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KEEPING THE PROMISE: IMPROVING ACCESS TO SOCIOECONOMIC RIGHTS IN AFRICA

*Nsongurua J. Udombana**

“Dad worked hard carrying heavy loads at the garage and marketplaces and he earned very little money. Out of what he earned he paid the creditors, who came to our room every evening to remind us that they were still alive. And out of what was left we could barely manage to pay the rent and eat. . . . Inside, we had no light because we couldn’t afford a candle. Mum moved about in the darkness in uncomplaining silence. She kicked something and cursed and sat down and I lit a match and saw blood pouring out of the big toe of her right foot. . . . I asked her what she had put on it. ‘Poverty,’ she said.”¹

This article addresses the challenge of realizing socioeconomic rights in Africa. It argues that Africans are fundamentally entitled to a life that is free from the current haunting fear of poverty and personal insecurity. Drawing on international and comparative constitutional legal frameworks, with insights from political economy, the article interrogates the vertical, diagonal, and horizontal obligations of duty-bearers. It calls on the ‘organs of society’—governments, courts, civil societies, et al.—to see individual freedom as a social commitment.

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¹ BEN OKRI, *THE FAMISHED ROAD* 78-79 (1991) (a metaphysical narrative of a Nigerian peasant life).

INTRODUCTION

Modern human rights grew out of the ashes of World War II, a war that “represented the destructive extensions of state sovereignty concepts that had dominated international relations for three centuries.”² These rights have generally come of age, though their socioeconomic components still face teething problems. As Simma observed, “there hardly exists another human rights treaty which has been more frequently misinterpreted, downplayed or intentionally abused than the International Covenant on Economic, Social and Cultural Rights.”³ Every now and then, arguments spring up on whether socioeconomic rights are *real* rights or mere oxymoron. The discussion is similar to the hair-splitting debate on whether international law is *law*:⁴ a worn-out, sometimes irritating, though still fascinating question, at least in university lecture theatres.⁵

The challenge to socioeconomic rights takes many forms, including the issue of justiciability: whether courts can, or should, entertain allegations of violations of these rights. There are also vexing issues relating to content, criteria, capacity, and measurement. For example, how does one measure and determine whether or not a State party has satisfied its obligations under the relevant human rights instruments?⁶ Might it not be better to

² DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 8-9 (4th ed. 2009) (adding: “The Nazis, seeking international preeminence, acted with unprecedented brutality and demonstrated that previous attempts to protect individuals from the ravages of war were hopelessly inadequate.”). On how and why human rights ideas resurfaced in the early to middle of the twentieth century, see generally Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 *HUM. RTS. Q.* 447 (1992).

³ Cf. Bruno Simma, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, in *THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS* 75, 79 (Franz Matscher ed., 1991).

⁴ See, e.g., Elizabeth Bruch, *Is International Law Really Law? Theorizing the Multi-Dimensionality of Law*, 44 *Akron L. Rev.* 333, 334 (2011) (“International law appears to lack many of the familiar institutions of domestic law, and the question is often raised whether international law is really law at all? An understanding of law as more than an instrument or particular system offers more productive means of considering that question.”).

⁵ The question whether international law is “law” is, at best, of verbal relevance in contemporary world order, with no practical consequences. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 214-215 (2d ed. 1994).

⁶ See Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to*

use political processes—like lobbying for larger budgetary appropriations—to fund these rights? Here is how Spagnoli articulates the problem:

Rights have to be enforceable. There is no right without a remedy. If a right is violated, then it must be possible to redress the situation in a court of justice. It has to be possible to find somebody who is responsible for the violation and who can stop the violation. If nobody can be forced to respect a right because nobody has the power and duty to respect it, then it is useless and wrong to speak about a right.⁷

Preoccupation with justiciability misses the fact that a standard need not be justiciable in order to be normative; nor does the effectiveness of the human rights perspective rest on seeing it invariably in terms of putative proposals for legislation.⁸ No doubt, courts could—and do—play critical roles in realizing human rights, but it is unreasonable to expect them to produce better pro-poor outcomes than through politics and agencies. This article addresses the practical problem of how to improve access to socioeconomic rights—food, work, housing, education, health care, work, and social security, et al.—in Africa. Its central claim is that Africans are fundamentally entitled to a life that is free from the present haunting fear of poverty and personal insecurity. The article assumes the indivisibility of all human rights, since the difference between torture and starvation is like the difference between six and half a dozen.

The article has three parts, each combining descriptive, analytical, and comparative methodologies, and employing authoritative secondary literature to interpret primary sources, where necessary. Although questions of economic development fall in the rubrics of political economy, the article

Adjudicate the Rights to Food, Water, Housing, and Health? 98 AM. J. INT'L L. 462, 464 (2004).

⁷ See, e.g., FILIP SPAGNOLI, MAKING HUMAN RIGHTS REAL 48 (2007). Cf. Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 816 (2005) ("There is no accepted understanding of what a right is – whether collective or group rights and nonjusticiable social, economic and cultural rights are really rights; of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities.").

⁸ See AMARTYA SEN, THE IDEA OF JUSTICE 365 (2009) [hereinafter SEN, THE IDEA OF JUSTICE] (maintaining, "it is important to give the general ethical status of human rights its due, rather than locking up the concept of human rights prematurely within the narrow box of legislation – real or ideal").

employs an interdisciplinary methodology in order to provide political and economic pretexts and contexts to the legal texts and analysis. Part I provides a theoretical background, examining the place of socioeconomic rights in the corpus of human rights. Part II advances arguments on why Africa must take socioeconomic rights seriously. It argues, *inter alia*, that the standard of living of a people has a strong positive influence on their country's propensity to develop and sustain democracy.

Part III interrogates the role of relevant stakeholders—governments, courts, and civil society—in improving access to socioeconomic rights. I conceive of rights as “broad social projects,” in which various actors—state and non-state—discharge various duties. The article concludes by calling on these “organs of society”—to invoke a familiar phrase⁹—to see individual freedom as a social commitment, chiefly because an economically or socially backward citizen is bereft of dignity, which is the common denominator of our humanity.

I. SOCIOECONOMIC RIGHTS IN THE CORPUS OF HUMAN RIGHTS

Socioeconomic rights are not only ethically important, but they also have sufficient social significance to generate obligations for others towards their realization. If this is so, why were most Western governments and the first generation human rights non-governmental organizations (“NGOs”) luke-warm, non-committal and, sometimes, hostile, towards these rights? This question assumes that these agencies now have a favorable disposition towards socio-economic rights, at least in theory. If so, what factors account for the change of attitudes and the increasing attention now given to these rights? This part interrogates these and related questions.

A. *Between Justiciable and Non-Justiciable Guarantees*

Several global and regional instruments define socioeconomic rights. This segment briefly interrogates these instruments, including Africa's level of participation in their elaboration, adoption, ratification, and constitutionalization.

1. Global and Regional Snapshots

The United Nations (“U.N.”) Charter stresses “the dignity and worth of the human person”¹⁰ and “the equal rights of men and women”¹¹ and contains

⁹ Universal Declaration of Human Rights 1948, pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹⁰ U.N. Charter pmbl.

¹¹ *Id.*

passages with clear human rights references. One of the purposes of the U.N. is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹² In Article 56 of the Charter, all members pledge to take joint and separate actions to realize the economic and social goals articulated in Article 55. The word “pledge” implies some form of legal obligation, albeit a weak one, as there is no enumeration in the Charter of specific human rights that States should observe. Nevertheless, references to human rights in the Charter were anticipatory and embryonic.

In 1948, the international community fashioned the Universal Declaration of Human Rights¹³ (“UHDR”) to breathe life into the human rights aspirations in the U.N. Charter. That “momentous global pronouncement”¹⁴ was the first major step in the evolutionary process of internationalizing human rights. The UDHR guarantees a full complement of rights—civil and political, as well as economic, social, and cultural—and provides that everyone has a right to an effective remedy for violations of these rights.¹⁵ Under the UDHR regime, no provision was superior—and no provision was inferior—to another. It was hoped that States will translate the aspirations in the Declaration into their internal laws—which many have done—and thereafter take positive actions to help individuals fulfill their potentials—which many have not.

The Cold War aberrations created an ideological divide and erected false hierarchies of rights. The Liberal West, led by the U.S., was preoccupied with personal liberty; whereas the Socialist East, led by the then-U.S.S.R., “focu[s]ed on the troubling possibility that economic inequity could make liberty a hollow concept.”¹⁶ Although socioeconomic rights are usually associated with a socialist ideology, “[a] careful review of the nineteenth century . . . shows that for most socialists, the struggles for political

¹² *Id.* art. 1, para. 3. *See also id.* art. 68 (mandating the Economic and Social Council to set up commissions in economic and social fields and for the promotion of human rights, among other activities).

¹³ UDHR, *supra* note 9 On history of the UDHR’s adoption; *see generally* MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

¹⁴ SEN, *THE IDEA OF JUSTICE*, *supra* note 8 at 359.

¹⁵ UDHR, *supra* note 9 art. 8.

¹⁶ MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 119 (2004) (adding that this belief “resonated powerfully with the burgeoning class of urban workingmen and workingwomen”).

and economic rights were closely linked.”¹⁷ Nevertheless, this cleavage truncated visions of human rights, culminating in the adoption of two separate Human Rights Covenants in 1966¹⁸ to give legal effect to the UDHR, each with a different template and approach to implementation.¹⁹

Since then, socioeconomic rights have wrongly been viewed as “programmatically aspirational and not justiciable,”²⁰ whereas civil and political rights are seen as inalienable and immediately enforceable.²¹ As Leckie observed, “[a]mbivalence towards violations of economic, social and cultural rights—whether by those entrusted with their implementation or those mandated to monitor compliance with them—remains commonplace.”²² This ambivalence ignores the fact that, according to both covenants, “the ideal of free human beings enjoying 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.”²³

¹⁷ *Id.* at 135 (adding that aristocratic and bourgeois forces resisted demands for the recognition of both categories of rights in the first decades after the Congress of Vienna of 1815).

¹⁸ Int’l Covenant on Civil and Political Rights, 99 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR]. See generally Int’l Covenant on Econ., Soc., and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESCR].

¹⁹ Each State party to the ICCPR “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” ICCPR, *supra* note 18 art. 2, para. 1. In contrast, each State party to the ICESCR “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” ICESCR, *supra* note 18 art. 2, para. 1 (emphasis added).

²⁰ Concluding observations of the Comm. on Econ., Soc., and Cultural Rights: Pol., U.N. Doc. E/C.12/POL/CO/5, para. 8 (Nov. 20, 2009).

²¹ See Robin West, *Rights Capabilities and the Good Society*, 69 FORDHAM L. REV. 1901, 1907 (2001).

²² Cf. Sarah Joseph, *Civil and Political Rights*, in INT’L HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 89, 91 (Mashood Baderin & Manisuli Ssenyonjo eds., 2010) (“[T]here has historically been greater agitation for states by human rights advocates to ‘do something’ about civil and political rights abuses, both at home and abroad, and less pressure to address deficiencies regarding economic, social and cultural rights.”). See Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20(1) HUM. RTS. Q. 81, 83.

²³ ICESCR, *supra* note 18, pmbl & ICCPR, *supra* note 18, pmbl.

The bland argument against socioeconomic rights was that they are costly to implement in that they engender positive state obligations. But as Sunstein rightly argues, “All constitutional rights have budgetary implications It follows that insofar as they are costly, social and economic rights are not unique.”²⁴ For example,

liberty and security, arrest and detention, the rights of accused persons and the provision of fair trials all require substantial expenditure by the State in training and maintaining competent police forces, a responsible public prosecution service, and a competent, independent, and impartial judiciary—as well as providing, where necessary, free legal assistance and court interpreters.²⁵

Notwithstanding the significant conceptual and interpretive progress showing that all human rights engender both negative and positive obligations, enforcement of socioeconomic rights has generally been sloppy, compared to their civil and political counterparts. The near exclusive focus on negative rights hurts positive rights in other ways, as West explains:

Negative rights . . . disempower the state from pernicious, intermeddling, paternalistic, or malign intervention into the private affairs of individual citizens. By virtue of so doing, however, negative rights also disempower the state from intervening into the private sphere for the democratically progressive purpose of redistributing power or resources within it. Negative rights elevate or empower the citizen

²⁴ Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 7 (2005).

²⁵ PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 126 (1983). See also U.N. Comm. on Econ., Soc., and Cultural Rights, Report on its 4th Sess., Jan. 15-Feb. 2, 1990, General Comment No. 2, *International Technical Assistance Measures (Art. 22)*, 6, 9, U.N. Doc. E/1990/23 (Feb. 2, 1990) [hereinafter General Comment 2]; *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) at 315 (1979) (“While the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. . . . [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”); Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples’ Rights*, 23 HUM. RTS. Q. 327, 337-39 (2001).

relative to an overreaching, paternalistic state. Yet by staying the paternalist's intervening hand, negative rights both subordinate that citizen to his stronger brother—thereby entrenching private inequalities—and disable the state from securing, on behalf of weaker citizens, the material preconditions to developing the capabilities necessary for a fully human life.²⁶

As a result of these fault lines, the U.N. Committee on Economic, Social and Cultural Rights (“ESC Committee”) and some human rights scholars have been working overtime to legitimize socioeconomic rights. Even the first two regional human rights instruments—the European Convention on Human Rights²⁷ and the American Convention on Human Rights²⁸—carefully ignored socioeconomic rights, arguably because these rights were not seen as *real*. It took several years for their States parties to elaborate weak agreements guaranteeing socioeconomic rights.²⁹ Even then, States applying for membership in the Council of Europe must undertake to ratify the European Convention on Human Rights,³⁰ but they are not obligated to give assurance of any type regarding its counterpart treaty—the European Social Charter.

The African Charter on Human and Peoples' Rights of 1981³¹ was a refreshing departure from the other depressing regional experiments on socioeconomic rights, in terms of its normative reach. The Charter boldly proclaims “that civil and political rights cannot be dissociated from economic,

²⁶ West, *supra* note 21 at 1907.

²⁷ Council of Eur., Convention for the Prot. of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 4, 1950, E.T.S. No. 155, 33 I.L.M. 960, 213 U.N.T.S. 221 (1994) [hereinafter European Convention].

²⁸ Org. of Am. States, Am. Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

²⁹ See Council of Eur., European Soc. Charter, Oct. 18, 1961, E.T.S. No. 35, 529 U.N.T.S. 89 (revised in 1996); Additional Protocol to the Am. Convention on Human Rights in the Area of Econ., Soc., and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 (entry into force Nov. 16, 1999). These treaties lack strong institutional mechanisms and procedures for their enforcement. The Additional Protocol to the Am. Convention, for example, has a partial system of individual complaint.

³⁰ See Statute of the Council of Eur., at art. 3, E.T.S. 1, 87 U.N.T.S. 103 (May 5, 1949) (explaining Council membership requirements).

³¹ African Banjul Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217, 21 ILM 58 (1982) [hereinafter African Charter].

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.”³² The Charter guarantees all categories of human rights equally.³³ It even provides that “all peoples shall have a right to a generally satisfactory environment,”³⁴ which obviously have implications for the conduct of States’ domestic and foreign policies. It calls on its States parties to recognize and take legislative and other measures to implement them;³⁵ and establishes a quasi-judicial regional institution—the African Commission on Human and Peoples’ Rights—to promote and protect all the rights in the Charter.³⁶ A supranational court—the African Court on Human and Peoples’ Rights—has also been established to complement the protective mandate of the African Commission.³⁷ The Human Rights Court is already functioning—with its seat in Arusha, Tanzania—though its future is tenuous, at best.³⁸

All African States are parties to the African Charter, with the exception of Morocco.³⁹ As of March 1, 2010, forty-five countries were parties to the African Charter on the Rights and Welfare of the Child of 1990,⁴⁰

³² *Id.* at pmb. Cf. ICESCR, *supra* note 18 pmb. (“the ideal of free human beings enjoying 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”).

