

## **Access to Medication as a Human Right**

*Holger P. Hestermeyer*

“Healing is a matter of time, but it is sometimes also a matter of opportunity.”

(Hippocrates, Precepts, Chapter 1)

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When in 1981 several unusually aggressive cases of *Karposi's sarcoma*, a rare skin-disease, were identified in young gay men in New York<sup>1</sup> no one was in a position to know that this was but the beginning of what would develop into a pandemic of biblical proportions: HIV/AIDS.

We have all heard the numbers: 37.8 million people have been infected with HIV, 2.9 million have died of AIDS, in Botswana 37.3 per cent of the adult population is infected.<sup>2</sup> They defy the imagination. Currently available antiretroviral medication cannot heal patients, but it prolongs their life significantly and improves their quality of life.<sup>3</sup> However, only 1 per cent of the people who need AIDS medication in southern Africa actually have access to it.<sup>4</sup> This raises the question whether and to what extent access to medication is guaranteed by current international human rights law. The importance of the question is highlighted by the debate on international patent law and access to medication.<sup>5</sup> NGOs,<sup>6</sup> scholars,<sup>7</sup> the WHO,<sup>8</sup> the U.N. General Assem-

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<sup>1</sup> K.B. Hymes et al., "Kaposi's sarcoma in homosexual men: A report of eight cases", *Lancet* 2 (1981), 598.

<sup>2</sup> UNAIDS (ed.), *2004 Report on the Global AIDS Epidemic. 4th Global Report*, 2004, 190 et seq.

<sup>3</sup> DHHS/ H.J. Kaiser Family Foundation (eds), *Guidelines for the Use of Antiretroviral Agents in HIV-Infected Adults and Adolescents*, 4 February 2002, 13.

<sup>4</sup> A.C. D'Adesky, *Moving Mountains. The Race to Treat Global AIDS*, 2004, 11.

<sup>5</sup> This paper, too, is inspired by a Ph.D. thesis on the issue of patents and access to medication.

<sup>6</sup> Most relevant are the lobbying work of Médecins Sans Frontières' Access to Essential Medicines Campaign (MSF, *Access News*, February 2002); Oxfam International's Cut the Cost Campaign (Oxfam, *TRIPS and Public Health. The next battle*), Oxfam Briefing Paper 15, 2002; CPTech's Health Care and Intellectual Property Campaign (CPTech, *Health Care and Intellectual Property*, at <<http://www.cptech.org/ip/health>> (last visited 20 January 2004); other very active NGOs in the area include Health Action International, Act Up, Treatment Action Campaign, HealthGAP; N. Gefen, "Pharmaceutical Patents, Human Rights and the HIV/AIDS Epidemic", TAC Discussion Document (2001).

<sup>7</sup> See only W.P. Nagan, "International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States", *Fla. J. Int'l L.* 14 (2002), 255 et seq.; S. Ghosh, "Pills, Patents, and Power: State Creation of Gray Markets as a Limit on Patent Rights", *Florida Law Review* 53 (2001), 789 et seq.

bly,<sup>9</sup> the Commission on Human Rights,<sup>10</sup> the Sub-Commission on the Promotion and Protection of Human Rights,<sup>11</sup> the Committee on Eco-

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<sup>8</sup> *Intellectual Property Rights, Innovation and Public Health*, WHA Res. 56.27 (28 May 2003) (initiating the establishment of a body to study intellectual property rights and their effect on public health); *Ensuring Accessibility of Essential Medicines*, WHA Res. 55.14 (18 May 2002); World Health Organization, “Globalization, TRIPS and Access to Pharmaceuticals”, WHO Policy Perspectives on Medicines, No. 3 (March 2001); World Health Organization, *Network for Monitoring the Impact of Globalization and TRIPS on Access to Medicines. Meeting Report, 19–21 February 2001 Chulalongkorn University Bangkok, Thailand*, 2002, 20 et seq.

<sup>9</sup> See *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, A/RES/58/179 of 22 December 2003; *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, A/RES/58/173 of 22 December 2003.

<sup>10</sup> The Commission on Human Rights is a subsidiary organ of ECOSOC (Article 68 U.N. Charter) established in 1946 by an ECOSOC Resolution, E/RES/5 (I) of 16 February 1946; E/RES/9 (II) of 21 June 1946. It is active e.g. in the area of standard-setting for human rights, cf. E. Riedel, in: B. Simma et al. (eds), *The Charter of the United Nations. A Commentary. Volume II*, 2nd edition 2002, Article 68 sidenote 84 et seq., R.K.M. Smith, *Textbook on International Human Rights*, 2003, 61 et seq.; *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Commission on Human Rights Res. 2002/32, para. 7 (22 April 2002), less obvious: *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Commission on Human Rights Res. 2001/33, para. 3 b (23 April 2001); *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, Commission on Human Rights Res. 2003/29, para. 5 b (22 April 2003); *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, Commission on Human Rights Res. 2004/26, paras. 6 b, 7, 11 (16 April 2004); *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Commission on Human Rights Res. 2004/27, chapeau (16 April 2004).

<sup>11</sup> The Sub-Commission was set up in 1946 as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as Sub-Commission of the Commission on Human Rights, see E/RES/9 (II), see note 10, paras 9 et seq. It was renamed in 1999 by ECOSOC Decision 1999/256. It is mostly charged with undertaking studies and making recommendations to the Commission, see Smith, see note 10, 63. *Intellectual Property and Human Rights*, Sub-Commission on Human Rights Res. 2001/21 (16 August 2001); *Intellectual Property and Human Rights*, Sub-Commission on Human Rights Res. 2000/7 (17 August 2000).

conomic, Social and Cultural Rights,<sup>12</sup> the U.N. High Commissioner for Human Rights<sup>13</sup> and the Special Rapporteurs on Globalization<sup>14</sup> have all alleged that the TRIPS Agreement imposing patent legislation on all World Trade Organization Member States touches on human rights standards that guarantee the accessibility of medication by enabling pharmaceutical companies to demand higher prices – and thus hamper access to the medication.

This article will first provide a background note on international human rights law in general and health as a human right in particular (I.), as well as on the interpretation of human rights conventions (II.). We will find that access to medication is closely connected to the notion of economic, social and cultural rights. Some authors argue that this category of human rights is of doubtful legal relevance at best, an objection we will treat under the heading of “justiciability” (III.). Finally we will discuss the right to access to medication in detail, proceeding in the order of the sources recognized by international law as stated in Article 38 of the Statute of ICJ,<sup>15</sup> international conventions, customary international law and general principles of law (IV.-V.). The analyses of the right to access to medication that have been conducted so far often determine the content and scope of the right and then point to several

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<sup>12</sup> Although charged with monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Committee was not set up by the ICESCR itself, but in 1985 by E/RES/1985/17 of 28 May 1985 to help ECOSOC in its monitoring task; Smith, see note 10, 69 et seq. *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. Follow-up to the day of general discussion on article 15.1 (c), Monday, 26 November 2001. Human Rights and Intellectual Property. Statement by the Committee on Economic Social and Cultural Rights*, Doc. E/C.12/2001/15 (14 December 2001).

<sup>13</sup> The office of the High Commissioner was created in 1993 by a General Assembly Resolution: *High Commissioner for the Promotion and Protection of All Human Rights*, A/RES/48/141 of 20 December 1993. The High Commissioner has the primary responsibility for the United Nations human rights activities under the direction of the Secretary-General of the United Nations, Smith, see note 10, 63 et seq. *Economic, Social and Cultural Rights. The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights. Report of the High Commissioner*, Doc. E/CN.4/Sub.2/2001/13 (27 June 2001).

<sup>14</sup> J. Oloka-Onyango/ D. Udagama, *Economic Social and Cultural Rights. Globalization and its Impact on the Full Enjoyment of Human Rights*, Doc. E/CN.4/Sub.2/2001/10, paras. 19-34 (2 August 2001).

<sup>15</sup> UNYB 55 (2001), 1449.

treaties as its sources. Not all states, however, have signed all of the treaties scholars have used as a basis for the right. The scope of the obligation incurred by State Parties to only some of the treaties differs from the obligations undertaken by State Parties to other or all treaties. We shall therefore determine the scope of the obligations imposed by each of the legal sources separately. Equally relevant is the question whether access to medication is guaranteed under general international law.

## I. Background

### 1. International Human Rights

Originally public international law was conceived as the body of law regulating the relationship between states. As *Oppenheim* wrote in his seminal treatise on International Law in 1912: “Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.”<sup>16</sup> International law did provide rules for the treatment of foreigners (the “law of aliens”), but it was the home countries of the foreigners and not the individuals themselves that could appeal to these rules.<sup>17</sup> Treatment of individuals by their own home state was regarded as an internal matter of that state. But little<sup>18</sup> presaged the sweeping

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<sup>16</sup> L. Oppenheim, *International Law. A Treatise. Vol. I. Peace*, 2nd edition 1912, 19; D. Anzilotti, *Corso di Diritto Internazionale (Ad uso degli studenti dell’Università di Roma), Volume Primo: Introduzione – Teorie Generali*, 3rd edition 1928, 112 et seq. (somewhat critical, though not from a human rights standpoint, but because of empirical observations); J. Delbrück/ R. Wolfrum, *Völkerrecht. Begründet von Georg Dahm. Band I/1 Die Grundlagen. Die Völkerrechtssubjekte*, 2nd edition 1989, 125.

<sup>17</sup> L. Henkin, *The Age of Rights*, 1990, 14; K. Ipsen, in: K. Ipsen (ed.), *Völkerrecht*, 4th edition 1999, 704 et seq. In-depth: J. Delbrück/ R. Wolfrum, *Völkerrecht. Begründet von Georg Dahm. Band I/2 Der Staat und andere Völkerrechtssubjekte; Räume unter internationaler Verwaltung*, 2nd edition 2002, 104 et seq.; K. Doehring, *Völkerrecht*, 2nd edition 2004, 374 et seq.; A. Bleckmann, *Völkerrecht*, 281 et seq. (2001). The law of aliens does not just prohibit the discrimination of foreigners – as many developing countries argued under the Calvo Doctrine, but also establishes minimum standards for their treatment. F.V. García-Amador, “Calvo Doctrine, Calvo Clause”, in: R. Bernhardt (ed.), *EPIL* Volume I, 1992, 521.

<sup>18</sup> Commonly named progenitors of international human rights law (besides the law of aliens) include the doctrine of humanitarian intervention, inter-

change that international law would undergo after World War II – a truly ‘constitutional moment’.<sup>19</sup> After the genocidal rule of the Nazi regime international law could no longer stand idly by when a state abused and killed its own citizens. Protecting the individual from its own government by granting rights to individuals became a moral imperative.<sup>20</sup> International law had come to see the person behind the state.<sup>21</sup>

President Roosevelt set the stage for the development of modern human rights law when he called for a world founded upon four essential human freedoms, among them both civil and political freedoms and “freedom from want.”<sup>22</sup> The U.N. Conference on International Organizations made good that promise by including several references to

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national humanitarian law, documents banning slave trade, and the protection of minority rights within the League of Nations system. T. Buergenthal, *International Human Rights in a Nutshell*, 2nd edition 1995, 3 et seq.; Smith, see note 10, 7 et seq.; A. Verdross/ B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3rd edition 1984, 797; I. Brownlie, *Principles of Public International Law*, 5th edition 1998, 558.

<sup>19</sup> The term, constitutional moment, is closely tied to Ackerman’s writing, B. Ackerman, *We the People. 1st Foundations*, 1991, 266 et seq. Here it is meant to imply that the historical crisis led to a radical change in the structure of international law.

<sup>20</sup> An excellent discussion of this issue is H. Lauterpacht, *International Law and Human Rights*, 1950, 3 et seq. (linking rights and duties of individuals); The International Military Tribunal explicitly rejected the argument that international law is concerned only with actions of sovereign states: International Military Tribunal, *Trial of The Major War Criminals Before the International Military Tribunal. Nuremberg 14 November 1945 – 1 October 1946. Volume XII. Proceedings 27 August 1946 – 1 October 1946*, 1948, 465 et seq.; For earlier precedence see *Jurisdiction of the Courts of Danzig*, PCIJ Ser. B, No. 15, 17 et seq. (Judgment of 3 March 1928).

<sup>21</sup> For a clear and outright rejection of the traditional tenet that only states are subjects of international law see H. Kelsen, *Principles of International Law*, 1952, 114 et seq.; *Contra*: A. Verdross, *Völkerrecht*, 2nd edition 1950, 101 et seq. Thoroughly: Delbrück/ Wolfrum, see note 17, 259 et seq.

<sup>22</sup> Buergenthal, see note 18, 21 et seq.; A.N. Holcombe, *Human Rights in the Modern World*, 1948, 4. Already as a Democratic presidential candidate campaigning at a time of economic crisis Roosevelt had stated that “[e]very man has a right to life, and this means that he also has a right to make a comfortable living.” M. Gilbert, *History of the Twentieth Century*, 2001, 212.

human rights in the Charter of the U.N.,<sup>23</sup> though falling short of including a declaration of human rights.<sup>24</sup> Besides being mentioned in the preamble of the U.N. Charter the promotion of human rights is one of the purposes of the organization, as stated by Article 1 (3) U.N. Charter which reads in the relevant part:

“[The Purposes of the United Nations are:] To achieve international co-operation 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 (...).”

To achieve this purposes both the U.N. (Article 55 U.N. Charter) and its members (Article 56 U.N. Charter) commit themselves to promote higher living standards, solutions of international economic, social and health problems and universal respect for, and observance of, human rights. Even though states are obliged to promote rather than to abide by human rights, U.N. involvement in human rights law became a success story – partly because it succeeded in internationalizing human rights concerns and partly because it provided a *forum* for further developments.<sup>25</sup> The U.N. Charter endows both the General Assembly<sup>26</sup> and ECOSOC<sup>27</sup> with competencies in the human rights field. Additionally, ECOSOC is required to set up commissions in economic and social fields and for the promotion of human rights.<sup>28</sup> It was the Commission on Human Rights that prepared the Universal Declaration of Human Rights (UDHR), which was adopted by the U.N. General Assembly in 1948<sup>29</sup> as a description of the “common standard of achievement” in the human rights field. As a General Assembly Resolu-

<sup>23</sup> Hereinafter U.N. Charter.

<sup>24</sup> Proposals for such a declaration had been made by the Netherlands (in case an alternative proposal fails), Panama, Cuba (proposing to bind Member States to a General Assembly Resolution in the Charter). United States Department of State, *The United Nations Conference on International Organization. San Francisco, California April 25 to June 26, 1945. Selected Documents*, 1946, 97, 103 et seq.

<sup>25</sup> R. Wolfrum, “The Progressive Development of Human Rights: A Critical Appraisal of Recent UN Efforts”, in: J. Jekewitz et al. (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag*, 1989, 67 et seq.

<sup>26</sup> Article 13 (1) (b) U.N. Charter.

<sup>27</sup> Article 62 U.N. Charter.

<sup>28</sup> Article 68 U.N. Charter.

<sup>29</sup> A/RES/217A (III) of 10 December 1948.



tion the UDHR was not binding.<sup>30</sup> The U.N. continued to strive for a legally binding document on human rights, but the road towards this goal proved cumbersome. It had become commonplace to distinguish two categories of rights: civil and political rights, the heritage of the French Revolution and the U.S. Bill of Rights, protect the individual from undue interference from the state. Economic, social and cultural rights, stemming from socialist ideas born during the Industrial Revolution, require states to promote the economic, social and cultural well-being of the individual.<sup>31</sup> At times the former rights are referred to as “first generation rights”, whereas the latter are called “second generation rights.”<sup>32</sup> The discussions exposed an ideological rift. Socialist countries saw both categories on an equal footing – if they preferred any category it was the economic and social rights as they were seen as a prerequisite for the exercise of civil and political rights. They therefore wanted both categories to be included in a comprehensive human rights document.<sup>33</sup> Western liberal democracies gave clear preference to

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<sup>30</sup> Over time, however, it achieved a significant legal status as discussed below. A. Eide et al. (eds), *The Universal Declaration of Human Rights: A Commentary*, 1992.

<sup>31</sup> For this distinction see T.C. Van Boven, “Les Critères de Distinction des Droits de l’Homme”, in: K. Vasak (ed.), *Les Dimensions Internationales des Droits de l’Homme*, 1978, 45, 53. It is submitted that the two categories cannot be neatly distinguished, nor can they be properly defined, as it is unclear whether the definition of the categories hinges on the subject matter of the right as implied by their names or on the distinction between positive and negative duties. See also M.C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights. A Perspective on its Development*, 1995, 7 et seq.; A. Eide/ A. Rosas, “Economic, Social and Cultural Rights: A Universal Challenge”, in: A. Eide/ C. Krause/ A. Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*, 2nd edition 2001, 3 et seq.

<sup>32</sup> This terminology appears e.g. in K. Drzewicki, “The Right to Work and Rights in Work”, in: Eide /Krause/ Rosas, see note 31, 223, 227; M. Nowak, “The Right to Education”, in: Eide/ Krause/ Rosas, *ibid.*, 245, 252 et seq.; K. Hailbronner, “Der Staat und der Einzelne als Völkerrechtssubjekte”, in: W. Graf Vitzthum (ed.), *Völkerrecht*, 2nd edition 2001, 161, 237. It was criticized forcefully by Eide/ Rosas, see note 31, 4.

<sup>33</sup> *Draft International Covenants on Human Rights. Annotation prepared by the Secretary General*, 23 para. 9, Doc. A/2929 (1 July 1955); I. Szabo, “Fondements historiques et développement des droits de l’homme”, in: K. Vasak (ed.), *Les dimensions internationales des droits de l’homme. Manuel destiné à l’enseignement des droits de l’homme dans les universités*, 1978,

civil and political rights, arguing that (1.) only those rights were justiciable, (2.) only civil and political rights were immediately applicable, whereas economic and social rights had to be progressively implemented and (3.) political rights guaranteed freedom from state action whereas, generally speaking, economic and social rights required states to take action to protect and promote those rights. Consequently, according to Western countries only two separate instruments could account for the fundamental differences between the two categories.<sup>34</sup> The latter position ultimately prevailed and two treaties were drafted: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Despite numerous resolutions, proclamations and declarations affirming that the two sets of rights are indivisible and interdependent,<sup>35</sup> symbolized also by them having been opened for signature simultaneously on 16 December 1966,<sup>36</sup> the distinction between them endures: economic, social and cultural rights have long been neglected

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11, 20 et seq.; P. Daillier/ A. Pellet, *Droit International Public*. Nguyen Quoc Dinh, 6th edition, 1999, 641 et seq.

<sup>34</sup> Ibid., K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects*, 1999, 17; H.J. Steiner/ P. Alston, *International Human Rights in Context. Law, Politics, Morals*, 1996, 256. On the Development of the Covenant on Economic, Social and Cultural Rights in general Craven, see note 31.

<sup>35</sup> *Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, A/RES/32/130 of 16 December 1977, para. 1 (a); *Declaration on the Right to Development*, A/RES/41/128 of 4 December 1986; *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the UDHR and in the ICESCR, and Study of Special Problems Which the Developing Countries Face in their Efforts to Achieve these Human Rights*, Commission on Human Rights Res. 2004/29, para. 8 (19 April 2004); *Proclamation of Teheran, Final Act of the International Conference on Human Rights. Teheran, 22 April to 13 May 1968*, Doc. A/CONF.32/41, 3 para. 13, (1968); *Vienna Declaration and Program of Action*, Doc. A/CONF.157/23, I para. 5 (12 July 1993); Craven, see note 31, 9.

<sup>36</sup> *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, A/RES/2200A (XXI) of 16 December 1966.

and only recently started to attract more interest.<sup>37</sup> Since the coming into force of the two Covenants many new additional human rights instruments have been created, but the UDHR and the two Covenants remain the centerpiece of universal human rights protection, the “International Bill of Human Rights”, their commitment to which states have reaffirmed in numerous declarations.<sup>38</sup>

## 2. Health and Human Rights

At the beginning of the development of a human rights approach to health stands the exercise of governmental functions in health care. The remnants of the ancient Roman sewage system are eloquent testimony to the fact that governments have striven to improve sanitation and thus public health since ancient times.<sup>39</sup> By the 18th century German monarchs had come to regard the protection of public health as part of their duty, their task to build a *gute policey*, a good order.<sup>40</sup> Public health became an international concern as international transportation became more common and knowledge about infectious diseases spread. Several International Conferences were held in the 19th century to prevent the spread of alien diseases to Europe and International Sanitary Conven-

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<sup>37</sup> Eide/ Rosas, see note 31, 3. On the reasons for the neglect of economic, social and cultural rights see the discussion between *van Hoof* and *Vierdag*, F. van Hoof, “Explanatory Note on the Utrecht Draft Optional Protocol”, in: F. Coomans/ F. van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights*, 1995, 147, 159; E.W. Vierdag, “Comments on the Utrecht and Committee Draft Optional Protocols”, in: F. Coomans/ F. van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights*, 1995, 199, 200; B. Simma, “Der Schutz wirtschaftlicher und sozialer Rechte durch die Vereinten Nationen”, in: S. Vassilouni (ed.), *Aspects of the Protection of Individual and Social Rights*, 1995, 75.

<sup>38</sup> Proclamation of Teheran, see note 35, para. 3; Vienna Declaration and Programme of Action, see note 35; *Status of the International Covenants on Human Rights*, Commission on Human Rights Res. 2004/69, para. 4 (21 April 2004); *Final Act of the Conference on Security and Co-operation in Europe of 1 August 1975 (Helsinki)*, ILM 14 (1975), 1292.

