
15. Interdependence of human rights

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1. INTRODUCTION

The primary source and authority for the modern principle of interdependence of human rights is the oft-cited statement in the Vienna Declaration and Programme of Action (Vienna Declaration) adopted by consensus on 25 June 1993 at the Second World Conference on Human Rights: ‘All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.’¹

The same statement, with an important improvement, was adopted by the UN General Assembly in its resolution creating the new UN Human Rights Council in 2006, adding to the previous four qualities a fifth: ‘mutually reinforcing’.² The five attributes are distinct, but the combination of all four or five of the listed attributes is usually referred to either as ‘indivisibility’, ‘interdependence’, or both. In this chapter, the principle of ‘interdependence’ is used to refer to the combination of the five attributes.

The affirmation of interdependence in the Vienna Declaration so as to place economic, social and cultural (ESC) rights ‘on the same footing and with the same emphasis’ as civil and political rights marks the beginning of a human rights restoration project aimed at reconstructing the original holistic architecture of rights embodied in the Universal Declaration of Human Rights (UDHR).³ The principle of interdependence is central to this project not simply as a statement about how the two categories of rights are to be regarded as conceptually related, but also as a dynamic principle of interpretation and application of human rights through which the norms and contents of different rights inform, reinforce, nurture and grow together in response to human rights claims emerging from human experience. Interdependence thus refers to the unity of purpose of human rights protections, so that they are interpreted and applied not as separate or reified entities, but as parts of an integrated and coherent commitment to recognizing the ‘inherent dignity’ and the ‘equal and inalienable rights of all members of the human family’.⁴

¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

² UN General Assembly, Human Rights Council Resolution, UN Doc A/RES/60/251 (3 April 2006), Preamble, para 3.

³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR), Preface.

⁴ For elaborations of this understanding of interdependence, see Craig Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of International Covenants on Human Rights’ (1989) 27 *Osgoode Hall LJ* 769; Craig Scott, ‘Reaching Beyond (without Abandoning) the Category of Economic, Social and Cultural Rights’ (1999) 21 *Human Rights Quarterly* 633; Alicia Yamin, ‘The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda’ [2005] *Human Rights Quarterly*

In accordance with the Vienna Convention on the Laws of Treaties (VCLT),⁵ interdependence demands that human rights be interpreted in context, and in light of the object and purpose of human rights treaties – not in relation to distinctions between categories of rights based on the nature of the obligations placed on governments. Those broader objects and purposes are described in the UDHR as recognizing ‘the inherent dignity and the equal and inalienable rights of all members of the human family’ and recognizing economic, social and cultural rights (ESCR) ‘as indispensable for dignity and the free development of personality’.⁶

This chapter describes the inclusion of ESC rights claimants as equal in dignity and rights through the principle of interdependence as a ‘work in progress’ with a lot at stake. It traces the evolution of the idea of interdependence from an earlier notion premised on the unequal status of ESCR to the modern conception premised on equal access to justice and ‘human rights made whole’. It describes, with reference to developments described in greater detail in other chapters, the development of interdependence in the jurisprudence of the Committee on Economic Social and Cultural Rights (CESCR) and the Human Rights Committee and within regional systems. Important applications of interdependence within the other seven UN treaty bodies outlined in Chapter 1 are unfortunately beyond the scope of this chapter.

The chapter argues that both civil and political rights and ESC rights have been damaged by their separation and that a failure to adequately engage with the principle of interdependence is continuing to allow many of the most egregious systemic violations of human rights, lying in the interstices between categories of rights, to go unchallenged. It calls for a more inclusive and transformational paradigm of human rights based on a modernized understanding of the interdependence of human rights and the full inclusion of those whose claims to equal dignity and rights have been marginalized or silenced.

2. HISTORICAL DEVELOPMENT

2.1 Interdependence in Response to the Separation of Rights

As described in Chapters 1 and 2, ESCR were included in the UDHR as fundamental human rights ‘indispensable for dignity and the free development of personality’⁷ and equally subject to ‘the right to an effective remedy by the competent national tribunals’.⁸ With the subsequent division of the rights in the UDHR into two covenants in the early 1950s, however, in the era of the Cold War and US dominance in international human rights discourse, ESCR came to be viewed as poor cousins to CPR, characterized as ‘second generation’ rights, aspirational

1200; Ioana Cismas, ‘The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014); Lilian Chenwi, ‘Permeability of Human Rights in the African Charter’ (2014) 39 Suppl SAYIL 93; Sandra Ratjen and Manav Satija, ‘Realizing Economic, Social, and Cultural Rights for All’ in Riedel, Giacca and Golay (eds), *Economic, Social, and Cultural Rights in International Law* (n 4).

⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶ UDHR art 22.

⁷ UDHR art 22, male pronoun omitted.

⁸ UDHR art 8.

objectives of State socio-economic policy and development, rather than as rights to be claimed and adjudicated and requiring effective remedy.

The principle of interdependence first became prominent during the debates in the early 1950s about whether to draft a unitary human rights covenant or two separate covenants. Proposals advanced for dividing human rights in the UDHR into two covenants were initially rejected on the basis that all human rights are ‘interdependent and interconnected’ and that ‘the spirit of the Universal Declaration’ is tied to the unity of rights.⁹ Proponents of separation, however, argued that the rights could be separated into two covenants at the same time as affirming their interdependence.¹⁰ A proposal for separate covenants led by the USA and the United Kingdom in 1952 succeeded in securing the adoption of a resolution calling for the drafting of separate covenants, while affirming the principle of interdependence in the same manner as in the previous resolution and noting the ‘unitary aim’ of the two covenants.¹¹

The distinction between the two categories of rights with respect to access to justice was suggested, but in no way explicitly stated, in the different provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR commits States, in article 2(3), to ensuring access to ‘competent judicial, administrative, legislative or other authorities’ within the legal system to determine their rights and provide ‘effective remedies’.¹² The ICESCR, on the other hand, is silent on the requirement of access to justice or effective remedies, committing States to the progressive realization of ESCR ‘by all appropriate means, including legislation’ and ‘to the maximum of available resources’.¹³ And most significantly, unlike the ICCPR, the ICESCR was adopted without an accompanying optional complaints procedure to provide access to justice when domestic remedies have been exhausted or are unavailable.

Each covenant, however, affirms interdependence in its preface. The ICESCR recognizes ‘that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy [their] economic, social and cultural rights, as well as [their] civil and political rights’. The ICCPR includes the same paragraph with some additional wording, referring to ‘the ideal of free human beings enjoying civil and political freedom and freedom from fear and want’. These paragraphs, according to the annotations, ‘were intended to underline the unity of the two covenants while at the same time maintaining the distinctive character of each’.¹⁴ As Craig Scott has observed, the tension between unity and distinctiveness ‘can only be mediated by means of an elaboration of the principle of interdependence’.¹⁵

Prior to the Vienna World Conference on Human Rights, the concept of interdependence was not generally articulated as a challenge to the unequal status accorded ESCR, and in

⁹ Scott, ‘The Interdependence and Permeability of Human Rights Norms’ (n 4) 799–801, footnotes 107 and 113.

¹⁰ UNGA Res. 421 (V), Part E (4 December 1950).

¹¹ UNGA Res 543 (VI) (5 February 1951). See Scott, ‘The Interdependence and Permeability of Human Rights Norms’ (n 4) 799, footnote 106.

¹² ICCPR art 2(3).

¹³ ICESCR art 2(1).

¹⁴ General Assembly, Annotations on the Text of the Draft International Covenants on Human Rights, 10 UN GAOR Annexes (Agenda Item 28, Pt.II), UN Doc AN2929 (1955) Ch. III at para. 8, cited in Scott, ‘The Interdependence and Permeability of Human Rights Norms’ (n 4) 811, footnote 140.