³³ See African Charter, *supra* note 31 at arts. 3-24.

³⁴ *Id.* art. 24.

³⁵ See *id.* art. 1.

³⁶ See *id.* arts. 30, 45.

³⁷ The Court was established pursuant to the Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) [hereinafter Human Rights Protocol].

³⁸ In 2008, the AU adopted a protocol to merge the Protocol on the African Court of Justice of 2003 with the Protocol on the Establishment of the African Court on Human and Peoples’ Rights of 1998. The 2008 Protocol, which has not yet entered into force, establishes a single Court, with dual chambers, known as the African Court of Justice and Human Rights. See Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, AU Doc. Assembly/AU/13(XI) (not yet in force) [hereinafter Protocol on African Court].

³⁹ Morocco pulled out of Africa’s continental body in 1984 because of a dispute over Western Sahara.

⁴⁰ See African Charter on the Rights and Welfare of the Child, adopted July 11, 1990, entry into force Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49. For the ratification status, see AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE

while there were twenty-eight States parties to the Protocol to the African Charter on the Rights of Women in Africa of 2003,⁴¹ as of July 22, 2010.⁴² Both treaties guarantee socioeconomic rights, among others.⁴³ Most African States are also parties to one or more of the global human rights instruments guaranteeing socioeconomic rights, including the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) (1966),⁴⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (1979),⁴⁵ and the Convention on the Rights of the Child (“CRC”) (1989).⁴⁶

2. Constitutionalization of Socioeconomic Rights

Constitutions are the prime, though not exclusive, domestic instruments used to express agreed human rights values. A constitution is not merely a source of power, but also of liberty; it protects the individual against all arbitrary coercion.⁴⁷ Constitutionalizing rights serves as a qualification on the powers granted to the government by the people. Some think that the enumeration of some specific rights means the exclusion of others not so included in the Constitution. The truth is that no constitution can fully enshrine all the rights implied in the general principles which are common to a people. Sometimes, these other rights are enshrined in some particular laws,

CHILD 1990 (March 1, 2010), *available at* www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf.

⁴¹ African Union. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. [hereinafter Women Protocol]. *available at* www.africa-union.org (July 11, 2003).

⁴² See AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN IN AFRICA (2010), *available at* www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf.

⁴³ See, e.g., Women Protocol, *supra* note 41 at art. 13 (containing economic and social welfare rights).

⁴⁴ See ICESCR, *supra* note 18

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th sess., Supp. No. 46, U.N. Doc.A/34/46, at 193 (Dec. 18, 1979).

⁴⁶ The ratification status of these global instruments is available at the Website of U.N. High Commissioner for Human Rights. UNITED NATIONS, OFFICE OF THE HIGH COMM. FOR HUMAN RIGHTS, www2.ohchr.org/english/law/docs/HRChart.xls (last visited Apr. 30, 2011).

⁴⁷ See FRIEDRICK A. HAYEK, THE CONSTITUTION OF LIBERTY 182 (1960) (writing: “A free society certainly needs permanent means of restricting the powers of government, no matter what the particular objective of the moment may be.”).

which—to the extent that they do not violate the principles of constitutionalism—should be enforced with equal force.

Consequently, some African constitutions contain groundbreaking and generous provisions on socioeconomic rights, with express provisions for their judicial enforcement. The South African Constitution of 1996 is a shining example of constitutionalization of socioeconomic rights. The new Constitution guarantees a minimum standard of living—including food and a place to live in—to the rich and poor alike. Specifically, the Constitution protects the rights to work, environment, housing, education, health care, food, and water.⁴⁸ It mandates that the State “respect, protect, promote and fulfill the rights in the Bill of Rights”⁴⁹ and empowers the Constitutional Court to grant appropriate relief for infringement of any of these rights.⁵⁰

Some commentators argue that making socioeconomic rights justiciable in this way could lead to “rights proliferation and diluting constitutions with unachievable goals.”⁵¹ This writer’s response is that courts should be left to worry about the outcomes. One must not neglect to do something that is immediately good, from fear of its being abused or not being realized. Meanwhile, the *Certification* case affirmed the justiciability of socioeconomic rights under the South African Constitution, “at least to some extent.”⁵² In the *Grootboom* case, the Court held that “the courts are constitutionally bound to ensure that [socioeconomic rights] are protected and fulfilled.”⁵³

Other States express socioeconomic concerns as policy goals or “directive principles.” A major feature of these principles is that courts are prevented—or so it seems—from enforcing them,⁵⁴ arguably because they require positive actions by States and, therefore, can be guaranteed only so far as resources permit. Compared to justiciable guarantees, directive principles confer obligations without creating individual entitlements, and they

⁴⁸ S. AFR. CONST., 1996.

⁴⁹ *Id.* § 7(2). For a typology of obligations, see *Social and Economic Rights Action Center v. Nigeria*, Comm. No. 155/96, 2001-2002 AFR. ANN. ACT. REP., ANNEX V, ¶ 45.

⁵⁰ See S. AFR. CONST., 1996, § 38.

⁵¹ See, e.g., Lanse Minkler, *Economic Rights and Political Decision Making*, 31 HUM. RTS. Q. 368, 369 (2009).

⁵² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa (Certification case)* 1996 (10) BCLR 1253 (CC) at ¶ 78 (S. Afr.).

⁵³ *South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) at ¶ 20.

⁵⁴ See, e.g., CONSTITUTION OF NIGERIA (1999), § 6(6)(c).

are subject to criticism “for being conditional, uncertain, and temporal.”⁵⁵ The truth is that different countries’ histories, cultures, institutions, and levels of development inform these differences between justiciable rights and non-justiciable “directive principles.”⁵⁶

Most African constitutions, especially those of former British colonies, express socioeconomic concerns as directive principles of state policy. The constitutions of Nigeria⁵⁷ and Sierra Leone⁵⁸ fit this mold. Ghana’s Constitution is equidistant between the two poles: it contains justiciable economic, social, and cultural rights as well as some non-justiciable directive principles.⁵⁹ These constitutional provisions were largely influenced by the Indian model, itself influenced by the Irish Constitution of 1937. However, though the Irish Constitution addressed its directive principles to the *Oireachtas* (Parliament)—much like the Indian Constitution—their contemporary African equivalents are addressed to all organs of government: the legislature, executive, and judiciary.

For example, the Nigerian Constitution provides: “It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or *judicial* powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.”⁶⁰ This provision is clearly in conflict with section 6(6)(c), which prevents courts from exercising their judicial powers over matters under Chapter II of the same Constitution—designated as “Fundamental Objectives and Directive Principles of State Policy.” Obviously, these provisions raise important questions about the role that courts should play in realizing socioeconomic rights, a subject that this article will later address.

B. *The Changing Landscape*

Until recently, some leading human rights NGOs and other commentators in the field were openly hostile to the idea of recognizing certain socioeconomic concerns as legal entitlements. Human Rights Watch, for example,

⁵⁵ Minkler, *supra* note 51 at 369.

⁵⁶ *Id.*

⁵⁷ See CONSTITUTION OF NIGERIA (1999), ch. II (containing “Fundamental Objectives and Directive Principles of State Policy”).

⁵⁸ See CONSTITUTION OF SIERRA LEONE (1991), ch. II.

⁵⁹ See CONSTITUTION OF GHANA (1992), §§ 24-30. For the directive principles, see *id.* §§ 35-39.

⁶⁰ CONSTITUTION OF NIGERIA (1999), § 13 (emphasis added). Cf. CONSTITUTION OF SIERRA LEONE (1991), § 4.

considered such concerns “equities”⁶¹ and advanced what Mutua calls “its own nebulous interpretation of ‘indivisible human rights’ which related civil and political rights to survival, subsistence, and poverty, ‘assertions’ of good that it did not explicitly call rights.”⁶² Such twisted perceptions have allowed States and other duty-bearers to prioritize negative rights over their positive counterparts, thereby thwarting efforts at socioeconomic reforms and the egalitarian distribution of social goods.

The landscape is changing, though. International human rights NGOs have broadened their missions to address complex human rights in a more holistic and comprehensive manner. Amnesty International, for example, no longer ignores socioeconomic rights “in recognition that there are many more prisoners of poverty than prisoners of conscience, and that millions endure the torture of hunger and slow death from preventable disease.”⁶³ Oxfam International now also engages in socioeconomic rights advocacy, by pressuring decision-makers to “change policies and practices that reinforce poverty and injustice.”⁶⁴

Even countries that treated socioeconomic rights as mere social goals now accept them as rights and embrace social welfare action.⁶⁵ For example, federal and state authorities in the U.S. now provide substantial welfare services to their citizens, though courts are still reluctant to award

⁶¹ See, e.g., Aryeh Neier, *Afternoon Session in*, HUMAN RIGHTS AND FOREIGN POLICY: A SYMPOSIUM 16 (1994) (“I regard economic equity and economic misery as matters of enormous significance. I just don’t think that it’s useful to define them in terms of rights.”); see also Aryeh Neier, *Social and Economic Rights: A Critique*, in HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 283, 283 (2007) (advancing arguments why socioeconomic rights are not *rights*).

⁶² Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 618 (1996).

⁶³ AMNESTY INT’L, HUMAN RIGHTS FOR HUMAN DIGNITY: A PRIMER ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 4 (2005) [hereinafter A PRIMER ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS].

⁶⁴ *What We Do*, OXFAM INTERNATIONAL, www.oxfam.org/en/about/what (last visited Jan. 3, 2011).

⁶⁵ Cf. Philip Alston, *Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States*, N.Y.U. Sch. of Law Center for Human Rights and Global Justice, Working Paper No. 09-35, 2009, at 3 (suggesting that even the U.S. now accepts these socioeconomic concerns as rights, although it continues to play “a central role in discouraging and sometimes blocking the development of the concept of ESCR”).

constitutional protection to welfare-entitlement claims.⁶⁶ The Patient Protection and Affordable Care Act (“PPAC Act”), which President Obama signed into law on March 23, 2010,⁶⁷ shows that capitalism can cohere with social welfare. The Act, which has been characterized as “the federal government’s biggest attack on economic inequality since inequality began rising more than three decades ago,”⁶⁸ expands health care coverage to all Americans and prevents insurers from raising premiums by double digits without facing recourse or accountability.⁶⁹ Obamacare—as the PPAC Act is popularly called—is an extension of the New Deal, the Great Society, Social Security, Medicare, and similar social insurance systems. It parallels what President Roosevelt referred to as America’s “*second Bill of Rights* under which a new basis of security and prosperity can be established for all—regardless of station, race or creed.”⁷⁰ Roosevelt himself presided over the New Deal, a series of programs by which the Federal Government combated the effects of the Depression of the 1930s.⁷¹

Not surprisingly, segments of American society have challenged the constitutionality of the PPAC Act. Multiple federal courts held that the Act’s individual mandate to purchase health insurance goes beyond Con-

⁶⁶ NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1219 (2003).

⁶⁷ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter PPAC Act].

⁶⁸ David Leonhardt, *In Health Bill, Obama Attacks Wealth Inequality*, N.Y. TIMES, Mar. 23, 2010, at A1.

⁶⁹ The PPAC Act additionally requires insurers to spend eighty to eighty-five percent of premium dollars on health care; frees families from the fear of losing their insurance, or having it capped unexpectedly, after an injury or illness; and prohibits insurance companies from discriminating against pregnant women or denying coverage to children born with disabilities. See generally PPAC Act, *supra* note 67.

⁷⁰ Franklin D. Roosevelt, State of the Union Message, 90-1 CONG. REC. 55, 57 (1944) (*italics in the original*) (calling for “the establishment of an American standard of living higher than ever before known,” adding: “We cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.”) *Id.*

⁷¹ See Theda Skocpol & Vanessa Williamson, *Obama and the Transformation of U.S. Public Policy: The Struggle to Reform Health Care*, 42 ARIZ. ST. L.J. 1203, 1205 (2010-2011) (“During the original New Deal, President Franklin Roosevelt and the Democratic Party were able to achieve immense social policy victories amidst the massive Great Depression.”).

gress' power,⁷² though no court so far has ruled that the Act violates individual rights. However, in June 2012, the U.S. Supreme Court settled the controversy, when it ruled in favor of the individual mandate provided for in the Act.⁷³ Such legal challenges illustrate the constant potential for conflict between negative and positive rights, which is comparable to the conversation in developing countries on the relationship between these two categories of rights.

The proposition that all human rights are interwoven and equally important is not merely a theoretical postulate, but a "fundamental tenet" of the international community's commitment to human rights.⁷⁴ The Vienna Declaration and Program of Action (1993) reaffirm this commitment to indivisibility: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."⁷⁵ The European Economic and Social Commission also states that socioeconomic rights "are indissolubly linked to civil and political rights: together these citizens' rights and accompanying duties constitute the cornerstone of a free, democratic society founded on respect for human rights."⁷⁶ The Algiers Declaration, adopted by the erstwhile Organization of African Unity ("OAU") in 1999, emphasized "the indivisibility, universality and interdependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective."⁷⁷ And in the African Charter on Democracy, Elections and Governance,⁷⁸ African States pledged to "ensure that citizens enjoy fundamental freedoms and human

⁷² Cf., *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010).

⁷³ See Adam Liptak, *Justices, By 5-4, Uphold Health Care Law, Roberts in Majority, Victory for Obama*, N.Y. TIMES, June 28, 2012.

⁷⁴ See Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 35 (1989).

⁷⁵ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Program of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

⁷⁶ Cf. European Econ. & Soc. Comm., *Report: The Citizens' Europe*, ¶ 1.2.3, Op. 1037 S/C 10 (Sept. 23, 1992).

⁷⁷ OAU Assembly of Heads of State and Gov't, 35th Ordinary Sess., July 12-14, 1999, *Algiers Declaration*, ¶ 18, AHG/Dec.1(XXXV).

⁷⁸ African Charter on Democracy, Elections and Governance art. 6, Jan. 30, 2007 (not yet in force) [hereinafter African Charter on Democracy] available at <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf>.

rights taking into account their universality, interdependence and indivisibility.”⁷⁹

Categorizing rights into “generations” is misleading, as it suggests—without any rational basis—that some rights are more important than others. As Laplante persuasively argues, “[e]veryday life, especially in poor countries with histories of political violence and repressive governments, prove[s] the impossibility of dividing rights into generations, especially when the guiding criterion is valuing life and dignity.”⁸⁰ The recent adoption of the Optional Protocol to the ICESCR⁸¹ underscores the increasing “trend towards a greater recognition of the indivisibility and interrelatedness of all human rights.”⁸² The Protocol reaffirms the “universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms.”⁸³ More significantly, the Protocol institutes individual complaint mechanisms to address State violations of socioeconomic rights. This development comes forty-two years after a similar mechanism was adopted for civil and political rights,⁸⁴ but it is better late than never.

II. THE IMPERATIVE TO IMPROVE ACCESS TO SOCIOECONOMIC RIGHTS

The post-colonial African States have struggled with multiple challenges, including institution building, economic development and democratic governance. These challenges left little room for the advancement of human

⁷⁹ *Id.* at art. 6.