<sup>39</sup> B.C.A. Toebes, *The Right to Health as a Human Right in International Law*, 1999, 8.

<sup>40</sup> M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band, Reichspublizistik und Policywissenschaft 1600-1800*, 1988, 345; Toebes, see note 39, 12 et seq.

tions were signed for the same purpose.<sup>41</sup> In the first half of the 20th century two international organizations were set up to supervise these conventions and to fulfill the League of Nations members' commitment to "take steps in matters of international concern for the prevention and control of disease."<sup>42</sup> The concept of a human right to health, however, has not developed until after World War II, when the World Health Organization (WHO), a specialized agency of the U.N.,<sup>43</sup> replaced the two old organizations at the helm of global health policy. Going beyond the mere concern for health expressed in the U.N. Charter,<sup>44</sup> the Constitution of the WHO, which went into force on 7 April 1948,<sup>45</sup> became the first international legal document to contain an explicit right to the "enjoyment of the highest attainable standard of health", albeit only in its preamble. Health was defined as "a state of complete physical, mental and social well-being." Despite its potential of exposing normal states of life, such as sadness after the death of a relative, to treatment as a disease the new definition became very influential.<sup>46</sup> The right to health was taken up in numerous legal instruments, most significantly in the ICESCR.

## II. The Interpretation of Human Rights Conventions

Before we delve into the material legal issues and interpret the Human Rights Covenants, a few words on the methodology of interpreting the

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<sup>41</sup> Toebe, see note 39, 12; H.K. Nielsen, *The World Health Organisation. Implementing the Right to Health*, 2nd edition, 2001, 12.

<sup>42</sup> Article 23 (f) of the Covenant of the League of Nations. The two organizations were the Office International d'Hygiène Publique and the Health Organization of the League of Nations. Nielsen, see note 41, 13.

<sup>43</sup> Article 57 U.N. Charter.

<sup>44</sup> The concern had been included after the Brazilian delegation had submitted a statement that "[m]edicine is one of the pillars of peace." Toebe, see note 39, 15.

<sup>45</sup> Nielsen, see note 41, 14 et seq. On the history of the WHO see S. Sze, *The Origins of the World Health Organization. A Personal Memoir 1945-1948*, 1982; World Health Organization, *The First Ten Years of the World Health Organization*, 1958.

<sup>46</sup> This potential should not be underestimated, given that pharmaceutical companies have an incentive to market and sell their products to as broad a customer-base as possible. R. Moynihan/ R. Smith, "Too much medicine? Almost certainly", *British Medical Journal* 324 (2002), 859.

Covenants seem warranted. The rules of treaty interpretation are laid down in articles 31 et seq. of the Vienna Convention on the Law of Treaties, which are not applicable only for State Parties of this Convention, but for every state, as the rules are deemed to be rules of customary international law.<sup>47</sup> According to article 31 (1) of the Convention a treaty is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A treaty authenticated in two or more languages is presumed to have the same meaning in all language versions.<sup>48</sup> Together with the context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation as well as any relevant rules of international law applicable in the relations between the parties and any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision has to be taken into account.<sup>49</sup> Article 32 of the Convention permits recourse to supplementary means of interpretation, particularly the *travaux préparatoires*, only to confirm the result of an interpretation or to determine the meaning of a norm where the interpretation leads to an absurd or unreasonable result or leaves the meaning ambiguous or obscure. Human rights treaties move beyond the traditional reciprocal international order. Their object and purpose of establishing universal respect for human rights calls for an interpretation that provides an effective protection of those rights rather than one following the principle *in dubio mitius* (choosing the interpretation that restricts state sovereignty the least).<sup>50</sup> Thus a dynamic approach to in-

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<sup>47</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, 4 et seq. (21, 22 para. 41). See A. Aust, *Modern Treaty Law and Practice*, 2000, 10 et seq., 184 et seq.; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 3 et seq. (36-38, 62 paras 42-46, 99) (on other provisions of the Convention). For a thorough examination see A. Watts, “The International Court and the Continuing Customary International Law of Treaties”, in: N. Ando/ E. McWhinney/ R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda. Volume I*, 2002, 251.

<sup>48</sup> Article 33 (3), (4) Vienna Convention on the Law of Treaties.

<sup>49</sup> Article 31 (3) *ibid.*

<sup>50</sup> F. Reindel, *Auslegung menschenrechtlicher Verträge am Beispiel der Spruchpraxis des UN-Menschenrechtsausschusses, des Europäischen und des Interamerikanischen Gerichtshofs für Menschenrechte*, 1995, 82, 113, 139 et seq.; V. Pechota, “The Development of the Covenant on Civil and Political Rights”, in: L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights*, 1981, 32, 69 et seq.; J. Kokott, *Beweis-*

terpretation has to be adopted, taking changes in society into account.<sup>51</sup> Finally interpretations of other human rights instruments and national human rights provisions are frequently used as persuasive arguments for the purposes of interpreting a human rights convention. Human rights instruments thus cross-fertilize each other.

### III. Justiciability

Access to medication, is at its core, about more than a state's negative obligation to abstain from interfering with the right. It imposes the obligation to take positive measures to protect and fulfill the right. Some commentators regard the imposition of positive obligations as a feature of rights granted in the ICESCR and have argued that the rights in that Covenant, including the right to health, are not justiciable. The debate is fraught with misunderstandings stemming from the vagueness of the concept of "justiciability"<sup>52</sup> and from inappropriate analogies to national debates on the question of adopting economic, social and cultural rights in national constitutions.<sup>53</sup>

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*lastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, 1993, 408 et seq.; P.M. Dupuy, "L'Unité de l'Ordre Juridique International. Cours Général de Droit International Public", *RdC* 297 (2002), 9et seq. (31).

<sup>51</sup> R. Bernhardt, "Thoughts on the Interpretation of Human-Rights Treaties", in: F. Matscher/ H. Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in honor of Gérard J. Wiarda*, 1988, 65 et seq. (69); R. Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", *GYIL* 42 (1999), 11 et seq. (12); G. Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR", *EJIL* 15 (2004), 279 et seq. (301 et seq.).

<sup>52</sup> Justiciability has rightly been called a "fluid concept", C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", *Osgoode Hall Law Journal* 27 (1989), 769 et seq. (839); F. Coomans, "Clarifying the Core Elements of the Right to Education", in: F. Coomans/ F. van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights*, 1995, 11 et seq. (19); M. Ssenyonjo, "Justiciability of Economic and Social Rights in Africa: General Overview, Evaluation and Prospects", *East African Journal of Peace & Human Rights* 9 (2003), 1 et seq. (7).

<sup>53</sup> J.P. Müller, "Soziale Grundrechte in der Verfassung?", *Zeitschrift für Schweizerisches Recht*, Neue Folge 92 (1973), 687 et seq.; E. Grisel, "Les

## 1. Terminology

The dictionary defines justiciability as “1. appropriate for or subject to court trial (...) 2. That can be settled by law or a court of law (...)”<sup>54</sup> Some commentators<sup>55</sup> apply the term to indicate that the ICESCR, unlike the ICCPR through its First Optional Protocol,<sup>56</sup> is not implemented by way of an individual communication procedure but by a reporting procedure, in which Member States submit reports on their progress in the implementation of the agreement<sup>57</sup> and those reports are examined by the Committee on Economic, Social and Cultural Rights, a Committee of 18 independent experts established by ECOSOC for this purpose, and to report back to ECOSOC.<sup>58</sup> Thus there is no judi-

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droits sociaux”, *Zeitschrift für Schweizerisches Recht*, Neue Folge 92 (1973), 1 et seq.; E.W. Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights”, *NYIL* 9 (1978), 69 et seq. (80).

<sup>54</sup> J.P. Picket et al. (eds), *The American Heritage Dictionary of the English Language*, 4th edition 2000; R.L. Bledsoe/ B.A. Boczek, *The International Law Dictionary*, 1987; G. Evans/ J. Newnham, *Dictionary of International Relations*, 1998; *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>55</sup> Vierdag, see note 53, 73. P. Alston, “Economic and Social Rights”, *Studies in Transnational Legal Policy* 26 (1994), 137. See also H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 1934, 47 et seq. (stating that a right requires the power of enforcement, if necessary by a lawsuit).

<sup>56</sup> Article 1 of the Optional Protocol allows individuals claiming a violation of their rights under the ICCPR to submit written communications to the Human Rights Committee.

<sup>57</sup> Article 17 et seq. ICESCR.

<sup>58</sup> E/RES/1985/17, see note 12. On the enforcement mechanism see B. Simma/ S. Bennigsen, “Wirtschaftliche, soziale und kulturelle Rechte im Völkerrecht”, in: J.F. Baur/ K.J. Hopt/ K.P. Mailänder (eds), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, 1990, 1477 et seq. (1492 et seq.); B. Simma, “The Implementation of the International Covenant on Economic, Social and Cultural Rights”, in: F. Matscher (ed.), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte*, 1991, 75; E. Riedel, “New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural Rights – The Example of the Right to Health -”, in: S. von Schorlemer (ed.), *Praxishandbuch UNO. Die Vereinten Nationen im Lichte globaler Herausforderungen*, 2003, 345. Efforts to introduce an individual communication procedure are being undertaken, but have not succeeded so far. The Committee itself started contemplating the adoption of an optional protocol in its fifth session. The idea

cial enforcement mechanism, but rather a procedure occasionally described as a “constructive dialogue.”<sup>59</sup> This observation is certainly true. In fact, automatic court enforcement of rules is the exception rather than the rule in all public international law.<sup>60</sup>

Others, however, assert that economic, social and cultural rights are inherently different from civil and political rights and not amenable to application by judicial bodies at all.<sup>61</sup> The distinction between this and

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was taken up in reports by *Türk* and *Alston* (D. Türk, *The Realization of Economic, Social and Cultural Rights*, Doc. E/CN.4/Sub.2/1992/16, para. 210 (1992); P. Alston, *Draft Optional Protocol Providing for the Consideration of Communications*, Doc. E/C.12/1994/12 (1994)) and encouraged by the Vienna Declaration and Programme of Action, see note 35, Part II, para. 75. The Committee finally submitted a draft to the Commission on Human Rights: *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Annex*, Doc. E/CN.4/1997/105 (1997). See K. Arambulo, “Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality”, *University of California, Davis Journal of International Law and Policy* 2 (1996), 111 et seq.; Alternative suggestions include e.g. a proposal to merge human rights treaty bodies – R. Wolfrum, “International Convention on the Elimination of All Forms of Racial Discrimination”, in: E. Klein (ed.), *The Monitoring System of Human Rights Treaty Obligations*, 1998, 49 et seq. (69).

<sup>59</sup> Simma, see note 37, 82; E. Riedel, “Verhandlungslösungen im Rahmen des Sozialpakts der Vereinten Nationen”, *Arbeitspapiere – Mannheimer Zentrum für Europäische Sozialforschung* Nr. 28 (2000).

<sup>60</sup> On the different notions of justiciability M.K. Addo, “Justiciability Re-examined”, in: R. Beddard/ D.M. Hill (eds), *Economic, Social and Cultural Rights. Progress and Achievement*, 1992, 93 et seq. (96). The question whether international law itself is law need not be discussed here, e.g. Kelsen, see note 21, 18 et seq., especially viii.

<sup>61</sup> Note that others regard them as imposing obligations on states, but not as creating rights. These obligations are sometimes called programmatic. Vierdag, see note 53, 83, 95; M. Bothe, “Les concepts fondamentaux du droit à la santé: Le point de vue juridique”, in: R.J. Dupuy (ed.), *Le droit à la santé en tant que droit de l'homme. The Right to Health as a Human Right*, *RdC* 1978 Colloque, 1979, 14 et seq. (21); R.J. Dupuy (ed.), “Résumé des débats – Summing up”, in: Dupuy, *ibid.*, 124 et seq. (130 et seq.). *Minow* argues that the individualism of rights rhetoric is unhelpful for allocating resources; nevertheless she sees the value of using a rights rhetoric. Harvard Law School Human Rights Program (ed.), *Economic and Social Rights and the Right to Health. An Interdisciplinary Discussion Held at Harvard Law School in September, 1993*, 1995, 3.



the former notion of “justiciable” might seem contrived to a national lawyer, but in international law the notion of legal rights that exist, but are not enforceable in judicial proceedings is rather common.<sup>62</sup> It is this challenge we need to discuss.

## 2. Economic, Social and Cultural Rights as Justiciable Rights

Traditionally the main distinction between civil and political and economic, social and cultural rights has been seen in that the former protect individuals from government interference by granting them a right to demand abstention from the state (negative right). Implementing this pledge of abstention does not require the state to commit financial resources. In contrast the latter category of rights demands action on the part of the state (positive rights) and thus also the committal of resources.<sup>63</sup> From these budgetary implications many authors have inferred the non-justiciable character of economic, social and cultural rights. At the most radical it is alleged that because of their limited resources states are simply unable to fulfill economic, social and cultural

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<sup>62</sup> Support for the position that this is also true for individual rights can be found in the *LaGrand Case (Germany/United States of America)*, ICJ Reports 2001, 466 et seq. (494, para. 77, 515, para 128) (concerning the rights of the individual under article 36 para. 1 of the Vienna Convention on Consular Relations, which can only be enforced by the home state as the enforcement procedure of the optional protocol is only available to the state); note Separate Opinion of Vice-President Shi (finding the view that article 36 para. 1 creates individual rights for the detained person in addition to the rights of the sending state at least questionable); the court affirmed its finding in the *Case Concerning Avena and other Mexican Nationals (Mexico/United States of America)*, ICJ Reports (31 March 2004) (para. 61, 153), again note the Declaration of President Shi. K. Oellers-Frahm, “Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht”, *EuGRZ* 2001, 265 et seq. (267 et seq.).

<sup>63</sup> M. Bossuyt, “La Distinction Juridique entre les Droits Civils et Politiques et les Droits Économiques, Sociaux et Culturels”, *Revue des Droits de l’Homme/ Human Rights Journal* (1975), 783, 788, 790, 796; T. Tomandl, *Der Einbau sozialer Grundrechte in das positive Recht*, 1967, 6; M. Scalabrino-Spadea, “Le Droit à la Santé. Inventaire de Normes et Principes de Droit International”, in: Institut International d’Études des Droits de l’Homme (ed.), *Le Médecin face aux Droits de l’Homme*, 1990, 95.

rights.<sup>64</sup> Invoking the old Roman maxim that *impossibilium nulla obligatio est*<sup>65</sup> – there is no duty to do the impossible – it is argued that these rights cannot be legal in character, but merely “utopian”<sup>66</sup> or “moral.”<sup>67</sup> A less radical proposition is that the budgetary implications of economic, social and cultural rights makes them mere relative rights, as opposed to the absolute civil and political rights rooted in human dignity.<sup>68</sup> Whereas the content of the latter is fixed, and they are immediately applicable, the content of the former varies according to a state’s financial resources and they are to be implemented progressively only.<sup>69</sup> Progressive implementation, however, implies that some parts of the rights are implemented before others, requiring a state to choose which parts to implement first and which groups obtain benefits before others. These choices are not necessary in the domain of civil and political rights as those have to be applied to everybody immediately.<sup>70</sup> Not only does the necessity of choices allegedly demonstrate that the rights are too vague to be enforced in court,<sup>71</sup> courts are also ill-equipped (and lack the legitimacy) to take the necessary decisions on the priorities in

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<sup>64</sup> M. Cranston, *What are Human Rights?*, 1973, 66; C. Tomuschat, “International Standards and Cultural Diversity”, *Bulletin of Human Rights. Special Issue. Human Rights Day 1985*, 24, 4; Vierdag, see note 53, 93; C. Tomuschat, “Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen”, *Vereinte Nationen* 26 (1978), 1 et seq. (2); J. Isensee, “Verfassung ohne soziale Grundrechte. Ein Wesenszug des Grundgesetzes”, *Der Staat* 19 (1980), 367 et seq. (376 et seq.).

<sup>65</sup> Dig. 50, 17, 185 (Celsus), printed in: P. Krueger/ T. Mommsen (eds), *Corpus Iuris Civilis. Volumen Primum. Institutiones Digesta*, 7th edition 1895, 873.

<sup>66</sup> Cranston, see note 64, 68.

<sup>67</sup> Harvard Law School Human Rights Program, see note 61, 1 (question asked by Henry Steiner).

<sup>68</sup> Bossuyt, see note 63, 790 et seq.; Vierdag, see note 53, 82.

<sup>69</sup> Article 2 (1) ICESCR.

<sup>70</sup> Bossuyt, see note 63, 791 et seq.; Vierdag, see note 53, 82.

<sup>71</sup> Vierdag, see note 53, 93 et seq. S. B. Shah, “Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India”, *Vand. J. Transnat. L.* 32 (1999), 435 et seq. (446 et seq.). Roth has pointed out that effective advocacy in this area requires a clear identification of violation, violator and remedy and goes on to show the difficulties involved in this identification, albeit he considers the rights as binding. K. Roth, “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization”, *HRQ* 26 (2004), 63 et seq. (68 et seq.).

the implementation of the rights.<sup>72</sup> Additionally, given how all-encompassing these “programmatically”<sup>73</sup> rights are, court enforcement of them would deal a death-blow to the separation of powers.<sup>74</sup> These decisions should be left to the discretion of the administration.

This traditional distinction between civil and political rights on the one hand and economic, social and cultural rights on the other cannot be maintained. Not only does it fly in the face of numerous documents claiming the indivisibility and interdependence of all human rights,<sup>75</sup> but the conceptual distinction between the rights itself is hard to maintain. The dichotomy of negative and positive state obligations cannot serve as its basis, as nowadays civil and political rights contained in most of the relevant documents, such as the ICCPR,<sup>76</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>77</sup> and many national constitutions,<sup>78</sup> have been rec-

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<sup>72</sup> Bossuyt, see note 63, 793 et seq. (806). Note that Bossuyt advocates a regional system with enforceable minimum standards.

<sup>73</sup> See *General Debate on the Draft International Covenant on Human Rights and Measures of Implementation*, GAOR, 6th Sess., 3rd Committee, 368th Mtg. (13 December 1951), 127, Doc. A/C.3/SR.368, para. 20 et seq. (1951); Brownlie, see note 18, 576. Note that the notion of programmatic (“programme rights”) implies a state obligation to establish a program for taking measures, but not an enforceable right. Vierdag, see note 53, 83.

<sup>74</sup> Vierdag, *ibid.*, 92 et seq.

<sup>75</sup> See note 35. For a thorough discussion of the notion of indivisibility see I. E. Koch, “Social Rights as Components in the Civil Right to Personal Liberty: Another Step Forward in the Integrated Human Rights Approach?”, *NQHR* 20 (2002), 29 et seq.

<sup>76</sup> Human Rights Committee, *General Comment 31 [80]* (2004), paras 6, 8; replacing Human Rights Committee, *General Comment 3/13* (1981), para. 1. See e.g. *Dimitry L. Gridin v. Russian Federation*, Communication No. 770, Doc. CCPR/C/69/D/770/1997, para. 8.2 (2000) (holding that the failure by a trial court to control the hostile atmosphere and pressure created by the public in the court room making it impossible for defense counsel to properly cross-examine and present a defense constitutes a violation of the right to a fair trial).

<sup>77</sup> European Court of Human Rights, *Marckx v. Belgium*, 31 Eur. Ct. H. R. (Ser. A), 15 (13 June 1979); European Court of Human Rights, *Airey v. Ireland*, 32 Eur. Ct. H. R. (Ser. A), 14 et seq. (9 October 1979); C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, 2003, 284 et seq.

<sup>78</sup> A notable exception is the United States Constitution, D.P. Currie, “Positive und negative Grundrechte”, *Archiv des öffentlichen Rechts* 111 (1986),

ognized to contain a positive component. Conversely, economic, social and cultural rights include a negative component, requiring state abstention, e.g. the right to education<sup>79</sup> includes the freedom to teach and to establish schools and not just the duty of the state to establish schools.<sup>80</sup> As *Eide* has stated, all human rights analytically entail an obligation to respect, protect and fulfill the right,<sup>81</sup> albeit the center of gravity might be on a different obligation for each right. Neither can the budgetary implications of economic, social and cultural rights serve as a distinguishing factor. Some of the most classic civil and political rights require state expenditure, e.g. periodic elections.<sup>82</sup>

Given that the premise is faulty, it is unconvincing to argue that economic, social and cultural rights are impossible to fulfill. At times such an argument seems to draw on the wording of the rights such as “the right to health.” The establishment of such a right would, of course, be absurd, as no one can provide good health where nature and human frailty take their toll. But the term “right to health” is a misnomer as the right is actually a right to health care. It is conceded that even immediate full realization of a right to health care or of the right to food and other such rights is impossible. Human misery cannot be ended in a day. If the ICESCR imposed such an obligation it would have to be read as merely hortatory even though it is contained in a binding international treaty.<sup>83</sup> But the Covenant does not demand the immediate full implementation of its rights and instead commits State Parties:

“to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Convention

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230 et seq. (238, 249 et seq.); T. Giegerich, *Privatwirkung der Grundrechte in den USA*, 1992, 46 et seq.

<sup>79</sup> Arts 13 et seq. ICESCR

<sup>80</sup> Vierdag, see note 53, 86.

<sup>81</sup> A. Eide, *The New International Economic Order and the Promotion of Human Rights. Report on the Right to Adequate Food as a Human Right*, Doc. E/CN.4/Sub.2/1987/23, paras 66 et seq., 115 (1987); Koch, see note 75, 32.

