart from the fact that the Human Rights Committee is likely to resist such a name-change (as Scott rightly points out, the Human Rights Committee does attach to its name a certain “imperial” quality, which other committees lack), such a change would technically require an amendment of the ICCPR. And if a change were to be achieved, there is no guarantee that this “subversive way” of educating “the world at large” about the unity of the human rights treaty system would actually be successful. Here too,

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recommendations shows that few of these recommendations were met, and that the respective committees spent little attention, if at all to these recommendations.

<sup>12</sup> For further information on this meeting, see UN Docs. HRI/ICM/2002/2 (background paper) and HRI/ICM/2002/3 (report and recommendations of the first inter-Committee meeting).

<sup>13</sup> Strengthening of the United Nations: an agenda for further change – Report of the Secretary-General (UN Doc. A/57/387, 9 September 2002, paragraphs 45-58).

there are a myriad of determining factors at play, which cannot be found in the formal expressions of international dynamics, as found in official UN documents.

### **The Concept of Indivisibility: The Need to Move from Theory to Practice**

In “Defending Women’s Economic and Social Rights,” Dianne Otto presents an interesting new take on the concept of indivisibility, perhaps one of the most (mis)understood terms in human rights. Indivisibility of human rights as a notion is mostly linked to that of interdependence, together meaning that “ideal of free human beings enjoying civil and political freedom and freedom from fear and want can 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>14</sup> And despite its prominence in many human rights documents as a permanent fixture in preambular paragraphs, the general understanding of the notion of indivisibility has remained superficial and vague, and in practice, the divisions between human rights continue to be sustained in the UN organs, including the treaty bodies themselves.

Otto’s dissection and analysis of indivisibility—such as “indivisibility as a rejection of hierarchy,” “indivisibility as the promotion of gender inclusivity,” and “indivisibility as a means of asserting structural linkages”—results in an “indivisibility approach” that may contribute to a new standard of equality that is interesting at the level of theory. Still, these three ideas—and particularly the first two—do not seem to add new meaning to existing interpretations of the term. Furthermore, the concept of indivisibility as the main vehicle to understand the linkage between women’s rights and economic, social and cultural rights (to arrive at “women’s economic, social and cultural rights”), may not adequately reflect the complexity of the underlying obstacles to the realization of these rights for women, given the practical challenges and political realities in the United Nations context.

It is not clear how the different dimensions of indivisibility as spelt out by Otto could be useful at the practical level. For example, recognition of indivisibility as a rejection of hierarchy is already evident in preambular paragraphs of many resolutions. Indivisibility as a means of asserting structural linkages in the system is already being applied when some of the treaty bodies, such as the CESCR and the Committee on the Rights of the Child, adopt statements or General Comments (which are normative interpretations of human rights and related issues) such as those on poverty, economic sanctions, and HIV/AIDS, which are clear innovative steps towards integrating different “types” of human rights.

In my view, in order to understand what the notion of indivisibility means in reality, there is a need to move beyond theory and conceptual analysis. The proof of the pudding is in the eating, and research has to be done on what is happening in the field. Indivisibility in practice essentially means applying a holistic rights-based approach to activities aiming to protect and promote human rights, including economic, social and cultural rights. Noteworthy in this regard are the activities of the

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<sup>14</sup> See the preamble of the ICESCR. The ICCPR has a nearly identical preambular paragraph.

Office of the High Commissioner for Human Rights on mainstreaming human rights in all UN activities. The UN Secretary-General's 1997 reform initiative identified human rights as the main cross-cutting issue in all United Nations activities, with the Office of the High Commissioner for Human Rights as the primary focal point and catalyst.<sup>15</sup>

The need to move from theory to practice by demonstrating “bottom-up” approaches and concrete application of economic, social, and cultural rights at the national and regional levels—particularly by judicial bodies—is illustrated aptly by the contributions of Leilani Farha and S. James Anaya. Farha's chapter on the Palestinian situation in Occupied East Jerusalem recounts how international human rights law is being used at the local community level in support of the Palestinian struggle, in particular with regard to current and real-life housing problems, such as house demolitions, discriminatory zoning laws and settlement expansion, and housing for Palestinians inside Israel, and the unrecognized villages. She describes how the human rights treaty mechanisms, and in particular the CESCRC, have consistently addressed the human rights of Palestinians, and reveals how international human rights law can contribute to empowering a people disappointed repeatedly by the international political machinery.