⁸⁰ Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 141-42 (2007) (exploring “how truth commissions provide rich [demonstration] of the interrelations between violations of [c]ivil and [p]olitical rights” as well as socioeconomic rights).

⁸¹ See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, 63rd Sess., 66th plen. Mtg., U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter ICESCR Protocol].

⁸² Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. L. REV. 617, 618 (2008) (quoting Louise Arbour, High Commissioner for Human Rights, in a statement to the Open-Ended Working Group on OP-ICESCR on Mar. 31, 2008).

⁸³ ICESCR Protocol, *supra* note 81 pmbl.

⁸⁴ The Human Rights Committee was established pursuant to the ICCPR to monitor the implementation of civil and political rights guaranteed under the Covenant. In 1966, an Optional Protocol to the ICCPR was adopted to allow aggrieved individuals to bring petitions before the Committee against a State party to the Covenant and its Protocol. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 1 (Dec. 16, 1966).

rights. Authoritarian regimes in Africa suggested that the quest for economic development necessarily “trump” human rights. Such an argument, which has since been discredited, approximated to the socialist conception of rights, which posited that a State can waive or trump individual rights in pursuit of its economic and social objectives.⁸⁵ The State, as a substitute for traditional communal group, was the embodiment of the people, and the individual has no right or freedoms that are natural and outside the purview of the State.⁸⁶

Sacrificing individual freedom for the communal interest, arguably, accords with notions of “rights” in traditional African society, where the individual derived his identity and status from his allegiance to the community. The African traditional society, like its Asian counterpart, is built on the notion of duty, as opposed to rights.⁸⁷ Okere wrote some time ago that “African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity”.⁸⁸ Mbiti sums it up in his now famous dictum: “I am because we are, and because we are therefore I am”.⁸⁹ However, this romantic view of African tradition does not exonerate the modern State from upholding and implementing internationally and constitutionally guaranteed rights. On the contrary, there are compelling and urgent reasons for taking human rights, especially socioeconomic rights, seriously in modern Africa, even if some factors still hinder their effective access. This part examines these complexities.

⁸⁵ See, e.g., ADAMANTIA POLLIS & PETER SCHWAB, *HUMAN RIGHTS: A WESTERN CONSTRUCT WITH LIMITED APPLICABILITY* 9 (1979) (emphasizing modernization, economic development, and the building of national states as the main goals of governments in newly independent non-Western countries, arguing that “whatever rights an individual possesses are given to him by the state, and this state retains the right and the ability to curtail individual rights and freedoms for the greater good of the group”, *id.* at 9).

⁸⁶ *Id.* at 13.

⁸⁷ Kenneth Kaoma Mwenda, *Deconstructing the Concept of Human Rights in Africa*, 25 *ALTERNATIVE L.J.* 292, 293 (2000) (arguing: “In general, rights, in contrast to duties, are aggressive and assertive. Duties, on the other hand, call for modesty and humility, yet at the same time realizing the importance of coexistence.”) *Id.*

⁸⁸ B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, 6 *HUM. RTS. Q.* 141, 148 (1984).

⁸⁹ JOHN MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 141 (1970).

A. *Why Socioeconomic Rights Matter*

Human rights are ethical standards that uphold the minimum threshold that individuals everywhere require to live in dignity.⁹⁰ They embody fundamental values that engender clusters of legal relations, values such as equality, liberty, peace, dignity, non-discrimination, justice, solidarity, rule of law, and democracy. According to Joseph Raz, to “assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person.”⁹¹ Do socioeconomic rights meet this threshold? Are the values they embody fundamental enough to deserve protection by all organs of society? This article argues that personal freedom—free speech, free press, free assembly, free worship, etc.—is important, but that true freedom cannot exist without economic security and independence, because “[n]ecessitous men are not free men.”⁹² Promoting effective access to socioeconomic rights in turn “promote[s] social progress and better standards of life in larger freedom.”⁹³

This segment further advances reasons why socioeconomic rights matter. It proceeds on the assumption that all human rights are realizable; that is to say, “peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality, and freedom for their spirits.”⁹⁴ The impoverishment that Africans endure and their lack of effective access to many socioeconomic rights have more to do with ideology, politics, and corruption and less with law or lack of resources.⁹⁵ Problems associated with socioeconomic rights are those of *ap-*

⁹⁰ See Nsongurua Udombana, *Life, Dignity, and the Pursuit of Happiness: Human Rights and Living Standards in Africa*, 27 U. TAS. L. REV. 47 (2008).

⁹¹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 180 (1986).

⁹² Roosevelt, *supra* note 70, at 57.

⁹³ UDHR, *supra* note 9, pmbl.

⁹⁴ Martin Luther King, Jr., Address Delivered in Acceptance of Nobel Peace Prize (Dec. 10, 1964), available at <http://nobelprize.org/peace/laureates/1964/king-acceptance.html>.

⁹⁵ Cf. Flavia Piovesan, *Social, Economic and Cultural Rights and Civil and Political Rights*, 1 SUR – INT’L J. ON HUM RTS. 21, 26 (2004) (“From an international normative perspective, the notion that social, economic and cultural rights are not legal rights has been superseded for good. *The idea that social rights are nonactionable is purely ideological and not scientific*; they stand out as authentic and genuine fundamental rights that are actionable, demandable and that require serious and responsible observance.”) (emphasis added); Leckie, *supra* note 22, at 86-87 (1998) (“The legal, conceptual, economic, and political obstacles commonly associated with the procedural aspects of enforcing economic, social, and cultural rights

plicability, not *validity*,⁹⁶ a distinction that is vital for clear and logical reasoning. The economic indigence and social and political vulnerability of rights-holders sometimes make the realization of their rights difficult. Even for the few cases that go to court, the ‘haves’ often come out ahead of the ‘have-nots,’ and the simple reason is that constitutions and courts generally represent conservative elite interests.⁹⁷ That is a different issue altogether from the question of whether or not those rights are valid or normative.

1. Socioeconomic Rights Raise Questions of Dignity and Justice

The indivisibility of all human rights has practical significance in a society founded on human dignity, equality, and freedom. It is fundamental to the evaluation of the reasonableness of a State action, requiring all stakeholders to take into account the inherent dignity of all human beings. In adopting the UDHR, the international community recognized that human beings can only achieve freedom from fear and want, as well as freedom of speech and belief, if conditions are created whereby all people can enjoy all human rights. The Declaration stipulates that “[e]veryone, as a member of society, has the right to the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁹⁸

Human dignity gives every individual a claim against society for a minimum livelihood. Havel captures this thought beautifully: “The essential aims of life are present naturally in every person. In everyone there is some longing for humanity’s rightful dignity, for moral integrity, for free expression of being and a sense of transcendence over the world of existences.”⁹⁹ Commitment to socioeconomic rights prevents alienation, integrates all citizens within the society, and furthers a sense of community and participation,¹⁰⁰ which are hallmarks of African tradition.

Justice—as fairness—is not simply the first virtue of social institutions; it is the principle that must regulate “a democratic society that not only professes but take[s] seriously the idea that citizens are free and

are often overstated and tend to be couched in terms far more reflective of ideology or self-interest than the prevailing status of law.”).

⁹⁶ See Martin Scheinin, *Economic and Social Rights as Legal Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 41, 41 (Asbjørn Eide et al. eds., 1995) [hereinafter *ECONOMIC, SOCIAL AND CULTURAL RIGHTS TEXTBOOK*].

⁹⁷ See M. Galanter, *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, 9(1) *L. & Soc. REV.* 95 (1974).

⁹⁸ UDHR, *supra* note 9, art. 22.

⁹⁹ VACLAV HAVEL et. al. *THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE* 23, 38 (M.E. Sharpe ed., 1990).

¹⁰⁰ See R.M. TITMUSS, *COMMITMENT TO WELFARE* 65 (1976).

equal.”¹⁰¹ Naturally, most of Africa’s constitutions are built on concepts of equality and justice. For instance, Angola’s stated primary objective is to build a free and democratic society of peace, *justice* and social progress.¹⁰² Benin’s Constitution sees “public freedoms, [and] the dignity and justice of the human being are guaranteed, protected and promoted as a necessary condition for the true and harmonious development of every Beninese in their temporal, cultural and spiritual dimension[.]”¹⁰³ Burkina Faso’s Constitution posits “liberty, dignity, security, well-being, development, *equality and justice* as the fundamental values of a pluralist society.”¹⁰⁴ Finally, South Africa seeks a republic that will, *inter alia*, “establish a society based on democratic values, social justice and fundamental human rights.”¹⁰⁵ Architects of these constitutions could not have wished that citizens should be denied rights, including socioeconomic rights, which form the basic underpinnings of a just society.

2. Socioeconomic Rights Enhance Human Capacity

Socioeconomic rights enhance human capacity and facilitate economic growth—essential prerequisites for Africa’s sustainable development. The right to food, for example, is the most basic of all human rights. If this right is not first fulfilled, “the protection of other human rights becomes a mockery for those who must spend all their energy merely to maintain life itself.”¹⁰⁶ A vote without food makes democracy a hollow concept and detracts from the claim that governments exist for the welfare of the people. This idea—that governments exist for the security and welfare of their people—is not a modern notion; even early liberal constitutions prescribe certain governmental welfare obligations. The French Constitution of 1791 obligated the State to “provide work for the able-bodied poor who may not

¹⁰¹ See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 39 (Erin Kelly ed., 2001).

¹⁰² See CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA (1992), § 1 (emphasis added).

¹⁰³ CONSTITUTION OF THE REPUBLIC OF BENIN (Dec. 11, 1990), pmbl (emphasis added).

¹⁰⁴ CONSTITUTION OF BURKINA FASO (June 2, 1991), pmbl. (as amended) (emphasis added).

¹⁰⁵ STATUTES OF THE REPUBLIC OF SOUTH AFRICA – CONSTITUTIONAL LAW [CONSTITUTION], 1996, pmbl.

¹⁰⁶ Philip Alston, *International Law and the Right to Food*, in *FOOD AS A HUMAN RIGHT* 162, at 162 (Ashbjørn Eide et al. eds., 1984) (quoting the Presidential Commission on World Hunger, 1980).

have been able to procure it for themselves.”¹⁰⁷ Even early liberal political writings, like Thomas Paine’s *Rights of Man* (1792), helped shape U.S. public policy for poverty eradication.¹⁰⁸

Like food, adequate housing is important;¹⁰⁹ without it, “employment is difficult to secure and maintain, physical and mental health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired and relationships are strained.”¹¹⁰ Similarly, the right to education is critical to any effort to establish a society of equal opportunities. More significantly, this right cuts across the false divide between human rights: it contains civil, cultural, economic, political, and social elements. In *Bandhua Mukti v. Union of India*,¹¹¹ the Indian Supreme Court maintained that education is liberation, a tool for the betterment of civil institutions, the protection of civil liberties, and the path to an informed and questioning citizenry. The democratic State may never reach its greatest potential without a citizenry sufficiently educated to understand civil rights and social duties.

3. Denial of Socioeconomic Rights Makes Life Nasty, Brutish, and Short

Africa is a continent of paradoxes, as typified by its constituent States. Nigeria, for example, is a failing state, as its government is unable to provide the fundamentals necessary for decent living.¹¹² Although the Country is the world’s sixth largest crude-oil exporting country, its government imports fuel for domestic consumption.¹¹³ Nigeria reportedly supplies electricity to

¹⁰⁷ 1791 CONST. tit. I (Fr.).

¹⁰⁸ See generally GARETH S. JONES, *AN END TO POVERTY* (2004).

¹⁰⁹ The ESC Committee identifies seven aspects of the right to adequate housing: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. U.N. Commission on Econ., Soc., and Cultural Rts. [CESCR], *The Right to Adequate Housing General Comment No. 4*, 6th Sess., (1991).

¹¹⁰ A. PRIMER ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 63 at 19 (referencing the Centre on Housing Rights and Evictions).

¹¹¹ See *Bandhua Mukti v. Union of India & Ors.*, 10 S.C.C. 549 (1997).

¹¹² See, e.g., Int’l Crisis Group, *Nigeria: Want in the Midst of Plenty*, AFRICA REPORT, No. 113 (2006), available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/Nigeria%20Want%20in%20the%20Midst%20of%20Plenty.ashx>.

¹¹³ Nnimmo Bassey, *Oil Politics: Nigeria’s Unacceptable Biofuels Policy*, NEXT (Nigeria) (Nov. 17, 2010), <http://234next.com/csp/cms/sites/Next/Money/5643461->

its neighboring States, including Togo and Benin Republic,¹¹⁴ but its local industries are struggling due to epileptic power supply and other pathologies, which also hinder Foreign Direct Investments (“FDI”).¹¹⁵ The manufacturing sector accounts for a laughable four percent of Nigeria’s Gross Domestic Product (“GDP”).¹¹⁶ On June 12, 1993, the military junta annulled an election universally hailed as the freest in Nigeria’s democratic history,¹¹⁷ but the same junta—and the ones that succeeded it—wasted enormous human and material resources in a war to restore democracy in Liberia and Sierra Leone. As an African saying goes, it is only a foolish man that carries another person’s load on his head while dragging his own on the ground.

Millions of Africans still live in extreme poverty; indeed, “Africa’s poor are the poorest of the world’s poor”¹¹⁸ The 2010 World Development Indicators (“WDI”) shows that child mortality is highest in Africa.¹¹⁹ An estimated 72 million children were out of school globally in 2007, “almost

184/story.csp (“Nigeria exports crude oil and still depends on imports of petrol to meet our domestic needs.”).

¹¹⁴ Niyi Odebo, *Nigeria to Supply Electricity to Ghana*, PUNCH (Nigeria) (Mar. 5, 2007), <http://www.punchontheweb.com/Articl.aspx?theartic=art200703051105154> (reporting that Nigeria’s Minister of State for Energy confirmed that Ghana had asked Nigeria to supply the country 20 megawatts of electricity: “The demand for 20 megawatts of electricity by Ghana came barely two weeks after Nigeria signed an agreement to supply 80 megawatts to Togo and the Benin Republic.”).

¹¹⁵ *Let There Be Light*, ECONOMIST (Oct. 21, 2010), www.economist.com/node/17312103 (“Nigeria’s power supply has been stagnant for 30 years. During the tumultuous 1990s there was no investment despite surging demand. Since then, generation capacity has risen by half but distribution is so dysfunctional that actual supply has remained flat.”).

¹¹⁶ *Id.*

¹¹⁷ KARL MAIER, *THIS HOUSE HAS FALLEN: NIGERIA IN CRISIS* 70 (2000) (“Nigerian and international observers judged the June 12, 1993, vote to be one of the freest and fairest ever in Nigeria. Abiola won nineteen states to Tofa’s eleven, but before the final vote count could be announced, Babangida annulled the elections.”).

¹¹⁸ World Bank, *Can Africa Reclaim the 21st Century?* 4 (2000).

¹¹⁹ *See* World Bank, 2010 World Development Indicators 53-54 (2010) [hereinafter WDI 2010], available at data.worldbank.org/sites/default/files/wdi-final.pdf. *Cf.* U.N. Econ. Commission for Africa, *Economic Report on Africa 2009: Developing African Agriculture Through Regional Value Chains* 8 (2009) [hereinafter *Economic Report on Africa 2009*] (reporting: “Child mortality has not declined in 27 African countries due mainly to preventable diseases and malnutrition.”).

half of them in Sub-Saharan Africa,”¹²⁰ and those African children that remain in school attend schools that “lack the most basic infrastructure elements that are taken for granted in developed countries.”¹²¹ Many children of school age still humiliatingly hawk wares in Africa’s major cities. The likely reason for the increasing illiteracy rate in Africa is that visionless politicians seem to like the status quo ante. A Governor in one of Nigeria’s northern states reportedly said that he is not worried by criticisms of his policies in the media, because less than five percent of the State’s population can read newspapers.¹²² Obviously, an informed and vocal citizenry will confront politicians with issues of good governance.