¹⁵ Scott, ‘The Interdependence and Permeability of Human Rights Norms’ (n 4) 811, footnote 140.

fact may have reinforced it. Rather than being understood as interdependence between two equally important categories of fundamental human rights – recognizing ESCR as human rights because they are ‘indispensable for dignity and the free development of personality’, as in the UDHR – interdependence was understood as a dependence of civil and political rights on a commitment by States to social and economic development. The Tehran Proclamation, issued in 1968 at the first World Conference on Human Rights, described interdependence in these terms:

Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.¹⁶

The Final Act of the Tehran World Conference of 1968, adopting the report of the Second Committee, did suggest room for further progress. It recognized ‘the close relationship between public administration, the participation of citizens in the decision making, planning, or programming process and the fulfilment of economic and social rights’, and noted a ‘trend towards incorporating these rights in national constitutions and providing means of defence against violations of these rights’.¹⁷ It called upon States to ‘focus their attention on developing the material means of protecting, promoting and realizing economic, social and cultural rights, as well as on developing and perfecting legal procedures for prevention of violations and defence of these rights’.¹⁸

2.2 The Emergence of the Committee on Economic, Social and Cultural Rights in the 1990s: Interdependence and Domestic Implementation

The hierarchical view of interdependence that predominated prior to the Vienna Declaration was reflected in and reinforced by the supervisory systems that were initially put in place for the respective categories of rights. As described in Chapter 1, civil and political rights compliance was assessed by independent human rights experts appointed to the UN Human Rights Committee. The Human Rights Committee considered both State reports and individual communications, generating a significant body of jurisprudence. ESCR, on the other hand, were originally assessed by a sessional working group of ‘governmental experts’ of the Economic and Social Council, on the basis of periodic reports by State parties which provided general data on economic development.¹⁹

As noted in Chapter 2, the CESCR as an independent body of ‘experts with recognized competence in the field of human rights’ was not established until 1985. Even with the creation of the Committee, the review of compliance with ESCR continued at first to consist primarily of dialogue with State delegates regarding social policy and economic development. The absence of a petition procedure or any role for rights-holders meant that the circumstances and con-

¹⁶ Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc A/CONF 32/41 (Proclamation of Teheran) 3 para 13.

¹⁷ Final Act of the International Conference on Human Rights, Tehran 22 April to 13 May 1968 UN Doc A/Conf.32/41, Part XX1 (Tehran Final Act) 17.

¹⁸ *ibid* para 6.

¹⁹ E/RES/1985/17 (28 May 1985).

cerns of rights-holders was rendered invisible, and the link between social programs, legislation and socio-economic data being reviewed with core human rights values of human dignity and the free development of personality, as affirmed in the UDHR, was difficult to engage. It was only in the early 1990s – under the leadership of a new chairperson, Philip Alston – that the CESCR really began to engage with ESCR as fundamental rights. In 1993, the Committee adopted a new procedure for civil society engagement, including oral submissions from civil society organizations from the State under review.²⁰

In the years following the Vienna World Conference, and in the face of resistance from some State delegates who continued to expect more of a social policy dialogue than a review of human rights compliance, the CESCR began to focus more intently on measures taken by State parties to ensure access to effective remedies for ESCR and asked States to provide information about relevant jurisprudence. In most States under review, ESCR were not directly justiciable, so the reports on jurisprudence and dialogue regarding access to remedies focused on the application of interdependence to rights considered justiciable.²¹ After a number of States contested the Committee's view that the implementation of the Covenant required the provision of effective remedies or that courts had any obligation to provide remedies by way of interpretations of domestic law, the Committee adopted General Comment No. 9 (1998) on the domestic implementation of the Covenant.²²

General Comment No. 9 represented a significant turning point in the understanding of interdependence. It clarified for the first time that the principle of interdependence, properly understood, and in accordance with the Vienna Declaration, means that the textual differences between the ICESCR and the ICCPR, with only the ICCPR referring to the requirement of effective remedies before judicial or other competent authority, does not alter the requirement of access to effective remedies for all human rights as affirmed in the UDHR.²³ The Committee observed that while the ICESCR provides some flexibility about how effective remedies will be ensured, and remedies need not always rely on courts rather than administrative tribunals or other adjudicative procedures, any rigid distinction between the two categories of rights is unacceptable both because it is contrary to the principle of interdependence and because it has unacceptable discriminatory consequences for disadvantaged groups:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²⁴

General Comment No. 9 also establishes a critical link between interdependence and the rule of law. The CESCR noted that many courts had acknowledged in principle that ESCR should inform the interpretation of all law, but in practice, courts either failed to apply this principle

²⁰ Bruce Porter, 'Socio-economic Rights Advocacy: Notes from Canada' (1999) 2(1) ESR Review 1.

²¹ See, for example CESCR, Concluding Observations: Canada (10 June 1993) UN Doc E/C.12/1993/5.

²² CESCR, General Comment No. 9: The Domestic Application of the Covenant (3 December 1998) UN Doc E/C.12/1998/249.

²³ *ibid* para 3.

²⁴ *ibid* para 10.

effectively or refused to apply it at all.²⁵ Interpreting domestic law in conformity with international human rights law, according to the Committee, is not optional: ‘Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.’²⁶ Importantly, the obligation to interpret domestic law in conformity with ESCR also applies to the interpretation of CPR, most noticeably the right to equality and non-discrimination:

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.²⁷

The obligation to ensure access to effective remedies for ESCR, therefore, does not necessarily require the direct incorporation of ESCR into domestic law. ESCR may be protected by various combinations of legislation, programmatic entitlements and interdependence with CPR. Direct incorporation is the CESCR’s preferred option, but in the context of periodic reviews, the CESCR was learning that it was important to engage constructively with the particularities of different legal systems around a more flexible concept of effective remedies. Most States provided constitutional guarantees linked to the rights guaranteed in the first three articles of the UDHR. These are the right to be treated as ‘equal in dignity and rights’; the right to the equal enjoyment of fundamental rights without discrimination; and the right to ‘life, liberty and security of person’. Though these foundational rights had been categorized as civil and political rights when rights were separated, they actually bridge the two categories within the unified architecture and purpose of the UDHR.²⁸

The CESCR therefore paid particular attention to the interpretation of rights to life, to the dignity or security of the person and to equality, noting as a positive development court decisions interpreting these rights as interdependent with ESCR and expressing concern when courts adopted, or when governments urged courts to adopt, interpretations that would deny protection of ESCR.²⁹ The CESCR recommended that, where necessary, judges be provided with training on ESCR rights and how they should be applied in the interpretation of domestic law.³⁰ As described in Chapter 16, the CESCR followed up General Comment No. 9 with a short General Comment on national human rights institutions, noting that they too ‘have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights’.³¹

²⁵ *ibid* para 13.

²⁶ *ibid* para 14.

²⁷ *ibid* para 15.

²⁸ UDHR articles 1, 2 and 3.

²⁹ CESCR, Concluding Observations: Canada (1998) UN Doc E/C.12/1/Add.31.

³⁰ CESCR, Concluding Observations: Canada (1993) UN Doc E/C.12/1993/5, para 19.

³¹ CESCR, General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights (10 December 1998) E/C.12/1998/25.

2.3 Interdependence under the OP-ICESCR

The affirmation of interdependence on ‘an equal footing’ in the Vienna Declaration included a somewhat tentatively worded commitment (the issue remained contentious) to address the longstanding differential treatment of ESCR by developing an Optional Protocol to the ICESCR (OP-ICESCR).³² As detailed in Chapter 2, 15 years later, the OP-ICESCR was adopted.³³ It was described by the then High Commissioner on Human Rights, Louise Arbour, as ‘human rights made whole’.³⁴

2.3.1 Textual support for interdependence in the OP-ICESCR

The text of the OP-ICESCR provides significant support for the principle of interdependence around which human rights are to be ‘made whole’. The Preface reaffirms ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms’. The OP-ICESCR includes the description of interdependence from the prefaces of the two covenants but, as a gesture of renunciation of any categorical divide, lists the categories of rights alphabetically, affirming that ‘free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights’.³⁵

Article 8(4) of the OP-ICESCR adopts the standard of reasonableness for the review of measures taken by States to progressively realize ESCR, drawing on the description of that standard in the South African Constitutional Court’s decision in *Grootboom*.³⁶ As noted in Chapter 2, the CESCR had adopted, for the Open Ended Working Group, a statement regarding the criteria it might apply in assessing the reasonableness of measures taken for compliance with progressive realization under article 2(1). These included a number of requirements linked to interdependence with CPR, including: whether there have been ‘transparent and participative decision-making processes’; whether discretion has been exercised in a non-discriminatory and non-arbitrary manner; whether resources have been allocated ‘in accordance with international human rights standards’; whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed; whether the measures adopted are non-discriminatory; and whether ‘grave situations or situations of risk’ have been prioritized.³⁷

³² Vienna Declaration (n 1) para 75: ‘The World Conference on Human Rights encourages the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights.’