<sup>82</sup> Vierdag, see note 53, 82; Koch, see note 75, 32.

<sup>83</sup> P. Weil, “Towards Relative Normativity in International Law”, *AJIL* 77 (1983), 413 et seq.

by all appropriate means, including particularly the adoption of legislative measures.”<sup>84</sup>

This provision shows convincingly that the Covenant is not utopian – it does not demand the immediate full realization of the rights of the ICESCR.<sup>85</sup>

The argument that the ICESCR fails to be justiciable because of the intricacies involved in the progressive implementation is somewhat more convincing, but it, too, ultimately fails. The notion of progressive realization of rights does not imply that there are no immediate state obligations.<sup>86</sup> The Covenant itself clarifies that State Parties undertake “to take steps” towards the realization of the rights.<sup>87</sup> This obligation is, according to a good faith interpretation of its wording in light of the objective of achieving the rights in the ICESCR,<sup>88</sup> an obligation to take concrete steps in a reasonable time, as well as a duty to use reasonable care in trying to achieve the goals.<sup>89</sup> The interpretation is affirmed by the even stronger Spanish and French wording of the obligation (*adoptar medidas, agir*). The Committee for Economic, Social and Cultural Rights in its General Comment No. 3 adopted a similar interpretation and states that the Covenant imposes various obligations with immediate effect, in particular the undertaking to take steps and the duty of non-discrimination.<sup>90</sup> General Comments are non-binding interpretations adopted to assist states in their interpretation of the Covenant. In drafting them the Committee draws on its expert knowledge of state practice in the application of the Covenant.<sup>91</sup> Secondly, to state that the

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<sup>84</sup> Article 2 (1) ICESCR.

<sup>85</sup> Simma/ Bennigsen, see note 58, 1488 (arguing that the ICESCR is justiciable, but does not grant individual rights).

<sup>86</sup> Simma, see note 37, 78 et seq.

<sup>87</sup> Article 2 (1) ICESCR.

<sup>88</sup> Article 31 (1) Vienna Convention on the Law of Treaties.

<sup>89</sup> Simma, see note 37, 80.

<sup>90</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 3* (1990), para. 1 et seq.

<sup>91</sup> Rule 65, Rules of Procedure of the Committee on Economic, Social and Cultural Rights. Provisional Rules of Procedure Adopted by the Committee at its third session (1989), as amended 1993, *Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies*, Doc. HRI/GEN/3/Rev. 1 (28 April 2003). Note that some authors claim that General Comments are (binding) authoritative interpretations. However there is little to support such a claim. D. Weissbrodt/ K. Schoff, “The Sub-

obligations imposed by the ICESCR are too vague to be justiciable overlooks that vague legal obligations are rather common. Some of the civil and political rights, too, are formulated in a very imprecise manner,<sup>92</sup> not to mention that international and national judicial bodies are regularly called upon to apply such notions as “good faith”. Courts enjoy much leeway in the interpretation of vague terms, which gives credence to the claim, however doubtful it may be under international law, that economic, social and cultural rights might violate the separation of powers, particularly as their decisions will have a stark impact on the budget. The argument was before the Constitutional Court of South Africa in *Certification of the Constitution of the Republic of South Africa*. The Court dismissed it, arguing that the budget is often also implicated in civil and political rights and the tasks conferred on the courts in the area of socio-economic rights is not different enough from the normal tasks of a court to warrant a different treatment of the rights.<sup>93</sup> Courts should, of course, tread carefully in these waters, but in other areas of the law, too, courts have properly recognized that political organs are better situated to analyze and weigh the facts involved and thus they grant deference to those bodies. A correct interpretation of economic, social and cultural rights will give some deference to the executive and the legislature.<sup>94</sup> The Constitutional Court of South Africa acknowledged this in *Minister of Health et al. v. Treatment Action Campaign et al.*, in which the court had to address the scope of the socio-economic obligations under the South African Constitution:

“Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take

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Commission’s Initiative on Human Rights and Intellectual Property”, *NQHR 22* (2004), 181 et seq. (183).

<sup>92</sup> Addo, see note 60, 101 (noting article 11, 16 ICCPR).

<sup>93</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para. 77 et seq. (6 September 1996).

<sup>94</sup> *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), para. 32 (4 October 2000) (rejecting the notion of minimum core obligations in the South African context with the argument that the court does not possess the information necessary to determine such obligations).

measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.”<sup>95</sup>

An entirely different attack on economic, social and cultural rights, which must be seen in the context of the Cold War, purports that these rights are inferior to civil and political rights<sup>96</sup> and the attempt to endow them with human rights status would result in weakening traditional human rights.<sup>97</sup> The attempt to illustrate this argument by examples (“the right to life is more important than a right to holidays with pay”)<sup>98</sup> shows its fallacy, as such a comparison can cut both ways: a person who is denied her right to food or health will care very little for her freedom to express herself in artwork. The juxtaposition merely illustrates the indivisibility of human rights: only where basic needs are met and basic freedoms granted simultaneously can a human being live in dignity.

Arguably, much of the opposition to justiciable economic, social and cultural rights can be explained with the justified fear that socialist countries would abuse those rights to deflect criticism from their human rights violations by pointing to their guarantee of a workplace, inconceivable in a market economy.<sup>99</sup> With the end of the Cold War, however, this fear is no longer warranted. As states have ratified the ICESCR, a binding international treaty, they are bound by its rules.<sup>100</sup> Any argument that these rights are not of a legal nature has to overcome the simple truism that a legally binding document is legally binding. We thus conclude that the rights contained in the ICESCR are justiciable. This position has recently been confirmed by the ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a*

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<sup>95</sup> *Minister of Health et al. v. Treatment Action Campaign et al.* 2002 (5) SA 721 (CC); 2002 (10 BCLR 1033 (CC) para. 38 (5 July 2002).

<sup>96</sup> Bossuyt explicitly rejects the thought that civil and political rights might be more important. Bossuyt, see note 63, 805.

<sup>97</sup> Cranston, see note 64, 68. The supposed danger of economic, social and cultural rights being used to justify violations of civil and political rights has been stressed by the US State Department – D. P. Forsythe, “Socioeconomic Human Rights: The United Nations, the United States, and Beyond”, *HRQ* 4 (1982), 433 et seq. (436); Harvard Law School Human Rights Program, see note 61, 1 et seq.

<sup>98</sup> Cranston, see note 64, 71.

<sup>99</sup> Vierdag, see note 53, 85.

<sup>100</sup> G.J.H. van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views”, in: P. Alston/ K. Tomaševski (eds), *The Right to Food*, 1984, 97 et seq. (101).

*Wall in the Occupied Palestinian Territory*. It ruled that the ICESCR was applicable and relevant in assessing the legality of the measures taken by Israel and found possible violations of arts 6, 7, 10, 11, 12, 13 and 14 ICESCR, notably including the right to health.<sup>101</sup> Equally the African Commission on Human and Peoples' Rights has applied social and economic rights granted under the Banjul Charter.<sup>102</sup> Thus in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* it found that Nigeria had violated the right to health and the right to a clean environment by not requiring environmental impact studies prior to allowing an oil consortium to exploit oil reserves in Ogoniland and by not monitoring the project.<sup>103</sup> Several other regional and universal human rights treaties allow complaints for a violation of (at least some) economic, social and cultural rights<sup>104</sup> and many national courts have either applied those rights or extended civil and political rights to include economic, social and cultural issues.<sup>105</sup> The crux of economic, social and cultural rights is in determining their content,<sup>106</sup> or in the words of the Constitutional Court of South Africa:

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<sup>101</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (9 July 2004) (paras. 112, 130).

<sup>102</sup> The Charter allows for individual communications to the African Commission on Human and Peoples' Rights. The system will be completed by an African Court on Human and Peoples' Rights, a key organ of the African Union: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT (III) (1998) (entry into force 25 January 2004). On the African Union cf. H.P. Hestermeyer, *African Union replaces Organization of African Unity*, *German Law Journal* 3 (2002), 8 et seq.

<sup>103</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/1996, ACHPR/COMM/A044/1, para. 53 et seq. (27 May 2002).

<sup>104</sup> E.g. a protocol to the European Social Charter establishes a collective complaints system, R.R. Churchill/ U. Khaliq, "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?", *EJIL* 15 (2004), 417 et seq. (421) (also for further examples).

<sup>105</sup> See the cases mentioned below.

<sup>106</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14* (2000), para. 1; Toebes, see note 39, 170; P. Rott, *Patentrecht und Sozialpolitik unter dem TRIPS-Abkommen*, 2002, 94.



“The question is (...) not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.”<sup>107</sup>

## IV. Conventions

We now turn to the protection of access to medication under international law. The sources of international law are habitually enumerated along the lines of Article 38 of the ICJ Statute. Article 38 (1) (a) of the Statute lists as the first source of law “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.”

### 1. ICESCR

With 149 State Parties as of June 2004 the ICESCR is the most widely adopted convention on economic, social and cultural rights. Nevertheless adherence is not universal: both the United States of America and South Africa have not ratified the Covenant, although they are signatories.

#### a. Access to Medication in the Right to Health

Access to medication is protected by the ICESCR as an integral part of the right to health contained in article 12 ICESCR, which reads:

“(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

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<sup>107</sup> *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para. 20 (4 October 2000).

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

The duties that the Covenant imposes on State Parties are put down in article 2 (1) ICESCR:

“Each State Party to the present Covenant 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.”

Finally article 4 ICESCR provides that:

“... in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

It is appropriate to follow the structure of the Covenant and discuss the scope of the right as it relates to access to medication first, bearing in mind that it shall be realized progressively, and to then turn to the obligations imposed on State Parties.

#### *aa. Content of the Right*

In recent years the right to health has gone through a remarkable development. Although it contains a non-exclusive list of steps to be taken by State Parties in article 12 (2) ICESCR<sup>108</sup> its scope originally seemed too large and vague to enable the right to have a major impact. However state practice has since clarified the content of the right. Drawing on this state practice<sup>109</sup> the Committee on Economic, Social and Cultural Rights drafted General Comment No. 14 on the right to health

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<sup>108</sup> Toebe, see note 39, 293; General Comment No. 14, see note 106, para. 7.

<sup>109</sup> “[B]ased on the Committee’s experience in examining State parties’ reports over many years”. General Comment No. 14, see note 106.

which has had a significant impact on the further development of the right.<sup>110</sup>

The wording of the right as the “right to the highest attainable standard of physical and mental health” is extraordinarily broad, whether health is defined as the absence of disease or – following the definition of the WHO as “a state of complete physical, mental and social well-being (...)”<sup>111</sup> However the wording does not go so far as to grant a (purely utopian) right to be healthy.<sup>112</sup> Only the highest “attainable” standard of health, or as the equally authentic French version puts it more clearly, the “*meilleur état de santé (...) qu’elle soit capable d’atteindre*” is protected – the highest standard that a person can reach according to its biological preconditions.<sup>113</sup> The wording indicates that the right is inclusive, extending to the socio-economic factors underlying a healthy life, such as food and housing just as it does to health care.<sup>114</sup> Evidently the right to health can also touch on the right to life.<sup>115</sup> Steps to be taken by State Parties to achieve the right to health

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<sup>110</sup> General Comment No. 14, *ibid.*, para. 6.

<sup>111</sup> J. Montgomery, “Recognising a Right to Health”, in: R. Beddard/ D.M. Hill (eds), *Economic, Social and Cultural Rights. Progress and Achievement*, 1992, 184, 186 et seq. For the discussion in the drafting process see H.D. Roscam Abbing, *International Organizations in Europe and the Right to Health Care*, 1979, 70 et seq.

<sup>112</sup> General Comment No. 14, see note 106, para. 8.

<sup>113</sup> There has been some debate as to whether “attainable” refers to the available resources of the state. Toebe, see note 39, 45 et seq. General Comment No. 14, see note 106, para. 9 opines that “attainable” includes both limitations. Given the clear wording of the French version the better view is that the limitation to state resources is introduced by article 2 ICESCR. In practice the debate is insignificant as both limitations are indubitably imposed by the Covenant.

<sup>114</sup> The interpretation is confirmed by the drafting history. General Comment No. 14, see note 106, para. 4. P. Hunt, *Economic, Social and Cultural Rights. The Right of Everyone to the Enjoyment of the Highest Attainable Standards of Physical and Mental Health. Report of the Special Rapporteur, Paul Hunt, Submitted in Accordance with Commission Resolution 2002/31*, Doc. E/CN.4/2003/58, para. 23 (13 February 2003). See also A.R. Chapman, “Monitoring Women’s Right to Health under the International Covenant on Economic, Social and Cultural Rights”, *American University Law Review* 44 (1994-1995), 1157 et seq. (1166).

<sup>115</sup> This relationship is stressed in the jurisprudence of the Corte Constitucional of Colombia that holds economic, social and cultural rights only enforceable where they are connected to rights such as the right to life

include those necessary for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” and for “the creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

In early medical science drugs played only a marginal role in the treatment of diseases. Nowadays, however, prevention, treatment and control of most diseases rely on medication as an integral, vital, indispensable part of the therapy. Treatment of serious infections without antibiotics, of fungal infections without antifungal agents and increasingly, of viral infections without antiviral agents is unthinkable – it would constitute malpractice.<sup>116</sup> Thus access to medication is certainly necessary for the prevention and treatment of most diseases as well as the control of communicable diseases. Medical service and medical attention in the event of sickness equally necessitate the provision of drugs.<sup>117</sup> They are now an integral part in enabling individuals to reach their “highest attainable” standard of health and thus of the right to health, as affirmed in numerous resolutions.<sup>118</sup> The provision of medication, of course, has to be part of the provision of general health services and health facilities.

The fact that access to medication is part of the right to health under the South African Constitution has been recognized by the Constitutional Court of South Africa in *Minister of Health v. Treatment Action*

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or the unviolability of the body: “Los derechos económicos, sociales o culturales se tornan en fundamentales cuando su desconocimiento pone en peligro derechos de rango fundamental o genera la violación de éstos, conformándose una unidad que reclama protección íntegra, pues las circunstancias fácticas impiden que se separen ámbitos de protección.” Corte Constitucional de Colombia, *Alejandro Moreno Alvarez v. Ministerio de Salud*, SU.819/99 (1999), see also Corte Constitucional de Colombia, *Alonso Muñoz Ceballos v. Instituto de los Seguros Sociales*, T-484-92 (1992).

<sup>116</sup> J. Drews (transl. D. Kramer), *In Quest of Tomorrow's Medicines. An Eminent Scientist talks about the Pharmaceutical Industry, Biotechnology, and the Future of Drug Research*, 1999, 3 et seq.

<sup>117</sup> General Comment No. 14, see note 106, 17.

<sup>118</sup> See only *Declaration of Commitment on HIV/AIDS*, A/RES/S-26/2 of 27 June 2001, para. 15; *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, Commission on Human Rights Res. 2004/26, para. 1 (16 April 2004); *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Commission on Human Rights Res. 2001/33, para. 1 (23 April 2001).

*Campaign*, in which the court ordered the government to make nevirapine, a drug preventing mother-to-child transmission of HIV, more widely available.<sup>119</sup> The *Tribunal Supremo de Justicia de Venezuela* held the same under the Venezuelan Constitution in *Cruz Bermúdez v. Ministerio de Sanidad y Asistencia Social*, in which it required the government to provide antiretroviral treatment to all AIDS-infected patients in Venezuela.<sup>120</sup> The Inter-American Commission on Human Rights has decided to tackle access to medication in *Jorge Odir Miranda Cortez v. El Salvador*, in which the HIV-positive petitioners allege a violation of the right to health, as the government has not provided them with the necessary triple therapy. Even though the Commission found itself not competent *ratione materiae* to examine a violation of the right to health, which is contained in article 10 of the Protocol of San Salvador, it decided that it could consider the Protocol in the interpretation of the provisions of the American Convention on Human Rights and declared the case admissible for alleged violations of, amongst others, social and cultural rights under article 26 of the American Convention on Human Rights.<sup>121</sup>

Conceptually, access to medication contains four elements, as stated in General Comment No. 14: (a.) the availability of the medication in sufficient quantity, (b.) the accessibility of the medication to everybody, (c.) the acceptability of the treatment with respect to the culture and ethics of the individual and (d.) an appropriate quality of the medication. Accessibility includes physical accessibility, e.g. the patient cannot be required to travel long distances, accessibility of information about the medication, economic accessibility of the medication, and accessibility of the medication without discrimination.<sup>122</sup> Economic accessibility implies that:

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<sup>119</sup> *Minister of Health et al. v. Treatment Action Campaign et al.* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

<sup>120</sup> Tribunal Supremo de Justicia de Venezuela, *Cruz Bermúdez v. Ministerio de Sanidad y Asistencia Social*, Case No. 15.789, Decision No. 916 (1999). M.A. Torres, "The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela", *Chicago Journal of International Law* 3 (2002), 105 et seq.

<sup>121</sup> *Jorge Odir Miranda Cortez et al. v. El Salvador*, Inter-American Commission on Human Rights Report No. 29/01. Case 12.249, paras 35 et seq., 49 (7 March 2001).

<sup>122</sup> General Comment No. 14, see note 106, para. 12; A.E. Yamin, "Not just a Tragedy: Access to Medications as a Right under International Law", *B.U. Int'l L. J.* 21 (2003), 325 et seq.

“health facilities, goods and services must be affordable for all (...) ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.”<sup>123</sup>

The requirements of an appropriate quality of medications and the accessibility of the medication can come into conflict. Most countries require a drug to be approved before it can be brought to the market. The agency responsible for approving drugs, in the United States the Food and Drug Administration (FDA), generally requires a showing that the drug is both safe and effective.<sup>124</sup> The trials necessary to support such a finding are lengthy and during this time access to the drugs is limited – a fact that was highly criticized by AIDS activists during the early AIDS medication trials.<sup>125</sup> Besides the potential for a real conflict between the two components there is also the danger that safety concerns are abused as an argument to curtail accessibility of drugs (e.g. to favor the innovative pharmaceutical industry).<sup>126</sup>

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<sup>123</sup> General Comment No. 14, see note 106, 12.

<sup>124</sup> For a description of the FDA process see G.M. Levitt/ J.N. Czaban/ A.S. Paterson, “Human Drug Regulation”, in: D.G. Adams/ R.M. Cooper/ J.S. Kahan (eds), *Fundamentals of Law and Regulation. Volume II. An in-depth look at therapeutic products*, 1997, 159.

<sup>125</sup> M.M. Dunbar, “Shaking up the Status Quo: How AIDS Activists Have Challenged Drug Development and Approval Procedures”, *Food Drug Cosmetic Law Journal* 46 (1991), 673 et seq.; M.C. Lovell, “Second Thoughts: Do the FDA’s Responses to a Fatal Drug Trial and the AIDS Activist Community’s Doubts about Early Access to Drugs Hint at a Shift in Basic FDA Policy?”, *Food and Drug Law Journal* 51 (1996), 273 et seq.

<sup>126</sup> The point is illustrated by the discussion about President *Bush’s* “Emergency Plan for AIDS Relief”, which initially restricted spending to brand-name drugs and now establishes an expedited review procedure with the FDA to approve the badly needed generic fixed-dosed combinations of anti-retroviral medication. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. 108-25, 117 Stat. 711 (27 May 2003); Office of the United States Global AIDS Coordinator (ed.), *The President’s Emergency Plan for AIDS Relief, U.S. Five-Year Global HIV/AIDS Strategy*, 2004. S. Lueck, “White House Gets Pressure on AIDS Plan – Activists, Drug Firms Duel Over Use of Funds For Generic Combination Drugs in Africa”, *Wall Street Journal*, 25 March 2004; “Botswana Conference Sparks Debate on Generics”, *Bridges Weekly Trade Digest*, 31 March 2004. S. Lueck, “White House Aims To Answer Critics Of

Health as a human right would lose its contours and its purpose if it protected access to all pharmaceuticals. General Comment No. 14 rightly quotes only “essential drugs” as included within the scope of the right.<sup>127</sup> The WHO maintains a regularly updated list of essential drugs,<sup>128</sup> defined as:

“those that satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. (...) The implementation of the concept of essential medicines is intended to be flexible and adaptable to many different situations; exactly which medicines are regarded as essential remains a national responsibility.”<sup>129</sup>

Based on its experience with state practice the Committee on Economic Social and Cultural Rights is of the view that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”<sup>130</sup> The concept is of particular significance when it comes to justifying non-compliance with a right with a lack of financial means as we will see below. The Committee considers the provision of essential drugs as defined under the WHO Action Program on Essential Drugs as well as ensuring access to the drugs on a non-discriminatory basis, especially for vulnerable or marginalized groups as part of these minimum core obligations – as well as the adoption and implementation of a national public health strategy and plan of action.<sup>131</sup> The Constitutional Court of South Africa declined to follow the concept of a core content,

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Its AIDS Fight”, Wall Street Journal, 29 April 2004. Note that the United States has not ratified the ICESCR and thus is not bound by it.

<sup>127</sup> General Comment No. 14, see note 106, para. 12 (a), 34 (additionally including contraceptives). Contra Yamin, see note 122, 360.

<sup>128</sup> WHO (ed.), *Essential Medicines. WHO Model List*, 13th edition 2003.

<sup>129</sup> WHO (ed.), *Essential Drugs and Medicines Policy*, at <<http://www.who.int/medicines>> (last updated 6 January 2004).