Life expectancy in other climes, including many developing countries, is on the rise—84 years in some advanced countries—but life remains nasty, brutish, and short in most of Africa most of the time. Half of the continent’s population is without access to improved water sources and about seventy percent without access to improved sanitation facilities.¹²³ Even in the 21st century, cholera is annually killing hundreds of Nigerians and, perhaps, several hundreds of other Africans.¹²⁴ The cholera outbreaks in Haiti and Pakistan resulted from a devastating earthquake and flood, respectively, but the chronic cholera deaths in Nigeria are the consequence of the nation’s retreat from humanism.

4. Impoverishment is a Threat to Peace and Democracy

Impoverishment is the greatest threat to peace, sustainable development, and democracy. Some countries are learning this lesson the hard way. In Nigeria, the government and its multinational collaborators almost accomplished ecocide and genocide in the Niger Delta through quiet, miserable death driven by resource exploitation.¹²⁵ Instead, militant youths rose up to

¹²⁰ WDI 2010, *supra* note 119 at 54.

¹²¹ *Id.* at 56.

¹²² See THIS DAY (Nigeria), Dec. 14, 2006, at 97 (back page) (*quoting* Alhaji Ali Modu Sherrif, then Governor of Borno State of Nigeria, as saying: “A lot of falsehood has been published over the years in newspapers about my government and I never lose sleep over them because less than five *per cent* of Borno people can read and understand what is written in newspapers.”).

¹²³ See WDI 2010, *supra* note 119 at 149.

¹²⁴ See Agence France Presse English Wire, *Nigeria’s Cholera Epidemic Kills More than 1,500: UNICEF*. AFP ONLINE, (Oct. 23, 2010) (“Nigeria is reporting its highest caseloads of cholera in recent years, 38,173 cases, including 1,555 deaths as of October 20.”).

¹²⁵ See, e.g., HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES,

announce their anger. At the risk of glorifying criminality, it appears that militancy,¹²⁶ kidnapping, and other forms of anti-social behavior that now define the Niger Delta have forced a hitherto deaf government to listen to its voice of conscience, even if halfheartedly. The establishment of the Niger Delta Development Commission (“NDDC”) and a special ministry for the Niger Delta, as well as the granting of amnesty to former militants, are some of the State’s feeble responses to the deepening crisis.¹²⁷

Freedom, justice, and peace in Africa must begin with freedom, justice and peace in the lives of individuals. The ballot box is meaningful only to the extent that it puts food on the table of those who hunger and provides shelter to those who are exposed to the elements. People who are hungry and out of a job are the stuff of which—terrorists and militants, but also—dictatorships are made. The type of unrest in Nigeria, Somalia, Egypt, Tunisia, Libya, Algeria, Zimbabwe, and beyond, to borrow Jeffrey Sachs’ words, has “its roots not in ideology per se, but in hunger, illiteracy, lack of employment, desperation and despair. All of the armies and drone missiles in the world will never build the wells, clinics, schools and productive farms that alone can bring true peace to today’s conflict-ridden countries.”¹²⁸

130 (1999) (exploring human rights violations in oil extraction activities in the Niger Delta and the role played by major oil companies); *see also* U.N. DEV. REPORT, NIGER DELTA HUMAN DEVELOPMENT REPORT (2006) [hereinafter UNDP, NIGER DELTA REPORT].

¹²⁶ In the past, politicians armed many of these militants and used them to perpetuate electoral frauds. *See, e.g.*, Uwhejevwe-Togbolo Samuel, “Problems of Election in Nigeria”, available at <http://www.gamji.com/article6000/NEWS7205.htm> (last visited Feb. 17 2012) (“Tuggery is rampant in the aspect of our youths, today most politicians have tugs whom they use to disrupt election and steal ballot boxes from pulling stations, this are jobless youths who are trying to earn a living from dubious antecedents, these are the same youths who they use in carrying out their nefarious activities ranging from political rallies, political assassination etcetera”).

¹²⁷ *See* Shola J. Omotola, *From the OMPADEC to the NDDC: An Assessment of State Responses to Environmental Insecurity in the Niger Delta, Nigeria*, 54 AFRICA TODAY 73 (2007) (evaluating State responses to environmental insecurity in the Niger Delta).

¹²⁸ Jeffrey Sachs, Op-Ed., *In Search of Equilibrium*, INT’L HERALD TRIB., Dec. 2, 2010, available at www.nytimes.com/2010/12/02/opinion/global/02iht-GA04Sachs.html (calling for a rebalancing of our conception of national security).

5. Human Security is the End Goal of Development

Reducing and ultimately eradicating poverty—both income and human¹²⁹—depends on the pace and character of economic growth. Of course, many States in Africa, like other developing societies, still grapple with imperatives of economic development that could possibly satisfy socioeconomic rights. However, until the recent global economic recession, real GDP per capita¹³⁰ in Africa was on the increase due, in part, to improved economic policies and more stable political conditions in some countries.¹³¹ In fact, notwithstanding the global financial crisis—and probably due to the region’s weak integration into the global financial system¹³²—Africa remains “one of the few regions where the current account surplus increased significantly in 2008, albeit from a low level.”¹³³

Curiously, this seemingly positive economic outlook has not brought a corresponding increase in individual prosperity or even social welfare. The majority of citizens still lack elementary “capabilities to be adequately nourished, to be comfortably clothed, to avoid escapable mor-

¹²⁹ As a social phenomenon, poverty may be analyzed on two dimensions: income poverty and human poverty. The former connotes the lack of income necessary to satisfy basic needs; the latter is the lack of human capabilities, e.g., poor life expectancy, poor maternal health, illiteracy, poor nutritional levels, poor access to safe drinking water and perceptions of well-being.

¹³⁰ GDP is a measure of all goods and services produced domestically. The basic formula for its calculation is $Y = C + I + E + G$, where ‘Y’ is GDP, ‘C’ is Consumer Spending, ‘I’ is Investment made by Industry, ‘E’ is Excess of exports over imports, and ‘G’ is Government spending. See Mindtools.net, available at <http://mindtools.net/GlobCourse/formula.shtml> (last visited Feb. 18, 2012).

¹³¹ See, e.g., U.N. ECON. COMM’N FOR AFRICA (ECA), ECONOMIC REPORT ON AFRICA 2005: MEETING THE CHALLENGES OF UNEMPLOYMENT AND POVERTY IN AFRICA at 34 (2005) [hereinafter ECONOMIC REPORT ON AFRICA 2005].

¹³² The absence of trade diversification lies at the heart of Africa’s low integration into global trade. Africa has not been able to take advantage of some trade preferences due to built-in constraints, including complex rules of origin that limit export diversification. See Paul Brenton, *Integrating the Least Developed Economies into the World Trading System: The Impact of Current European Union Preferences Under Everything but Arms*, 37 J. WORLD TRADE 623 (2003) (arguing, *inter alia*, that rules of origin particularly restrict simple manufactured products where export diversification may be feasible for LDCs, products such as clothing and processed foods).

¹³³ ECONOMIC REPORT ON AFRICA 2009, *supra* note 119 at 2.

bidity and preventable mortality.”¹³⁴ The reason for this disconnect between economic growth and social welfare is not far-fetched: it is the absence of political will that accounts for States’ reluctance or failure to implement at least those basic rights that promote an adequate standard of living.

I argue, then, that development is not merely the growth of GDP; rather, it “consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency.”¹³⁵ People are the real wealth of nations, the central subject of development.¹³⁶ “National destinies,” columnist David Brooks writes, “are not shaped by what percentage of G.D.P. federal spending consumes. They are shaped by the character and behavior of citizens. The crucial question is: How does government influence how people live?”¹³⁷ A clue to the puzzle is to first dismantle the supposed dichotomy in human rights, since “people who cannot buy bread cannot follow the suggestion that they eat cake; [and] people bowed under the weight of poverty are unlikely to stand up for their constitutional rights.”¹³⁸

B. *Hindrances to Effective Access*

As part II of this article describes, there has been much movement on socio-economic rights guarantees, though there appears to be no corresponding movement in their implementation.¹³⁹ It seems the more we know about

¹³⁴ Jean Dreze & Amartya Sen, *Public Action for Social Security: Foundations and Strategy*, in SOCIAL SECURITY IN DEVELOPING COUNTRIES 8 (Ehtisham Ahmad et al. eds., 1991).

¹³⁵ AMARTYA SEN, DEVELOPMENT AS FREEDOM xii (1999) (arguing that the expansion of freedom is the primary end and principal means of development). Cf. UNDP, *Human Development Report 2004*, 127 (2004) [hereinafter *UNDP Report 2004*] (“Indeed, the basic purpose of development is to enlarge human freedoms. The process of development can expand human capabilities by expanding the choices that people have to live full and creative lives.”).

¹³⁶ See Declaration on the Right to Development, GA Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, UN Doc. A/41/128, 186 (Dec. 4, 1986), art. 2(1) (“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”). Cf. *UNDP Report 2004*, supra note 135 at 127 (“And people are both the beneficiaries of such development and the agents of the progress and change that bring it about. This process must benefit all individuals equitably and build on the participation of each of them.”).

¹³⁷ David Brooks, *The Achievement Test*, N.Y. TIMES, Jan. 4, 2011, at A21.

¹³⁸ LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 778 (2d ed., 1988).

¹³⁹ Cf. Wojciech Sadurski, *Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe*

human rights, the less we practice them; and the excessive levels of non-compliance with socioeconomic rights obligations show how far human rights law and practice have yet to travel down the elusive road of indivisibility.¹⁴⁰ This is particularly true in Africa, where economic security is beyond the reach of many citizens. Many States have failed, or are failing, to take deliberate, concrete, targeted, and progressive steps towards securing citizens the minimum livelihood necessary for a life of dignity and integration into the society. For many States, “progressive realization”—subject to availability of resources—has meant indefinite postponement, notwithstanding available resources. In some cases, as will be explored later in this article, Africa’s managing elite deliberately work to impoverish their peoples.

1. Indifference and Greed of the Political Class

The African Union (“AU”) eulogizes the virtues of democracy, rule of law, free and fair elections, good governance, and the independence of the judiciary.¹⁴¹ One of the AU’s objectives is to “promote democratic principles . . . popular participation and good governance.”¹⁴² Its Constitutive Act condemns and rejects unconstitutional changes of government¹⁴³ and provides that “governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”¹⁴⁴

Part I: Social and Economic Rights 17 (EUI Working Paper No. 2002/14, 2002) (asserting that, in general, there appears to be “no meaningful correlation between the generosity of socioeconomic rights in a constitution, and the objective circumstances of that country.”).

¹⁴⁰ See Leckie, *supra* note 22 at 83 (also noting: “Ambivalence towards violations of economic, social and cultural rights—whether by those entrusted with their implementation or those mandated to monitor compliance with them—remains commonplace.”).

¹⁴¹ See African Charter on Democracy, *supra* note 78 art. 2.

¹⁴² See Constitutive Act of the African Union, art. 3(g), July 11, 2000, 12 AFR. J. INT’L & COMP. L. 629 (2000) [hereinafter AU Act] (having, as one of its principles, “[r]espect for democratic principles, human rights, the rule of law and good governance”). *Id.*

¹⁴³ See *id.* at art. 4(p). *Cf.* African Charter on Democracy, *supra* note 78. at art. 2(4) (stating that among the Charter’s objectives is to “[p]rohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development”).

¹⁴⁴ AU Act, *supra* note 142, art. 30.

The Act even permits military intervention in member States in the event of a serious threat to legitimate order.¹⁴⁵

What underpins the above normative framework is a belief that democracy—that is, majority rule—probably offers the best hope for Africa’s future stability, so long as it is realized that democracy does not end with the casting of a ballot. Africa’s post-independent history is that of authoritarianism, whether of military or one-party dictatorship. Authoritarianism has set Africa’s clock of development several decades back—because such systems do not tolerate the kind of free speech and opposition that are instrumental to development. The bad news is that even Africa’s current brand of democracy is nothing more than what Fela Anikulapo Kuti—the late AfroBeat musician—calls “democracy” or “demonstration of craze.”¹⁴⁶ With limited exceptions, it is rigging, thuggery, and looting that answer to the name “democracy.” Africa’s democracy has become a government of the greedy by the greedy and for the greedy. Indeed, the political class is driving the continent toward an economic precipice due to its inability to manage its greed.

In Nigeria’s lawmaking industry, the emoluments of mostly idle federal legislators are far in excess of those of their active counterparts in advanced countries. In 2009, for example, “a Nigerian Senator earned N240m [about \$1.7m] in salaries and allowances, while his House of Representatives Counterpart earned N203.76m [about \$1.45m]. . . . By contrast, a U.S. Senator earns about [\$]174,000,” while a United Kingdom (U.K.) parliamentarian earns about £64,000 [about \$100,000], annually.¹⁴⁷ Nigeria’s Central Bank Governor, Lamido Sanusi, recently stated that twenty-five percent of the nation’s operating budget goes to the National Assembly as salaries and allowances: “Total Federal Government Overhead is over N500 billion and the Overhead of the National Assembly is N136.2 billion.

¹⁴⁵ See *id.* art. 4(h).

¹⁴⁶ Fela Anikulapo Kuti, *Teacher Don’t Teach Me Nonsense* (Mercury, 1986) (“[T]his e no be democracy. Democracy, Crazy Demo, demonstration of craze, crazy demonstration . . . if e no be craze why for Africa? As time dey go, things just dey bad, e bad more and more, poor man dey cry . . . rich man dey mess. Crazy demonstration.”[sic]).

¹⁴⁷ Mudiaga Affe, *Legislators: Between Jumbo Pay and the Impoverished Populace*, PUNCH (Nigeria), Aug. 10, 2010, www.punchng.com/Articl.aspx?theartic=art20100810226048.

This is exactly 25.1 per cent of total government overhead. I am quoting from the figure I got from the Budget Office.”¹⁴⁸

This feeding frenzy, or more appropriately, looting is occurring in a country where nothing works. Hospitals are still mere consulting clinics in Nigeria; and workers go on strike to press for a monthly minimum (not living) wage of just N18,000 (about \$120).¹⁴⁹ A government violates socio-economic rights if it maintains an economic condition in which a trivial proportion of its population gains most of the nation’s wealth while a large majority subsists at, or below, the poverty line.¹⁵⁰ Confucius preaches that “where there is even distribution there is no such thing as poverty,”¹⁵¹ but Africa’s predatory States and elites have not allowed such an egalitarian philosophy to flourish.

2. Corruption and Patronage

Africa is probably the most aid-dependent continent in the world; and this dependency creates the impression that Africa is too poor to meet the basic needs of its population. Those who have had the unearned privilege to rule Africa hide under this lie to misappropriate States resources—including external resource transfers—to serve their own self-interest. Corruption is a key source of Africa’s economic ills, souring every aspect of life and making many states fall short of their commitments to the basic needs of their citizens. The Monster of corruption now metastasizes all sectors of African States such that the AU Assembly recently set up an Advisory Board on Corruption.¹⁵²

Some politicians, like Nigeria’s James Ibori (who recently pleaded guilty to charges of fraud and money laundering in a British court),¹⁵³ own

¹⁴⁸ Emmanuel Ogala, *Sanusi Stands by Comments on National Assembly Spending*, NEXT (Nigeria), Dec. 2, 2010, http://234next.com/csp/cms/sites/NexU/News/5649072-146/sanusi_stands_by_comments_on_national.csp.