³³ UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution/adopted by the General Assembly (5 March 2009) A/RES/63/117 (OP-ICESCR).

³⁴ See discussion in Chapter 2; Louise Arbour, ‘Human Rights Made Whole’ Project Syndicate [June 26, 2008]

³⁵ OP-ICESCR Preface.

³⁶ Bruce Porter, ‘Reasonableness and Article 8(4)’ in M Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 173–202, 186.

³⁷ CESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’ E/C.12/2007/1 (10 May 2007) para 8. See Chapter 14.

2.3.2 Interdependence in the OP-ICESCR jurisprudence

UN treaty bodies frequently draw on the jurisprudence of other treaty bodies, but they only have authority under their respective optional protocols to admit and consider the merits of allegations of violations of rights that are contained within their own treaty. The CESCR cannot formally consider an allegation, for example – or make a finding – that a violation of the right to health under the ICESCR also constitutes a violation of the right to life or cruel and inhuman treatment under the ICCPR. This presents some limitations in the application of international jurisprudence to the interpretation of interdependent rights domestic law. A finding by the CESCR that a certain policy constitutes a violation of the right to health without reference to the right to life may or may not be helpful in a jurisdiction where only the right to life is considered justiciable.

The CESCR, however, is able to rely on the affirmation of interdependence in the Preamble to both the ICESCR and the OP-ICESCR, the inclusive understanding of reasonableness and the inclusion in the ICESCR itself of rights to non-discrimination and equality (article 2(2)), gender equality (article 3) and protection of the family, mothers and children (article 10), as a basis for a rigorous application of the principle of interdependence. Without actually making findings of violations of civil and political rights under the ICCPR, the CESCR has made it clear that violations of ESCR frequently also constitute violations of CPR.

In its emerging jurisprudence under the OP-ICESCR, the CESCR has adopted the phrase ‘read together’ to describe the application of interdependence between rights in the Covenant. In assessing State obligations in the context of an eviction of a family with children at the termination of a lease, considered in the case of *Ben Djazia et al. v Spain*,³⁸ the CESCR stated that ‘obligations with regard to the right to housing should be interpreted together with all other human rights obligations and, in particular, in the context of eviction, with the obligation to provide the family with the widest possible protection (art. 10 (1) of the Covenant)’.³⁹ It noted that effects of evictions on women, children, older persons, persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination must receive particular attention and that alternative accommodation must be negotiated in a manner that respects all human rights, prevents stigmatization and complies with the right of access to information, ‘communicated in a transparent, timely and complete manner’.⁴⁰ Noting that the alternative housing offered to the petitioner would have split up the family, the Committee found a violation of article 11(1), ‘read separately and in conjunction with articles 2 (1) and 10 (1) of the Covenant’.⁴¹

The CESCR’s consideration of the right to sexual and reproductive health in the case of *SC and GP v Italy* demonstrates a serious commitment to interpreting and applying ESCR in light of their interdependence with civil and political rights.⁴² As noted in Chapter 9, the CESCR found in this case that an embryo had been transferred into S.C.’s uterus without her consent by an in vitro fertilization clinic. The CESCR held that this violated the petitioner’s right to health under article 12 of the ICESCR, read in conjunction with article 3, women’s right to

³⁸ *Ben Djazia et al. v Spain* (20 June 2017) CESCR E/C.12/61/D/5/2015 paras 20–21.

³⁹ *Ibid* para 15.4.

⁴⁰ *Ibid* para 15.2 and 17.2.

⁴¹ *Ibid* para 19.

⁴² *SC and GP v Italy* (7 March 2019) CESCR E/C.12/65/D/22/2017. See the discussion of this case in Chapter 9.

equality. While the finding was restricted to the two articles of the ICESCR, the Committee supported its reasoning by recalling, from General Comment No. 22, that the right to sexual and reproductive health is interdependent with other human rights and ‘intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment’.⁴³ The Committee also noted that the right to sexual and reproductive health entails both freedoms and entitlements. The freedoms include ‘the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health’.⁴⁴

The CESCR has also applied interdependence to recognize the intersection of gender equality with the right to social security. As noted in Chapter 5, the CESCR found in *Trujillo Calero v Ecuador* that the disqualification of a woman from a pension scheme because she was unable to pay six consecutive monthly contributions constituted a violation of the right to social security in article 9 ‘read together’ with the right to non-discrimination in article 2(2) and the right to equality of women and men in article 3.⁴⁵

Sandra Liebenberg has pointed out that in its emerging jurisprudence under the OP-ICESCR the CESCR has also emphasized procedural and participatory elements of ESC rights that are interdependent with procedural guarantees applied to civil and political rights and with the idea of ‘participatory justice’ and ‘deliberative democracy’.⁴⁶ In its first case, *IDG v Spain*, the CESCR stated that ‘appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions’.⁴⁷ Required protections include adequate and reasonable notice for all affected persons prior to any eviction or mortgage foreclosure and access to legal aid. Consultation must be informed by equality rights in order to assess the impacts on groups subject to systemic discrimination or with unique needs.⁴⁸

As noted in Chapter 2, the CESCR has also adopted a participatory model for the consideration of and follow-up to communications, encouraging third party amicus submissions from human rights organizations and engaging civil society and rights claimants in the implementation of remedial measures.⁴⁹ As Liebenberg points out, this emphasis on participation is consistent with modern understandings of ‘deliberative democracy’.⁵⁰ Incorporating these concepts into ESCR adjudication addresses concerns about tensions between justiciable ESCR

⁴³ *ibid* para 8.1. See CESCR, ‘General Comment No. 22: The Right to the Highest Attainable Standard of Health (4 March 2016) UN Doc E/C.12/GC/22. In the General Comment, the CESCR states quite explicitly at para 10 that ‘lack of emergency obstetric care services or denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment’.

⁴⁴ *Ibid*.

⁴⁵ *Trujillo Calero v Ecuador* (26 March 2018) CESCR E/C.12/63/D/10/2015. See Chapter 5.

⁴⁶ Sandra Liebenberg, ‘Participatory Justice in Social Rights Adjudication’ (2018) 18(4) *Human Rights Law Review* 623.

⁴⁷ *I.D.G. v Spain*, CESCR E/C.12/55/D/2/2014 (17 June 2015), para 15.2.

⁴⁸ *Ibid*.

⁴⁹ See Chapter 2.

⁵⁰ Liebenberg, ‘Participatory Justice’ (n 46). See also Lilian Chenwi, ‘Democratizing the Socio-economic Rights-enforcement Process’ in Helena Alviar García, Karl Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014) 178.

and democracy and opens the door to reconceiving remedies so as to be more responsive and effective in the context of ESC rights.⁵¹

3. INTERDEPENDENCE IN REGIONAL SYSTEMS

As described in Chapters 3, 4 and 5, regional systems have developed protections of ESCR independently of the international human rights system and in some respects have led the way. The understanding of interdependence has evolved in similar fashion at the regional level, often in reference to the Vienna Declaration, and there has been a significant degree of cross-pollination between the international (UN) and the regional systems. A review of complex developments in regional systems regarding the interdependence of ESCR and civil and political rights is beyond the scope of this chapter but it is important to note some significant advances in the application and understanding of interdependence that have emerged at the regional level, and that are now playing an important role internationally.

3.1 Interdependence in the African System

As noted by Lilian Chenwi, interdependence has been seen as one of the unique features of the African Charter on Human and Peoples' Rights (the African Charter).⁵² Adopted 12 years before the Vienna World Conference, the African Charter affirms interdependence in the following terms:

[I]t is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁵³

While the emphasis on the satisfaction of ESC rights as a prerequisite for the enjoyment of civil and political rights is somewhat reminiscent of earlier formulations in the Tehran Proclamation, the central statement that civil and political rights cannot be dissociated from ESC rights 'in their conception as well as universality' has provided a solid basis on which to develop a substantive conception of interdependence, applied by the African Commission on Human and Peoples' Rights (African Commission) in both the consideration of individual cases and in authoritative commentary.