Similarly, S. James Anaya's contribution on the Maya petition on land and resource rights, made to the Inter-American Commission on Human Rights, illustrates how the theory of international human rights law can be brought to life and made more concrete as a result of a supranational judicial body's consideration of a specific national case. This case, concerning the harmful effects of logging and oil exploration on the environment and on the lives of the indigenous Maya, illustrates the more progressive positions found *vis-à-vis* economic, social and cultural rights in regional systems (the European, the African and the Inter-American system). All of these acknowledge in principle the justiciability of economic, social and cultural rights, by providing for a procedure of complaints (either individual or collective) regarding these rights.

Martha Shaffer's contribution on Canada's new Child Support Guidelines is another example of bringing theory to practice, as it analyzes the relationship between international norms and the national reality, and in this particular case, how Article 27 of the Convention on the Rights of the Child relates to the Canadian family law. It is such analysis of specific treaty provisions in a concrete country context that contribute to a clearer understanding of what “vague” international norms actually mean in reality.

### **The Role of Non-State Actors: Civil Society, Business and National Human Rights Institutions**

As the primary addressee of international human rights law, States parties and their governments have the principal obligation to respect, protect and fulfill human rights. This is echoed in Rebecca Cook's contribution, “Advancing Safe Motherhood through Human Rights,” of which the main message is that many forms of maternal mortality are preventable if there is legal framework, which

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<sup>15</sup> See the OHCHR Website, on Human Rights in Development: [www.unhchr.ch/development/mainstreaming.html](http://www.unhchr.ch/development/mainstreaming.html)



establishes legal obligations and accountability for governments. In this regard, Cook also provides examples of performance standards, which could be used by courts and treaty-monitoring bodies to measure government compliance with their legal obligations, both national and international.

Cook rightly points out that:

*the preventable rate of maternal mortality is but a...tragic symptom of a larger social injustice of discrimination against women and violation of women's human rights that societies are unwilling to prevent, remedy and punish....The overarching challenge in applying human rights to advance safe motherhood is to characterize women's multiple disempowerments, not just during pregnancy and childbirth, but from their own births, as a cumulative injustice that governments are obliged to remedy (110).*

However, in the ongoing process to attain fuller realization of economic, social and cultural rights, the role of other actors has been and continues to be crucial in different ways. This important role of other, non-State actors—especially international and regional inter-governmental organizations, civil society groups, and, increasingly, the private sector—has been recognized by the CESCR, especially in its general comments of recent years.<sup>16</sup> Civil society organizations—including NGOs—that are active at the international level have often been in the vanguard of international debates on economic, social and cultural rights.<sup>17</sup>

#### *Non-Governmental Organizations*

Chisanga Puta-Chekwe and Nora Flood's chapter, "From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights," partly illustrates this pioneering role of NGOs. Since its inception, the CESCR has benefited from consistent attention of a small number of NGOs, which have been a source of support in the context of the periodic reporting procedure, as well as in the drafting of General Comments, which contain the Committee's interpretation of treaty provisions or issues related thereto. Among the treaty bodies, it has the reputation of being one of the most open to receiving NGO information.

In recent years, the number of NGOs active in the field of economic, social and cultural rights has been increasing both in political fora such as the Commission on Human Rights, and in the context of the treaty body system, including those organizations who did not traditionally address these rights, such as the World Organization against Torture (OMCT), Human Rights Watch and

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<sup>16</sup> See, for example, CESCR General Comments Nos. 12 (right to food), 13 (right to education), 14 (right to health, all in UN Doc. HRI/GEN/1/Rev.5, pp. 66-109), and 15 (right to water), UN Doc. E/C.12/2002/11.

<sup>17</sup> Examples of NGOs that have been active in the field of economic, social and cultural rights are: the Centre for Housing Rights and Evictions (COHRE); Habitat International Coalition (HIC); Food International Action Network (FIAN); the Fédération Internationale des Droits de l'Homme (FIDH); and the International Commission of Jurists (ICJ).