<sup>130</sup> General Comment No. 3, see note 90, para. 10. On the concept see P. Alston, “Out of the Abyss: The Challenges of Confronting the New UN Committee on Economic, Social and Cultural Rights”, *HRQ* 9 (1987), 331 et seq. (352 et seq.); E. Özücü, “The Core of Rights and Freedoms: The Limit of Limits”, in: T. Campbell et al. (eds), *Human Rights: From Rhetoric to Reality*, 1986, 37, 45 (referring to the German concept of *Wesensgehalt*).

<sup>131</sup> General Comment No. 14, see note 106, para. 44 (a), (d), (f); Rott, see note 106, 97.

stating that it simply does not have the data and the experience for determining its scope.<sup>132</sup> The situation is different on the international level, as the Committee profits from its long-standing experience in the examination of state reports. The concept of core obligations contributes significantly to the clarity of the right to health.

*bb. Duties imposed on State Parties*

It would be illusory to require states to realize the full extent of the right immediately. The Covenant regulates state obligations in its article 2 (1).<sup>133</sup> These obligations are not modified by article 12 (1) ICESCR, which provides that State Parties are to “recognize” the right, rather than stating that “everyone has” the right. Even though the wording was consciously adopted because it is weaker,<sup>134</sup> for all intense and purposes, the difference is naught. “Recognize” is defined as “acknowledge the existence, validity, character, or claims of.”<sup>135</sup> A state that acknowledges the right of everyone to health must guarantee the right.

Even though article 2 (1) ICESCR provides only for “achieving progressively the full realization of the rights” in the Covenant, the

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<sup>132</sup> See also *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para. 32 (Judgment of 4 October 2000).

<sup>133</sup> General Comment No. 3, see note 90, para. 9. The duty of progressive realization is at times called an “obligation of result”, requiring states to bring about a result leaving them the choice of means to be distinguished from an obligation of conduct, requiring the performance or omission of a specific determined action. The distinction stems from the International Law Commission’s work on State Responsibility. R. Ago, Sixth Report on State Responsibility, *ILCYB* 1977 (II), 3 et seq. (8 et seq.). The present author agrees with Dupuy’s criticism in P.M. Dupuy, “Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility”, *EJIL* 10 (1999), 371 et seq. (375 et seq.) that the distinction is both confusing and unnecessary. As it does not add analytical clarity to the study of human rights the distinction will not be discussed any further. See also P.M. Dupuy, “The Duty to Protect and to Ensure Human Rights under the International Covenant on Civil and Political Rights – Comment on the Paper by Eckart Klein –”, in: E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights. Colloquium Potsdam, 1-3 July 1999*, 2000, 321 et seq. (391).

<sup>134</sup> Toebe, see note 39, 293.

<sup>135</sup> Della Thompson (ed.), *The Concise Oxford Dictionary of Current English*, 9th edition 1995.



wording clearly imposes obligations with immediate effect,<sup>136</sup> most significantly the obligation to take steps to the maximum of a State Party's available resources and, in article 2 (2) ICESCR the principle of non-discrimination. Read in the light of the purpose of the Covenant, the full realization of the rights, the "obligation to take steps" means that State Parties have to establish a reasonable action program towards the full realization of the rights and to start its implementation within a reasonably short time.<sup>137</sup> The action plan has to comply with the principle of non-discrimination, involve individuals and groups in the decision-making, be based on transparency and accountability, establish targets and time-frames, designate responsible parties and establish recourse procedures.<sup>138</sup> States have to employ all appropriate means to realize the right, including – but not limited to – legislative measures. The provision leaves the choice of means to the states,<sup>139</sup> but shows that the rights are relevant for all levels of state action, be it the drafting of health policies, the negotiation of trade agreements, the drafting of a law on social security or adjudication. Violations can occur through commission (including the repeal or the adoption of legislation) or omission (e.g. the failure to adopt a national health policy).<sup>140</sup>

To describe states' human rights obligations in more detail it has become habitual to refer to *Eide's* typology of obligations: the obligations to respect, protect and to fulfill the right.<sup>141</sup> We will describe these obli-

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<sup>136</sup> International Commission of Jurists et al., *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Doc. E/CN.4/1987/17, Annex, para. 21 (2-6 June 1986).

<sup>137</sup> General Comment No. 3, see note 90, paras 1, 2. General Comment No. 14, see note 106, para. 30. Simma/ Bennigsen, see note 58, 1489. Drafting National AIDS programs was an important part of the WHO's first resolution on AIDS, *Global Strategy for the Prevention and Control of AIDS*, WHA Res. 40.26 (5 May 1987); G. Behrman, *The Invisible People. How the U.S. Has Slept through the Global AIDS Pandemic, the Greatest Humanitarian Catastrophe of Our Time*, 2004, 44 et seq.

<sup>138</sup> General Comment No. 14, see note 106, paras. 54-56; M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, 2003, 364 et seq.

<sup>139</sup> General Comment No. 3, see note 90, para. 4.

<sup>140</sup> General Comment No. 14, see note 106, para. 48.

<sup>141</sup> Eide, see note 81, paras 66 et seq. Koch, see note 75, 32. General Comment No. 14, see note 106, para. 33. The African Commission additionally assumes an obligation to promote, see *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, see note

gations and then turn to the question to what extent a State Party can excuse its poor performance in realizing the right to access to medication by appealing to the limitation of its obligation by the “maximum of its available resources.”

#### aaa. Obligation to Respect

The duty to respect obligates a state to refrain from interfering with a right and to abstain from discriminatory practices.<sup>142</sup> In the domain of access to medication that means that a state has to refrain from denying or limiting equal access to essential medication.<sup>143</sup> The Commission on Human Rights phrased the duty as one “to refrain from taking measures which would deny or limit equal access for all persons to preventative, curative or palliative pharmaceutical products (...).”<sup>144</sup> The danger of discrimination is particularly high with respect to vulnerable groups,<sup>145</sup> such as prisoners, minorities, asylum seekers, drug users, women and children. The AIDS epidemic aptly illustrates the danger: HIV-positive patients in many parts of the world have encountered stigmatization and discrimination (including quarantine and imprisonment) rather than treatment and help, partly because of the disease’s early identification with homosexuality and drug use.<sup>146</sup> Any discrimination constitutes a violation of the obligation to respect. The duty of non-discrimination is strengthened by article 2 (2) ICESCR which bans “discrimination of any kind as to race, colour, sex (...) or other status.”

Besides banning discriminatory practices the obligation to respect demands abstention from state action that interferes with the right to health. In the area of access to drugs such actions would include marketing unsafe drugs, limiting access to contraceptives, applying coercive

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103. The different existing typologies have been studied in-depth by Sepúlveda, see note 138, 157 et seq. The tripartite typology was originally proposed with a different wording by H. Shue, *Basic Rights: Subsistence, Affluence & U.S. Foreign Policy*, 1980, 52.

<sup>142</sup> Yamin, see note 122, 352 et seq.

<sup>143</sup> General Comment No. 14, see note 106, para. 34.

<sup>144</sup> *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, Commission on Human Rights Res. 2004/26, para. 7 (a) (16 April 2004).

<sup>145</sup> *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Commission on Human Rights Res. 2004/27, para. 8 (16 April 2004).

<sup>146</sup> Behrman, see note 137, 32 et seq.

treatment or prohibiting traditional medicine.<sup>147</sup> State Parties also have to take the right to access to medication into account when negotiating treaties.<sup>148</sup> Two words of caution must be added concerning traditional medicine: were the said medicine is actually detrimental to health, a state may certainly (and has the duty to) take action. Furthermore, there recently has been an increased awareness of the pharmaceutical industry's practice of bioprospecting: learning about medicinal uses of a plant from the indigenous population, extracting the active ingredient and patenting it. These patents may not prevent the indigenous population from using their traditional medication. The result can be reached by not allowing any patent claim that would have this effect, because the claimed subject matter is not new. Problems arise where countries do not allow evidence of commonly non-written indigenous practices both domestic and foreign, to defeat patent claims. Thus in the United States evidence of foreign use or knowledge of an invention, unlike the description of the invention in a foreign patent or printed publication, does not defeat novelty according to 35 U.S.C. § 102 (a), the definition of "novelty" in the U.S. Patent Act.

It has been argued that the adoption of patent laws leads to higher prices and thus, too, constitutes a state interference with the right to health.<sup>149</sup> But in the end it is not the state that takes the action that interferes with the economic accessibility of drugs, it is private parties. We are faced with the question to what extent a state is under a duty to prevent private parties from interfering with access to medication.

#### bbb. Obligation to Protect

The obligation to protect requires State Parties to prevent third parties from interfering with the right. General Comment No. 14 states that this obligation includes:

"inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and ser-

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<sup>147</sup> General Comment No. 14, see note 106, para. 34.

<sup>148</sup> General Comment No. 14, see note 106, para. 50.

<sup>149</sup> Yamin, see note 122, 353 et seq.

vices; to control the marketing of medical equipment and medicines by third parties (...).”<sup>150</sup>

With the privatization of the health care sector the duty to protect plays a key role in the achievement of the right to health. This is all the more so as international law itself is not directly binding on private parties.<sup>151</sup> If anything, the importance of the obligation to protect is even greater for access to medication, as pharmaceuticals tend to be almost entirely manufactured and marketed by the private sector. The duty includes taking measures to ensure the safety of the drugs and the correctness of the information provided about the drug by its manufacturer. Given that accessibility and particularly economic accessibility is part of the right to health, the state is also under an obligation to make sure that pharmaceutical manufacturers do not limit the accessibility of essential drugs. This danger is of particular importance where a drug is patented, as the patent-holder might abuse its rights and engage in excessive pricing. Such excessive pricing raises no issue under the right to health where states acquire the drugs for the patients or finance a comprehensive health insurance system that provides the drugs to all patients who need them.<sup>152</sup> But most countries cannot afford such a policy. They can (and are under an obligation to) make full use of the flexibilities that the TRIPS Agreement provides for, such as imposing compulsory licenses, allowing parallel imports or adopting price controls such as those in force in many developed countries to guarantee the

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<sup>150</sup> General Comment No. 14, see note 106, para. 35. See also B.C. Alexander, “Lack of Access to HIV/AIDS Drugs in Developing Countries: Is There a Violation of the International Human Rights (sic) to Health?”, *Human Rights Brief* 8 (2001), 12 et seq.

<sup>151</sup> E. Klein, “The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights”, in: E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights. Colloquium. Potsdam, 1-3 July 1999*, 2000, 296 et seq.; N.S. Rodley, “Can Armed Opposition Groups Violate Human Rights?”, in: K.E. Mahoney/ P. Mahoney (eds), *Human Rights in the Twenty-first Century. A Global Challenge*, 1993, 297; Human Rights Committee, General Comment No. 31 [80], see note 76, para. 8. But see J.J. Paust, “Human Rights Responsibilities of Private Corporations”, *Vand. J. Transnat’l L.* 35 (2002), 801 et seq. (803 et seq.).

<sup>152</sup> Note that even in that situation, though, states will want to intervene for budgetary reasons.

economic accessibility of medication.<sup>153</sup> Of similar importance is the enforcement of laws preventing anti-competitive practices. This is illustrated by a recent case before the South African Competition Commission: the complainants charged GlaxoSmithKline, which markets antiretrovirals such as AZT in South Africa, and Boehringer Ingelheim, which markets the antiretroviral nevirapine in South Africa, with excessive pricing of antiretrovirals to the detriment of consumers in violation of the South African Competition Act. Among others, the complainants compared the prices charged by the defendants with the prices of generics, which are unavailable in South Africa as the defendants' products are patented. Even after granting a reasonable allowance for research and development and additional profit as an incentive for innovation the complainants considered the prices excessive and an impediment to access to medication.<sup>154</sup> The Commission followed that argument and announced:

“Our investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. We believe that this is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned.”<sup>155</sup>

The case was settled with the defendants agreeing to grant voluntary licenses to other manufacturers.<sup>156</sup>

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<sup>153</sup> S. Joseph, “Pharmaceutical Corporations and Access to Drugs: The “Fourth Wave” of Corporate Human Rights Scrutiny”, *HRQ* 25 (2003), 425 et seq., 438 et seq.; Yamin, see note 122, 355 et seq.

<sup>154</sup> Competition Commission of South Africa, *Hazel Tau et al. v. GlaxoSmithKline, Boehringer Ingelheim et al.*, Competition Commission, Statement of Complaint in Terms of Section 49B(2)(b) of the Competition Act 89 of 1998.

<sup>155</sup> Competition Commission, “Competition Commission finds pharmaceutical firms in contravention of the Competition Act, Press Release”, 16 October 2003.

<sup>156</sup> Settlement Agreements with Boehringer Ingelheim and GlaxoSmithKline, on file with author; on the case see Law and Treatment Access United of the AIDS Law Project/ Treatment Action Campaign (eds), *The Price of Life. Hazel Tau and Others v. GlaxoSmithKline and Boehringer Ingelheim: A Report on the Excessive Pricing Complaint to South Africa’s Competition Commission*, 2003.

## ccc. Obligation to Fulfill

The duty to fulfill requires appropriate measures including legislative, administrative and budgetary to work towards the full realization of the right.<sup>157</sup> The right to health has to be given sufficient recognition in the national political and legal system and State Parties have to adopt a national health policy. The provision of a public, private or mixed health insurance system affordable for all is part of the duty, as is the provision of health information.<sup>158</sup> In the area of medication, states have to provide information on available pharmaceutical treatment for diseases such as HIV/AIDS and they have to adopt a pharmaceutical policy, including a policy on generics.<sup>159</sup> But the duty to fulfill demands further positive measures to be taken,<sup>160</sup> such as assistance for indigents by providing them with essential medication. Indubitably this obligation entails severe budgetary implications and will therefore quite often be limited by budgetary constraints.

## ddd. Obligation to Cooperate

Finally, article 2 (1) ICESCR imposes an obligation of international assistance and co-operation on State Parties. The duty to cooperate in the realization of human rights was established by Articles 1 (3), 55 (b), (c) and 56 U.N. Charter and later included in the U.N. General Assembly *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*.<sup>161</sup> The importance of the obligation is

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<sup>157</sup> Koch, see note 75, 32; General Comment No. 14, see note 106, para. 33.

<sup>158</sup> General Comment No. 14, see note 106, para. 36.

<sup>159</sup> Yamin, see note 122, 358 et seq.

<sup>160</sup> Koch, see note 75, 32.

<sup>161</sup> A/RES/2625 (XXV) of 24 October 1970; R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: A Survey", *AJIL* 65 (1971), 713 et seq.; M. Šahović, "Codification des Principes du Droit International des Relations Amicales et de la Coopération entre les États", *RdC* 137 (1972), 243 et seq.; E. McWhinney, "The Concept of Co-operation", in: M. Bedjaoui (ed.), *International Law: Achievement and Prospects*, 1991, 425. See also *Declaration on the Right to Development*, A/RES/41/128 of 4 December 1986, Doc. A/41/53, article 3 (3), article 4, article 6 (1); articles 8 et seq. *Charter of Economic Rights and Duties of States*, A/RES/3281 (XXIX) of 12 December 1974; C. Tomuschat, "Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten. Zur Gestal-

stressed by the Committee on Economic, Social and Cultural Rights that regards it as a core obligation of states that are in a position to assist other states.<sup>162</sup> The obligation can claim a noble and long line of heritage. It brings to mind *Grotius*' statement about man's *appetitus societatis* defying the idea that man only pursues his own good.<sup>163</sup> *Vattel* famously declared:

“les Nations n'étant pas moins soumises aux lois naturelles que les particuliers (...), ce qu'un homme doit aux autres hommes, une Nation le doit, à sa manière, aux autres Nations (...). Tel est le fondement de ces devoirs communs, de ces offices d'humanité, auxquels les Nations sont réciproquement obligées les unes envers les autres. Ils consistent en général à faire pour la conservation et le bonheur des autres tout ce qui est en notre pouvoir, autant que cela peut se concilier avec nos devoirs envers nous-mêmes.”<sup>164</sup>

For all its long heritage and its firm roots in the highest aspirations of mankind it meets with considerable skepticism. Its vagueness, the myriad of ways to feign compliance and the difficulty to enforce the obligation seem to put cooperation into the realm of wishful thinking.<sup>165</sup> Whatever the merits of these doubts are where the question of a

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tungskraft von Deklarationen der UN-Generalversammlung”, *ZaöRV* 36 (1976), 445 et seq. (457 et seq.).

<sup>162</sup> General Comment No. 14, see note 106, para. 45; General Comment No. 3, see note 90, paras 13 et seq.

<sup>163</sup> H. Grotius, *De iure belli ac pacis*, 1646, prologomena. *Pufendorf* deduced duties of men towards other men from common obligations with which God wanted to join men together, S. von Pufendorf (transl. K. Luig), *Über die Pflicht des Menschen und des Bürgers nach dem Gesetz der Natur*, 1994, Kapitel 6 § 1.

<sup>164</sup> E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, Appliquée à la Conduite et aux Affaires des Nations et des Souverains*, 1839, liv. II, § 2. (as nations are just as much subject to natural law as individuals (...), it owes, in its own way, to other nations what man owes to other men (...). That is the foundation of these common duties, of these offices of mankind, which nations are bound by in reciprocity one towards the others. In generally they consist of doing everything within our power for the conservation of the happiness of others, to the extent that this can be conciliated with our duties towards ourselves (translation by author)).

<sup>165</sup> B. Graf zu Dohna, *Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten*, 1973, 188 et seq.; G. Arangio-Ruiz, “The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, *RdC* 137 (1972), 419 et seq. (573 et seq.); H. Neuhold,

“general obligation to cooperate” is concerned,<sup>166</sup> they are less warranted for a duty to co-operate in reaching a specific goal – in such a context the obligations imposed take a clearer form.<sup>167</sup>

Cooperation of states in the achievement of the right to access to medicine, i.e. states working together towards the realization of the right whether in an institutional or in a bilateral setting, addresses the global imbalances in access to medicines that are currently all too obvious.<sup>168</sup> Reflecting the typology of human rights obligations, State Parties may not interfere with access to medicine in other states, e.g. they may not pressure other State Parties to adopt regulations that would hamper access to medicine. Furthermore, where possible they have to prevent third parties from violating the right in other states. Finally they have to help other states fulfill the right depending on the availability of resources.<sup>169</sup> It is this last mentioned obligation that is the most doubtful. Developing countries have attempted repeatedly to construct an obligation to grant development aid, but while there seems to be an obligation of solidarity going beyond mere token cooperation, it would be difficult to give a precise definition to its scope:<sup>170</sup> is technical

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“Die Pflicht zur Zusammenarbeit zwischen den Staaten: Moralisches Postulat oder völkerrechtliche Norm?”, in: H. Miehsler et al. (eds), *Ius Humanitatis. Festschrift zum 90. Geburtstag von Alfred Verdross*, 1980, 575.

<sup>166</sup> For a forceful statement in favor of such a general obligation see P.M. Dupuy, “The Place and Role of Unilateralism in Contemporary International Law”, *EJIL* 11 (2000), 19 et seq. (22 et seq.).

<sup>167</sup> J. Delbrück/ R. Wolfrum, *Völkerrecht. Begründet von Georg Dahm. Band I/3 Die Formen des völkerrechtlichen Handelns; Die inhaltliche Ordnung der internationalen Gemeinschaft*, 2nd edition 2002, 851 et seq.

<sup>168</sup> This definition of cooperation is taken from L. Fislser Damrosch, “Obligations of Cooperation in the International Protection of Human Rights”, in: J. Delbrück (ed.), *International Law of Cooperation and State Sovereignty. Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law May 23-26, 2001, 2002*, 15, 24, who includes negative cooperation – the withholding of certain benefits from the target nation – in the concept of cooperation.

<sup>169</sup> General Comment No. 14, see note 106, paras 38 et seq.

<sup>170</sup> Rott, see note 106, 102 et seq.; *Declaration on the Right to Development*, A/RES/41/128 of 4 December 1986; Para. IX Declaration of Alma-Ata (12 September 1978), in World Health Organization (ed.), *From Alma-Ata to the year 2000. Reflections at the midpoint*, 1988. The idea that in the pursuit of common goals the rich have to pay more than the poor in many respects is now rather common, though falling short of being a norm of customary



aid sufficient? Or is there a duty to pay development aid? If so, what amount is necessary? Developed countries insist that development aid is granted on a purely voluntary basis and it would be unrealistic to assume the contrary.<sup>171</sup> Nevertheless in dire emergencies there is at least some duty to assist: it seems justified to say that developed nations have failed to comply with this obligation at the beginning of the AIDS pandemic. Even after the domestic response to HIV/AIDS picked up, held back initially by the stigma attached to the modes of transmission and the marginalization of the initially most affected groups, the global effort long remained minuscule for a disease that affects 7.5 per cent of all adults in Sub-Saharan Africa – global AIDS spending was just US \$300 million in 1996. Since then it has increased significantly to US \$4.7 billion in 2003, which is still less than needed,<sup>172</sup> but more than just token help.

Another route to assist other State Parties with the fulfillment of the right was opened by a recent WTO decision. It allows WTO members to grant compulsory licenses for the manufacture and export of patented medication to countries without manufacturing capacities.<sup>173</sup> This

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international law: C.D. Stone, “Common but Differentiated Responsibilities in International Law”, *AJIL* 98 (2004), 276 et seq. Note that the European Communities have included human rights as an objective in their developmental policies, see *Council Regulation (EC) No. 975/1999 of 29 April 1999 Laying down the Requirements for the Implementation of Development Cooperation Operations which Contribute to the General Objective of Developing and Consolidating Democracy and the Rule of Law and to that of Respecting Human Rights and Fundamental Freedoms*, Official Journal EC L 120 (8 May 1999).