As described in Chapter 3, the African Commission has applied interdependence to derive protection in the African Charter of a number of ESCR that were not explicitly enumerated in its text. The Charter identifies only a limited number of ESCR for protection: rights to

⁵¹ Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 Stellenbosch L. Rev 742; Lilian Chenwi, "'Meaningful Engagement" in the Realisation of Socio-economic Rights: The South African Experience' (2011) 26(1) Southern African Public Law 128.

⁵² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 1520 UNTS 217 (African Charter); Chenwi, 'Permeability' (n 4) 94.

⁵³ African Charter, Preface.

work, health, education, protection of the family and the right to economic, social and cultural development, along with the rights to life and to property.⁵⁴ By reading these rights together, as interdependent with guaranteed rights, and with reference to unifying human rights values, the African Commission has concluded that rights to housing, water, sanitation, food and social security are guaranteed as implicit or derived rights in the Charter.⁵⁵

The African Commission first applied this approach to interdependence in response to individual communications. In *SERAC v Nigeria* the Commission found that environmental degradation had ‘made living in Ogoniland a nightmare’ and concluded that ‘the most fundamental of all human rights, the right to life, has been violated’.⁵⁶ It also found that the right to housing and protection from forced evictions, guaranteed by a joint and interdependent reading of the rights to property, health and protection of the family had been violated.⁵⁷ In *Free Legal Assistance Group v Zaire*, the Commission found that mismanagement of finances and failure to provide water and other services violated the right to health.⁵⁸ In *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan*, the Commission found that in addition to the rights identified in *SERAC v Nigeria*, forced evictions in that case also violated the right to freedom from cruel and inhuman treatment, for which the Commission relied on jurisprudence from the UN Committee against Torture.⁵⁹

Building on its unique jurisprudence on interdependence, the African Commission adopted the ‘Pretoria Declaration on Economic, Social and Cultural Rights’ in 2004.⁶⁰ The Declaration noted that despite the consensus on the indivisibility of human rights, ESCR ‘remain marginalised in their implementation’ and that resistance to ESCR ‘excludes the majority of Africans from the enjoyment of human rights’.⁶¹ The Declaration recognized ‘the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans including, food security, sustainable livelihoods, human survival and the prevention of violence’.⁶² The Declaration affirmed that ESCR explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of ESCR not explicitly guaranteed in the Charter.⁶³ The resolution also called for the preparation of Guidelines on the Implementation of ESCR.⁶⁴

⁵⁴ Chapter 3.

⁵⁵ Chapter 3.

⁵⁶ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (ACHPR 2001) (*SERAC v Nigeria*) para 67.

⁵⁷ *Ibid* para 63.

⁵⁸ *Free Legal Assistance Group v Zaire*, Communications 25/89, 47/90, 56/91 and 100/93 (joined) (ACHPR 1995) para 47.

⁵⁹ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 279/03-296/05, (ACHR 2009) para 159, citing *Hajrizi Dzemajl et al. v Yugoslavia*, Communication No. 161/2000 CAT/C/29/D/161/2000 (2002).

⁶⁰ ‘Pretoria Declaration on Economic, Social and Cultural Rights’ ACHPR /Res.73 (XXXVI) 04.

⁶¹ *ibid* Preface.

⁶² *ibid*.

⁶³ *ibid* para 10.

⁶⁴ ACHPR /Res.73 (XXXVI) 04 para 4.

The African Commission's 2011 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights'⁶⁵ (Principles and Guidelines) draw from the CESCER's General Comment No. 9 to affirm that the principle of interdependence demands the rejection of any rigid categorization of rights and that ESCR 'entitle affected individuals and peoples to effective remedies and redress under domestic law'.⁶⁶ The Principles and Guidelines adopt a holistic interpretive approach emphasizing that rights must be read together, informed by evolving international human rights norms and tied to unifying human rights values of dignity and equality in rights. Most significantly, they state that the same interpretive approach should be followed by courts and administrative tribunals under domestic law. Domestic law 'must be interpreted as far as possible in a way which conforms to State parties' obligations under the African Charter':⁶⁷

[W]here economic, social and cultural rights are not expressly included in the constitution of a State party, the courts and administrative tribunals should strive to protect the interests and values underlying these rights through an expansive interpretation of other rights, for example, the rights to life, human dignity, security of the person, equality and just administrative action.⁶⁸

While the Principles and Guidelines derive ESCR from the particular rights guaranteed in the African Charter, they define their meaning and content with reference to broader human rights values linked to human dignity, drawing on international human rights jurisprudence. They define the right to housing as 'the right to gain and sustain a safe and secure home and community in which to live in peace and dignity'.⁶⁹ They note that the right to food is inherent in the rights to life and health and the right to economic, social and cultural development, 'is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights that are also enshrined in the African Charter'.⁷⁰ The right to social security 'can be derived from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled'.⁷¹

As described in Chapter 3, this approach to interdependence has now been applied in the emerging jurisprudence of the African Court. In the *Ogiek* case, for instance, the Court found that the eviction of the Ogiek community from ancestral lands in the Mau Forest of Kenya violated the right to land as well as rights to culture, free disposal of wealth and natural resources and economic, social and cultural development.⁷² The Court drew on the UN Declaration on the Rights of Indigenous Peoples to recognize the obligations of the State to take positive

⁶⁵ 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (ACHPR October 2001) (Principles and Guidelines). See Chapter 3.

⁶⁶ *ibid* para 21.

⁶⁷ *ibid* para 25.

⁶⁸ *ibid* para 24.

⁶⁹ Principles and Guidelines (n 65) para 78. See CESCER, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), (13 December 1991) E/1992/23.

⁷⁰ *ibid* para 84.

⁷¹ *ibid* paras 80–82.

⁷² *African Commission on Human and Peoples' Rights v Kenya* Application No. 006/2012, Judgment (ACTHPR 2017) (*Ogiek*).

measures to support the rights of indigenous peoples to development.⁷³ Unfortunately, the Court departed from the African Commission's interdependent interpretation of the right to life, stating that 'it is necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life.'⁷⁴

3.2 The Inter-American System

As described in Chapter 5, ESCR in the Inter-American System of Human Rights, as in the international system, were first treated as equal rights integrated within a unified framework but were subsequently relegated to separate status based on distinctions related to justiciability. The American Declaration of the Rights and Duties of Man, adopted in 1948, contemporaneous with the UDHR, recognizes ESCR on an equal footing with civil and political rights, including the rights to health (which includes social measures respecting food, housing, clothing), education, work, social security, culture and property (as meets the essential needs of decent living and helps to maintain the dignity of the individual).⁷⁵ The American Convention on Human Rights (ACHR) on the other hand, adopted in 1969, includes a wide range of civil and political rights but references ESCR only as a commitment, in article 26, to the progressive realization of 'the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States'.⁷⁶

The Protocol of San Salvador,⁷⁷ adopted in 1988, provides for a limited number of ESCR, subject to periodic reports on progress submitted to a Working Group. The Protocol includes a strong statement of interdependence, noting

the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized.⁷⁸

The jurisdiction of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACtHR) to consider petitions alleging violations of rights under the Protocol is restricted to trade union and education rights, though interde-

⁷³ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (October 2007) A/RES/61/295 2 (UNDRIP).

⁷⁴ *Ogiek* (n 72) 154.

⁷⁵ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992), articles XI, XII, XIV, XVI, XIII, XXIII.

⁷⁶ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, (ACHR) art 26.

⁷⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Adopted at the Eighteenth Regular Session of the General Assembly of the Organization of American States, San Salvador, El Salvador, 17 November 1988.