Amnesty International. This increased attention has prompted the Committee to adopt a document to assist NGOs interested in contributing to its work.<sup>18</sup>

In Farha's contribution on housing rights of Palestinians, we can see how the engagement of Palestinian NGOs and international human rights mechanisms in the context of the right to housing has contributed to the benefit of both: acquisition of skills, education and empowerment of local activists, and access to information by and enhanced awareness on the part of the human rights mechanisms.

### *The Private Sector*

Craig Forcese's "Human Rights Mean Business" explores the interrelationship between various dimensions of globalization and human rights in the Canadian context. As to his section on avoiding complicity and contributing to human rights-abusing activity or capacity of repressive regimes, Forcese's conclusions reflect the limitations of international law to provide for satisfactory solutions. With the scope of the international human rights legal framework, *strictu sensu*, limited to the conduct of States-parties, and with no "hard-law" human rights mechanisms to hold non-State actors such as companies accountable, not much more can be done than stating that companies "should be expected to apply international core labor rights" and "steps must be taken to mitigate the negative human rights impact of business trading [...] in countries with repressive human rights-abusing regimes" (page 80). The emergence of an alternative "regime," consisting of codes of conduct, which constitute non-binding guidelines for enterprises with regard to a range of human rights, such as labor and trade union rights is rightly criticized for not always being driven by the appropriate motives, as is its general lack of monitoring mechanisms. The motivation to embrace codes of conduct is not so much based on the businesses' increased awareness and understanding of human rights as by external pressure to do the "right thing." Nor is this backed by monitoring or enforcement mechanisms: were there to be conflict between adherence to human rights standards and the main profit-making objective, the result would be surprising to none. Forcese aptly observes that the Canadian government needs to articulate a strong policy on its actions *vis-à-vis* Canadian corporate involvement with repressive regimes, instead of pleading legal incapacity.

Unfortunately, there is no reference in this chapter (apart from what appears in the footnotes) to the CESCR, the only human rights treaty body to date that has taken and expressed a position with regard to human rights and globalization.<sup>19</sup> Nor was there mention of the potential role of the Committee in coaxing States to more adequately address and even regulate actions of non-State

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<sup>18</sup> UN Doc. E/C.12/2000/6, NGO participation paper.

<sup>19</sup> The Committee on Economic, Social and Cultural Rights has devoted considerable attention to the issue of globalization. It adopted a statement on globalization and its impact on the enjoyment of economic, social and cultural rights in May 1998, in which it basically appeals to relevant actors, in particular the international financial institutions (such as the World Bank and the International Monetary Fund) to uphold human rights and to ensure that they are duly taken into consideration in their activities (UN Doc. E/1999/22, para. 515). This statement was followed by a letter to the Third Ministerial Conference of the World Trade Organization, held in Seattle, Washington, U.S.A. in November 1999, basically affirming the same message (UN Doc. E/2000/22).

actors, which have an impact on the enjoyment of economic, social and cultural rights. Examples of such cautious steps of addressing the role of private sector can be found in some of the Committee's more recent General Comments. In its General Comment No. 12 on the right to food, the CESCR expressly states that "all members of society [...], including] the private business sector, have responsibilities in the realization of the right to food."<sup>20</sup> In its most recent General Comment No. 15 on the right to water, the Committee refers to the need for States parties to take "take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities."<sup>21</sup>

Kerry Rittich basically continues this theme in her contribution, "Feminism after the State." She demonstrates clearly the interplay between the globalizing market and its impact on some of women's economic, social and cultural rights, such as labor-related rights, as well as the dangers that linkages would entail, as the dictates of the global market marginalize and even nudge specific women's economic, social and cultural rights out of the equation. Similarly, various UN entities, such as the CESCR and the Special Rapporteurs on globalization of the Sub-Commission on the Promotion and Protection of Human Rights, have warned against the risk of human rights, and in particular economic, social and cultural rights, being downgraded from the central place it has been accorded in the UN Charter and in the International Bill of Human Rights.<sup>22</sup>