<sup>171</sup> F. Menghistu, “The Satisfaction of Survival Requirements”, in: B.G. Ramcharan (ed.), *The Right to Life in International Law*, 1985, 63, 76; E.U. Petersmann, “Entwicklungsvölkerrecht” “Droit International Du Développement”, “International Economic Development Law”: Mythos oder Wirklichkeit”, *GYIL* 17 (1974), 145 et seq. (165 et seq.); D.E. Buckingham, “A Recipe for Change: Towards an Integrated Approach to Food under International Law”, *Pace Int’l L. Rev.* 6 (1994), 285 et seq. (301) (concerning food assistance).

<sup>172</sup> UNAIDS (ed.), *2004 Report on the Global AIDS Epidemic. 4th Global Report*, 2004, 131, 191; E. Becker, “Donor Nations Reach Accord for Efficient Use of AIDS Funds”, *N.Y. Times*, 26 April 2004.

<sup>173</sup> H.P. Hestermeyer, “Flexible Entscheidungsfindung in der WTO – Die Rechtsnatur der neuen WTO Beschlüsse über TRIPS und Zugang zu Medikamenten”, *Gewerblicher Rechtsschutz und Urheberrecht Int.* 2004, 194 et seq.

enables the latter countries to obtain cheap generics they could not have obtained otherwise. To implement the new mechanism, states with manufacturing capacities have to amend their domestic patent legislation. Canada recently became the first country to do so, while India has introduced a bill for that purpose and the EU is preparing a draft regulation.<sup>174</sup> The adoption of such legislation is not just laudable, but a way to comply with the obligation to co-operate.<sup>175</sup>

### eee. Justifying Non-Compliance

Economic, social and cultural rights often require budgetary measures by states. But financial resources are limited. The ICESCR takes account of this fact in that states only undertook to take steps towards the full realization of the rights “to the maximum” of their available resources. Non-compliance with the obligations under the Covenant can thus be excused by a lack of resources. The Committee has specified that where states adopt retrogressive measures, i.e. measures reducing an already achieved standard of protection of the rights, the state carries the burden of proving that the measures are justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the state party’s maximum available resources.<sup>176</sup> A State Party that does not comply with the core obligations, including access to essential medicines, is *prima facie* violating the ICESCR. To justify

<sup>174</sup> An Act to Amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa), Statutes of Canada 2004, Chapter 23, Bill C-9 (The Bill received Royal Assent on 14 May 2004 and is not yet in force). § 49 The Patents (Amendment) Bill, 2003 (Bill No. 92 of 2003). The dissolution of the Lok Sabha (the lower house of the Indian Parliament) necessitates the re-introduction of the bill. M. Singh Nair, “India Moving Towards a TRIPS Compliant Patent Regime – Implications for the Pharmaceutical Industry”, at <[http://www.mondaq.com/i\\_article.asp\\_Q\\_articleid\\_E\\_27499](http://www.mondaq.com/i_article.asp_Q_articleid_E_27499)> (28 July 2004); S. Mukherjee, “The Journey of Indian Patent Law towards TRIPS Compliance”, IIC 2004, 125, 148; European Union (ed.), *Intellectual Property. The WTO Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPs)*, at <[http://europa.eu.int/comm/issues/sectoral/intell\\_property/memo230604\\_en.htm](http://europa.eu.int/comm/issues/sectoral/intell_property/memo230604_en.htm)> (23 June 2004); L. Elliott, “Cheap Drugs Law Held up by Lack of Translators”, *The Guardian*, 28 July 2004; S. Taylor, “Brussels rejects Aids drug claims”, *The Guardian*, 30 July 2004.

<sup>175</sup> Yamin, see note 122, 368.

<sup>176</sup> General Comment No. 3, see note 90, para. 9; General Comment No. 14, see note 106, para. 30.

its non-compliance the state must “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” However, State Parties have to continue to strive to realize the right, monitor their progress and protect the vulnerable members of society.<sup>177</sup> General Comment No. 14 goes a step further and does not allow a state to justify non-compliance with core obligations at all.<sup>178</sup> Sadly, however, some developing countries lack the resources to even provide a bare minimum of medical services. Rather than demanding the impossible the minimum core concept should be understood as requiring a heightened burden of proof that the state has committed all its available resources.<sup>179</sup>

How states implement access to medicine, e.g. by financing general health insurance, by providing drugs at the government’s expense in hospitals or by safeguarding the economic accessibility of the drugs by preventing excessive pricing, is, as far as the right to health is concerned, left to their discretion. In providing access to medicine it should be noted that often states will not be able to plead lack of resources, e.g. where the medication is made available for free by pharmaceutical companies. Where resources are relevant and the prioritization of resources is at issue, deference should be given to the decisions of the administration; however, the reasonableness of those decisions should be controlled. Two cases of the Constitutional Court of South Africa properly demonstrate how such a control can be put into operation.

In 1997 the Constitutional Court had to answer to the request of an indigent diabetic in an irreversible condition who was ineligible for a kidney transplant but whose life could be prolonged by regular renal dialysis. He had been refused access to dialysis because treatment was reserved to patients whose conditions could be remedied or patients eligible for a kidney transplant. The Department of Health had already

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<sup>177</sup> General Comment No. 3, see note 90, paras 10 et seq.

<sup>178</sup> General Comment No. 14, see note 106, para. 47.

<sup>179</sup> The South African Supreme Court regards the full realization of the core obligations as impossible, *Minister of Health et al. v. Treatment Action Campaign et al.* 2002 (5) SA 721 (CC); 2002 (10 BCLR 1033 (CC) para. 35 (Judgment of 5 July 2002). Note the interpretation in P. Alston/ G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *HRQ* 9 (1987), 156 et seq. (181) that is somewhat more lenient (entitling a plea to resource scarcity to some deference, but allowing “some sort of objective scrutiny”).

overspent its budget and the dialysis machines were stretched beyond their capacity by handling the patients eligible for treatment according to the guidelines. Admitting the significant number of people in the same situation as the diabetic would have made substantial inroads in the health budget, already burdened by South Africa's HIV/AIDS crisis, the court upheld the health policies of the state in the name of the larger needs of society.<sup>180</sup>

Five years later the court had to examine an aspect of South Africa's response to the HIV/AIDS pandemic. The government had restricted the provision of nevirapine, a drug preventing mother-to-child transmission of HIV, to pilot sites, which could offer additional services such as substitution of bottle-feeding for breastfeeding at the option of the mothers. The drug was unavailable for women without access to either private health care or these public sites, albeit their doctors regarded the treatment as indicated. The government argued that it wanted to evaluate the safety and efficiency of the drug as well as the provision of formula-feed along with nevirapine. Costs of the drug itself were not an issue as the manufacturer had offered it to the government for free for a period of five years. It was demonstrated that administering nevirapine without substituting breast-feeding would save a significant number of infants, but some infants would acquire HIV through breastmilk. The court ruled that the reasons given by the government did not justify the restrictions of the program and that the drug should be available where there is the capacity to administer it and its use is medically indicated. The government was ordered to train counselors and extend testing and counseling facilities to facilitate the use of nevirapine.<sup>181</sup>

## 2. The WHO

The WHO is an international organization, a specialized agency of the United Nations. It formally came into existence in 1948. According to article 1 of its Constitution WHO's objective is "the attainment by all peoples of the highest possible level of health." Membership is open to

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<sup>180</sup> *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (27 November 1997).

<sup>181</sup> *Minister of Health et al. v. Treatment Action Campaign et al.* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

all states<sup>182</sup> and territories not responsible for the conduct of their international relations.<sup>183</sup> It currently boasts 192 Member States.

#### a. WHO Constitution

The WHO Constitution was the first international legal document to mention the right to health. The preamble states that:

“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and States.

The achievement of any State in the promotion and protection of health is a value to all.”

The preamble also adopted a new definition of health that went far beyond the theretofore common understanding that health is the absence of disease:<sup>184</sup>

“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>185</sup>

It has been alleged that the WHO preamble is one of the sources of a binding right to health.<sup>186</sup> The discussions that promote this idea usually list the sources of the right to health such as the ICESCR and the WHO preamble and then proceed to discuss its content. This faulty methodological approach glosses over the differences in the scope of the rights granted under various instruments. Indeed, the WHO pre-

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<sup>182</sup> Article 3 WHO Constitution.

<sup>183</sup> Article 8 WHO Constitution. Such territories can be admitted as Associate Members. For details Y. Beigbeder, *The World Health Organization*, 1998, 31.

<sup>184</sup> M. Vierheilg, *Die rechtliche Einordnung der von der Weltgesundheitsorganisation beschlossenen Regulations*, 1984, 14.

<sup>185</sup> Preamble WHO Constitution.

<sup>186</sup> Toebes, see note 39, 33 (“The Constitution of the WHO is therefore binding upon States that are a party to the WHO. States parties will accordingly have to comply with the right to health as set forth in the preamble to the WHO Constitution.”); Shah, see note 71, 453; A. Gupta, “Patent Rights for Pharmaceuticals: TRIPS and the Right to Health at Crossroads”, <<http://users.ox.ac.uk/~edip/gupta.pdf>> (last visited 31 July 2004).

amble should not be listed as a source of the right to health at all, as it is not legally binding. Preambles of international agreements set forth the motives of the parties as well as the object and purpose of the treaty. They serve as “context” for the purposes of treaty interpretation<sup>187</sup> and do not create any legal commitment beyond the treaty’s operative part.<sup>188</sup> It is in this context that the WHO Constitution’s right to health was referred to in the ICJ’s Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* when it interpreted the WHO’s functions in the light of the object and purpose of the organization and held that its request for an Advisory Opinion was not within the scope of its activities in accordance with Article 96 (2) U.N. Charter.<sup>189</sup> There is nothing in the operative part of the Constitution that would allow us to infer a right to health under the document. This limited legal relevance of the preamble’s right to health explains why it received little attention in the drafting process of the Constitution.<sup>190</sup>

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<sup>187</sup> J.A. Corriente Cordoba, *Valoración jurídica de los preámbulos de los tratados internacionales*, 1973, 21; A. Maresca, *Il diritto dei trattati. La convenzione codificatrice di Vienna del 23 Maggio 1969*, 1971, 355. The ICJ referred to the preamble for treaty interpretation e.g. in *Case concerning Rights of Nationals of the United States of America in Morocco (France/United States of America)*, ICJ Reports 1952, 176 et seq. (196).

<sup>188</sup> H.D. Treviranus, “Preamble”, in: R. Bernhardt (ed.), *EPIL Volume III*, 1997, 1097, 1098; Daillier/Pellet, see note 33, 131; C. Rousseau, *Droit International Public. Tome I: Introduction et Sources*, 1970, 87; I. Seidl-Hohenveldern/ G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 7th edition 2000, 247; Aust, see note 47, 336 et seq.; Contra P. You, *Le préambule des traités internationaux*, 1941, 140 (“un engagement plus ou moins général inséré dans le préambule reste un engagement”).

<sup>189</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 et seq. (75, 76 paras 20 et seq.).

<sup>190</sup> The right was not mentioned in any of the four proposals submitted to the Technical Preparatory Committee, even though, naturally, they stress the importance of health: *Proposals for the Establishment of an International Health Organization (United Kingdom)* E/H/PC/9 (20 March 1946), 1 Official Records of the World Health Organization 42 (1947); *Proposals for the Establishment of an International Health Organization (USA)* E/H/PC/6 (19 March 1946), 1 Official Records of the World Health Organization 46 (1947); *Proposal for an International Convention Establishing the International Health Organization (France)* E/H/PC/5 (19 March 1946), 1 Official Records of the World Health Organization 49 (1947);

Even though it is conceivable that later state practice changes a treaty – indeed, states are free to modify a treaty in violation of its amendment procedures if the decision is taken unanimously<sup>191</sup> – this has not taken place. The World Health Assembly, one of the three principal bodies of the WHO<sup>192</sup> has adopted numerous resolutions mentioning and reaffirming the right to health,<sup>193</sup> but these resolutions are

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*Suggestions Relating to the Constitution of an International Health Organization (Yugoslavia)* E/H/PC/10 (20 March 1946), 1 Official Records of the World Health Organization 54 (1947). The right was first included in a draft preamble by a 4 Member Sub-committee of the Technical Preparatory Committee: *Draft of "Preamble" to the Convention of the World Health Organization*, E/H/PC/W/2 (21 March 1946), 1 Official Records of the World Health Organization 61 (1947) and became part of the Technical Preparatory Committee's proposal after only minor changes. *Proposals for the Constitution of the World Health Organization*, 1 Official Records of the World Health Organization 69 (1947). Neither did the provision elicit debate during the International Health Conference. *Summary Report on Proceedings Minutes and Final Acts of the International Health Conference*, 2 Official Records of the World Health Organization 5 (1948). Abbing, see note 111, 105 (stating that it is realistic to conclude that the objective was to express the need for adequate health measures for a dignified life).

<sup>191</sup> Seidl-Hohenveldern/ Loibl, see note 188, 234. On an international organization's power to adopt legal instruments see J. Klabbbers, *An Introduction to International Institutional Law*, 2002, 197 et seq.; J. Verhoeven, "Les activités normatives et quasi normatives – élaboration, adoption, coordination", in: R.J. Dupuy (ed.), *Manuel sur les organisations internationales*, 2nd edition 1998, 413 et seq.; M.D. de Velasco Vallejo, *Las Organizaciones Internacionales*, 12th edition 2002, 140 et seq.

<sup>192</sup> Beigbeder, see note 183, 31.

<sup>193</sup> *Human Rights*, WHA Res. 23.41 (21 May 1970) (reaffirming that the right to health is a fundamental human right). Note that the resolution merely requests the Director-General to affirm the WHO's willingness to draft a report on the health aspects of human rights and was consented as the item "Co-ordination with the United Nations, the specialized agencies and the International Atomic Energy Agency: Programme matters – Human Rights" (15th Plen. Mtg. Thursday, 21 May 1970, 185 Official Records of the World Health Organization 241 (1970)); see also Para. I Declaration of Alma-Ata, see note 170 (the Declaration was adopted by the International Conference on Primary Health Care, convened by the WHO and UNICEF and attended by country, UN and NGO delegates, Beigbeder, see note 183, 24).

not legally binding<sup>194</sup> and did not establish a right to health under the Constitution. Be that as it may, the constant reaffirmation of the right to health might have contributed to the establishment of the right under customary international law. We will come back to this question later on.

### 3. ICCPR

With an Optional Protocol providing for an individual communication procedure the ICCPR is one of the more potent human right conventions. By June 2004, it has been ratified by 152 nations. 104 of them are also parties to the Optional Protocol. However, China has not yet ratified the ICCPR, although it has signed it.

Article 6 (1) ICCPR contains the right to life in the following wording:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

The obligations imposed on State Parties are explained in some detail in article 2 of the Covenant:

“(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex (...).

(2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such

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<sup>194</sup> The WHA can adopt conventions and agreements (article 19 et seq. WHO Constitution), regulations (article 21 et seq. WHO Constitution) and recommendations (article 23 WHO Constitution). Its resolutions according to article 23 WHO Constitution are not binding. M. Vierheilig-Langlotz, “WHO – World Health Organization”, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice. New, Revised English Edition. Volume 2*, 1995, 1425 et seq. (1426 et seq.); Beigbeder, see note 183, 71 et seq. It appears that the WHA has exercised the power to adopt conventions only once – in case of the WHO Framework Convention on Tobacco Control, *WHO Framework Convention on Tobacco Control*, WHA Res. 56.1 (21 May 2003).



legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.”

#### a. Content of the Right

The right to life, the first substantive right granted by the ICCPR, is the quintessential fundamental human right, a prerequisite for the enjoyment of all other human rights.<sup>195</sup> The right is non-derogable, according to article 4, i.e. even in times of a public emergency threatening the life of the nation it may not be derogated from.<sup>196</sup> The significance of the right is also stressed by its wording: it is an “inherent” right, a right that the individual “has” originating in natural law, not a right that he/she

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<sup>195</sup> Such statements have been made by the Human Rights Committee, *General Comment No. 6/16* (27 July 1982), para. 1 as well as during the drafting of the Covenant (M.J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, 1987, 115) and later by commentators); Y. Dinstein, “The Right to Life, Physical Integrity and Liberty”, in: L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights*, 1981, 114; Nowak, see note 151, article 6 sidenote 1; Inter-American Court of Human Rights, *Villagrán Morales v. Guatemala (Caso de los “niños de la Calle”)*, 1999 Inter-Am. Ct. H.R. (Ser.C) No. 63, para. 144 (19 November 1999); see also *Human Rights and Scientific and Technological Developments*, A/RES/37/189A of 18 December 1982, paras 1, 6; E. Klein, “Bedeutung des Gewohnheitsrechts für den Menschenrechtsschutz”, in: E. Klein (ed.), *Menschenrechtsschutz durch Gewohnheitsrecht. Kolloquium 26.-28. September 2002 Potsdam*, 2003, 11 et seq. (17).

<sup>196</sup> Article 4 (2) ICCPR.

“shall have.”<sup>197</sup> The importance of the right has led many commentators to categorize it as *ius cogens*,<sup>198</sup> a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted.<sup>199</sup>

Does the “right to life” include access to medication? According to the traditional view such a broad reading of the right to life is unjustified, the right is limited to the state killing persons or protecting persons from murder and does not guarantee an appropriate standard of living, food, housing, or medical care.<sup>200</sup> Textually, this view argues either with the last sentence of article 6 (1) ICCPR or with the fact that article 6 protects the “right to life” and not “life.”<sup>201</sup> However such a distinction between “right to life” and “life” is not only artificial, it also seems unclear why it should support a limitation of the right. Also there is no plausible reason why the first sentence of article 6 (1) ICCPR should not have a broader content than the provision’s last sentence. Even more importantly, there is no reason why a lack of food or medical services should be less significant for the right to life than insufficient penal laws on murder. To be meaningful, the right to life has to extend to the basic conditions of life, the components necessary for survival, even if that part of the right to some extent coexists with economic, social and cultural rights.<sup>202</sup> This includes access to life-saving medication, a narrower scope than access to medication under the right to health. This broader reading of the right to life has also been adopted by the Human Rights Committee, which rejected a restrictive interpretation building on its experience in the examination of state reports:

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<sup>197</sup> Nowak, see note 151, article 6 sidenote 2.

<sup>198</sup> B.G. Ramcharan, “The Right to Life”, *NILR* 30 (1983), 297 et seq. (307, 308, 311 et seq.); R. Higgins, “Derogations under Human Rights Treaties”, *BYIL* 48 (1976-1977), 281 et seq. (282); *Report of the Economic and Social Council. Protection of Human Rights in Chile*, Doc. A/37/564, para. 22 (1982).

<sup>199</sup> Article 53 Vienna Convention on the Law of Treaties.

<sup>200</sup> Dinstein, see note 195, 115; F. Przetacznik, “The Right to Life as a Basic Human Right”, *Revue des Droits de l’Homme/Human Rights Journal* 1976, 585 et seq. (586 et seq., 603); N. Robinson, *The Universal Declaration of Human Rights*, 1958, 106 (concerning the UDHR).

<sup>201</sup> For the ECHR: J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, 2nd edition 1987, 37.

<sup>202</sup> Ramcharan, see note 198, 305 et seq.; Yamin, see note 122, 330 et seq.; B. Gammie, “Human Rights Implications of the Export of Banned Pesticides”, *Seton Hall Law Review* 25 (1994), 558 et seq. (585).

“it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”<sup>203</sup>

Our position that access to life-saving medication is part of the right to life is further supported by a survey of the right to life in other documents, which confirms a trend towards including basic survival conditions. Thus, according to a concurring opinion of two judges of the Inter-American Court of Human Rights the right to life under the American Convention on Human Rights includes the right to live with dignity.<sup>204</sup> The African Commission on Human and Peoples’ Rights has adopted a broad interpretation of the right to life in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, citing, amongst others, destruction of farms on which the survival of the Ogonis depends as well as pollution and environmental degradation to such an extent that it made living in the territory “a nightmare”, as violations of the right to life.<sup>205</sup> The right to life under the ECHR is worded somewhat more narrowly and has generally been interpreted accordingly.<sup>206</sup> However, the European Commission of Human Rights explicitly did not rule on the question whether the right to life includes a positive duty to provide free medical services to indigents,<sup>207</sup> and did hold, in the context of a vaccination scheme, that states have to take appropriate steps to safeguard life.<sup>208</sup>

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<sup>203</sup> General Comment No. 6/16, see note 195, para. 5.

<sup>204</sup> Inter-American Court of Human Rights, *Villagrán Morales v. Guatemala (Caso de los “niños de la Calle”)*, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63, Voto Concurrente Conjunto de los jueces A. A. Cançado Trindade y A. Abreu Burelli, para. 4 (19 November 1999). Note that *Jose Odir Miranda v. El Salvador*, see note 121, explicitly left the question of the admissibility with respect to the right to life open and can therefore not be cited in support of the proposition here advanced (thus incorrect Yamin, see note 122, 334).

<sup>205</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, see note 103, para. 67.

<sup>206</sup> C. Grabenwarter, *Europäische Menschenrechtskonvention*, 2003, 147 et seq.; P. van Dijk/ G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edition 1998, 296 et seq.; T. Opsahl, “The Right to Life”, in: R.St.J. Macdonald/ F. Matscher/ H. Petzold (eds), *The European System for the Protection of Human Rights*, 1993, 207.

