

# Judicial Enforcement of Economic, Social and Cultural Rights

Geneva Forum Series no 2



International  
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# **Judicial Enforcement of Economic, Social and Cultural Rights**

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Materials relating to the 2014 Geneva Forum of Judges  
and Lawyers convened by the International Commission  
of Jurists



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## **Preface**

The 2014 Geneva Forum of Judges and Lawyers was the fifth such annual meeting convened by the ICJ Centre for the Independence of Judges and Lawyers (CIJL). The Forum brings together judges and lawyers from diverse backgrounds and from all regions of the world, for an in-depth discussion on issues related to the independence and impartiality of the judiciary and the legal profession, and their role in ensuring the effective protection of human rights. In 2014, the Forum was a joint initiative of the CIJL and the ICJ Programme on Economic, Social and Cultural Rights.

Economic, social and cultural rights can only be realized through an adequate legal framework accompanied by effective public policies. As to the normative framework, progress has been made over the past two decades. Recently adopted or reformed constitutions have tended to explicitly guarantee an extended catalogue of rights, including some or all of the economic, social and cultural rights recognized in international law. Legislation more generally and jurisprudence have also evolved significantly at national, regional and international levels.

Growing acceptance by States and the international community of the justiciability and legal enforceability of economic, social and cultural rights, in 2008 culminated in the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which has entered into force on 5 May 2013. It is hoped that this milestone will boost the international protection of economic, social and cultural rights, as it allows individuals to bring complaints of violations to an independent international body of experts for adjudication.

However, important legal, procedural, political and policy challenges remain to be addressed. Courts and quasi-judicial bodies have an

important role to play in the legal enforcement of economic, social and cultural rights. Judicial remedies can provide reparation in individual cases, and can directly or indirectly result in substantial changes in domestic law and policy.

At the same time, many judges still encounter difficulties or have concerns in relation to the judicial protection of these rights. Some issues pertain to the appropriate roles of the different branches of government. Some decisions may have important implications for public human and financial resources. Other may involve conflicts between State development plans, public interest, and the interests of indigenous groups. Some may theoretically recognize the rights in their domestic legal order, but do not in practice provide accessible and effective enforcement mechanisms.

At the fifth Geneva Forum of Judges and Lawyers, the participants explored these and other conceptual issues pertaining to the judicial enforcement of economic, social and cultural rights, speaking from their experience and practice in national and international systems.

## **Executive summary**

The development and global acceptance of the justiciability of economic, social and cultural rights has been a slow and lengthy process, despite a growing consensus that it is possible to have recourse to the courts to seek their enforcement. The discussion is hence no longer whether these rights are justiciable, but how the remaining obstacles to access to justice and to the enjoyment of the right to an effective remedy by victims of violations of these rights can be overcome.

Accordingly, at the 2014 Geneva Forum of Judges and Lawyers, participants discussed in three sessions the following: the progress to date as regards the legal and judicial enforcement and protection of economic, social and cultural rights; respecting the separation of powers while ensuring effective judicial protection; and, challenges and obstacles in the judicial enforcement of economic, social and cultural rights.

During the first session, Forum participants discussed the progress to date, both internationally and domestically.

Although the Universal Declaration of Human Rights encompasses all categories of rights, the global political division of the Cold War gave rise to two separate human rights Covenants, a division largely overcome – at the policy level – at the 1993 Vienna World Conference on Human Rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005, identifies mechanisms, modalities, procedures and methods for the implementation of existing legal obligations, and clearly also apply to gross violations of economic, social and cultural rights. At the international level, the elaboration of the

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has opened up the way to a quasi-judicial communications mechanism at the UN level.

The participants at the Geneva Forum also discussed how domestic courts have dealt with challenges that have impeded the justiciability of economic, social and cultural rights. Those include, among others, normative gaps in the guarantee of economic, social and cultural rights, judges' insufficient familiarity with these rights (and human rights law in general), the principle of progressive realization, and a low standard of judicial review regarding executive action. Increasingly, domestic courts are overcoming these obstacles, as the Forum participants demonstrated with numerous positive examples.