¹⁴⁹ See *Nigerian Unions Call Strike over Minimum Wage*, NIGERIA INDEP., Nov. 8, 2010, <http://af.reuters.com/article/investingnews/idAFJ0E6A709B2010=08> (“Nigeria’s two main labour unions called a three-day nationwide strike from Wednesday and threatened an indefinite stoppage over what they say is the government’s failure to adopt a \$120 monthly minimum wage.”).

¹⁵⁰ Cf. RICHARD FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 165 (1981).

¹⁵¹ CONFUCIUS, *THE ANALECTS* 138 (Arthur Waley trans., 1956).

¹⁵² See Decision on the Appointment of Members of the Advisory Board on Corruption Doc. EX.CL/652(XVIII), AU Doc. Assembly/AU/ Dec.359(XVI) (Jan. 2011).

¹⁵³ Mark Tran, *James Ibori Pleads Guilty to Fraud and Money-laundering Charges*, GUARDIAN [UK], Feb. 27, 2012, available at <http://www.guardian.co.uk/>

private jets,¹⁵⁴ among other accoutrements of splendor. In Kenya, the other “homeland of the bribe,”¹⁵⁵ corruption accounts for about eight percent of the country’s GDP; indeed, the names of honest ministers and senior government officials in Mwai Kibaki’s Government “would fit on the back of a postage stamp.”¹⁵⁶ Some fear that corruption could push Kenya into violence worse than its post-2007 election crisis.¹⁵⁷

African politics breed personality cults, which are aided by a vast patronage network, especially in rent-seeking States that are already suffering from the resource curse. As Claude Ake describes the Nigerian context:

Our predatory disposition constitutes the Nigerian state as a negative unity of takers in which collective enterprise is all but impossible. . . . Where does the wealth which we are forever scheming to appropriate come from? We do not want to know. All we want to know is whether we can muster the power to appropriate it.¹⁵⁸

Government by patronage undermines accountability and transparency in the management of public affairs. In contrast, socioeconomic rights claims pressure governments to prioritize basic needs.

global-development/2012/feb/27/james-ibori-pleads-guilty-fraud?newsfeed=true (last visited Feb. 29, 2012) (reporting: “James Ibori, formerly one of Nigeria’s wealthiest and most influential politicians, has pleaded guilty to conspiracy to defraud, paving the way for British police to confiscate assets he stole and return them to Nigeria — Ibori admitted to fraud totaling more than \$79m (£50m), said to be part of total embezzlement that could exceed \$250m (£157m)”).

¹⁵⁴ See, e.g., *British MP Accused of Lobbying for Ibori*, NIGERIAN TRIBUNE, Feb. 15, 2010, <http://www.tribune.com.ng/index.php/component/content/article/1340-british-mp-accused-of-lobbying-for-ibori> (reporting on the plundering of millions of British pounds of state funds by Mr. James Ibori — former state governor in Nigeria — “which he used to buy a private jet” and choice houses in London, among others).

¹⁵⁵ MICHELA WRONG, *IT’S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLEBLOWER 2* (2009).

¹⁵⁶ MARTIN MEREDITH, *THE STATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 688 (Penguin Books 2006) (2005).

¹⁵⁷ See George Hepple & David Smith, *Rampant Corruption ‘Could Push Kenya Back into Violence,’* Guardian [UK], Dec. 8, 2010, available at <http://www.guardian.co.uk/world/2010/dec/08/wikileaks-cables-kenya-violence-china>.

¹⁵⁸ Claude Ake, *Points of Departure*, NIGERIAN TRIBUNE, Dec. 17, 1992, quoted in ROTIMI SUBERU, *FEDERALISM AND ETHNIC CONFLICT IN NIGERIA* 10 (2001).

3. The Cold Winds of Globalization

Another reason for putting socioeconomic rights on the front burner of politics, law, and policy is the increasing threat to these rights from an era of corporate-led globalization. Contemporary globalization represents an unmet opportunity for a critical mass of humanity.¹⁵⁹ Except for China, which is globalization's "poster child," the number of people living on less than \$2 a day globally has increased markedly in recent years.¹⁶⁰ This impoverishment results, in part, from the "ways that economic interactions are structured: by interlocking national and international institutional arrangements."¹⁶¹ Africa has always been acted upon, rather than stepping up as an actor in the global political and economic theatre. The continent was the battlefield on which Cold War belligerents fought; it is currently a casino for global and corporate powers. While the Iron Curtain of poverty and inequality continue to exclude Africa from the so-called opportunities of globalization and free trade,¹⁶² Western multinationals operating in Africa are neck-deep in what Adam Smith calls the "vile maxim of the masses of mankind: . . . All for ourselves, and nothing for other people."¹⁶³

Africa is one of the regions most affected by the increasing global food crisis,¹⁶⁴ and the countries most affected are those where some thirty percent of the population is already undernourished.¹⁶⁵ Famine is once more ravaging Somalia and neighboring countries in the Horn of Africa. As Greg Barrow writes, "Ever since the devastating 1984-85 famine in Ethiopia, the media has turned its attention with unerring regularity back to stories about

¹⁵⁹ Cf. Juridical Condition, Legal Status and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R., OC-18/03 ¶ 115 (Sept. 17, 2003) (Advisory Opinion).

¹⁶⁰ See RAPHAEL KAPLINSKY, GLOBALIZATION, POVERTY AND INEQUALITY 31-32 (2005).

¹⁶¹ Thomas Pogge, *Introduction*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT 3 (Thomas Pogge ed., 2007).

¹⁶² See Nsongurua Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations*, 38 J. MARSHALL L. REV. 1153 (2005) (Discussing Africa's position in world trade).

¹⁶³ ADAM SMITH, THE WEALTH OF NATIONS 334 (Modern Library, 1994) available at <http://i-ahrens.de/schule/bvw/Wealth-Nations.pdf>.

¹⁶⁴ See ECONOMIC REPORT ON AFRICA 2009, *supra* note 119 at 110 ("On average, food price inflation has been very high in African countries and well above the average of other developing countries.").

¹⁶⁵ See *id.* at 111 ("Children and women are particularly affected. Women, who need to eat more nutritious food during pregnancy and childbirth, are sacrificing their food intake to cater for their families with consequences for their health and that of their children.").

death and misery in Africa, illustrated by heart-wrenching pictures of severely malnourished children.”¹⁶⁶ The current food crisis, which affects all food commodities, is partly due to drought, global recession, higher fuel and fertilizer prices (which increases the cost of production and marketing), and climate change.¹⁶⁷ “In many countries,” as the Economic Commission for Africa (“ECA”) bemoans, “urban populations are finding that there is food on the shelves but they cannot afford to buy it.”¹⁶⁸ In many developed societies, cats and dogs are rich enough to eat fillet of beef, whereas many children in Africa go to bed hungry most of the time. These capability deprivations, coupled with other pathologies like rising unemployment, crime, and homelessness, limit the means—and hence the *freedom*—to achieve one’s ends.¹⁶⁹

The evident visibility of the U.N. World Food Programme (“WFP”) in Africa is indicative of States’ inability to establish and fund regular social safety nets. I maintain that “[a] country that cannot feed its population should have no claim to any kind of sovereignty.”¹⁷⁰

III. KEEPING THE PROMISE

Any discussion on improving access to socioeconomic rights in Africa inexorably leads to speculations on the vertical, diagonal, and horizontal obli-

¹⁶⁶ Greg Barrow, *As Famine Hits, East Africa Needs You*, CNN ONLINE, July 22, 2011, <http://edition.cnn.com/2011/OPINION/07/22/barrow.somalia.famine/index.html> (calling for humanitarian response in the Horn of Africa in the wake of the current famine).

¹⁶⁷ See ECONOMIC REPORT ON AFRICA 2009, *supra* note 119 at 108 (adding that “the effects of climate change on agricultural production and the demand for bio-fuels create considerable uncertainty and render market reaction highly unpredictable.”); see also Rene Verduijn, *The Food and Agricultural Organisation and the World Food Programme*, in FROM GLOBAL APARTHEID TO GLOBAL VILLAGE: AFRICA AND THE UNITED NATIONS 437, 438 (Adekeye Adebayo ed., 2009) (attributing Africa’s food insecurity to such factors as “climate, geography and poor resource endowment, including low water availability in large areas; historical/political factors, such as lack of infrastructure; skewed national borders; a lack of sound governance; socioeconomic factors, such as a high susceptibility to diseases such as malaria, tuberculosis and HIV/AIDS; poverty; and gender inequality.”).

¹⁶⁸ See ECONOMIC REPORT ON AFRICA 2009, *supra* note 119 at 111.

¹⁶⁹ See generally SEN, DEVELOPMENT AS FREEDOM, *supra* note 135 (explaining how, in a world of unprecedented increase in overall opulence, millions of people in developing countries still live in destitution and deprivation).

¹⁷⁰ Nsongurua Udombana, *The Summer Has Ended and We Are Not Saved! Towards a Transformative Agenda for Africa’s Development*, 7 SAN DIEGO INT’L L.J. 5, 59 (2005).

gations of duty-bearers. This final part explores the role that governments, courts, and civil society organizations could, and should, play in this quest.

A. *The Role of Governments*

Real human rights, especially real socioeconomic rights, require responsible governments that are aware of their obligations, and that are able and willing to act accordingly.¹⁷¹ In interpreting States' obligations under Article 2(1) of the ICESCR, the ESC Committee states that, though a State need not achieve the full realization of socioeconomic rights immediately, it has an immediate duty to construct a program or action plan towards their realization.¹⁷² Do African States have such action plans for realizing socioeconomic rights? In answering this question, it is nearly impossible to interrogate all African States individually. Instead, I shall attempt a brief examination of the various proposals by the AU for sustainable economic development and promotion of human wellbeing in Africa in Africa.

As the umbrella organization of African States, the AU in the last decade has unveiled more than a dozen policy-related frameworks for sustainable economic development and achievement of the Millennium Development Goals ("MDGs"). Notable among the economic numerous agenda is the New Partnership for Africa's Development ("NEPAD"),¹⁷³ a pledge by African governments "to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate activity in the world economy and body politic."¹⁷⁴ Through NEPAD,

African leaders are making a commitment to the African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people-oriented development, and to hold each other accountable in terms of the agreements outlined in the Programme.¹⁷⁵

¹⁷¹ See SPAGNOLI, *supra* note 7, at 54.

¹⁷² See U.N. Comm. on Econ. Soc., and Cultural Rights, Rep. on its 3d Sess., Feb. 16-24, 1989, General Comment No. 1, *Reporting by State Parties*, 1 4, U.N. Doc. E/1989/22, E/C.12/1989/5 (Feb. 24, 1989) [hereinafter *General Comment 1*].

¹⁷³ New Partnership for Africa's Development, OAU AHGOR, 37th Summit, OAU Doc. AHG/NEPAD (XXXVII) (2001) [hereinafter *NEPAD*].

¹⁷⁴ *Id.* ¶ 1.

¹⁷⁵ *Id.* ¶ 202.

The African Peer Review Mechanism (“APRM”) is NEPAD’s accountability mechanism.¹⁷⁶ It is a self-monitoring mechanism which aims “to prompt states to draft a national program of action to remedy identified governance deficiencies.”¹⁷⁷ The APRM deals with four governance areas: democracy and political governance; economic governance and management; corporate governance; and socioeconomic development. Many African States have voluntarily signed into the APRM mechanism.

More recently, the AU Assembly adopted the Declaration on Creating Employment for Accelerating Youth Development and Empowerment.¹⁷⁸ The Declaration recalled other related policy documents adopted in Africa to improve the well-being of African people, including “the Ouagadougou Declaration and Plan of Action on Employment Promotion and Poverty Alleviation; the AU Social Policy Framework; the AU Migration Policy Framework; the African Women Decade 2010-2020; [and] the African Youth Decade Plan of Action, 2009-2018.”¹⁷⁹ The Assembly Members then reaffirmed their “previous commitments,” individually and collectively, “at accelerating job creation, reduction of poverty, social protection for our people and the social development of Africa.”¹⁸⁰

In order to attain the MDGs by 2015, African leaders commit their countries “to accelerate efforts to reduce unemployment and under-employment of Africa’s Youth and Women.”¹⁸¹ They promise to maintain, extend and harmonize Labour Market Information Systems in support of employment policy formulation, implementation and evaluation;¹⁸² improve and increase responsiveness of the education and training systems to current and

¹⁷⁶ African Peer Review Mechanism (APRM): Base Document, adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee, Mar. 9, 2003, Abuja, Nigeria, NEPAD/HSGIC/03-2003/APRMIMOU/Annex II (Mar. 9, 2003).

¹⁷⁷ Magnus Killander, *The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward*, 30 HUM. RTS. Q. 41, 41 (2008) (analyzing the APRM structure and process with a focus on how “the APRM could complement other efforts to realize the African Union objective of promotion and protection of human rights”).

¹⁷⁸ Declaration on Creating Employment for Accelerating Youth Development and Empowerment, Assembly/AU/Decl. (XVII) (July 1, 2011) [hereinafter *Declaration on Youth Empowerment*] (calling on “Member States which have not yet done so to sign, and ratify the African youth Charter”).

¹⁷⁹ *Id.* p.mbl.

¹⁸⁰ *Id.* at ¶ 1.

¹⁸¹ *Id.*

¹⁸² *Id.* at ¶ 3.

future labour market needs in order to address the pervasive and structural skills mismatch;¹⁸³ and accelerate] appropriate social protection coverage expansion for the youth, women, informal economy and rural workers and members of their families, in order to reduce poverty and vulnerability.¹⁸⁴ In a related document,¹⁸⁵ the AU has called on its member States to adopt policies and mechanism that will create safe, decent and competitive employment opportunities in their countries.¹⁸⁶

Action plans are good, but the above blueprints require concrete measures for their realizations. This segment examines some other legal and policy options open to AU member States in order to improve citizens' access to socioeconomic rights.

1. Meeting Minimum Obligations through Good Governance

Socioeconomic rights entail certain minimum obligations of conduct and result. The minimum essentials include nutritious food, adequate and affordable housing, functional educational systems, clean drinking water, effective and affordable drugs, reliable electricity and telecommunications, efficient transportation networks, jobs for those who can work, and security for those who need it. The demands of public finance ought not to excuse States from fulfilling these obligations; indeed, Adam Smith—the first guru of free-market economics—wrote that there are two objects of an economy: “first, to provide a plentiful revenue or subsistence for the people, or, more properly, to enable them to provide such a revenue or subsistence for themselves; and secondly, to supply the state or commonwealth with a revenue sufficient for the public services.”¹⁸⁷

Africa needs good and accountable governance in order to mobilize its resources and provide citizens access to socioeconomic rights. The sacrifice is not as great as it seems. It is possible, for example, for every African

¹⁸³ *Id.* at ¶ 4.

¹⁸⁴ *Id.* at ¶ 6. The AU Assembly also asked the AU Commission to work with the African Development Bank (“AfDB”), the regional economic communities (“RECs”) and international partners, “on a comprehensive youth employment pact, with mechanisms that will ensure its implementability at national level through strong ownership by the key Line Ministries, Employers and Trade union organisations, women and youth organisations and the Private Sector, with clear Monitoring and Evaluation system”). *Id.* ¶ 8.