<sup>207</sup> European Commission of Human Rights, *X v. Ireland*, Application No. 6839/74, 7 DR 78, 79 (1976). See also M. O’Boyle, “The development of

National courts, too, are embracing a broad approach, often explicitly ruling on the question of access to medication. The right to life under the Indian Constitution has been held to include a right to livelihood and a right to live with human dignity. The protection of health has been adjudged to be among the minimum requirements of the thus understood right to life.<sup>209</sup> Access to life-saving medication is certainly part of this right. *The Sala Constitucional* of Costa Rica, reasoning that the right to life is a right to a dignified life, ruled that health is part of the right to life and that the state therefore has to provide AIDS medication.<sup>210</sup> Other courts have similarly included access to AIDS medication in the right to life.<sup>211</sup> Even though the right to life under the German *Grundgesetz* includes a guarantee of the means for basic subsistence, commentators have doubted whether it grants an individual claim to medical care.<sup>212</sup> However the *Bundesverfassungsgericht* has ruled in the context of the AIDS pandemic that the objective content of the right to life imposes a duty on the state to protect society from the disease, albeit the court can only rule against the state where it does not act at all or acts in a manifestly insufficient manner.<sup>213</sup> Recently the court emphasized that the judiciary has to pay due attention to the right to life when considering whether the state has to pay for the medical treatment of an individual.<sup>214</sup>

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the Right to Life”, in: D.Þ. Björgvinsson et al. (eds), *Afmælisrit Þór Vilhjálmsson. Sjötugur. 9. Júní 2000*, 2000, 65.

<sup>208</sup> European Commission of Human Rights, *X v. United Kingdom*, Application No. 7154/75, 14 DR 31, 32 (1978).

<sup>209</sup> D. De, *The Constitution of India. Volume I Articles 1-104*, 2002, 805, 842 et seq., 866 et seq.; Shah, see note 71, 475 et seq.

<sup>210</sup> C. Chinchilla Sandí, “Artículo 21”, in: N. Cheves Aguilar/ C. Araya Pochet (eds), *Constitución Política Comentada de Costa Rica*, 2001, 54.

<sup>211</sup> See e.g. Corte Constitucional de Colombia, *Juan Guillermo Gómez Morales v. Ministerio de Salud*, T-328/98 (1998).

<sup>212</sup> H.D. Jarass in: H.D. Jarass/ B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 7th edition 2004, Artikel 2 sidenote 69; P. Kunig, in: I. von Münch/ P. Kunig (eds), *Grundgesetz-Kommentar. Band 1 (Präambel bis Artikel 20)*, 4th edition 1992, Artikel 2 sidenote 60; C. Starck in: H. v. Mangoldt/ F. Klein/ C. Starck (eds), *Das Bonner Grundgesetz. Kommentar. Band 1: Präambel, Artikel 1 bis 19*, 4th edition 1999, Artikel 2 sidenote 192 et seq.

<sup>213</sup> BVerfG *Neue Juristische Wochenschrift* 1987, 2287.

<sup>214</sup> BVerfG *Neue Juristische Wochenschrift* 2003, 1236.

## b. Duties imposed on State Parties

Article 6 (1) ICCPR does not just establish the right to life, it also explicitly demands that the right be protected by law. This takes up and does not limit<sup>215</sup> the obligations in article 2 (1) ICCPR to respect and ensure the rights in the Covenant. These duties, both of which have immediate effect for all State Parties,<sup>216</sup> include the negative obligation to refrain from violations of the right as well as the positive duty to take measures to fulfill the legal obligation and to protect individuals against violations of the right by the state and by private parties.<sup>217</sup> Thus again we encounter the obligations to respect, protect<sup>218</sup> and fulfill. The duty to protect resonates through the cases of the Human Rights Committee.<sup>219</sup> The immediate effect of the obligations was confirmed by the

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<sup>215</sup> At a first glance the wording “protected by law” is more limited than that of article 2 (2) ICCPR demanding legislative or other measures. However to read article 6 (1) ICCPR as a restriction of the general obligations would run counter to the effective protection of human rights. See statement by Tomuschat in the *443rd Meeting of the Human Rights Committee*, Yearbook of the Human Rights Committee 1983-1984, Volume 1, 204, para. 55 (“it was not only for the legislator, but for all State authorities – the executive, the police, the military – actively to protect life”); see also *Guillermo Ignacio Dermít Barbato and Hugo Haroldo Dermít Barbato v. Uruguay*, Communication No. 84/1981, Doc. A/38/40 (1983), printed in Yearbook of the Human Rights Committee 1983-1984, Volume I, 419 et seq. (488).

<sup>216</sup> General Comment No. 31 [80], see note 76, para. 5.

<sup>217</sup> Article 2 (2) ICCPR; General Comment No. 31 [80], see note 76, paras 5 et seq.

<sup>218</sup> Klein, see note 151, 301 et seq.

<sup>219</sup> *W. Delgado Páez v. Colombia*, Communication No. 195/1985, in Yearbook of the Human Rights Committee 1989-1990, Volume II, 396, para. 5.6. *Herrera Rubio v. Colombia*, Communication No. 161/1983, in Yearbook of the Human Rights Committee 1987-1988 Volume II, 430, para. 10.3; *Guillermo Ignacio Dermít Barbato and Hugo Haroldo Dermít Barbato v. Uruguay*, Communication No. 84/1981, Doc. A/38/40 (1983), in: Yearbook of the Human Rights Committee 1983-1984, Volume I, 419 et seq. (488) (stating that the Uruguayan authorities were responsible by act or omission for not taking adequate measures to protect the life of Hugo Dermít even though it could not be established whether he committed suicide, was driven to suicide or was killed by others while in custody); *Nydia Bautista de Arellana v. Colombia*, Communication No. 563/1993, printed in GAOR, 51st Sess., Suppl. No. 40, 132, Doc. A/51/40, para. 8.3 (1997). On the duty to protect see K. Wiesbrock, *Internationaler Schutz der Menschenrechte vor Verletzungen durch Private*, 1999, 136 et seq.

Human Rights Committee when it did not accept tense economic circumstances to justify poor prison conditions in violation of the Covenant.<sup>220</sup>

The State Parties are obligated to create a legal order in which access to life-saving medication is guaranteed. This includes measures to prevent private parties from hampering access to life-saving medication.<sup>221</sup> How access is guaranteed is within the discretion of the state: states could provide the medication or regulate the private sector in a way that accessibility of the medication is guaranteed. Developing countries, however, will have to adopt the latter option as the former is outside their financial means.

The right to life just like the right to health obliges states to cooperate – an obligation that results from Articles 1 (3), 55 (b), (c) and 56 U.N. Charter and is reiterated in (non-binding) General Assembly resolutions like the Friendly Relations Declaration. The obligation to cooperate has already been described with respect to the right to health. It is worth discussing a further issue, though, that has been raised with respect to President *Bush's* ambitious emergency plan to combat AIDS. At times developed nations attach conditions to their aid, or threaten withdrawal of the aid if the recipient does not adopt a certain policy. Those conditions are problematic where they are not linked to the goal that the aid itself pursues. The AIDS plan, for example, urges state recipients of HIV/AIDS help not to reject U.S. food assistance with genetically modified food.<sup>222</sup> One might argue that where there is no duty to provide aid at all, a state is free to grant aid on whatever conditions it wants to impose as the recipient will in any event not be worse off than without aid. But this assumes that the recipient can freely choose whether to accept the offer of aid or not. Often this is not the case and

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<sup>220</sup> Klein, see note 151, 299.

<sup>221</sup> Menghistu, see note 171, 63 et seq. (arguing that there is no meaningful difference between depriving a person of basic needs and thus killing him or to execute him wrongfully); Dinstein, see 195, 119 (noting that protection against interference by individuals has to be provided, but limiting this duty mostly to prevention of mass murder); L.O. Gostin/ Z. Lazzarini, *Human Rights and Public Health in the AIDS Pandemic*, 1997, 12 et seq. (emphasizing that vaccines and treatment have to be made available to everybody). With far more expansive propositions Ramcharan, see note 198, 302 et seq. However the submissions made by Ramcharan include the ones made here, *ibid.*, 304.

<sup>222</sup> § 104 A (g) (1) (C), (2) United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, see note 126.

the recipient state will have to accept whatever conditions are attached to the offer – in such a case the conditions seem to go against the spirit of cooperation.

#### 4. Universal Declaration of Human Rights

So far we have failed to mention one of the most significant sources of international human rights law, the UDHR. In fact, it might come as a surprise that we mention it under the heading of conventions at all. After all, as the reader will remember, it is solely a resolution of the General Assembly of the United Nations – not a treaty. We will ask for some patience before we solve this puzzle. First the relevant rights contained in the UDHR deserve to be mentioned *verbatim*:

Article 3

“Everyone has the right to life, liberty and security of person.” (...)

Article 22

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” (...)

Article 25

“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” (...)

Article 27

“(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

As a resolution of the General Assembly of the United Nations the UDHR is, if we are to take the U.N. Charter seriously, merely a rec-

ommendation<sup>223</sup> and, as such, not binding.<sup>224</sup> Nevertheless, most scholars agree that the UDHR has obtained at least some legal effect. Some authors argue that the UDHR, possibly along with the Covenants and other human rights instruments, has become part of customary international law<sup>225</sup> – an argument we will pursue below. *Sohn* favors another highly noteworthy approach. He regards the UDHR and the Covenants as interpretations of the human rights provisions of the U.N. Charter, i.e. Articles 55 et seq. U.N. Charter. This would put the UDHR squarely under the heading of treaty law. He refers to state practice to back up his argument. Not only have states invoked the UDHR as soon as it was passed, the International Conference on Human Rights at Teheran in 1968 proclaimed the Declaration to constitute “an obligation for the members of the international community.” Many later resolutions are based simultaneously on the Charter and the UDHR.<sup>226</sup> The ICJ, too, applied the Charter and the UDHR simultaneously in the *United States Diplomatic and Consular Staff in Tehran Case*.<sup>227</sup> Were we to follow this argument the UDHR and the Covenants would be binding on all U.N. Member States. But alas, we resist

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<sup>223</sup> Articles 10-14 U.N. Charter.

<sup>224</sup> K. Hailbronner/ E. Klein, in: B. Simma (ed.), *The Charter of the United Nations. A Commentary. Volume I*, 2nd edition 2002, Article 10 sidenote, 44 et seq.

<sup>225</sup> M.S. McDougal/ H.D. Lasswell/ L. Chen, *Human Rights and World Public Order. The Basic Policies of an International Law of Human Dignity*, 1980, 273 et seq. (274, 325) (concerning the UDHR); K. Oellers-Frahm, “Comment: The erga omnes Applicability of Human Rights”, *AVR* 30 (1992), 28 et seq. (claiming that most of the treaty based human rights have to be qualified as customary international law). For a general overview see the treatment in T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1991, 79 et seq.; A. Bleckmann, “Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen”, in: Klein, see note 151, 29; K. Doehring, “Gewohnheitsrechtsbildung aus Menschenrechtsverträgen”, in: Klein, *ibid.*, 84.

<sup>226</sup> L.B. Sohn, “The Human Rights Law of the Charter”, *Tex. Int’l L. J.* 12 (1977), 129 et seq. (132 et seq.); L.B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States”, *American University Law Review* 32 (1982-1983) 1 et seq. (16); T. Buergenthal, “International Human Rights Law and Institutions: Accomplishments and Prospects”, *Wash. L. Rev.* 63 (1988), 1 et seq. (9); Proclamation of Teheran, see note 35, para. 2.

<sup>227</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America/ Iran)*, ICJ Reports 1980, 3 et seq. (42 para. 91).



the temptation to do so. It is already doubtful whether the mere mention of human rights in the Charter without further ado is a sufficiently solid ground to accommodate the colorful modern-day crowd of human rights.<sup>228</sup> What is more, the General Assembly does not have the power to make authentic and binding interpretations of the Charter. Such a power is simply not contained in the Charter – in fact, a Belgian proposal to incorporate it was explicitly rejected.<sup>229</sup>

## 5. Other Agreements

The ICESCR and the ICCPR are not the only conventions that a plea for a right to access to medication can be based on.<sup>230</sup> Article 24 of the United Nations Convention on the Rights of the Child contains a right to health for children. Article 25 of the International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries<sup>231</sup> guarantees the right to health for indigenous and tribal peoples. Gender-specific health provisions can be found in the Convention on the Elimination of All Forms of Discrimination against Women. Race-discrimination in health care is tackled by article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination. Furthermore many regional documents protect health and/or life, such as the African Charter on Human and Peoples' Rights (Banjul Charter), the ECHR, the European Social Charter, the Charter of Fundamental Rights of the European Union, the American Declaration of the Rights and Duties of Man, the Ameri-

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<sup>228</sup> B. Simma, "Die Erzeugung ungeschriebenen Völkerrechts: Allgemeine Verunsicherung – klärende Beiträge Karl Zemaneks", in: K. Ginther et al. (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag*, 1994, 95 et seq. (108 et seq.).

<sup>229</sup> Hailbronner/ Klein, see note 224, Artikel 10 sidenote 46.

<sup>230</sup> For a collection of documents see G. Alfredsson/ K. Tomaševski (eds), *A Thematic Guide to Documents on Health and Human Rights. Global and Regional Standards Adopted by Intergovernmental Organizations, International Non-Governmental Organizations and Professional Associations*, 1998; D.P. Fidler, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, 2000.

<sup>231</sup> See A. Mestri, "The Violation of the Human Right to Health as a Factor in the Zapatista Revolution of Chiapas, México", *Tulsa Journal of Comparative & International Law* 10 (2003), 473 et seq. (497 et seq.).

can Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). As the scope of protection of all of these instruments is limited either *ratione materiae* or *ratione loci* we will not discuss them in any detail.

## V. General International Law

We will now turn our attention to the question of whether access to medication is also part of general international law, i.e. in the words of Article 38 (1) (b) and (c) of the Statute of the ICJ “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations.” The body of general international law, i.e. customary international law and general principles of law, binds all states, albeit custom is not binding on a state that persistently objected to a rule.<sup>232</sup>

### 1. Customary International Law

For a long time customary international law was perhaps the defining source of international law.<sup>233</sup> One might assume that its old age implies that the rules pertaining to this area are settled and clear, but nothing could be further from the truth – if anything the uncertainty about customary law has recently grown. It does not only involve the obvious practical questions arising in proving custom, namely that both sides will use arguments from a large amount of often contradictory state practice which will always vary to a greater or lesser extent. More worrying is the fact that there is no definite rule of recognition<sup>234</sup> for customary international law – generations of scholars have now quarreled

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<sup>232</sup> There is an increasing tendency to regard customary international norms as binding on all states regardless of individual consent. Weil, see note 83, 433 et seq. (criticizing this tendency). Nevertheless the law remains that states consistently objecting to a rule of customary international law are not bound by it, *Colombian-Peruvian Asylum Case (Colombia/Peru)*, ICJ Reports 1950, 266 et seq. (277 et seq.); *Fisheries Case (United Kingdom/Norway)*, ICJ Reports 1951, 116 et seq. (131).

<sup>233</sup> Dupuy, see note 50, 157.

<sup>234</sup> H.L.A. Hart, *The Concept of Law*, 1961, 92 et seq., 228 et seq.

about what exactly it takes to form customary international law.<sup>235</sup> The confusion about customary international law led Jennings to quip, “most of what we perversely persist in calling customary international law is not only *not* customary international law: it does not even faintly resemble a customary law.”<sup>236</sup> To make matters worse, norms that fall short of whatever definition of customary law is adopted are no longer discarded as non-law. Numerous of the staggering amount of (non-binding) declarations and resolutions have been seized upon to support “nascent norms”, “norms in the making”, or political commitments – a sliding scale of normativity often captured under the heading of “soft law.”<sup>237</sup> It goes without saying that such an unsettled area is a treasure trove for “creative lawyering” – bending, twisting and tweaking rules and facts until the outcome suits the taste.<sup>238</sup> The charge that the multitude of documents in international relations can support just about any customary claim, just like the charge that under the Common Law the rich body of precedent can justify any outcome<sup>239</sup> certainly has a grain of truth to it, but a degree of uncertainty about the precise scope of rules is a common occurrence in law and state practice does provide at least some amount of clarity.

As the language of the Statute of the ICJ suggests, customary international law arises where two components are present: an objective component – state practice – and a subjective one. The subjective element, known as *opinio iuris sive necessitatis*, requires, in the words of the ICJ, that the “States concerned must (...) feel that they are conform-

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<sup>235</sup> On customary international law see: Brownlie, see note 18, 4 et seq.; Verdross/ Simma, see note 18, 345 et seq.; P.M. Dupuy, *Droit International Public*, 5th edition 2000, 301 et seq.; M. Byers, *Custom, Power and the Power of Rules. International Relations and Customary International Law*, 1999.

<sup>236</sup> R.Y. Jennings, “The Identification of International Law”, in: B. Cheng (ed.), *International Law: Teaching and Practice*, 1982, 3 et seq. (5) (emphasis in the original).

<sup>237</sup> On this point and the different meanings of soft law see Weil, see note, 83.

<sup>238</sup> M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, 1989, 363.

<sup>239</sup> Llewellyn analyzed the use of precedent in court decisions and offers a stinging presentation of almost random use of precedent: K.N. Llewellyn, *The Common Law Tradition. Deciding Appeals*, 1960, 62 et seq.; see also U. Fastenrath, “Relative Normativity in International Law”, *EJIL* 4 (1993) 305 et seq. (317 et seq.).

ing to what amounts to a legal obligation”<sup>240</sup> and not just following a tradition or usage.

#### a. Treaties and Customary International Law

At this point a national lawyer would feel compelled to object. Why are we even discussing customary law, he might ask, after all human rights law is now contained in treaties. Do those not “overrule” customary law or count as *lex specialis*?<sup>241</sup> In the *Nicaragua* Case the ICJ explicitly ruled on this question and held that norms of customary international law and of treaty law have a separate existence, even if they have the same content and even if they both bind the same state.<sup>242</sup> To treat the two sources separately is more than a mere academic exercise. Even though the universal human rights treaties have been widely embraced not all states have ratified them. Customary international law, on the other hand, binds every state with the exception of “persistent objectors.” Moreover, numerous countries treat customary international law as the law of the land whereas they require treaty law to be transformed into national law.<sup>243</sup>

Notwithstanding their “separate existence” the two sources interact with each other: customary international law can modify treaty rules<sup>244</sup>

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<sup>240</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, 3 et seq. (44 para. 77); see also *The Case of the S.S. “Lotus” (French Republic/Turkish Republic)*, PCIJ Reports 1927, Ser. A, No. 10 (28).

<sup>241</sup> This is implied by H. Dreier, “Kontexte des Grundgesetzes”, *Deutsches Verwaltungsblatt* 1999, 667 et seq. (675); cf. Klein, see note 195, 26 et seq.

<sup>242</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)*, ICJ Reports 1986, 14 et seq. (95 para. 178); Watts, see note 47, 261. See also *United States Diplomatic and Consular Staff in Tehran (United States of America/Iran)*, ICJ Reports 1980, 3 et seq. (30 para. 62); article 43 Vienna Convention on the Law of Treaties.

<sup>243</sup> Meron, see note 225, 3 et seq., 79 et seq.

<sup>244</sup> *Case concerning the Temple of Preah Vihear (Cambodia/Thailand)*, ICJ Reports 1962, 6 et seq. (33-34) (admitting a later document as an interpretation of an earlier treaty); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. (22 para. 22) (on the practice of abstention of permanent members in Security Council voting); Byers, see note 235, 172 et seq.; G.M. Danilenko, *Law-*

and, more significant to our study, a treaty norm can give rise to a norm of customary international law, which unlike the treaty norm (*pacta tertiis*) binds states that are not parties to the treaty.<sup>245</sup> We will see that many of the details of this process are still unclear.

## b. State Practice

The concept of customary law evokes a practice hardening into law. While this sociological premise largely holds true for public international law we immediately encounter two problems. The first one concerns the question of what acts of the state are to count as state practice. Possible answers range from *D'Amato's* claim that only acts and not statements of states can be admitted as practice<sup>246</sup> to *Akehurst's* assertion that any act or statement by a state from which its view can be inferred counts as state practice<sup>247</sup> – including press releases, state legislation, international and national judicial decisions, the practice of international organs, and resolutions of the United Nations General Assembly.<sup>248</sup>

The second problem is the required duration of the practice. Some authors require the practice to be of a certain duration, consistency, and generality.<sup>249</sup> This is well in line with common perceptions of custom as a practice going back to times immemorial. But the exigencies of our quickly changing times and the frequency of international conferences at which numerous states can voice their opinions on what the law is, might well indicate otherwise – particularly as to resolutions and conventions becoming part of customary international law. In the *North Sea Continental Shelf* Cases the ICJ stated that:

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*Making in the International Community*, 1993, 162 et seq. (listing the arguments contra).

<sup>245</sup> Article 38 Vienna Convention on the Law of Treaties; Weil, see note 83, 434 et seq.; Meron, see note 225, 81.

<sup>246</sup> A.A. D'Amato, *The Concept of Custom in International Law*, 1971, 88; A.A. D'Amato, *Trashing Customary International Law*, *AJIL* 81 (1987), 101 et seq. (102); K. Wolfke, *Custom in Present International Law*, 2nd edition 1993, 41 et seq. (84).