The Forum's second session centred on respecting the separation of powers, while ensuring effective judicial protection. The justiciability of economic, social and cultural rights has often been contested because their realization is seen as involving policy making and public expenditure, decisions which are posited to be the exclusive prerogative of the executive and legislature. However, the complying with the duty to respect or protect does not necessarily require significant expenditure. In addition, in the context of judicial review, it is possible for the courts to act as a check on the powers of the other branches of the State, while allowing the latter to retain critical latitude with regard to the elaboration of public policies and the allocation of financial resources.

Forum participants discussed a variety of methods employed by domestic courts, including ways in which courts can set out the legal framework for the realization of certain economic, social and cultural rights and establish oversight mechanisms, allowing them to monitor Governments' progress while not usurping executive or legislative prerogatives. They also discussed techniques employed by regional human rights bodies. However, especially in relation to

decisions relative to the Organization of American States, decisions by these bodies have unfortunately led to a setback because a number of States refuse to implement Commission and Court orders, decisions and judgments. Within the African system, the record of implementation of decisions is also rather poor. One participant elaborated on the resurgence of the cultural relativism argument in the Asia-Pacific region. With reference to European jurisprudence, Forum participants also discussed the regional judicial enforcement of economic, social and cultural rights in times of austerity following the economic crisis, which was characterized as a particularly difficult context for the adjudication of economic, social and cultural rights.

During the third session, Forum participants further discussed challenges in the judicial enforcement of economic, social and cultural rights.

Among others, a significant obstacle is the interference with the work of lawyers and judges as human rights defenders working on economic, social and cultural rights. They often face challenging social structures, powerful economic interests, traditional practice and religious dogma, and hence face particular dangers.

Furthermore, the enforcement and the monitoring of the implementation of judicial decisions often pose a challenge. While sometimes through litigation, strategic aims are achieved regarding the contents of certain economic, social and cultural rights, subsequent non-compliance by the authorities with judicial decisions has served to partially undermine progress. However, as highlighted by one Forum participant, it is up to the judiciary to change its deferential attitude towards the executive, and, in addition, civil society can play an enhanced role in monitoring implementation and demanding enforcement.

Forum participants also discussed a number of ways forward and good practices. There was general agreement on the need for more training of the members of the judiciary on economic, social and cultural rights, in order to build knowledge and change mind-sets. A more contested issue was the establishment of specialized human rights jurisdictions at the domestic level, with Forum participants expressing a variety of opinions, some in favour and others preferring mainstreaming throughout all jurisdictions.

The theoretical debate on the justiciability of economic, social and cultural rights to an extent appears to have been settled, not least since the adoption and entry into force of the Optional Protocol to the ICESCR. However, the need to demystify the roles that courts can and do play to protect these rights, remains. The debate should be reframed in light of the victims' right to an effective remedy and reparation. In particular, it should be highlighted that there is no basis for excessive judicial deference to the expertise of the other branches of power, especially when this in practice serves to deprive victims of access to justice.

## **Session I**

### **Legal and judicial enforcement and protection of economic, social and cultural rights: progress to date**

The development of the justiciability of economic, social and cultural rights, as noted by the Forum's introductory speaker, has been a slow and lengthy process, due to the complexity of the matter. Already at the time of the International Covenant on Economic, Social and Cultural Rights' (ICESCR) entry into force, there was a campaign in favour of recognition of justiciability. Many actors especially State actors, however, refused to even consider the possibility at that time.

Even today, only twenty States have ratified the Optional Protocol to the ICESCR (OP). Despite the slow start to the ratification of the OP, there is an increase in the recognition of the justiciable character of economic, social and cultural rights. Every day, judicial decisions are made that recognize this, either through application of domestic law, by reference to the ICESCR or another regional instrument, or in a combination of both. The evolution is characterized by a gradual alignment of domestic legal norms and international standards.

Nevertheless, the participant concluded that many difficulties remain. Although there are 162 States Parties to the ICESCR (at the time of the Forum; at the date of publication, also South Africa and Belize have become Parties), conceptual doubts about economic, social and cultural rights persist within the legal community, for instance when it concerns the role of courts to decide whether a State policy in the area of education or health complies with the State's obligations under the rights to education and health, and if necessary to order a change in this policy. Legal professionals

moreover often lack knowledge of the international instruments, especially the ICESCR. While practitioners may better know regional instruments, obstacles and limitations remain as to their applicability in regard to economic, social and cultural rights. More generally, especially at domestic level, even when judges consider some of these rights justiciable (e.g. rights related to trade union membership and activities), they remain skeptical about others (e.g. the right to water).