¹⁸⁵ See Decision on the Theme: Accelerating Youth Empowerment for Sustainable Development Doc. Assembly/AU/2(XVII), AU Doc. Assembly/AU/Dec.363 (XVII) (July 2011).

¹⁸⁶ See *id.* ¶ 5(i).

¹⁸⁷ SMITH, *supra* note 163, at 341.

child to have a path to quality education. What Africa needs in order to mobilize its resources and provide citizens access to socioeconomic rights is good and accountable governance, defined as “the responsible use of political authority to manage a nation’s affairs.”¹⁸⁸ As a policy framework, good governance contemplates an effective state in an enabling political and legal environment. That environment should promote economic growth and equitable distribution of social goods, representation of civil societies and communities in policy-making processes, and a meaningful role for the private sector in the economy. Adherence to good governance principles is essential for sustained development and African States’ capacity to effectively complement the market through policy reforms.

The collapse of Zimbabwe’s economy under Robert Mugabe, one of Africa’s remaining dinosaur leaders, shows that terrible governance and policies can rapidly destroy a hitherto solid economy. Zimbabwe was once the second most industrialized country in Africa, after South Africa,¹⁸⁹ but Mugabe’s atrocious rule has brought the once boisterous country to its knees. Conversely, Botswana’s economic success, though now threatened by the HIV/AIDS pandemic,¹⁹⁰ shows that prudent economic management and political stability are critical to a country’s development. Botswana’s elections have been relatively honest; the government has largely kept its promises, so that the opposition acts as “a loyal opposition, believing sincerely in the possibility of alternation.”¹⁹¹ These elements are presently lacking in most other African countries, except perhaps South Africa and Ghana.

¹⁸⁸ CLARENCE J. DIAS & DAVID GILLIES, HUMAN RIGHTS, DEMOCRACY, & DEVELOPMENT 10 (1993). Its yardsticks include effective leadership, technical policy competence, and administrative efficiency. *See id.*

¹⁸⁹ *See* Percy S. Mistry, *Africa’s Record of Regional Cooperation and Integration*, 99 AFR. AFF. 553, 554 (2000) (“[T]he two sub-Saharan economies—South Africa and Zimbabwe—that are more industrialized than any other African country already had an incipient industrial base prior to independence or liberation. Their industrial capacity emerged between the First and Second World Wars as a result of deliberate as well as inadvertent protection[.]” though “their recent industrialization has been neither efficient nor competitive.”).

¹⁹⁰ HIV/AIDS has had a devastating impact on Botswana. *See HIV & AIDS in Botswana*, AVERT, www.avert.org/aids-botswana.htm (last visited July 7, 2011). Almost one in four adults is infected with HIV. *Id.* “Life expectancy at birth fell from 65 years in 1990-1995 to less than 40 years in 2000-2005, a figure about 28 years lower than it would have been without AIDS.” *Id.*

¹⁹¹ *Panel on Issues in Democratization*, in NATIONAL RESEARCH COUNCIL DEMOCRATIZATION IN AFRICA: AFRICAN VIEWS, AFRICAN VOICES 47 (Sahr Kpundeh ed., 1992).

2. Fighting Corruption

Socioeconomic rights will remain more of an aspiration than an actuality until public officials see public office not as a means to raw power and wealth but rather as a responsibility to deploy public resources for the common good. Sadly, most governments pay lip service to the war on corruption. Their anti-corruption commissions are dead horses; at best, they apprehend and arraign some corrupt officials, all on a discriminatory basis. Former Nigerian President Obasanjo used the Economic and Financial Crimes Commission (“EFCC”) to persecute political opponents to the extent of almost damaging the reputation of the Commission’s hugely popular then-chairman, Mallam Nuhu Ribadu.¹⁹² Governments should instead strengthen these institutions and guarantee their independence. Efforts at combating corruption should also be distributed equally among preventive, enforcement, and prosecutorial measures.¹⁹³

African States should prioritize the involvement of women in development and in the fight against corruption. They should promote “their participation at all levels in the conceptualisation, decisionmaking, implementation and evaluation of development policies and programmes.”¹⁹⁴ Women play crucial roles in preserving African values; they should be part of efforts to tackle the vices that plague Africa and hinder sustainable development.

3. Creating a Framework Conducive to Investment

Improving access to socioeconomic rights requires governments to adopt measures informed by local realities. Governments must create and maintain a framework conducive to the effective interplay of national laws and local regulations, so that individuals can freely realize their rights and freedoms. This requires, for example, the reform of municipal legal systems, “so that rights to social security can be made to stand as guarantees of

¹⁹² See Idumange John, *Rethinking Ribadu’s Beatification*, VANGUARD ONLINE CMTY. (June 10, 2010, 2:03 PM), <http://community.vanguardngr.com/profiles/blogs/rethinking-ribadus> (arguing that, though Ribadu did fairly well as EFCC Boss, “he perverted justice by the administration of selective treatment and turned the Commission into Obasanjo’s attack dog.”).

¹⁹³ See generally Nsongurua Udombana, *Fighting Corruption Seriously? Africa’s Anti-corruption Convention*, 7 SINGAPORE J. INT’L & COMP. L. 447 (2003) (analyzing the regional treaty for combating corruption in Africa from a socio-legal perspective).

¹⁹⁴ See Decision on the Recognition of Women as Resource for Sustainable Development and Economic Growth in Africa, Assembly/AU/15(XVI) Add.6, AU Doc. Assembly/AU/ Dec.355 (XVI), ¶ 9 (Jan. 2011).

minimal protection and survival.”¹⁹⁵ The State must also adopt regulations that enable access to rights-enhancing services, such as functional national health insurance schemes.

Infrastructure also helps economic activity and entrepreneurship to flourish, both in urban and rural communities. With limited exceptions, African countries have yet to prioritize infrastructural development—including energy access, not to mention renewable energy—that could stimulate economic activities and generate employment. The kind of power shortages that Nigeria and few other African countries experience is a major brake on growth, as it pushes the cost of business and makes local industries uncompetitive against their foreign counterparts. A society does not have to be extra rich to possess a functional system.

4. Enhancing Agricultural Productivity

Africa’s continuous dependence on food aid creates the impression that the continent cannot feed itself. Indeed, given the abundant natural and human resources in Africa, it is shameful that its governments still import food and are somewhat dependent on food aid. Hunger exists in Africa due to a number of human factors. First, there is not enough investment in the rural sector to support agricultural development. Second, many people do not have adequate control over local resources or decent opportunities to engage in meaningful, productive work. Third, many States still retain archaic land tenure systems that impede effective agricultural and housing development. It is tremendously wearisome to acquire land in many countries, even for agricultural purposes; and it takes multiple procedures to record or register real property after acquisition. These regulations significantly inhibit economic growth.¹⁹⁶

Hunger will never be solved by charity, but by aggressive agrarian, tax, credit, and investment policy reforms. It will be solved by reforming the conditions of land ownership and encouraging producer and consumer cooperatives. Furthermore, the hunger problem will be solved by governments mobilizing the full human potential of their peoples for an integrated rural development and involving small farmers, fishermen, and landless workers in achieving the required food production and employment.¹⁹⁷ Other policy options for increased agricultural productivity include the use

¹⁹⁵ See JEAN DRÉZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 20 (1989).

¹⁹⁶ Cf. *Measure First, Then Cut*, ECONOMIST, Sept. 11, 2004, at 77 (reviewing a World Bank study).

¹⁹⁷ Cf. Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 4, G.A. Res. 29/3180, U.N. Doc. A/RES/29/3180 (Nov. 16, 1974).

of better seeds, more fertilizer, and better methods of cultivation and irrigation. Africa should also develop “regional value chains for agricultural commodities in order to enhance . . . global competitiveness.”¹⁹⁸ As Abdoulie Janneh and Jean Ping observed, “[t]he transformation of African agriculture does not only provide the best opportunities for economic diversification, it also enhances rapid and sustained growth for poverty reduction.”¹⁹⁹

5. Access to Information

Many socioeconomic rights depend for their effectiveness on access to information. For example, in *Minister of Health v. Treatment Action Campaign (TAC Case)*,²⁰⁰ the South African Constitutional Court noted:

The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.²⁰¹

Lamentably, only a handful of African countries have constitutional guarantees of the right of access to information, among them Botswana,²⁰² Congo,²⁰³ Malawi,²⁰⁴ and South Africa.²⁰⁵ Furthermore, only a handful of States have passed freedom of information laws to provide institutional

¹⁹⁸ See Abdoulie Janneh & Jean Ping, *foreword* to ECONOMIC REPORT ON AFRICA 2009 xiii (calling for “sustained long-term investment strategies to ensure agricultural transformation [in Africa].”).

¹⁹⁹ *Id.* at xiv.

²⁰⁰ 2002 (5) SA 721 (CC) (S. Afr.).

²⁰¹ *Id.* at 73, para. 123.

²⁰² See CONSTITUTION OF BOTSWANA (2006), § 12 (guarantee, *inter alia*, the “freedom to receive ideas and information without interference . . .”).

²⁰³ See CONSTITUTION OF THE REPUBLIC OF CONGO, Jan. 20, 2002, § 19 (“Freedom of the press and information is guaranteed. Censorship is prohibited. The access to sources of information is free. Every citizen has the right to information and to communication.”).

mechanisms for access to information, among them Angola, Liberia, Uganda, Zimbabwe,²⁰⁶ and South Africa.²⁰⁷

Some governments, even those claiming to be democratic, subject public officials to secrecy oaths, as though their positions depended on hiding information. In September 2008, the late President Yar'Adua's Administration in Nigeria, which hitherto affirmed its faith in freedom of information, forced an Abuja High Court Judge to administer an Oath of Secrecy and Declaration of Secrecy on aides to the President and Vice President. The oath of secrecy was intended to prevent possible disclosure of confidential reports to "outsiders," particularly the media and opposition.²⁰⁸

²⁰⁴ See CONSTITUTION OF MALAWI (1994), § 37 ("Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his right.").

²⁰⁵ S. AFR. CONST., 1996, § 32(1) ("Everyone has the right of access to— (a) any information held by the State; and (b) any information that is held by another person and that is required for the exercise or protection of any rights."). The Constitution directs the State to enact national legislation "to give effect to this right, [which] may provide for reasonable measures to alleviate the administrative and financial burden on the state." *Id.* § 32(2).

²⁰⁶ Zimbabwe's Access to Information and Privacy Act appears to be used more to suppress information in the name of privacy than to make information available. See Access to Information and Protection of Privacy Act (Acts 5/2002, 5/2003, 21/2004, 20/2007) (Zim.).

²⁰⁷ South Africa passed the Promotion of Access to Information Act in 2000, "to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any right." The Country's Human Rights Commission is mandated, *inter alia*, to "compile and make available a guide on how to use this Act" and to "submit reports to the National Assembly." See Promotion of Access to Information Act No. 2 of 2000 intro. note, at 2, § 83 (S. Afr.).

²⁰⁸ See Ihuoma Chiedozie, *Yar'Adua, VP's Aides Take Secrecy Oath*, NIGERIAN GUILD OF EDITORS (Sept. 24, 2008), <http://nigerianguildofeditors.com/2008/09/yar%20%80%99adua-vp%20%80%99s-aides-take-secrecy-oath/>; see also Reuben Abati, *President Yar'Adua and the Oath of Secrecy*, NIGERIAN VILLAGE SQUARE (Sept. 28, 2008), http://www.nigeriavillagesquare.com/index.php?option=com_content&view=article&Itemid=194&id=10408 ("By imposing an oath of secrecy on his staff, President Yar'Adua has taken Nigerian democracy further backwards. The oath may have been administered on the staff in the Presidential Villa, from Permanent Secretary to cook and gardener but its impact goes beyond the Villa. The Presidency has just released a big signal to the effect that public and civil servants must treat the Nigerian people as outsiders, by refusing to tell them anything that is related to government. Such a Manichean dichotomisation of government into

It was the first time in Nigeria's political history that political appointees were asked to take oaths of secrecy, in addition to the constitutional Oath of Allegiance and Oath of Office. This strange development has merely added insult to injury, as the Nigerian Official Secrets Act already made it illegal to publish official government data, including accounts spent by or accruing to the government.

Chad provides another, among many, appalling example of secrecy in governance. The Catholic Relief Services and the Bank Information Centre reports that, "[w]hile some information on Chad's oil revenues is made public, details regarding the calculation of revenues and many key agreements between the oil companies and the government remain secret."²⁰⁹ Such secrets engender massive corruption by making it difficult for citizens to verify the accuracy of revenue information disclosed, if any is disclosed at all. The undisclosed revenues are then laundered.²¹⁰

In the African Charter on Democracy, the AU aims, *inter alia*, to "[p]romote the establishment of the necessary conditions to foster citizen participation, transparency, *access to information*, freedom of the press and accountability in the management of public affairs[.]"²¹¹ If the AU is serious about its pledge, it should urge all its members to open up the public space so that citizens can access public records—including official deals with multinational companies. Access to information is a constitutive and instrumental right. Without it, effective access to socioeconomic rights will be impossible; indeed, without it, "progress towards the realization of development cannot be measured, citizens come nowhere close to being able

'them and us' is misplaced in a democratic context. It belongs to the era of colonialism, it belongs to the season of military rule.").

²⁰⁹ Ian Gary & Nikki Reisch, *Catholic Relief Services and the Bank Information Center, Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State*, Catholic Relief Service and The Bank Information Center 2 (2005), available at http://www.crs.org/publications/showpdf.cfm?pdf_id=187.

²¹⁰ Cf. Stephen Ellis, *The Roots of African Corruption*, CURRENT HIST., May 2006, at 203, 208 (stating: "Africans keep an estimated \$150 billion of capital offshore, money that could be used to develop the continent if its owners had the confidence to invest at home. Those states with something to sell – especially oil – risk becoming what have been called 'successful failed states,' places that show all the symptoms of failure but that are able to continue indefinitely to the benefit of a corrupt ruling clique and its friends overseas.").

²¹¹ African Charter on Democracy, *supra* note 78 art. 2(10) (emphasis added).

to realize their potentials, and our state becomes captive to a self-perpetuating narrow elite.”²¹²

6. Arresting Free Market Excesses

Finally, the AU and its member States must hold in check unfettered global capitalism. Governments should strengthen their oversight mechanisms for multinationals conducting operations with negative impacts on human rights in host communities, such as the operations in Nigeria’s Niger Delta. Parliaments should organize regular public hearings so that host governments and foreign investors can explain to nationals how development activities impact on their lives. Allowing the “invisible hand” of free enterprise to operate may be inevitable in an age of globalization. However, “markets, free or otherwise, are not a product of nature . . . [t]hey are legally constructed instruments, created by human beings hoping to produce a successful system of social ordering.”²¹³ Socioeconomic rights claims remain “the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world.”²¹⁴ The neglect of these rights in Africa has already marginalized the poorest, most vulnerable groups in African societies and rendered the so-called autonomy of individuals a hollow promise.

B. *The Role of Courts*

Liberal constitutions often assign special roles to courts as bastions of democracy, rule of law, and human rights, the assumption being that laws—and courts that interpret them—can be used to achieve social engineering. The central question today is not whether constitutional courts have powers, but how they should exercise them. *A fortiori*, what matters is not so much the function of the State but the judicial understanding of its proper role.²¹⁵ Whether or not a court fulfills the great expectations in the realm of human rights depend on the mindset and methodology that a judge deploys in interpreting and applying the constitution and the law. A judge with egalitarian convictions about economic justice will have little problem advancing so-

²¹² Chidi Odinkalu, *Freedom of Information in Nigeria: Perspectives, Problems and Prospects*, VANGUARD (Nigeria), Oct. 31, 2008, <http://www.accessmylibrary.com/article-1G1-188207206/freedom-information-country-perspectives.html>.