⁷⁸ *Ibid* Preface.

pendence with other rights in the Protocol may be referenced to interpret the provisions of the ACHR.⁷⁹

In light of this history, the adjudication of ESCR under the ACHR has relied significantly on their interdependence with guaranteed CPR, and most significantly on interdependence with the right to life. The IACtHR has developed the concept of the right to life as the right to a dignified life (*vida digna*), which, as will be discussed below, has now been incorporated into the interpretation of the right to life under the ICCPR. The concept was first described in the *Villagrán Morales et al. ('Street Children') v Guatemala* case, in which the IACtHR stated that the right to life 'is not only the right of every human being not to be deprived of life arbitrarily, but also the right not to be prevented from having access to the conditions that guarantee a dignified existence'.⁸⁰

The IACtHR has since applied the *vida digna* principle in a number of other cases, including several related to indigenous peoples' claims to rights to food, housing and culture on their ancestral lands. In *Sawhoyamaxa v Paraguay*, an indigenous community was displaced from their lands and left to live on the side of a road without housing, potable water, sanitation or access to health care.⁸¹ The Court found that these conditions constituted a violation of the right to a dignified life and took the occasion to explain the important transformation that had been instituted in the Court's jurisprudence on the right to life, previously viewed as a negative right:

Some remarkable decisions by the Court have shifted the focus towards the other side of the right to life which, seen from yet another perspective, constitutes the other face of State duties: beyond the mere omission curbing arbitrariness or mitigating punishment, action is required to create conditions to guarantee a decent existence. In this view, the right to life is restored to its original status as an opportunity to choose our destiny and develop our potential. It is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions.⁸²

The other right in the IACHR through which the IACtHR has leveraged significant protection of ESC rights through interdependence is the right to property. As with the right to life, this has been achieved by interpreting the right not only within a negative rights framework, as protection from State interference, but also as a substantive right to land, housing, water, food and other ESCR.⁸³ The interpretation of the right to property by the IACtHR has also drawn significantly on the UN Declaration on the Rights of Indigenous Peoples.⁸⁴ Beginning with its decision in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the IACtHR has emphasized the close ties of indigenous peoples with their traditional territories and held that

⁷⁹ Ibid, art 19. *Jorge Odir Miranda Cortez et al. v El Salvador* [2000] Case 12.249, Report No. 29/01, OEA/Ser. L/V/II.111 Doc. 20 rev 284 para 36.

⁸⁰ *Villagrán Morales et al. v Guatemala* (19 November 1999) IACtHR, Series C No 77, para 188 [male pronoun deleted].

⁸¹ *Sawhoyamaxa Indigenous Community v Paraguay* (29 March 2006) IACtHR Series C No 146.

⁸² Ibid para 18.

⁸³ For a summary of this jurisprudence, see *Kaliña and Lokono Peoples v Suriname* (25 November 2015) IACtHR (*Kaliña v Suriname*) paras 129–32.

⁸⁴ UNDRIP (n 73). Article 25 states: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.'

their right to property must respect their traditions of collective ownership and ensure that their culture is safeguarded. In *Kaliña and Lokono Peoples v Suriname*, the Court found that the laws of Suriname violated the right to property by failing to ensure the collective rights of the Kaliña and Lokono peoples of access to a river that was essential to both their cultural life and their survival.⁸⁵

Despite the relatively weak protections of ESCR in the IACHR, the jurisprudence now establishes, on the basis of interdependence of ESCR with the right to life and the right to property, an interpretive foundation on which ESCR claims can be adjudicated in reference to a unifying framework of core human rights values linked to equal dignity and the free development of personality, drawing on international human rights law, including the ICESCR and the UN Declaration on the Rights of Indigenous Peoples.

3.3 The European System

As described in Chapter 4, the European Social Charter (ESC) represents a unique advance internationally, engaging with systemic violations of ESC rights through a collective complaints system. At the same time, it is marginalized by distinctions with respect to enforceability and domestic implementation. Civil and political rights guaranteed by the European Convention on Human Rights (ECHR) are enforceable by the European Court of Human Rights (ECtHR) and in national courts, while the decisions of the European Social Rights Committee are not considered binding by State parties. Moreover, the rights in the ECHR are framed and interpreted within a predominantly negative rights paradigm, while the ESC is viewed as guaranteeing more positive rights. It is important, therefore, that the different status and understandings of the two categories of rights be mediated by a recognition of their interdependence.

The European Committee on Social Rights (ECSR), as stated in Chapter 4, has promoted interdependence by emphasizing interpretation based on common human rights values and norms, through which it gives ‘life and meaning to fundamental social rights’.⁸⁶ It has focused on human dignity as ‘the fundamental value and indeed the core of positive European human rights law – whether under the ESC or under the European Convention of Human Rights’:⁸⁷

[T]he rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights. Indeed, according to the Vienna Declaration of 1993, all human rights are ‘universal, indivisible and interdependent and interrelated’ (para. 5). The Committee is therefore mindful of the complex interaction between both sets of rights.⁸⁸

The ECSR has emphasized that under the Vienna Convention, a treaty shall be interpreted ‘in the light of its object and purpose’ and that the object and purpose of the ESC is linked to the unifying purposes of human rights.⁸⁹ In *FIDH v France*, considering the issue of access to

⁸⁵ *Kaliña v Suriname* (n 83) paras 152–60.

⁸⁶ *Complaint No 14/2003: International Federation of Human Rights Leagues (FIDH) v France* (ESRC) para 29.

⁸⁷ *FIDH v France* para 31.

⁸⁸ *Ibid* para 28.

⁸⁹ *Ibid* para 28; Vienna Convention on the Law of Treaties, art 31.

health care for migrants without legal status, the ECSR noted that the complaint ‘is connected to the right to life itself and goes to the very dignity of the human being’.⁹⁰

The ECSR has also adopted and promoted the idea of substantive equality as a bridge between social rights and the right to equality in the ECHR.⁹¹ In *Complaint No. 27/2004: European Roma Rights Centre v Italy*, the ECSR held that measures to ensure the right to housing of Roma under the ESC are also required by the right to equal treatment, because indirect discrimination can arise ‘by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all’.⁹² In *Complaint No. 15/2003: European Roma Rights Centre v Greece*, the ECSR made a similar finding and referenced the decision of the European Court in *Connors*, in which the Court found that article 8 of the ECHR requires positive measures to protect the Roma’s way of life.⁹³

The ECtHR has been less inclined towards substantive interdependence. Much has been made of its decisions in *Airey v Ireland*, finding that ‘there is no water-tight division separating that sphere from the field covered by the Convention’.⁹⁴ It should be remembered, however, that the issue at stake in the *Airey* case was access to legal aid for a judicial hearing relating to separation from an abusive husband. The idea that the case overlapped with ESCR seemed to be largely premised on the fact that it involved a positive obligation and the allocation of resources to ensure access to legal representation in a civil rights issue.

As further outlined in Chapter 4, there have been numerous cases in which the ECtHR has applied rights to freedom from inhuman and degrading treatment (article 3), the right to private and family life (article 8), the right to non-discrimination (article 14) and the right to property (article 1 of the First Protocol) that engaged issues that relate to ESCR. Failure to provide basic social and medical support to vulnerable individuals, to ensure decent conditions in reception centers for asylum seekers or to exempt victims of domestic violence accommodated in special housing from cuts to housing benefit have been found to violate rights under the ECHR.⁹⁵ As noted by Colm O’Cinneide in Chapter 5, however, all of these decisions have been made within the confines of a presumption that the justiciable human rights in the ECHR are ‘essentially directed at the protection of civil and political rights’ and which provide a ‘wide margin of discretion’ when making decisions about the allocation of resources.⁹⁶

⁹⁰ *FIDH v France* para 30.

⁹¹ H. Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights’ (2009) 9 Human Rights Law Review 61; C. O’Cinneide, ‘Equality and Non-Discrimination Rights within the Framework of the European Social Charter’ [2015] European Discrimination Law Review 1.

⁹² *Complaint No. 27/2004: European Roma Rights Centre v Italy* (ECSR Decision on the Merits, 7 December 2005); *Complaint No. 13/2002: Autism-Europe v France* (ECSR Decision on the Merits, 4 November 2003) para 52.

⁹³ *Complaint No. 15/2003: European Roma Rights Center v Greece* (ECSR Decision on the merits adopted 8 December 2004) para 20 citing *Connors v the United Kingdom* (ECtHR Judgment, 27 May 2004) Application No. 66746/01 para 84.

⁹⁴ *Airey v Ireland* (9 October 1979) ECtHR 1980 2 EHRR 305 para 26.

⁹⁵ *J.D. and A v The United Kingdom* (ECtHR Judgment of 24 October 2019) Application nos 32949/17 and 34614/17. See Chapter 4.