<sup>247</sup> M. Akehurst, "Custom as a Source of International Law", *BYIL* 47 (1974-1975), 1 et seq.; *Case concerning Rights of Nationals of the United States of America in Morocco*, see note 187, 200 (examining diplomatic correspondence as state practice).

<sup>248</sup> Brownlie, see note 18, 5.

<sup>249</sup> Brownlie, see note 18, 5 et seq.; D'Amato, see note 246, 56.

“it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”

to make a norm-creating conventional rule enter customary international law.<sup>250</sup> Cheng, famously, in some circumstances is ready to discard any durational requirement completely and accept the creation of “instant customary law.”<sup>251</sup> The acceptability of such a proposition depends very much on the view of *opinio iuris* one prefers to adopt. Adherents of a consensual notion of international law that regard custom as nothing but a tacit sort of treaty will have no problem accepting the instant meeting of the minds of states, so to speak.

Given the wide range of positions that easily fill numerous shelves, dressing up a concise argument on state practice with respect to access to medication seems preposterous. All the more so because human rights law is quite particular in many respects: no other area is so inextricably linked to morality, no other area can point to so many various documents affirming, re-affirming and re-reaffirming concepts that have already been re-affirmed a hundred times over. What is more significant for our legal task is that state practice in international law is normally found in the international relations of states, but practice in the area of human rights concerns the treatment by a state of its own nationals.<sup>252</sup> The degree to which morality permeates human rights law makes Koskenniemi doubt the value of technical legal arguments altogether:

“Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them

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<sup>250</sup> *North Sea Continental Shelf Cases*, see note 240, para. 73; *South West Africa, Second Phase (Ethiopia/South Africa; Liberia/South Africa)*, ICJ Reports 1966, 6 et seq. (250, 291) (Dissenting Opinion Judge Tanaka); M.E. Villiger, *Customary International Law and Treaties*, 1985, 24.

<sup>251</sup> B. Cheng, “Some Remarks on the Constituent Element(s) of General (or So-called Customary) International Law”, in: A. Anghie/ G. Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, 1998, 377 et seq. (385); B. Cheng, “United Nations Resolutions on Outer Space: “Instant” International Customary Law?”, *IJIL* 5 (1965), 23 et seq. (35 et seq.).

<sup>252</sup> O. Schachter, “International Law in Theory and Practice. General Course in Public International Law”, *RdC* 178 (1982), 9 et seq. (334).

to that effect, rather than because (...) noncompliance would shock ... the conscience of mankind and be contrary to elementary considerations of humanity.”<sup>253</sup>

However appealing this position is, it does little to clarify the scope of customary human rights law as it fails to answer precisely what would shock the conscience of mankind. This is not to deny the enormous importance of moral considerations in the area of human rights as customary law. Indeed – the impact of morality can hardly be overestimated. Whereas in other areas states will be quite willing to reject rules, in human rights law they tread more carefully, afraid of a backlash in public opinion, afraid to end up on the morally and ethically wrong side. Publicly they will almost always deny that they breached their human rights obligations rather than refuse to accept the rule as such. But the effect of this is simply that some human rights norms have entered customary international law – we will expand on this when we talk about the requirement of *opinio iuris*.

The wide variety of doctrinal positions on customary law allows us to argue that the whole International Bill of Human Rights (along with the right to life and the right to health) has become customary international law.<sup>254</sup> With respect to state practice two arguments could do that trick: The first relies on the *North Sea Continental Shelf Cases*' passage we have just quoted. The very widespread and representative participation in the human rights conventions, the immediate approval of both the negotiating states and the world community at large by themselves let the whole International Bill enter customary international law.<sup>255</sup> But the conclusion is rash. States are free to choose whether they want to enter into treaty obligations. If they choose not to, the principle of *pacta tertiis nec nocent nec prosunt* protects them from any harmful ef-

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<sup>253</sup> M. Koskenniemi, “The Pull of the Mainstream”, *Mich. L. Rev.* 88 (1989-1990), 1946 et seq. (internal quotation marks omitted).

<sup>254</sup> W.P. Gormley, “The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *jus cogens*”, in: B.G. Ramcharan (ed.), *The Right to Life in International Law*, 1985, 120 (advancing broad claims as to the customary international law and *ius cogens* status of human right norms).

<sup>255</sup> L.B. Sohn, “‘Generally Accepted’ International Rules”, *Wash. L. Rev.* 61 (1986), 1073 et seq. (1077-1078); G. Abi-Saab, “La Coutume dans Tous ses États ou le Dilemme du Développement du Droit International Général dans un Monde Éclaté”, in: H.C. Batiffol et al. (eds), *Le Droit International à l'Heure de sa Codification. Études en l'Honneur de Roberto Ago. I*, 1987, 53 et seq. (64); A. Cassese, *International Law in a Divided World*, 1986, 183 et seq. (but regarding the UDHR as formally non-binding).

facts of the treaty.<sup>256</sup> To extend treaty obligations to them under the guise of customary law not only violates this central element of treaty law,<sup>257</sup> it is also logically erroneous. It alleges a form of tacit consent to surmount a quite definite absence of willingness to ratify a treaty. A similar argument applies to the UDHR: even where all states agreed to a non-binding resolution this, by itself, means hardly more than that all states agreed to a non-binding resolution. To argue that wide agreement by itself makes the non-binding resolution binding overlooks that states might have agreed because the resolution is non-binding.

Our second (and enhanced) argument consists of dressing up a list of all the conventions, resolutions, statements and documents emanating from states, U.N. human rights bodies and other bodies repeating, citing and reaffirming the UDHR, the ICCPR and the ICESCR. Surely this must be sufficient state practice to back up the customary international law status of those documents.<sup>258</sup> But we should not allow the sheer number of repetitions to dazzle and overwhelm us. The first intricate argument against this plethora of state practice beseeches us to dismiss the documents, statements and other behavior emanating from states that are legally bound by the human rights documents. After all, their practice only shows that they try to comply with their obligations. What we have to scrutinize is the state practice *dehors* the treaty, i.e. state practice of non-party states.<sup>259</sup> In our opinion the argument misperceives customary international law. Customary law as a source of law is based on the evolution of a behavior to a habit that solidifies and raises expectations of that behavior in others until ultimately *opinio iuris* arises. Such expectations, the understanding of the norm as being deeper and stronger than just based on the treaty, can arise from the practice of parties. But apart from these abstract considerations, *D'Amato* has shown that the argument leads to an absurd result: the

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<sup>256</sup> Article 35 Vienna Convention on the Law of Treaties.

<sup>257</sup> R.R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", *BYIL* 41 (1968), 275 et seq. (286).

<sup>258</sup> A. D'Amato, "Human Rights as Norms of Customary international Law", in: A. D'Amato (ed.), *International Law: Prospect and Process*, 1987, 123 et seq.; L. Chen, "Protection of Persons (Natural and Juridical)", *Yale J. Int'l. L.* 14 (1989), 542 et seq. (546 et seq.); Schachter, see note 252, 334 et seq.; Meron, see note 225, 89. See generally Buergenthal, see note 18, 36.

<sup>259</sup> H. Waldock, "General Course on Public International Law", *RdC* 106 (1962), 5 et seq. (84); R.R. Baxter, "Treaties and Custom", *RdC* 129 (1970), 27 et seq. (64 et seq.); H. Lauterpacht, *International Law. A Treatise. By L. Oppenheim. Vol. I. - Peace*, 8th edition 1955, 28.



more support a convention has garnered, the more difficult it is to find state practice outside the convention and hence the more unlikely it would be to pass into customary international law.<sup>260</sup>

But there are more profound doubts about our showing of state practice. They concern, on the one hand, the acts we included: many of the documents we used are non-binding. We must assume that states agree to them fully aware that they do not commit themselves legally.<sup>261</sup> It is dubitable that custom can arise from them. As *Weil* put it so eloquently “thrice nothing is still nothing.”<sup>262</sup> What is worse, we referred to “paper practice” only and excluded the deeds of states from our analysis. Such an analysis would certainly show a different level of compliance for different rights. A casual glance at the numerous reports of human rights organizations shows that some human rights provisions are commonly violated by states. What to do in this conundrum: admit the sad reality of non-adherence or take heed of the lip service that states pay to human rights and hold them to their words?<sup>263</sup> *Simma* cautions against the all too hasty reliance on “paper practice” only. Sole reliance on paper practice supports claims for norms that have not withstood the test of time, “*coutume sauvage*”, and depart from the “*coutume sage*” of the olden days deduced from the actual deeds of states.<sup>264</sup> According to *Simma* if there is any customary international human rights law it is not the substantive standards, but the *droit de regard*, entitling the United Nations to respond to gross violations of human rights, e.g. through decisions of the human rights bodies.<sup>265</sup> Whereas *Simma* nevertheless considers paper practice as state practice<sup>266</sup> others do not even want to go that far, as we have already seen.

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<sup>260</sup> D’Amato, see note 258, 129.

<sup>261</sup> Weil, see note 83; Arangio-Ruiz, see note 165, 444 et seq.

<sup>262</sup> Weil, see note 83.

<sup>263</sup> Bleckmann, see note 225, 31.

<sup>264</sup> *Simma*, see note 228, 105 et seq.; R.J. Dupuy, “*Coutume Sage et Coutume Sauvage*”, in: R. Ago et al. (eds), *La Communauté Internationale. Mélanges Offerts à Charles Rousseau*, 1974, 75; G.J.H. van Hoof, *Rethinking the Sources of International Law*, 1983, 107 et seq.; A.M. Weisburd, “Customary International Law: The Problem of Treaties”, *Vand. J. Transnat’l L.* 21 (1988), 1 et seq. (10 et seq.).

<sup>265</sup> B. Simma/ P. Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles”, *Austr. Yb. Int’l L.* 12 (1992), 82 et seq. (88 et seq.).

<sup>266</sup> *Simma*, see note 228, 98 et seq.

*Wolfke* represents this position and he summarized it in a brilliant, if somewhat cynical manner:

“repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations.”

But despite the pointed language the argument is mistaken. Customary international law requires the analysis of all available practice. A state’s verbal affirmation of the existence of a right bears on the right itself and cannot automatically be taken as empty words. Many practitioners have relied on statements on the existence *vel non* of a norm of customary international law as state practice.<sup>267</sup> A state’s deeds, however, are equally relevant. This does not mean that any contrary act vitiates a whole body of state practice supporting a norm. The state practice only needs to be consistent and dense.<sup>268</sup> A dense and consistent paper practice is highly significant for a showing of state practice, as a state can be held to its word, but it is not sufficient where there is no non-paper practice at all. However, mere instances of non-compliance that are condemned by the international community do not prevent the development of a customary norm.<sup>269</sup>

Here we would like to submit a note of caution against the common belief that non-paper state practice disproves most norms of customary international human rights law. Orthodox scholarship examines this practice with an inherent bias against such norms, due to the selection of the non-paper practice. Even though a wide definition of non-paper practice might include national court decisions and possibly even national legislation, the decisive factor remains the establishment of “the facts on the ground”, the *de facto* compliance with the right. We will not bore the reader with the obvious workload difficulties of such a Herculean task, of rather more interest are the conceptual difficulties. Human rights elicit attention solely where they are violated. Such reports are the point of departure for orthodox claims that actual non-paper practice does not bear out customary human rights norms. A fair

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<sup>267</sup> Bleckmann, see note 225, 32; Simma, see note 228, 101.

<sup>268</sup> *Military and Paramilitary Activities in and against Nicaragua*, see note 242, para. 186; A. Kiss, “The Role of the Universal Declaration of Human Rights in the Development of International Law”, *Bull. of Hum. Rts. Special Issue*, Fortieth Anniversary of the Universal Declaration of Human Rights (1988), 47 et seq. (48).

<sup>269</sup> Kiss, see above.

evaluation has to establish instances of compliance with the right as well as instances of its violation.<sup>270</sup>

It is rather self-evident that the scrutiny of state practice, including non-paper practice, will yield different results for different rights and will not support a claim that the whole International Bill of Rights has entered customary international law.<sup>271</sup>

Our examination of state practice on access to medication starts with a look at the “right to health” and the “right to life”. The right to health is contained in some 60 national constitutions,<sup>272</sup> but there is insufficient non-paper practice to support it as a whole.<sup>273</sup> In contrast the right to life is commonly mentioned as a part of customary international law. State practice consists not just of numerous international conventions mentioning the right to life,<sup>274</sup> resolutions,<sup>275</sup> and national

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<sup>270</sup> This, of course, is rather an impossible task. There are millions of instances a day where a state does *not* kill its citizens and where the citizens *do* have access to medication. Not all of these are relevant to our analysis. Instead we would have to isolate the cases where the right in question did or should have made a difference.

<sup>271</sup> Schachter, see note 252, 334 et seq.

<sup>272</sup> Hunt, see note 114, para. 20.

<sup>273</sup> With the same conclusion, but arguing that the right is too vague, nebulous and infinitely malleable *Flores et al. v. Southern Peru Copper Corporation*, 343 F.3d 140, 160 (2nd Cir. 2003), see Toebe, see note 39; S. D. Jamar, “The International Human Right to Health”, *Southern University Law Review* 22 (1994), 1 et seq. (49 et seq.). Note that the ICESCR has not been ratified by the United States that is skeptical towards economic, social and cultural rights. Rott, see note 106, 94; P. Alston, “U. S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy”, *AJIL* 84 (1990), 365 et seq. (366 et seq.); R. Copelon, “The Indivisible Framework of International Human Rights: A Source of Social Justice in the U. S.”, *New York City Law Review* 3 (1998), 59 et seq. (63 et seq.); *Interpretative Statements for the Record by the Government of the United States of America*, I.) First Paragraph, in *Report of the World Food Summit. 13-17 November 1996*. Doc. WFS 96/REP Part One (1996). Nevertheless in favor of such a customary right (but failing to address non-paper practice) E.D. Kinney, “The International Human Right to Health: What Does this Mean for Our Nation and World?”, *Indian Law Review* 34 (2001) 1457 et seq. (1464 et seq.).

<sup>274</sup> For example: article I American Declaration of the Rights and Duties of Man; article 2 (1) ECHR; article 6 (1) ICCPR; article 4 (1) American Convention on Human Rights; article 4 African Charter on Human and Peo-

constitutions,<sup>276</sup> but also a rich body of both national and international case law.<sup>277</sup> Numerous violations of the right are documented by NGOs such as Amnesty International,<sup>278</sup> but they are often condemned by other states. It would be wrong, however, to now simply assume that the scope of the customary right to life is coexistent with the one under the ICCPR.<sup>279</sup> It is far from clear whether its positive component, of which access to life-saving medication is a part, has also entered

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ples' Rights; article 6 (1) Convention on the Rights of the Child; article 2 (1) of the Charter of Fundamental Rights of the European Union.

<sup>275</sup> For example article 3 UDHR, *Declaration on the Protection of All Persons from Enforced Disappearance*, A/RES/47/133 of 18 December 1992, article 1 (2) (adopted without a vote); *Declaration on the Elimination of Violence against Women*, A/RES/48/104 of 20 December 1993, article 3 (a) (adopted without a vote); U.N. World Food Conference, *Universal Declaration on the Eradication of Hunger and Malnutrition*, Report of the World Food Conference, Rome 5-16 November 1974, Doc. E/CONF.65/20 (1975) (16 November 1974) (adopted without a vote).

<sup>276</sup> For a collection of Documents see A. Weber, *Menschenrechte. Texte und Fallpraxis*, 2004. Examples include (in various wordings) Algeria (article 34 (1)); Brazil (article 5); Bulgaria (article 28); Canada (article 7); Chile (article 19 No. 1); Czech Republic (article 6); Estonia (§ 16); Finland (§ 7); Germany (article 2 (2)); India (article 21); Ireland (article 40 (3.2)); Japan (article 13); Namibia (article 6); Poland (article 38); Portugal (article 24 (1)); Russia (article 20 (1)); South Africa (§ 11); Spain (article 15); Switzerland (article 10); Thailand (§ 31); Tunisia (article 5); United States of America (XIVth Amendment § 1).

<sup>277</sup> Dinstein, see note 195, 115; Gormley, see note 254, 121; B.G. Ramcharan, "The Concept and Dimensions of the Right to Life", in: B.G. Ramcharan (ed.), *The Right to Life in International Law*, 1985, 1 et seq. (3); H.A. Kabaaliodlu, "The Obligations to 'Respect' and to 'Ensure' the Right to Life", in: B.G. Ramcharan (ed.), *The Right to Life in International Law*, 1985, 160 et seq. (161); A. Redelbach, "Protection of the Right to Life by Law and by other Means", *ibid*, 185; see Commission on Human Rights, *Question of Human Rights in Chile*, Doc. E/CN.4/1983/9, para. 19 (1983) ("The international community therefore considers the right to life in the context of jus cogens in international human rights law"). For international case law see also Nowak, see note 151, article 6.

<sup>278</sup> Amnesty International (ed.), *Amnesty International Report 2003*.

<sup>279</sup> M. Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen. Kritische Würdigung und Dokumentation der Rechtsgrundlagen*, 1973, 38 et seq.; The wrong approach has been adopted by A.P. Kearns, "The Right to Food Exists via Customary International Law", *Suffolk Transnational Law Review* 22 (1998), 223 et seq.

customary international law. *Bleckmann* rightly stated that the application of a customary norm in state practice defines the precise bounds of the norm.<sup>280</sup> The common core of the paper practice is only a first step in this analysis.<sup>281</sup>

While state practice concerning individual access to medication (outside the question of asylum for lack of medical services in the home country)<sup>282</sup> can hardly be deemed dense, the same cannot be said in respect to access to medication in national health emergencies, generally pandemics such as HIV/AIDS, tuberculosis and malaria.<sup>283</sup> This dovetails with the position of the Restatement (Third) of the Foreign Relations Law of the United States, that considers a “consistent pattern of gross violations of internationally recognized human rights” (as compared to single instances of violations) as a violation of customary international law<sup>284</sup> and regards all rights protected by the principal International Covenants as relevant for such gross violations.<sup>285</sup>

In the context of the AIDS pandemic the General Assembly of the United Nations<sup>286</sup> stressed in several resolutions “the importance of

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<sup>280</sup> A. Bleckmann, “Zur Feststellung und Auslegung von Völkergewohnheitsrecht”, *ZaöRV* 37 (1977), 504 et seq.; note also that American courts require a rule of customary international law to be clear and unambiguous, rather than a mere abstract right or liberty devoid of coherent or discernable standards: *Sosa v. Alvarez-Machain et al.*, 542 U.S. (2004); *Hilao et al. v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2nd Cir. 1980).

<sup>281</sup> Bleckmann, see above, 524 et seq.

<sup>282</sup> E.g. European Court of Human Rights, *D v. United Kingdom*, 24 EHRR 423 (1997) (2 May 1997); United Kingdom Court of Appeal (Civil Division), *N. v. Secretary of State for the Home Department*, *ILM* 43 (2004), 115 et seq.

<sup>283</sup> Pandemics hit closer to home as infectious diseases know no frontier. Here it is most evident that health is a public good. See M.W. Zacher, “Global Epidemiological Surveillance. International Cooperation to Monitor Infectious Diseases”, in: I. Kaul/ I. Grunberg/ M.A. Stern (eds), *Global Public Goods. International Cooperation in the 21st Century*, 1999, 266 et seq. (268 et seq.).

<sup>284</sup> American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States. Volume 2*, 1987, § 702.

<sup>285</sup> *Ibid.*, § 702 comment m.

<sup>286</sup> *Prevention and control of acquired immune deficiency syndrome (AIDS)*, A/RES/42/8 of 26 October 1987, (adopted without a vote).

making these technologies and pharmaceuticals available as soon as possible and at an affordable cost” and requested efforts of the UN System to collaborate to promote access of all peoples to therapeutic technologies and pharmaceuticals.<sup>287</sup> Its special session on HIV/AIDS in 2001 resulted in a resolution that was adopted without a vote<sup>288</sup> and in which government representatives declared their commitment to “address factors affecting the provision of HIV-related drugs, including anti-retroviral drugs, inter alia, affordability and pricing, including differential pricing, and technical and health-care system capacity” as well as to make every effort to progressively provide treatment including anti-retroviral therapy.<sup>289</sup> Access to treatment was explicitly framed as a human rights issue.<sup>290</sup> An even clearer expression of states’ obligations to safeguard access to medication in the context of pandemics came in December 2003, when the General Assembly adopted Resolution 58/179 that calls upon states to pursue policies promoting availability, accessibility and affordability of safe pharmaceutical products to treat pandemics such as HIV/AIDS, tuberculosis and malaria and to develop and implement national strategies to progressively realize access for all to comprehensive treatment for all individuals infected. The resolution mentions all three obligations of human rights law by stating that states should adopt legislation in accordance with applicable international law to safeguard access to the relevant pharmaceutical products from any limitation by third parties and take all appropriate measures, to the maximum of the resources allocated for this purpose, to promote effective access to preventive, curative or palliative pharmaceutical products. States are furthermore called upon to take all appropriate measures to promote research and development of new and more effective drugs. The resolution was adopted by 181 votes to 1, the United States being the sole dissenter.<sup>291</sup> Similar statements have been made by the

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<sup>287</sup> *Prevention and control of acquired immunodeficiency syndrome (AIDS)*, A/RES/44/233 of 22 December 1989, (adopted by consensus). See also *Prevention and control of acquired immunodeficiency syndrome (AIDS)*, A/RES/45/187 of 21 December 1990, (adopted without a vote); *Prevention and control of acquired immunodeficiency syndrome (AIDS)*, A/RES/46/203 of 20 December 1991, (adopted without a vote).