²¹³ CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 384 (1997).

²¹⁴ Rolf Künemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 332 (1995).

²¹⁵ See DORSEN ET AL., *supra* note 66, at 1219.

cioeconomic rights through adjudication. This segment interrogates these and related issues.

1. Dealing with the Demon of Justiciability

Access to courts is a human right guaranteed by international and national instruments. The UDHR provides that “[c]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him by the constitution or by law.”²¹⁶ This right inures to every citizen and any person who alleges an infringement of any of his legal rights; in other words, anyone who has *locus standi*.²¹⁷ Such a person is entitled to a remedy, defined as “the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.”²¹⁸ A remedy, thus, consists of two elements: a victim’s access to the appropriate authorities to have his claim fairly heard and decided, and the redress or relief that he or she may receive.²¹⁹

Rights are defined according to desired and expected remedial outcomes;²²⁰ yet, attempts to create remedies for human rights violations are often met with many practical and even speculative setbacks.²²¹ The dominant paradigm is that courts are not well suited to dabble into socioeconomic rights issues because such issues involve resource allocations that are better handled by the political organs: the legislature and executive. Court intervention, the argument continues, will amount to a naked usurpation of the legislative and executive functions and, hence, a breach of the separa-

²¹⁶ UDHR, *supra* note 9 art. 8. *Cf.* African Charter, *supra* note 31 arts. 7, 25 (providing for fair hearing and for the establishment of appropriate national human rights and judicial institutions to protect human rights).

²¹⁷ The South African Constitution lists the categories of persons that can approach a competent court for relief if any of the guaranteed rights is violated: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. *See S. AFR. CONST.*, 1996, § 38.

²¹⁸ BLACK’S LAW DICTIONARY 1294 (6th ed. 1990).

²¹⁹ *See Ihenacho v. Uzochukwu*, [1997] 2 N.W.L.R. (Pt. 487) 257, 268 (Nigeria); *Chief Shittu v. Solicitor General of Kwara State*, [1984] 5 N.C.L.R. 661 (Nigeria).

²²⁰ *See Margaux Hall & David Weiss, Human Rights and Remedial Equilibration: Equilibrating Socioeconomic Rights*, 36 BROOK. J. INT’L L. 453, 484 (2010-2011).

²²¹ *See generally* Sonja Starr, *Rethinking ‘Effective Remedies:’ Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008).

tion of powers doctrine.²²² This argument, which represents only a partial truth, continues to complicate intellectual and practical efforts at advancing all human rights. It also acts as a self-fulfilling prophecy by preventing the normative development of socioeconomic rights through adjudication.

Africa's courts should deal with the demon of justiciability that, for long, has obstructed efforts at a creative interpretation and application of socioeconomic rights. As An-Na'im persuasively argues,

if human rights are to be universal in a genuinely inclusive sense, they must include ESCR [economic, social, and cultural rights], and that cannot be without judicial supervision of the performance of the normal political and administrative process in this regard.²²³

2. Interpreting Rights Creatively

There is no concrete evidence that judicial forays into the fields of socioeconomic rights have led to immediate realization of these rights,²²⁴ but a sustained and creative interpretation of constitutionally guaranteed rights will have a positive impact on States' behavior over time. The Indian courts have shown that even "directive principles" can be used to interpret fundamental values and order the government to implement enforceable rights, notwithstanding the constitutional prohibition against judicial action.²²⁵ In

²²² See, e.g., Lord Lester of Herne Hill QC & Colm O'Cinneide, *The Effective Protection of Socioeconomic Rights*, in ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE: THE ROLE OF JUDGES IN IMPLEMENTING ECONOMIC, SOCIAL & CULTURAL RIGHTS 17, 20 (Yash Ghai & Jill Cottrell eds., 2004) [hereinafter ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE] ("Any judicial supervisory role in this area [of socioeconomic rights] must be restricted because of the constitutional separation of public powers and because of the limits of judicial expertise.").

²²³ Abdullahi An-Na'im, *To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights*, in ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE, *supra* note 222 at 15.

²²⁴ A few federating states in Nigeria, such as Akwa Ibom State, have introduced free and compulsory primary and secondary education to improve the literacy rate and reduce incidences of child labor. However, these impressive initiatives have not come about by judicial pressures, though courts will likely be called upon in the future to resolve legal issues arising from them. See, e.g., *Godswill Akpabio Education Projects for Akwa Ibom State*, available at http://www.godswillakpabio.com/achieve_educ.aspx (chronicling some of the education infrastructure in Akwa Ibom State of Nigeria).

²²⁵ See, e.g., *People's Union for Democratic Rights v. Union of India* (1983) 1 S.C.R. 456 (challenging private-sector employment policies in connection with the

any event, these principles can become justiciable by legislation, a view taken by the Nigerian Supreme Court in *Ondo State v. Federation*:

We do not seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand.²²⁶

Further, for any country that ratifies and transforms the African Charter into domestic law—as Nigeria did in 1983²²⁷—the Charter becomes both an international treaty and a municipal law. Supranational judicial or quasi-judicial institutions, such as the African Human Rights Court, can interpret and apply the ratified Charter as a treaty law, while domestic courts can legally and legitimately interpret and apply the transformed Charter—including its socioeconomic guarantees—as a municipal law. Thus construed, the African Charter becomes a law enacted by the municipal legislature to give expression to the Directive Principles in the Constitution. The failure by some of our courts to give full effect to the African Charter is due, arguably, to ignorance of the relationship between international and municipal law. Some courts still treat the African Charter as

Asian Games that India hosted). See also *Manguru v. Commissioners of Budge, Budge Municipality* (1951) 87 C.L.J. 369; *Paschim Banga Khet Mazdoor Sabha v. West Bengal* (1996) 4 S.C.C. 37; *Laxmi Kant v. Union of India* (1987) 1 S.C.C. 67; and *Olga Tellis v. Bombay Mun. Corp.* (1986) 2 S.C.R. 51 (India).

²²⁶ See *Attorney-General, Ondo State v. Attorney-General, Federation*, (2002) 9 N.W.L.R. (Pt. 772) 222, 291 (Nigeria) (Justice Uwaiifo); *Id.* at 410 (“[T]he National Assembly can well legislate if in its wisdom it considers it necessary to activate section 15(2), for instance, so that ‘national integration shall be actively encouraged. Whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.’ In fact a similar enactment can possibly be made in regard to section 16(2)(d) and some other sections . . . to ensure ‘that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.’”).

²²⁷ Nigeria ratified the African Charter on 17 March 1983 and transformed it into domestic law, pursuant to the African Charter on Human and Peoples’ Law (Ratification and Enforcement) Act, (2004) Cap. A9 (Nigeria). The Act calls on all organs exercising legislative, executive, and judicial authorities to give effect to the provisions of the Charter, which is annexed to the Act. See *id.* § 1.

treaty law, even when—for monist states²²⁸—it has been incorporated into municipal law by ratification, or—for dualist states²²⁹—transformed into municipal law in accordance with constitutional requirements.

There is no monolithic model of judicial interpretation and enforcement for all rights, however classified and regardless of local context. In any event, there are a number of socioeconomic rights that are capable of immediate judicial application, including the rights to equality of opportunities, equal pay for equal work, and collective bargaining. Others include the protection of children from economic and social exploitation, the right to basic education, the right of parents to choose their children's schools, the right of individuals and bodies to establish educational institutions, and the freedom to undertake research and creative activities.²³⁰

²²⁸ Monists assume that internal and international legal systems form a unity and that both national and international legal rules that a State has accepted determine whether actions are legal or illegal. *See, e.g.*, CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA Aug. 23, 1992, § 21(3) (“In the assessment of disputes by Angolan courts, those international instruments shall apply even where not invoked by the parties.”). An international treaty does not require any further legislative act, other than ratification, to become justiciable in Angolan municipal courts, and this includes the African Charter. *See id.* § 21(2). *Cf.* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, § 151 (providing that treaties “shall have the force of law after their conclusion, ratification and publication according to the established procedure.”) *available at* www.egypt.gov.eg/english/laws/constitution.

²²⁹ Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. *See, e.g.*, CONSTITUTION OF NIGERIA (1999), § 12(1) (“No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”).

²³⁰ *See* CESCR, *General Comment No. 3, The Nature of States Parties Obligations* (Art. 2 ICESCR), ¶ 5, U.N. Doc. E/1991/22-E/CN.4/1991/1 Annex III (1990) *available at* www.unhcr.org/refworld/docid/4538838e10.html; Int'l Comm'n of Jurists, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987) (recognizing that some socioeconomic rights “are capable of immediate application by judicial and other organs in many national systems.”) *available at* www.acpp.org/RBAVerl_0/archives/LimburgPrinciples.pdf. Similarly, the Maastricht Guidelines, agreed upon in 1997 by a group of experts, established a list of violations of economic, social, and cultural rights with a view to facilitating an adjudicative exercise. U.N. Economic and Social Council, *The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights*, Nov. 13, 2000 – Dec. 1, 2000, U.N. Doc. E/C.12/2000/13; 24th sess., (Oct. 2, 2000).

Africa's courts should ignore abstractions and give citizens a new sense of their governments' concerns for their welfare. Governments are founded upon the needs of citizens to secure the highest quality of life.²³¹ This end should dominate the judicial function; after all, law is one of the instruments for advancing the common good. Being an integral and necessary part of constitutional engineering in Africa, and conscious of the great disparities in wealth in most countries, courts should help make socioeconomic rights work. Citizens increasingly look to this least dangerous branch to ensure executive and legislative accountability (by way of judicial review) and the protection of their basic interests.²³² As Lord Lester of Herne Hill and Colm O'Cinneide rightly observed: "The Judiciary has an important role to play where there exists a sufficient gross failure to uphold basic socioeconomic rights. Where the other two branches have comprehensively failed to fulfill their responsibilities, then 'the least dangerous branch' has a duty to intervene."²³³

Human rights guarantees embody a social contract and establish a different juridical relationship between the individual and society than that represented by the limited-government paradigm. Therefore, courts should use different interpretive apparatuses from those built on the traditional premise of parliamentary or legislative sovereignty. "A truly transformative interpretation of rights," writes Malam, "would empower the poor, the homeless, the excluded and the marginalized to overcome the limitations of the history, structure and abilities of society, and enable them to realise their rights in concert with different forms of social provision and the opportunities that there are in society."²³⁴

In the realm of socioeconomic rights, judicial intervention could take one of three forms. It could demand that a government provide some goods or services; or that it modifies or creates a regulatory environment that is more conducive to realization of the right in question; or that it modifies the rights and duties running between a third party and the rights bearer, in order to facilitate realization of the right.²³⁵ Beyond intervening in

²³¹ See, e.g., CONSTITUTION OF NIGERIA (1999), § 14(2).

²³² See Philip B. Kurland, *The Rise and Fall of the 'Doctrine' of Separation of Powers*, 85 MICH. L. REV. 592, 607 (1986).

²³³ Lester & O'Cinneide, *supra* note 222 at 21.

²³⁴ Naude Malan, *The Performance of the Right to Have Access to Social Security*, 13 L. DEM. & DEV. 71, 72 (2009).

²³⁵ See Daniel M Brinks & Varun Gauri, *The Law's Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 5999, at 11 (Mar. 1, 2012), available at <http://ssrn.com/abstract=2024823>. See also COURTING SOCIAL JUSTICE: JUDICIAL ENFORCE-

such manners, courts could also play a role in reforming governance institutions to promote greater access to socioeconomic rights.

3. Some Comparative Illustrations

Mounting evidence suggests that courts are increasingly taking important roles in deciding the extent to which legally guaranteed socioeconomic rights should be considered and protected in policy making.²³⁶ In South Africa, for example, its unique constitutional schema permitted a deconstruction and reconstruction of the separation of powers doctrine and the judiciary's role within that doctrine. As Marius Pieterse argues:

The challenges posed by a Bill of Rights to 'traditional' notions of separation of powers appear to be considerably magnified where the Bill of Rights contains socioeconomic rights, which seem to require judicial involvement in decisions with (often significant) budgetary impact. Such involvement dramatically departs from 'traditional' conceptions of the judicial role.²³⁷

Not surprisingly, the South African Constitutional Court has enforced a number of guaranteed socioeconomic rights without deference to legislative judgment. It is probably "one of the courts to most successfully define a resolute content to socio-economic rights, it has also fostered an innovative form of enforcing these rights."²³⁸ In *Soobramoney v. Minister of Health (KwaZulu-Natal)*²³⁹ the Court explained that a commitment to address the "great disparities in wealth"—which allow millions of people to live "in deplorable conditions and in great poverty"—and transform South Africa into a society "in which there will be human dignity, freedom and

MENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 6 (V. Gauri & D. M. Brinks, eds. 2008).

²³⁶ See generally Brinks & Gauri, *supra* note 235 (estimating the potential distributive impact of socioeconomic rights litigation by examining whether the poor are over or under-represented among the beneficiaries of litigation, relative to their share of the population).

²³⁷ Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-economic Rights*, 20 SAJHR 383, 388-89 (2004); see also Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiceable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 41-42 (1992).

²³⁸ Hall & Weiss, *supra* note 220 at 484.

²³⁹ See *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC) (S. Afr.).

equality, lies at the heart of our new constitutional order.”²⁴⁰ The Constitutional Court has demonstrated its commitment to social justice in a number of high-profile cases.

In the *TAC Case*, the Court followed the reasonableness approach in *Grootboom*²⁴¹ and rejected the minimum core obligation approach of General Comment No. 3 of the ESC Committee. Using this approach, the Court ordered the South African Government to provide free *nevirapine* to pregnant women, 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.”²⁴² The Court stressed that the Government’s inaction was unreasonable because it “fail[ed] to address the needs of mothers and their newborn children who do not have access to [pilot] sites.”²⁴³

The African Commission on Human and Peoples’ Rights has also adjudicated violations of socioeconomic rights. In the *SERAC Case*, for example, the Commission held Nigeria liable for failing to exercise due diligence over Shell’s egregious violations of socioeconomic and other human rights in the Niger Delta.²⁴⁴ In *Purohit & Moore v. Gambia*, Gambia noted that it actually had a sufficient supply of medicines for mental health patients in the course of analyzing the adequacy of its mental healthcare. It simply had not distributed the medicine.²⁴⁵ The Commission justifiably ordered the State to distribute medicines to those in need, though it also acknowledged the State’s severe resource constraints.²⁴⁶ This case shows that courts do, and should, take resource constraints into consideration in making specific orders, but a general lack of resources is not synonymous with inability to realize a specific obligation.

On October 27, 2009, the Court of Justice of the Economic Community of West African States (“the ECOWAS Court”) handed down a

²⁴⁰ *Id.* ¶ 8 (noting that these “great disparities in wealth . . . already existed when the Constitution was adopted.”).

²⁴¹ See *Grootboom*, *supra* note 53 (clarifying the constitutional framework on socioeconomic rights).

²⁴² *Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC)* ¶ 36 (S. Afr.).

²⁴³ *Id.* ¶ 67.

²⁴⁴ See *Social and Economic Rights Action Centre v. Nigeria*, Comm. No. 155/96, (Afr. Comm’n on Human and People’s Rights 2001), www.achpr.org/english/Decison_Communication/Nigeria/Comm.155-96.pdf.