⁹⁶ See Chapter 4, *N v the United Kingdom* (ECtHR Judgment of 27 May 2005) Application no. 26565/05.

The progress that has been made by the ECtHR's recognition of interdependence has overcome the discriminatory consequences of the dominant negative rights paradigm that still prevails. This has been particularly evident in the ECtHR's application of the right to life in article 2 of the ECHR. There is no reason why the obligation to protect the right to life by law under the ECHR should not be interpreted, as within the African and Inter-American systems, as imposing obligations on States to address systemic socio-economic conditions that deprive people of a dignified life and, in fact, lead to premature death – particularly in a region with abundant resources to ensure a dignified life for all.

States' positive obligations to protect the right to life under the ECHR have been largely restricted to the context of the administration of health care or to persons in the care of the State, or to particularly vulnerable individuals who should have been provided care.⁹⁷ The right to life has not been applied, for example, to require measures to address the growing problem of homelessness in Europe and the right to equality has not been applied to address its disproportionate effects on persons with disabilities and other protected groups. Last year, the Office for National Statistics (ONS) for England and Wales estimated that 726 homeless people died in England and Wales – a 22 per cent rise from 2017.⁹⁸ Similar increases have been occurring throughout Europe. A full recognition of interdependence, based on the equal dignity and rights of all members of the human family, would cross the boundary between civil and political rights and ESCR to require urgent action in response to this crisis.

While the application of interdependence within the European system has certainly challenged any rigid categorical division between ESCR and CPR, the prevailing negative rights framework under the ECHR also creates what Scott has referred to as a 'ceiling' that restricts the full application of interdependence.⁹⁹ The separate treatment of rights that are equally essential to life and equality within the ESC has meant that the ECtHR and national courts have denied access to justice for many of the most egregious violations of these rights. This ceiling effect has immense discriminatory consequences for those whose lives are at risk because of inaction and policies of governments with abundant resources to both create and leave unaddressed systemic conditions in society that are grossly incompatible with the objects and purposes of human rights.

4. INTERDEPENDENCE AT THE UN HUMAN RIGHTS COMMITTEE

With 116 State parties to the Optional Protocol to the ICCPR (OP-ICCPR) and only 24 State parties to the OP-ICESCR, rights claimants advancing claims based on the interdependence of rights are significantly more likely to seek remedies under the OP-ICCPR than under the OP-ICESCR. Until recently, the Human Rights Committee seemed unlikely to venture very

⁹⁷ See ECtHR, 'Guide on Article 2 of the European Convention on Human Rights Right to Life' (updated on 31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf>.

⁹⁸ Office of National Statistics, Deaths of homeless people in England and Wales: 2018. <www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsofhomelesspeopleinenglandandwales/2018>.

⁹⁹ Scott, 'Reaching Beyond' (n 4) 638.

far in the direction of any interdependence of ICCPR with ESCR, but new developments give grounds for hope.

4.1 The Right to Equality and Non-discrimination (Article 26)

The issue of interdependence has most frequently been addressed by the Human Rights Committee in applying the right to non-discrimination under articles 2 and 26 of the ICCPR to existing social benefit schemes. In such cases, remedies extend benefits to previously excluded groups so as to enhance the protection of ESCR, with resource consequences. Such claims, even when based on a formal equality model of prohibiting differential treatment, are at least superficially interdependent with ESC rights claims. State parties have argued, in fact, that they are beyond the scope of the ICCPR because they fall in the domain of the ICESCR.

The two historic cases in which the Human Rights Committee first dealt with this issue were first *Broeks v The Netherlands*,¹⁰⁰ and then *Zwaan-de Vries v The Netherlands*,¹⁰¹ in which the petitioners challenged their disqualification from social security benefits and unemployment benefits on the basis that they were married and men would not have been similarly disqualified. The Netherlands argued that both petitions addressed obligations with respect to the right to social security under article 9 of the ICESCR, subject to progressive realization, and were beyond the scope of article 26 of the ICCPR. The petitioners countered that the rights in the two covenants are ‘highly interdependent’, citing the wording of the Separation Resolution at the General Assembly and the preambles of the two covenants.¹⁰² The Human Rights Committee examined the travaux préparatoire of the ICCPR and found that no conclusive commentary that would limit the scope of article 26 of the ICCPR applied to the enjoyment of rights contained in the ICESCR.¹⁰³ It held that discrimination in relation to access to social security programs is within the scope of article 26.

The Human Rights Committee’s position was not, however, based on a principle of substantive equality in which the particular needs of women for social security would be considered through an equality lens, and the right to social security would be seen as a component of the right to equality. Rather, interdependence was regarded as a one-way street. The right to non-discrimination could inform obligations with respect to social security but the right to social security does not inform women’s right to equality. The Human Rights Committee did not entertain the possibility that women’s right to equality and non-discrimination could oblige States to adopt social security legislation that addresses women’s socio-economic disadvantage:

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with article 26 of the Covenant.¹⁰⁴

¹⁰⁰ *Broeks v The Netherlands*, Communication 172/1984, CCPR/C/29/D/172/1984.

¹⁰¹ *Zwaan-de Vries v The Netherlands*, Communication 182/1984, CCPR/29/D/182/1984.

¹⁰² *Ibid* para 5.9.

¹⁰³ *Ibid* para 12.2.

¹⁰⁴ *Ibid* para 12.4.

The idea that a State could ensure equality for women without enacting any social security legislation is what has been referred to as ‘equality with a vengeance’.¹⁰⁵ In its General Comment No. 18 on the right to non-discrimination, the Human Rights Committee defines discrimination as any distinction, exclusion, restriction or preference based on prohibited grounds ‘which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’.¹⁰⁶ The reference to all rights and freedoms would seem to provide a basis on which to develop a more substantive understanding of the right to equality and non-discrimination in which inaction or failures to take appropriate measures to address systemic socio-economic inequality, linked to ESCR obligations, would be requirements equally emanating from the guarantee of equality. In its General Comment No. 28 on the equal rights of men and women guaranteed in article 3 of the ICCPR, the Human Rights Committee explains that States must take steps to remove obstacles to the equal enjoyment of rights in the ICCPR, including the right to life. ‘The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.’¹⁰⁷ In general, however, the Human Rights Committee has been hesitant to apply a substantive equality approach that would be interdependent with ESCR.

The CESCR has developed a more robust understanding of interdependence of women’s equality and ESCR which could just as easily be applied by the Human Rights Committee. In its General Comment on the right to social security, the CESCR has outlined a number of requirements linked to gender equality, including equalization of the compulsory retirement age; equal benefits in both public and private pension schemes; adequate maternity leave and eliminating the factors that prevent women from making equal contributions to contributory benefit schemes, such as lower wages, intermittent participation in the workforce or bearing sole responsibility for the care of children.¹⁰⁸

In the context of State reports and concluding observations, the Human Rights Committee has invoked a more substantive understanding of the right to equality that has been developed by the CESCR, referencing disproportionate poverty, unemployment and inadequate housing or homelessness as potential violations of articles 2 and 26, and requiring positive measures.¹⁰⁹ Applying this approach in reviewing State reports but not in examining petitions, however, has entrenched the idea that substantive equality and the enjoyment of ESCR are more in the realm of social policy than of human rights.

¹⁰⁵ *Schachter v Canada* [1992] 2 S.C.R. 679 para 30.

¹⁰⁶ UN Human Rights Committee, General Comment No. 18: Non-discrimination (10 November 1989) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994) para 7.

¹⁰⁷ Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights between Men and Women) (29 March 2000) HRI/GEN/1/Rev.9 (Vol. I) para 3.

¹⁰⁸ CESCR, General Comment No. 19, The Right to Social Security (Article 9) (4 February 2008) E/C.12/GC/19, paras 19 and 32.

¹⁰⁹ See, for example, Concluding Observations of the Human Rights Committee, Lithuania, UN Doc. CCPR/C/LTU/CO/3 (2012) para 8.