### *National Human Rights Institutions*

Another group of non-State actors that are becoming increasingly important with regard to the protection, promotion and realization of economic, social and cultural rights are national human rights institutions. Barbara von Tigerstrom's chapter on the role of national human rights institutions in the implementation of economic, social and cultural rights makes a number of insightful observations throughout—positions that seem evident but have not been articulated often (enough). For example, with regard to how violations of economic, social and cultural rights can fall within the purview of an ombudsman's mandate, von Tigerstrom notes that:

*Administrative actions may have significant impact on individuals' economic and social rights, including rights to work, social security, an adequate standard of living including food and housing, health and education. Cultural rights...although they have traditionally received even less attention than economic and social rights, may also be affected by administrative decisions or actions within an ombudsman's jurisdiction.*

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<sup>20</sup> UN Doc. E/C.12/1999/5, 12 May 1999, CESCR General Comment No. 12 on the right to food (ICESCR, Article 11), paragraph 20.

<sup>21</sup> UN Doc. E/C.12/2002/11, 20 January 2003, CESCR General Comment No. 15 on the right to water (ICESCR, Articles 11 and 12), paragraph 49.

<sup>22</sup> See the Committee on Economic, Social and Cultural Rights statement on globalization, *supra* note 16, and the reports on globalization and its impact on the full enjoyment of human rights, by Joe Oloka-Onyango & Deepika Udagama, Special Rapporteurs on the Sub-Commission on the Promotion and Protection of Human Rights, UN Docs E/CN.4/Sub.2/2000/3, E/CN.4/Sub.2/2001/10 and E/CN.4/Sub.2/2003/14.

*The complaints in these areas show the substantial hardship that can follow from an administrative decision, action, inaction or delay. Individuals may be deprived of their sole source of income, unable to work, denied health care, or evicted from their homes. Such deprivations, when they are the result of unfairness or unlawfulness on the part of government officials, are both instances of maladministration within the scope of the ombudsman's mandate and, potentially, violations of the state's obligation to respect economic, social or cultural rights contrary to the norms and legal obligations of international human rights law (143).*

The complex issue of progressive realization of economic, social and cultural rights has contributed to continuing discord about these rights. Some have interpreted the “progressive realization” language of Article 2(1) of the ICESCR to justify non-action as to the implementation of economic, social and cultural rights. However, progressively achieving the realization of these rights should not be considered to mean that States have the right to defer indefinitely efforts to ensure full realization. As pointed out by Alston and Quinn, it should not be viewed “as an escape hatch for states whose performance failed to match their abilities or as a lessening of state obligations. It [should be] viewed and defended simply as a necessary accommodation to the vagaries of economic circumstances.”<sup>23</sup> In addition, the phrase “to the maximum available resources” in the same provision should not be misused as “wobble room,” or justification for not taking steps that a State party is obligated to take under the Covenant. In its General Comment No. 3 on the nature of States parties’ obligations, the Committee describes progressive realization as follows:

*The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time....[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*

According to Von Tigerstrom:

*[T]he socioeconomic situation of people and the actions of the government must be considered within the context. The scrutiny of an ombudsman is of value even when the economic conditions are such that the government resources are limited. The obligations of a state are qualified, not erased, by a situation of economic hardship (154-155).*

Von Tigerstrom further deals with some issues that are particularly relevant to economic, social and cultural rights at this time, but which have been subjected to precious little scrutiny so far. She raises the relationship between corruption and the violation of economic, social and cultural rights, and

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<sup>23</sup> P. Alston & G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights,” *Human Rights Quarterly* 9 (1987): 156-229.

how an independent institution as the ombudsman could be useful in combating corruption (pages 148-149). Most importantly, Von Tigerstrom's contribution is realistic, as it looks at the various strengths and limitations of these institutions: flexibility on one hand, financial capacity of the institution itself and of the government on the other.

## Conclusion

In conclusion, it can be said that Giving Meaning to Economic, Social and Cultural Rights brings together an interesting collection of writing on human rights themes that are in the center of international attention at present. The value of these individual essays to the discourse on economic, social and cultural rights would have been enhanced by a cohesive conclusion that would have been a step forward in the struggle, towards a new level of awareness. Nevertheless, Giving Meaning to Economic, Social and Cultural Rights is a significant attempt at understanding some economic, social and cultural rights-related issues in the contemporary context, a time in which these rights are subject to both increasing attention and formidable challenges.

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