²⁴⁵ No. 241/2001, (Afr. Comm’n on Human and People’s Rights 2003), www.achpr.org/english/Decison_Communication/Gambia/Comm.%20241-2001.pdf.

²⁴⁶ *Id.*

seemingly landmark decision on the right to education in Nigeria. In *Socio-economic Rights and Accountability Project (SERAP) v. Nigeria & Universal Basic Educ. Comm'n*, the applicant alleged that the Nigerian government violated the right to quality education guaranteed in the African Charter. The suit followed a petition sent by SERAP to the Independent Corrupt Practices and Other Related Offences Commission (“ICPC”), which led to the discovery by the ICPC of massive corruption and mismanagement of the Universal Basic Education Commission funds. The respondent State objected to the suit, *inter alia*, on the grounds that the educational objective under the 1999 Constitution is not justiciable.²⁴⁷

The Court held that Nigerians are entitled to education as a human and legal right, which means by implication that Nigeria is under obligation to meet the “minimum core” requirements with respect to education: availability, accessibility, and affordability. The Court based its decision solely on the African Charter, since it is not empowered to interpret the municipal constitutions of ECOWAS member States.²⁴⁸ Might a decision like this invite confusion between the ECOWAS Court and other regional human rights institutions—for example, the African Commission and the African Court of Justice and Human Rights—on the type of remedies for human rights violations? Perhaps comity will prevent confusion and divergent interpretations of the African Charter and consequent remedial measures, but how about national courts *vis-à-vis* supranational courts? Are domestic courts bound to follow decisions of supranational courts established by treaties to which their States are parties? It appears that national courts are expected to apply such decisions to their local jurisdiction, though the ECOWAS Court has held that it lacks jurisdiction to sit on appeal from municipal court decisions.²⁴⁹

4. Need for Sensitivity to the Democratic Theory

One possible objection is that courts with free rein to direct elected organs to implement socioeconomic rights could become powerful tools for both

²⁴⁷ See *Socioeconomic Rights and Accountability Project v. Federal Republic of Nigeria & Universal Basic Education Commission*, ECW/CCJ/APP/08/09 ¶ 31 (Court of Justice of the Econ. Cmty. of W. Afr. States 2010) www.worldcourts.com/ecowasecj/eng/decisions/2010.12.10_SERAP_v_Nigeria.htm.

²⁴⁸ Regrettably, the Court missed a golden opportunity to make a pronouncement on the vexed issue of justiciability or otherwise of “directive principles,” even as an obiter dictum. The human rights community will have to continue to hope that a future opportunity will arise for a definitive pronouncement on this issue.

²⁴⁹ See *Alhaji Hammani Tidjani v. Federal Republic of Nigeria & 4 Ors.*, ECW/CCJ/APP/01/06 (Court of Justice of the Econ. Cmty. of W. Afr. States 2008).

good and evil, especially as they are constitutionally insulated from democratic accountability. The concern is legitimate, but the existing judicial service commissions are meant to provide oversight of judges. Admittedly, socioeconomic rights “present genuinely different and, in many respects, far more difficult challenges than do civil and political rights.”²⁵⁰ Minimally, “socioeconomic guarantees can be negatively protected from improper invasion,”²⁵¹ though this might not be a sufficient judicial strategy in this field.

Balancing interests, costs, and benefits requires political accountability to those with relevant interests, which explains why the legislative and executive branches are usually entrusted with the implementation of rights. In South Africa, for example, the legislature adopted the Water Services Act—three years after the country achieved democracy—to help provide tangible meaning to people’s constitutional right of access to a basic water supply.²⁵² Thus, courts should be sensitive to the democratic theory, which sees democracy as “majoritarian” rule. When indispensable, courts should defer to the executive or legislative branches, if their policy determinations are the most effective mechanism for enforcing human rights.²⁵³ This “weak-form review” “allows for more flexible remedial rules that evaluate contextual elements, accepting less than complete remedies in light of other social goals.”²⁵⁴

Nonetheless, courts should bear in mind that majoritarianism “may have little regard for ‘numerical’ minorities such as sentenced criminals, linguistic or religious minorities, non-nationals, ‘indigenous peoples’, and the socially stigmatized.”²⁵⁵ The heart of judicial enforcement of socioeconomic rights lies in maintaining this right balance while creating a synergy with other organs and institutions established to promote human rights.

²⁵⁰ Dennis & Stewart, *supra* note 6 at 464.

²⁵¹ Cf. *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at 801 ¶ 578 (S. Afr.).

²⁵² See *City of Johannesburg v. Mazibuko* 2009 SACLX 12, at 10-12, 17-18 (S. Afr.). See generally Hall & Weiss, *supra* note 220 at 453 (urging “remedial deterrence” by courts in the realm of socioeconomic rights, arguing: “Those who view human rights as universal, agreed-upon norms and separately inquire about practical, remedial fixes are missing a critical complexity in the interplay between rights and remedies.”). *Id.* at 456.

²⁵³ See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2003) (“[S]ometimes, the enforcement of first- and second-generation rights has some implications for government budgets.”).

²⁵⁴ Hall & Weiss, *supra* note 220 at 486. See also Tushnet, *supra* note 253 at 1896.

²⁵⁵ FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 5 (2007).

C. *The Role of Civil Society Organizations*

Individual agency, ultimately, is central to overcoming Africa's development and poverty challenges. Civil society organizations ("CSOs") are the main analytical paradigms in African politics. In recognition of their vital role in social engineering, the AU seeks to build "a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among [African] peoples."²⁵⁶ Obviously, a reinvigorated civil society holds the key to social transformation in Africa, including improving access to socioeconomic rights. Women and youths, in particular, are at the center of many of Africa's problems; sometimes they are at the receiving ends of such problems as HIV/AIDS pandemic and conflicts. They are also the key to finding solutions to these crises.

Non-governmental organizations (NGOs), as part of civil society, play critical roles in resolving human rights issues and have made tremendous contributions to the development of human rights in Africa, often at huge human and material costs. They "gather information, seek to influence public opinion, provide assistance to individual victims of abuses, and press governments and international supervisory bodies for action."²⁵⁷ Many African human rights NGOs are mobilizing and campaigning to secure or improve access to socioeconomic rights, with some positive outcomes. This article has already shown the judicial victory achieved in South Africa by the Treatment Action Campaign in its effort to secure greater access to HIV treatment. Other campaigns have also led to changes in policies and institutional behaviors.

A few years ago, the Social and Economic Rights Action Centre ("SERAC") petitioned the World Bank's Inspection Panel when a World-Bank-supported draining and sanitation project in impoverished districts of Lagos, Nigeria did not follow the Bank's own operating policies.²⁵⁸ The project was halted after SERAC complained that thousands of people were forcibly evicted from their homes.²⁵⁹ After visiting the sites, the Inspection Panel concluded that some of the affected communities had not received

²⁵⁶ AU Act, *supra* note 142 pmb1.

²⁵⁷ CLAUDE WELCH, PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS 3 (2001).

²⁵⁸ See WORLD BANK, INSPECTION PANEL REPORT AND RECOMMENDATION ON REQUEST FOR INVESTIGATION, NIGERIA: LAGOS DRAINAGE AND SANITATION PROJECT (1998), available at http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000265513_20040525111851.

²⁵⁹ *Id.*

adequate notice of eviction or any compensation for their loss, in contravention of the Bank's policies.²⁶⁰

These campaigns are commendable, but more must be done—and more urgently—because the problems in African development are deep and ongoing. The pace and process of political democratization in Africa, albeit imperfect, have opened up space for human rights CSOs in general and NGOs in particular to engage African States and influence policy-making for the benefit of citizens. These organizations should publicize the economic plight of citizens and positively engage governments to implement socioeconomic rights. They should share information and opinions with the various government organs and offer advice to legislative committees on issues affecting the welfare of citizens. They should lobby legislators during budgetary appropriations and monitor their implementation by the executive to ensure rigorous compliance. Budget monitoring involves the collection and analysis of data about budget activities. Civil society could advance socioeconomic rights if it took an active interest in the resources allocated for social goods and services and how the relevant ministries and departments execute the budgetary allocations.

Studies have shown that only a negligible percentage of budgetary allocations—sometimes less than five percent—reach their destinations in Africa.²⁶¹ One 2004 survey in particular showed that less than one percent of money released by the Ministry of Finance in Chad for rural health clinics actually reached the clinics.²⁶² Criminals in power usually embezzle a huge portion of the common wealth (in millions or even billions of dollars), which they launder using Swiss banks and other Western financial institutions. Ironically, while these Western institutions tirelessly advocate good, transparent, and accountable governance, they brazenly aid and abet corruption in Africa.²⁶³

Furthermore, Africa's landscape is dotted with uncompleted projects that could have improved life for the average African. Contractors and political operatives collect mobilization fees for infrastructural and

²⁶⁰ *Id.*

²⁶¹ See PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 66 (2007).

²⁶² *Id.*

²⁶³ See COMM'N FOR AFRICA, *OUR COMMON INTEREST: REPORT OF THE COMMISSION FOR AFRICA* 14 (2005), available at <http://allafrica.com/sustainable/resources/view/00010595.pdf> (urging foreign banks to repatriate money and state assets stolen from the people of Africa by corrupt leaders and “foreign companies involved in oil, minerals and other extractive industries [to] make their payments much more open to public scrutiny.”).

other projects and divert the money to their private bank accounts, often in collusion with corrupt government officials. These actors are not bothered by the adverse impact of their behavior on economic development and social welfare. Even when projects are executed, the ends often do not justify the means. Many “white elephant” projects are conceived and executed to satisfy political expediency rather than real needs. According to Afeikhena Jerome and Ademola Ariyo:

[S]pending on infrastructure has not always contributed to pro-poor growth. Actual benefits have often been less than anticipated, especially because of inadequate attention to governance and institutional frameworks. “White elephant” infrastructure projects are far from unknown. Poor governance and corruption often hinder a demand-led approach, distort public investment choices, divert benefits away from the poor and encourage the neglect of maintenance.²⁶⁴

Human rights activists should improve their methodologies for identifying human rights violations, violators, victims, and available remedies. They should explore the different remedies available for various categories of rights. Human rights remedies extend beyond the classic judicial remedies of compensation and restitution; they embrace rehabilitation, satisfaction, and guarantees of non-repetition.²⁶⁵ Often, human rights petitioners insist on the traditional remedy of monetary compensation when injunctive relief might suffice. Human rights NGOs should also develop independent indicators for measuring the extent of compliance with socio-economic rights in Africa.²⁶⁶ Indicators and benchmarks “have a significant

²⁶⁴ Afeikhena Jerome & Ademola Ariyo, *Infrastructure Reform and Poverty Reduction in Africa* (African Development and Poverty Reduction Conference, Forum Paper, 2004), available at www.tips.org.za/files/infrastructure_Reform_Jerome.pdf.

²⁶⁵ See generally Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/65/197 (March 21, 2006), available at www2.ohchr.org/english/law/remedy.htm. See also DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed., 2006) (providing an overview of the law and practice governing human rights remedies).

²⁶⁶ See Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurements*, 23 HUM. RTS. Q. 1062, 1065 (2001) (“A human rights indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.”). Cf. Report on Indicators for Monitoring Compliance with International Human Rights

role to play in bringing about positive change in the protection and promotion of economic, social and cultural rights.”²⁶⁷

In the final analysis, CSOs hold the key to effective access to socioeconomic rights in Africa. History shows that most significant advances in human rights have developed from social struggles by local, regional, and international CSOs.²⁶⁸ In the absence of a sustained struggle, States’ political and administrative organs will live up to their affirmative obligations only on their own terms and timeframes.²⁶⁹ These political organs cannot always be trusted to act, on their own volition, for the common good. Everyone needs an opponent to keep him on his toes.

CONCLUSION

This article set out to prove that socioeconomic rights, like other categories of rights, embody fundamental values and engender practical consequences that should be taken seriously even in developing countries of Africa. As Ziegler puts it, “human rights are not only unashamedly utopian but are also eminently practical.”²⁷⁰ The human rights movement deserves commendation for ensuring that these rights remain on the front burner of international law and politics, notwithstanding the ambivalence and reticence of some States. The ESC and other entities have equally provided general comments and developed benchmarks on many socioeconomic rights, which are useful tools for advocacy, monitoring and evaluation.

The danger, however, is that preoccupation with socioeconomic concerns could lead to “compassion fatigue,” as the ESC Committee stressed:

Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been

Instruments, ¶ 7, U.N. Doc. HRI/MC/2008/3 (June 6, 2006) (“[H]uman rights indicators are specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles: and that are used to assess and monitor promotion and protection of human rights.”).

²⁶⁷ U.N. Econ. & Soc. Counsel [ECOSOC], Report of the U.N. High Commissioner for Human Rights, ¶ 2, U.N. Doc. E/2006/86 (June 21, 2006).

²⁶⁸ See, e.g., WELCH, *supra* note 257 at 3.

²⁶⁹ See *id.* (“If these NGOs lack political space within which to operate or resources necessary for fact-finding and publicity, it stands to reason that human rights abuses will continue. Governments unchecked by civil society become major threats to their societies.”).

²⁷⁰ Jean Ziegler, *Foreword* to GEORGE KENT, *FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD* xvi (2005).

cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterize the problems that exist as gross and massive denials of economic, social and cultural rights. Yet it is difficult to understand how the situation can realistically be portrayed in any other way.²⁷¹

It is equally difficult to understand *why* the wealth of nations should become the poverty of its peoples—as is the case in many parts of Africa—though it is easy to understand *how* this has come about. The poverty that plagues Africans, and which shows no signs of abating, is not a product of fate; it is the result of human decisions, inactions, and, most especially, greed. Ending this impoverishment will require bold and imaginative decisions, actions, and sacrifices. In this moment of desperate necessity, what Africans need from the various organs of society is empathy, not sympathy.²⁷² Sympathy focuses on the effect, rather than the cause, of a problem.²⁷³ Africans are not interested in politicians who will donate bags of rice to some party loyalists and, in a flourish of trumpets, advertise them as “dividends of democracy.” They are also not interested in multinationals that will drill a few boreholes in communities where they do business and, in a tsunami of publicity, broadcast them as “corporate social responsibilities.”

Africans demand more: they demand governments that really care about them and about the daily war of survival they wage and the dusty ghetto paths they walk. They demand politicians who are willing to see the world through the eyes of those they claim to represent. They demand judges who care enough about the common man as to let his welfare define the path, direction, and distance of their interpretation and application of the law. They demand corporations that will respect and promote the human rights of communities where they operate, realizing that it is in their business interest to do so. They demand NGOs that will give attention to the

²⁷¹ U.N. Comm. on Econ., Soc., and Cultural Rights, *Statement to the 1993 Vienna World Conference*, ¶ 7, U.N. Doc. E/1993/22, annex III (Dec. 7, 1992).

²⁷² Cf. Asbjorn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS TEXTBOOK*, *supra* note 98 at 17-18 (“Fundamental needs must not be made contingent on charity from state programs and policies, but must be defined as rights.”).

²⁷³ Cf. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 66 (2006) (explaining, and illustrating, the difference between the two related words).

rural poor in their advocacy, rather than obsess over a few urban areas, implementing agendas set by Western donors. And they demand a global community that will be more concerned with the personal security of the poor and oppressed than with the national security of States and their irresponsible leaders. That is the essence of empathy. Any other indulgence, however framed and offered, is a smokescreen, a meaningless vanity and vexation of the spirit.