4.2 THE RIGHT TO LIFE (ARTICLE 6)

4.2.1 General Comment 36

In its first General Comment on the right to life, General Comment No. 6 (1982), the Human Rights Committee emphasized that the right to life should not be interpreted narrowly or understood in a restrictive manner. It stated that the protection of the right to life requires that States adopt positive measures such as measures to address malnutrition, infant mortality and epidemics.¹¹⁰ In concluding observations following consideration of State reports, the Committee has at times referred to the need for positive measures to address systemic violations of the right to life, including measures to address homeless and food security.¹¹¹ In the consideration of petitions, however, the Human Rights Committee has, until recently, engaged with interdependence of the right to life with ESCR in only the most limited fashion, and primarily in the context of conditions of detention.¹¹²

The issue of interdependence of the right to life with ESCR, however, was prominently open for review during the consultations and drafting of a new General Comment on the right to life, leading up to its adoption in October 2018.¹¹³ The new General Comment moves decisively in the direction of recognizing the interdependence of the right to life with ESCR. Significantly, Latin American members of the Committee were able to secure support for the critical inclusion of a reference to ‘the right to a dignified life’, thereby opening article 6 to the interpretive possibilities developed by the IACtHR.

General Comment No. 36 also states that the duty to protect life requires measures ‘to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity’. Such conditions may include ‘deprivation of indigenous peoples’ land, territories and resources’ and ‘widespread hunger and malnutrition and extreme poverty and homelessness’, and measures called for may include ‘access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation’ as well as measures ‘designed to promote and facilitate adequate general conditions ... such as social housing programmes’. The General Comment also recognizes the interdependence of the right to life and environmental rights, stating that the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, ‘on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors’.¹¹⁴

¹¹⁰ UN Human Rights Committee, General Comment No. 6: Article 6 (Right to Life), (30 April 1982) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (1994) UN Doc. HRI/GEN/1/Rev 1 at 6.

¹¹¹ See, for example, UN Human Rights Committee, Concluding Observations: Peoples’ Republic of Korea (27 August 2001) UN Doc CCPR/CO/72/PRK para 12; UN Human Rights Committee, Concluding Observations: Canada (7 April 1999) CCPR/C/79/Add.105.

¹¹² See *Ms. Yekaterina Pavlovna Lantsova v The Russian Federation*, Communication No. 763/1997 (2002) UN Doc CCPR/C/74/D/763/1997; *Barkovsky v Belarus* (13 August 2018) UN Doc. CCPR/C/123/D/2247/2013.

¹¹³ Human Rights Committee, General Comment No. 36 (3 September 2019) UN Doc. CCPR/C/GC/36.

¹¹⁴ *Ibid* paras 26, 62.

Given the history of the Human Rights Committee's differentiation between general obligations raised in the context of periodic reviews and obligations to be considered in the context of petitions, a critical question relating to the drafting of General Comment 36 was whether States' failures to address general conditions in society that deprive people of the right to a dignified life must be subject to effective remedy. An earlier draft of the General Comment contained a paragraph that referred to the 'wide-ranging obligations' imposed on States by article 6 but proposed to limit admissible claims to victims whose rights have been 'directly violated by acts or omissions attributable to the ss [to the Optional Protocol], or are under are under a real and personalized risk of being violated'.¹¹⁵ Significantly, after concerns were raised about limiting access to justice for critical systemic issues, the paragraph was deleted from the final text.

4.2.2 *Toussaint v Canada*

The question left open in General Comment No. 36 about access to justice has been at least partially answered in the Human Rights Committee's ground-breaking decision in the case of *Nell Toussaint v Canada*, adopted at the time that General Comment No. 36 was being finalized.¹¹⁶ Nell Toussaint had lived and worked in Canada as an undocumented migrant for almost a decade and was denied access to health care (other than emergency hospital care) because of her immigration status. She challenged this in domestic courts as a violation of the right to life and to non-discrimination under the Canadian Charter of Rights and Freedoms (Canadian Charter). The domestic courts agreed that Toussaint's life had been put at risk, with long-term health consequences, but found this violation of the right to life was justified as a means to promote compliance with immigration law. Toussaint filed a petition alleging, inter alia, violations of articles 6 and 26 of the ICCPR. Canada responded by citing previous Human Rights Committee jurisprudence stating that the right to health is not contained in the ICCPR, and that the right to life 'cannot be interpreted to include a positive obligation to provide comprehensive health insurance coverage to foreign nationals unlawfully present in the territory'.¹¹⁷ The Human Rights Committee answered this argument by stating that 'the author has explained that she does not claim a violation of the right to health, but of her right to life, arguing that the State party failed to fulfil its positive obligation to protect her right to life which, in her particular circumstances, required provision of emergency and essential health care'.¹¹⁸ Accordingly, the Committee found the claims under article 6 admissible.¹¹⁹

In its consideration of the merits, the Committee referred to 'the right to enjoy a life with dignity' and found that Toussaint's rights to life and non-discrimination had been violated.¹²⁰

¹¹⁵ Draft General Comment 36 on article 6 of the International Covenant on Civil and Political Rights: Revised Draft Prepared by the Rapporteur. Adopted on First Reading at the 120th Session. Para 15. Text in square brackets shows proposed additions on which consensus had not been reached on First Reading.

¹¹⁶ *Nell Toussaint v Canada*, Communication 2348/2014 (24 July 2018) CCPR/C/123/D/2348/2014. It should be noted that I acted as a co-representative for Toussaint.

¹¹⁷ 'Submission of The Government of Canada on the Admissibility and Merits of the Communication to the Human Rights Committee of Nell Toussaint Communication No. 2348/2014' (2 April 2015) paras 21, 95. <www.socialrightscura.ca/documents/legal/toussaint%20IFBH/Canada%20-%20Submissions%20on%20Merits.pdf>

¹¹⁸ Ibid para 10.9.

¹¹⁹ Ibid para 10.9.

¹²⁰ Ibid para 11.3.

In considering whether the distinction between regular and irregular migrants was based on a reasonable and objective criteria, the Committee emphasized that the interest at stake in this case was the right to life. ‘States therefore cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.’¹²¹ The implications of the decision, however, will hopefully be that discriminatory denials of the equal enjoyment of the right to a dignified life linked to violations of a wide range of ESCR will now be considered to ground justiciable claims and access to effective remedies.

5. RECLAIMING EQUALITY IN RIGHTS THROUGH INTERDEPENDENCE: THE WAY FORWARD

5.1 Inequality in Rights and the ‘Negative Inference’

Prior to Toussaint’s claim being heard by lower courts in Canada, the Supreme Court of Canada considered a similar claim to access to health care to protect the right to life advanced by patients with considerably more financial means than Toussaint. The claimants in *Chaoulli v Quebec* challenged legislation that prevented wealthier health care consumers from creating private health care plans to avoid waiting times for certain essential services in the public health care system.¹²² In upholding the wealthier care consumer’s claim, the Chief Justice explained, in terms reminiscent of the Human Rights Committee’s rationale in *Broeks*, that ‘the [Canadian] Charter does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter’.¹²³ The Chief Justice’s statement was relied upon by the Federal Court of Appeal to dismiss Toussaint’s claim as a claim to a self-standing right to health care, and it has been relied upon in subsequent cases to affirm that ‘the current state of the law in Canada is that section 7 of the Charter’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care’.¹²⁴ In other words, the state of the law in Canada is that wealthy people’s right to life protects them from being denied access to health care but poor people’s right to life does not.

The reasoning applied by Canadian courts, at the encouragement of the Canadian government, is what Craig Scott and Philip Alston have called ‘negative inference’.¹²⁵ Rather than interpreting the right to life as interdependent with ESCR, which Canada has recognized under international law, some courts have drawn a negative inference from the absence of ESCR in the Charter. Those whose right to life or equality is violated by government interference or action enjoy the protection of the right to life. However, when the same rights and interests require government action or positive measures, the right to life or equality is not protected. This is the legacy of the divorce of ESCR from CPR. Rather than focusing on the interest

¹²¹ Ibid para 11.7.

¹²² *Chaoulli v Quebec (Attorney General)* (2005) 1 S.C.R. 791

¹²³ Ibid para 104.

¹²⁴ *Canadian Doctors for Refugee Care v Canada (Attorney General)* 2014 FC 651.

¹²⁵ Craig Scott and Philip Alston, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’ (2000) 16(2) South African Journal on Human Rights 206, 227–28.

meant to be protected and the broader purposes of human rights, the focus has been redirected to categories of obligations of governments, on the basis of which unequal categories of rights and unequal categories of claimants are divided. The issue at stake is not just about how the right to life is or is not protected by courts. It is about which lives matter within the dominant human rights paradigm and which do not.