<sup>288</sup> *Declaration of Commitment on HIV/AIDS*, see note 118.

<sup>289</sup> *Ibid.*, Annex para. 55.

<sup>290</sup> *Ibid.*, Annex para. 58.

<sup>291</sup> *Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria*, see note 9, adopted with the sole dissent of the United States.

WHO,<sup>292</sup> by United Nations human rights bodies,<sup>293</sup> and by innumerable conferences on the issue.<sup>294</sup> We have already seen that several national constitutional courts, too, e.g. those of South Africa and Colombia, have safeguarded access to medication in the AIDS pandemic as a human right.

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<sup>292</sup> *Global Health-sector Strategy for HIV/AIDS*, WHA resolution 56.30 (28 May 2003) (exhorting Member States “as a matter of urgency” to fulfil their obligations under the Declaration of Commitment on HIV/AIDS of the General Assembly, including those related to access to care and treatment), *Ensuring Accessibility of Essential medicines*, WHA resolution 55.14 (18 May 2002) (urging Member States to reaffirm their commitment to increase access to medicines); *Scaling up Treatment and Care within a Coordinated and Comprehensive Response to HIV/AIDS*, WHA resolution 57.14 (22 May 2004) (urging Member States to pursue policies promoting affordability and availability of relevant medicines as a matter of priority). Today the Joint United Nations Programme on HIV/AIDS (UNAIDS), a joint program of specialized agencies set up by ECOSOC/RES/1994/24, is coordinating the response to the HIV/AIDS pandemic.

<sup>293</sup> *Access to medication in the context of pandemics such as HIV/AIDS*, Commission on Human Rights Res. 2001/33 (23 April 2001) (recognizing that access to medication in the context of pandemics is a fundamental element for achieving the full realization of the right to health and calling on states to promote availability and accessibility of pharmaceuticals) (adopted 52 votes to none, with the United States of America abstaining, see Commission on Human Rights, Report on the Fifty-Seventh Session, ESCOR 2001, Suppl. No. 3, Doc. E/CN.4/2001/167, 410 (2001)); *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, Commission on Human Rights Res. 2004/26, para. 6 b (16 April 2004) (recognizing that access to medication in the context of pandemics such as HIV/AIDS is one fundamental element for achieving progressively the right to health) (adopted without a vote); *Access to medication in the context of pandemics such as HIV/AIDS*, Commission on Human Rights Res. 2002/32 (22 April 2002); *The right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Commission on Human Rights Res. 2003/28 (22 April 2003) (urging states to fulfil the right to health); *Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria*, Commission on Human Rights Res. 2003/29 (22 April 2003) (calling upon states to pursue policies promoting availability and accessibility of safe medication in the context of pandemics); General Comment No. 14, see note 106.

<sup>294</sup> See the overview in *Declaration of Commitment on HIV/AIDS*, see note 118, para. 6.

Despite the favorable paper practice the access situation remains bleak: only 1 percent of the people who need AIDS medication in southern Africa actually have access to it.<sup>295</sup> Bearing in mind, however, that a customary right to access to medication would include resource limitations just as the right to health under the ICESCR, this fact alone does not prevent the development of a customary norm guaranteeing access. What is more important is states' efforts to guarantee access and international reaction to states' ignoring access to medication in national health emergencies. Practice here supports a right to access to medication in national health emergencies. Most countries are working hard towards universal access to treatment for AIDS, as is evidenced by state reactions to the new WHO access initiative "3 by 5."<sup>296</sup> Even the United States, the only major democracy that generally fails to recognize a universal entitlement to health care, has established a program to achieve universal AIDS treatment.<sup>297</sup> China recently reportedly established a similar program.<sup>298</sup> States that fail to provide access to medication do not argue that they do not have to make access available – they engage in denial. Thus when South Africa's President *Mbeki* refused to make AIDS medication available he argued that HIV does not cause AIDS.<sup>299</sup> Some countries simply deny that an epidemic is taking place.<sup>300</sup> Public pressure on such countries has grown enormously in

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<sup>295</sup> A.C. D'Adesky, *Moving Mountains. The Race to Treat Global AIDS*, 2004, 11; A. Park, "China's Secret Plague", *Time Magazine*, 15 December 2003.

<sup>296</sup> WHO (ed.), *3 by 5 Progress Report. December 2003 through June 2004*, 2004, 23.

<sup>297</sup> The so-called Ryan White CARE program, see Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. 101-381 as amended by the Ryan White CARE Act Amendments of 1996, Pub. L. 104-146 and the Ryan White CARE Act Amendments of 2000, Pub. L. 106-345. See also A.R. Chapman, "Conceptualizing the Right to Health: A Violations Approach", *Tennessee Law Review* 65 (1998), 389 et seq.

<sup>298</sup> "China verabschiedet erstes Aids-Gesetz", *Frankfurter Allgemeine Zeitung*, 30 August 2004.

<sup>299</sup> A. Meldrum, "Call for 'dishonest' Mbeki to apologize for Aids gaffe", *The Observer*, 28 September 2003; M.W. Makgoba, "HIV/AIDS: The Peril of Pseudoscience", *Science* 288 (2000), 1171 et seq.; G.J. Annas, "The Right to Health and the Nevirapine Case in South Africa", *New England Journal of Medicine* 348 (2003), 750 et seq.

<sup>300</sup> X. Lei, "China: Sars and the Politics of Silence. SARS is Making a Change", *World Press Review* 50 (July 2003); A. Park, "China's Secret Plague", *Time Magazine*, 15 December 2003.



the last years.<sup>301</sup> We consider this state practice sufficient to support a customary international law norm guaranteeing access to life-saving medication in the face of national health emergencies, particularly pandemics subject to progressive realization.

Without a doubt the United States' position deserves some further comment. It could be argued that with its consistent rejection of universal health care as a national policy and its track record of objection to economic, social and cultural rights and access to medication, e.g. to General Assembly Resolution 58/179,<sup>302</sup> it cannot be bound by the right to access to medication. But United States' practice on the point is more subtle. While it objected to sweeping claims concerning the right to health it did not vote against resolutions aiming to tackle specific pandemics, such as HIV/AIDS.<sup>303</sup> Indeed, on several occasions it explicitly took the stance that access to medication in pandemics should not be restricted, as illustrated by the following two examples: in December 1999 President *Clinton* announced that the United States would "implement its health care and trade policies in a manner that ensures that people in the poorest countries won't have to go without medicine they so desperately need."<sup>304</sup> When the United States attacked Brazil's patent laws in the WTO, it made it a point to mention in the Mutually Agreed Solution reached in 2001 that the U.S. concerns "were never di-

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<sup>301</sup> D'Adesky, see note 295.

<sup>302</sup> *Interpretative Statements for the Record by the Government of the United States of America*, see note 273; *Flores et al. v. Southern Peru Copper Corporation*, see note 273. Note, however, that there are indications that this attitude might change. Numerous recent bills in Congress try to expand health care, some even invoke a right to health. See e.g. *Healthcare Equality and Accountability Act*, S. 1833, 108th Congress, 6 November 2003; *Afghan Women Security and Freedom Act of 2004*, 2032, 108th Congress, 27 January 2004 (finding that the Taliban regime denied women the most basic human rights, including the right to health care); *Expressing the sense of the Congress that access to basic health care services is a fundamental human right*, H. Con. Res. 56, 103rd Congress, 2 March 1993; see Chapman, see note 297, 393 et seq.

<sup>303</sup> See notes 286 et seq., 291 et seq.

<sup>304</sup> W. J. Clinton, "Remarks at a World Trade Organization Luncheon in Seattle, December 1, 1999", in: Office of the Federal Register National Archives and Records Administration (ed.), *Public Papers of the Presidents of the United States. William J. Clinton. 1999 (in Two Books). Book II – July 1 to December 31, 1999*, 2001, 2189, 2192.

rected” at Brazil’s HIV/AIDS program, a “bold and effective” effort.<sup>305</sup> Thus the United States is not a persistent objector to the customary norm guaranteeing access to life-saving medication in the face of national health emergencies, particularly pandemics.

### c. *Opinio Iuris*

State practice by itself evidences solely a usage of states. There must be something that raises this usage from the level of an empirical statement about what states do to a normative rule about what states have to do. The content of this second component of customary law, *opinio iuris sive necessitatis*, is the subject of much debate. For consensualists like *Anzilotti*<sup>306</sup> the answer must appear simple. As for them all international law is based on the consent of states<sup>307</sup> *opinio iuris* has to be the

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<sup>305</sup> *Brazil-Measures Affecting Patent Protection. Notification of Mutually Agreed Solution*, WT/DS199/4 (19 July 2001). Further state practice stems from the recent WTO actions relating to TRIPS and access to medication and clearly implies different U.S. behavior in different disease areas, see e.g. R.B. Zoellick, “Letter to Trade Ministers dated December 27, 2002”, InsideHealthPolicy.com, 17 January 2003 (complaining about a possible expansion of the scope of diseases covered under the Doha Declaration); Council for Trade-Related Aspects of Intellectual Property Rights, *Moratorium to Address Needs of Developing and Least-Developed Members with no or Insufficient Manufacturing Capacities in the Pharmaceutical Sector. Communication from the United States*, IP/C/W/396 (14 January 2003) (declaring a moratorium on dispute settlement for article 31 (f) TRIPS Agreement for economies facing a grave public health crises associated with HIV/AIDS, Malaria, Tuberculosis or other infectious epidemics of comparable scale and gravity); D.R. Andresen (U.S. Embassy Singapore), “US Active in Helping Poorer Nations Tackle Health Crises”, IP-Health, 27 January 2003; R.B. Zoellick, “Statement of Robert B. Zoellick, U.S. Trade Representative before the Committee on Ways and Means of the House of Representatives”, 26 February 2003, IP-Health, 26 February 2003 (emphasizing U.S. commitment to help poor countries obtain medication). *Understanding between Canada and the United States regarding the implementation of the Decision of the WTO General Council of August 30, 2003 and NAFTA*, <<http://www.ustr.gov/regions/whemisphere/canada/2004-07-16-canadatrips-mou.pdf>> (last visited 16 July 2004).

<sup>306</sup> Anzilotti, see note 16, 41 et seq.

<sup>307</sup> *The Case of the S.S. “Lotus”*, see note 240, 18 (“The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law”).

tacit consent of states. In practice they infer this consent, i.e. they accept acquiescence as consent, and only exempt states from the new rule that have persistently objected to its formation.<sup>308</sup> Other authors reject the consensual premise to be able to include the majority of “passive states”<sup>309</sup> and even natural law notions rear their head in the debate.<sup>310</sup> The majority view on *opinio iuris* has been expressed by the ICJ in the *North Sea Continental Shelf Cases* in the following terms:

“the acts (...) must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. (...) The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>311</sup>

Scholars have had an extraordinarily hard time to come to terms with this notion. The problems begin with proving *opinio iuris*. Obviously any such proof will have to recur to verbal acts of state officials. Peculiarly, the same acts could also evidence state practice. Mendelson strongly cautions against using the same act for both purposes. Such an approach, he asserts, is incompatible with the two-prong test of customary international law.<sup>312</sup> Once this difficulty is overcome we encounter the next challenge. The *opinio iuris* formula premises the development of a new customary norm on the belief of a state that it is legally bound by the norm. But how can this be if the norm is not yet in existence? Are we to demand that states mistakenly assume the existence of a binding norm?<sup>313</sup> In the face of this challenge Kelsen initially wanted to abandon the notion of *opinio iuris* altogether.<sup>314</sup> The alleged

<sup>308</sup> Byers, see note 235, 142 et seq.

<sup>309</sup> G. Scelle, *Manuel de Droit International Public*, 1948, 575.

<sup>310</sup> E.g. J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 2nd edition 1872, 58 et seq.

<sup>311</sup> *North Sea Continental Shelf Cases*, see note 240, para. 77.

<sup>312</sup> M. Mendelson, *The Formation of Customary International Law*, RdC 272 (1999), 155 et seq. (206 et seq.); J. Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems”, *EJIL* 15 (2004), 523 et seq. (526).

<sup>313</sup> F. Geny, *Méthode d'Interprétation et Sources on Droit Privé Positif*, 2nd edition 1919, 367 et seq.

<sup>314</sup> H. Kelsen, “Théorie du Droit International Coutumier”, *Revue Internationale de la Théorie du Droit. Nouvelle Série* 1 (1939), 253 et seq. (263 et seq.); P. Guggenheim, “Les deux Éléments de la Coutume en Droit International”, in: *La Technique et les Principes du Droit Public. Études en l'Honneur de Georges Scelle. Tome Premier*, 1950, 275 et seq. (283).

difficulties disappear, however, if we conceive the development of customary law as a process and bear in mind such notions as legitimate expectations and soft law. Through repetition acts give rise to a usage, usage begins to raise expectations of a certain behavioral pattern and ultimately what was a mere fact hardens to soft and then to hard law. Those who criticize using verbal practice for both the *opinio iuris* and the state practice element apply an overly static approach. We submit that where such verbal acts evince both elements they can be used as evidence for both elements. Often *opinio iuris* can be inferred from paper practice.<sup>315</sup> Moral considerations, too, are not misplaced here, for which nation will publicly take a stance against the right to life or access to medication? Given the numerous documents in which states explicitly guarantee access to medication in pandemics we have no doubt that *opinio iuris* exists and that access to life-saving medication in national health emergencies, particularly in pandemics, subject to progressive realization is part of customary international law.

## 2. General Principles

“[G]eneral principles of law recognized by civilized nations”<sup>316</sup> are, as a source of international law, to be examined after treaties and customary law.<sup>317</sup> Doctrine admits several types of general principles. First and foremost they can be derived from principles recognized *in foro domestico*, i.e. common rules in a large majority of states representing all legal systems. The restriction of the comparative exercise to “civilized nations” is a remnant of eurocentristic views that are no longer valid. The second category of general principles are general principles of the international legal order arising directly in international relations. The astute reader will already have noticed that distinguishing general principles and customary law is not a simple task. If anything can be deduced

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<sup>315</sup> C. DeVisscher, *Theory and Reality in Public International Law*, 1957, 149 n. 29; Wolfke, see note 246, 70; D’Amato, see note 246, 47 et seq.

<sup>316</sup> Article 38 (c) ICJ Statute.

<sup>317</sup> This does not imply an inferiority of general principles in the sense of a hierarchy. R.A. Billib, *Die allgemeinen Rechtsgrundsätze gemäß Art. 38 I c des Statuts des Internationalen Gerichtshofes – Versuch einer Deutung*, 1972, 168 et seq.

from the vague definitions of general principles it is that these can be more general than customary rules.<sup>318</sup>

It is far from settled whether human rights can be admitted as general principles. Most established general principles stem from the branch of private law, such as the principle of good faith or the law of unjust enrichment.<sup>319</sup> The predominance of private law principles is an acknowledgement of the contract – treaty analogy. But there is nothing inherent in the notion of general principles itself that would limit it to private law principles<sup>320</sup> and in their seminal study on the issue *Simma* and *Alston* convincingly argue that human rights can be general principles. Both routes of genesis of general principles are open to human rights: recognition *in foro domestico*,<sup>321</sup> or as basic considerations that have obtained general acceptance or recognition by states on the international plane.<sup>322</sup> The old objection that human rights are within the exclusive domestic jurisdiction of states has long been overcome.<sup>323</sup>

The inclusion of human rights in the ambit of general principles gains support from the *Corfu Channel* Case of the ICJ, in which it recognized “elementary considerations of humanity” as a general principle, but with little regard to the method used to discern the principle:

“The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based (...) on certain general and well-recognized principles, namely: elementary consid-

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<sup>318</sup> On general principles see H. Mosler, “General Principles of Law”, in: R. Bernhardt (ed.), *EPIL* Volume II, 1995, 511 et seq.; H. von Heinegg, in: Ipsen, see note 17, 198 et seq.; Billib, see note 317; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953.

<sup>319</sup> Bleckmann, see note 225, 38 et seq.; E. Fanara, *Gestione di affari e arricchimento senza causa nel diritto internazionale*, 1966; R. Yakemtchouk, *La Bonne Foi dans la Conduite Internationale des États*, 2002, 72 et seq.

<sup>320</sup> Mosler, see note 318, 512, 521.

<sup>321</sup> Meron, see note 225, 88 et seq.

<sup>322</sup> Simma/ Alston, see note 265, 102 et seq.; B. Vitanyi, “Les positions doctrinales concernant le sens de la notion de ‘principes généraux de droit reconnus par les nations civilisées’”, *RGDIP* 86 (1982), 48 et seq. (85 et seq.) (discussing the genesis of general principles).

<sup>323</sup> *Interpretation of Peace Treaties*, ICJ Reports 1950, 65 et seq. (70 et seq.); Meron, see note 225, 106.

erations of humanity, even more exacting in peace than in war (...).<sup>324</sup>

Similarly in the *Genocide Convention* Case the ICJ held that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.”<sup>325</sup> The German *Bundesverfassungsgericht* considers a minimum human rights standard as part of general international law.<sup>326</sup>

The wide acceptance of human rights makes it plausible to follow the new trend to accept basic human rights as general principles.<sup>327</sup>

The national practice we have scrutinized in our analysis of the customary law status of access to medication allows us to conclude that access to life-saving medication in national health emergencies subject to progressive realization is also a general principle of law.

## VI. Conclusion

The AIDS pandemic has focused the spotlight of international attention on the issue of access to medication. Only recently has the international community stepped up its efforts to combat the disease. Nevertheless in much of the world the affected population still does not have access to the necessary medication. At times it seems that the very real size of the looming catastrophe defies the imagination and stifles many an attempt at combating the disease. Despite this fact and even though the access debate is commonly set within the context of HIV/AIDS, we should be aware that access to medication is not just a pressing issue within the HIV/AIDS debate, but it covers all essential medicines and all diseases.

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<sup>324</sup> *Corfu Channel Case (United Kingdom/Albania)*, ICJ Reports 1949, 4 et seq. (22).

<sup>325</sup> *Reservations to the Convention on Genocide*, ICJ Reports 1951, 15 et seq. (23).

<sup>326</sup> BVerfGE 46, 342, 362 (1977); BVerfGE 60, 253, 304 (1982).

<sup>327</sup> Mosler, see note 318, 525; Simma/ Alston, see note 265, 102 et seq.; Meron, see note 225, 88 et seq.; Waldock, see note 259, 198; J. P. Humphrey, “The Universal Declaration of Human Rights: Its History, Impact and Juridical Character”, in: B.G. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration*, 1979, 21 et seq. (29).

We have seen that the issue is more than just a moral one – the right to access to medication is guaranteed under the ICESCR, the ICCPR and general international law. However the scope of the right varies for the different sources: the ICESCR protects access to essential medication. The ICCPR is restricted to life-saving medication and general international law, as expected, is even more limited and guarantees access to life-saving medication in national health emergencies, particularly in pandemics. We have also seen how the right is subject to progressive implementation, i.e. how non-compliance can at times be justified by financial constraints. Particularly the jurisprudence of the South African Constitutional Court has given valuable guidance in operationalizing the right, emphasizing the deference that has to be granted to the executive, yet also imposing limits on the executive's discretion and striking down a policy that was proven to be irrational.

But, the esteemed reader might wonder, what is the use of rights language in this context? Are we not falling into a trap that *Pellet* refers to as “*Droits-de-l’Hommisme*”?<sup>328</sup> He describes this phenomenon as the admirable mindset of human rights lawyers or even more so of human rights activists, struggling to bring relief to the downtrodden and using human rights law as a tool in their fight. Two risks flow from the agenda: the (erroneous) belief that human rights require special legal techniques, quite distinct from those applied in other legal areas, and the tendency to hang on to new lines of thinking and to regard them as binding law. We cannot but agree that some of the claims raised under human rights law seem to rely on wishful thinking rather than legal reasoning. But the charge of undifferentiated human rights claims<sup>329</sup> fails where such claims are properly founded.

It would also be illusory to assume that framing access to medication as a right alone solves the problems in providing access. Many of the problems are factual and deeply rooted in underdevelopment and poverty: how can medication be made available without infrastructure and without clean water? Even where framing access to medication as a right could make a difference, the full effectiveness of human rights law is often hampered by a comparatively weak enforcement mechanism that relies on shaming countries into compliance rather than threaten

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<sup>328</sup> A. Pellet, “Droits-de-l’Hommisme” et Droit International, *Droits fondamentaux* 1 (2001).

<sup>329</sup> K. Doehring, Die undifferenzierte Berufung auf Menschenrechte, in: U. Beyerlin (ed.), *Festschrift für Rudolf Bernhardt*, 1995, 355 et seq.

any serious consequences.<sup>330</sup> This is of particular concern where the human rights regime encounters regimes that are associated with “hard-and-fast” enforceable rules, such as the WTO regime. This, however, is not the place to discuss the encounter. Asking for forgiveness for such reckless advertising I would refer the reader interested in that conflict to my forthcoming book on the subject of TRIPS and access to medication.

Nevertheless human rights language has shown to be effective. It provides a tool for prioritizing and as an argument has often proven helpful in promoting concerns that were neglected, even if it is at times only through public pressure that the human rights argument prevails. Despite their notoriously weak enforcement under public international law we should not dismiss the value of such claims easily, if only for their power as an argument.

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<sup>330</sup> See P. Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, *EJIL* 13 (2002) 815 et seq. (833 et seq.); O.A. Hathaway, “Do Human Rights Treaties Make a Difference?”, *Yale L. J.* 111 (2002), 1935 et seq. (with a rather doubtful attempt at measuring compliance with human rights treaties).