5.2 Interdependence and the Current Human Rights Crisis

Many of the most critical systemic violations of human rights now lie in the interstices of the two categories of rights, constituting overlapping violations of ESCR and CPR. Violations of ESCR linked to unprecedented socio-economic inequality; erosion of universality of social programs; corporate capture of housing, land and services; and the climate emergency are interwoven with new attacks on democracy and freedom of expression, criminalization of those whose social and economic rights are violated by homelessness and poverty and increased racism and xenophobia.

Not just ESCR but also civil and political rights have been damaged by the separation of the categories. An estimated one-third of deaths worldwide are linked to poverty, clearly engaging the rights to life and equality for the groups that are disproportionately affected.¹²⁶ However, States' failures to take appropriate measures to protect and value these lives have not been effectively challenged as violations of the rights to life and equality. The right to non-discrimination for racial and ethnic minorities has not been effectively applied in conjunction with the right to housing to remedy systemic racial and ethnic inequalities linked to disproportionate homelessness or marginalization in cities. Equality guarantees for persons with disabilities have not challenged unacceptable levels of unemployment or the growing numbers of persons with intellectual, mental health and physical impairments living in homelessness.¹²⁷ Protections for refugees and asylum seekers have failed to provide meaningful protection for growing numbers of migrants driven from their homes by poverty or loss of livelihood. These violations of human rights tend to escape human rights-based responses, both in the administration of justice and in the political priorities of governments, because they lie in the largely neglected and uncharted territory between the two categories of rights.

5.3 Retrieving the Human Dimension of Human Rights

Until the adoption of the OP-ICESCR, ESCR at the international level were rights without claimants. The rights tended to be described and understood in reference to States' obligations rather than to the circumstances, perspectives or dignity interests of claimants.

The lives of rights-holders are not divided into categories of rights, nor are the often multiple violations they face. For a single mother left unable to provide necessary nutrition to a child to sustain life, there is no categorical divide between the right to life and the right to food, and no distinction between first or second generation rights. The struggle for access to food, with

¹²⁶ Anne-Emanuelle Birn, 'Addressing the Societal Determinants of Health: The Key Global Health Ethics Imperative of Our Times' in Solomon Benatar and Gillian Brock (eds), *Global Health and Global Health Ethics* (CUP 2011) para 43.

¹²⁷ UNGA Report of the Special Rapporteur on the Right to Housing (12 July 2017) UN Doc. A/72/128.

many dimensions, is often linked to systemic discrimination based on gender, race, ethnicity or disability as well as to socio-economic deprivation and is experienced through these and many other intersectionalities. In this sense, the affirmation of interdependence of rights on an equal footing in the Vienna Declaration was a call to reground human rights in the integrity, complexity and multidimensional struggles that characterize the lives of rights-holders. As Scott has suggested:

The term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation. It is not meant to create the impression of relationships between rights as entities with some kind of objective existence that goes beyond intersubjective understandings.... It is important to remember that the idea of interdependence has been developed not for the sake of rights but for the sake of persons.¹²⁸

The development of the principle of interdependence focused on the inherent dignity and worth of persons that began in the 1990s was also a result of courts and human rights bodies beginning to actually hear claims and engage with the circumstances in which people were living. Advances in access to justice for ESC rights meant that the voice and lived experience of claimants could become central to the process of elaborating the content of ESCR and the obligations that flow from them. Rather than assessing the reasonableness of programs and policies primarily in relation to the concerns and rationale of governments in a two-way dialogue, rights claimants provide a contextual foundation for assessing what constitutes a reasonable response to the circumstances in which they live.¹²⁹ When claimants are actually heard, interdependence, or what is referred to from the claimants' perspective as 'intersectionality', emerges as a lived reality.

The Constitutional Court of South Africa in the *Grootboom* case, which established the normative framework for reasonableness review subsequently incorporated into the OP-ICESCR, rejected an earlier deferential standard of review in response to the 'intolerable circumstances' in which Irene Grootboom and her community, and millions of others, were living.¹³⁰ These circumstances were seen not only to violate the specific right to housing in article 26 of the South African Constitution, but to constitute an assault on the core values affirmed in its preamble: '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.' The decision begins by noting that the case 'brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream'.¹³¹

Similarly, the Colombian Constitutional Court's ground-breaking decision in T-025, granting a wide-ranging, progressively implemented and participatory remedy for violations of the rights of internally displaced persons to health, housing, education and social assistance,

¹²⁸ Craig Scott, 'Interdependence and Permeability of Human Rights Norms' (n 4).

¹²⁹ Stuart Wilson and Jackie Dugard describe a tendency of South African courts adjudicating ESC rights to prefer 'a facial examination of state policy, implicitly accepting the conceptions of reasonableness and possibility upon which those policies are drafted and implemented. This tends to reproduce the exclusion from policy formulation and implementation processes which have brought the claimants to court in the first place.' Stuart Wilson and Jackie Dugard, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011) 22 Stellenbosch Rev 664, 673.

¹³⁰ Bruce Porter, 'Reasonableness and Article 8(4)' in M Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 173, 186.

¹³¹ *South Africa and Others v Grootboom and Others*, 2001 (1) SA 46, 2000 (11) BCLR 1169 1.

was premised on an initial finding of interdependence of these rights with CPR, including the rights to life, to choose one's place of residence, to freely develop personality, to freedom of expression and association, and to the protection and reunification of the family.¹³²

Some of the most significant advances in interdependence of ESCR with the right to life have emerged from India – one of the States that pushed for the separation of the two covenants in the 1950s. The Indian Constitution, which came into force in 1950, recognized civil and political rights as fundamental rights subject to access to justice but accorded ESCR the status of non-justiciable 'directive principles'. The right to life, therefore, was justiciable, but the right to food and housing were not. Some of the early judges of the Indian Supreme Court, however, displayed a willingness to engage in a human and empathetic way with the circumstances of claimants. This eventually compelled the Court to reject the false separation between directives for State policy and the rights of citizens. As early as 1981, the Indian Supreme Court had recognized that

the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.¹³³

As described in Chapter 8, in the case of *People's Union for Civil Liberties v Union of India and Others*,¹³⁴ the Court was driven by its outrage at the prospect of widespread starvation when surplus grain was rotting in storage to issue a series of interim orders that saved thousands of lives and resulted in legislative implementation of the right to food.

Remedying the unequal status of ESCR is not, therefore, as simple as including these rights in constitutions as justiciable rights, as desirable as that is. Those who have been excluded from the human rights movement must be accorded substantive equality, not just formal equality. The dominant paradigms related to the content of rights, the obligations of governments, the role of courts and the types of remedies that are required must be transformed by the inclusion of ESCR claimants as equal participants in the human rights movement.

There is much to be gained on both sides of the human rights divide from a reconciliation of a 70-year separation. The negative rights paradigm that dominates CPR, and human rights practice generally, must be transformed by a constructive engagement with ESCR. This will allow civil and political rights to transcend the discriminatory denial of protection to claimants whose civil and political rights are denied by socio-economic deprivation. At the same time, ESC rights advocacy and adjudication must be transformed by engaging with civil and political claims so as to overcome the tendency to marginalize the claimant in a two-way conversation between courts and legislatures, focused on the nature of government obligations rather than on claimants' circumstances and entitlements.

There is a lot at stake in a successful outcome of the reconciliation. As noted above, a more inclusive paradigm of human rights is critical to address current human rights challenges, which tend to fall in territory between the two covenants. Moreover, many of the current challenges are themselves products of the separation of rights. Governments' inaction on

¹³² *Decision T-025* (2004) Colombian Constitutional Court.

¹³³ *Francis Mullins v The Administrator Union* (13 January 1981) Supreme Court of India.

¹³⁴ In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 196 of 2001.

poverty, inadequate housing and hunger is often linked to the idea that these are social policy challenges, not fundamental human rights violations. As was affirmed at the Vienna World Conference in 1993, recognizing everyone as equal in dignity and rights requires States to place ESC rights on an equal footing with civil and political rights, based on the principle of interdependence. This is a critical work in progress.