### ***The right to an effective remedy for violations of economic, social and cultural rights***

Although the principles of the right to an adequate remedy are mostly conceived with civil and political rights in mind, they also apply to economic, social and cultural rights. However, there is an apparent need to reinforce judicial protection mechanisms.

In 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law. The Principles identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations. A superficial reading may appear to suggest that civil and political rights inspired these rules. However, a deeper and more systematic reading indicates that these standards apply also to gross violations of economic, social and cultural rights. Especially the rules on reparation aim to establish a standard that is valid for any gross violation.

Although there is a growing consensus that it is possible to have recourse to the courts in order to seek enforcement of economic, social and cultural rights and compensation when violations have occurred, bias remains. The question has become not, are these

rights justiciable, but rather, can the judicial systems act effectively and properly decide on these matters?

Domestic remedies for human rights violations and abuses vary, depending on a State's legal system. This variability was said to be even more pronounced as regards remedies for violations of economic, social and cultural rights as compared to civil and political rights, as the former are often not explicitly or completely guaranteed in States' constitutions or general legislation. Given the dispersal of rules and their diffuse nature, judicial protection is often an illusion rather than a reality. A robust judicial system, the Forum participant noted, equipped with specific tools, resources and procedures is critical for the effective protection of economic, social and cultural rights, and to ensure fair compensation to victims of violations.

It was highlighted that international mechanisms that were established to prosecute violations of human rights, to elaborate their contents and to decide on appropriate remedies, are generally overwhelmed or not easily accessible to victims. This is especially due to the large volume of cases, and to natural and artificial delays that such procedures generate. Another limitation to the use of these mechanisms concerns the high cost of litigating in these forums. Moreover, only Europe and the Americas have well-established regional courts of human rights, while the rest of the world lacks effective international judicial protection (although the participant noted that also in Africa, the Court has started its activities in 2005 and is now also developing a body of jurisprudence). Accordingly, the participant deemed it impossible to achieve justice relying exclusively on international systems, whether regional or universal. The international system serves as the alternative avenue, but the State has a primary duty to improve its own internal mechanisms, thus giving it a mandate of establishing effective enforcement mechanisms. The American Convention states that all domestic remedies must be exhausted before the case may

be admissible. The European system requires the same. States have the primary responsibility to resolve the conflict, amend the law or to provide appropriate relief. When the State fails in this duty, the international system is the only way for victims to present their cases.

The participant pointed out that citizens are increasingly aware of their human rights and of the possibility to file cases against the State. However, domestic systems are often not sufficiently prepared to adequately deal with these claims. There is often an obvious gap between human rights under international human rights law, international humanitarian law and refugee law, on the one hand, and the domestic law applied in practice, on the other. This inconsistency directly affects people and in many cases leaves rights recognized in international instrument illusory. The courts are charged with materializing the law and when they are unable to meet the demand for justice, the abstract statement of rights is of little use.

Litigants alleging violations of economic, social and cultural rights often face a variety of obstacles with regard to the internal legal procedures. It can prove a major hurdle to overcome the barrier of credibility, i.e., proving to the court that one is actually facing a human rights violation. A second obstacle is often posed by the norms, especially when national and international standards are different. Third, it was argued that judges are often not trained to address the issues relating to economic, social and cultural rights, which often arise in the context of public policies and by their nature involve complex management issues. Generally, in addition, courts may not consider themselves legitimate to review and, if necessary, to quash a public policy. Lastly, there is a major difficulty in accessing justice: victims have trouble finding adequate legal representation, which in many cases comes at a high price.

By way of conclusion, the participant stated it is necessary to propose radical change. Not much is gained from more standards, if there is no effective implementation mechanism. This mechanism should, moreover, be close to the victim. Whereas international tribunals are important and will remain so, he said it is crucial to have flexible bodies embedded in the ordinary justice systems of each country. Specialized, national human rights courts, which are part of the ordinary court structure, would have the advantage of enjoying the legitimacy of being a domestic judicial body, while entrenching through its presence and work the idea that it is the State's responsibility to comply with and implement its international human rights obligations. Such a court of special jurisdiction, it was proposed, would solve matters pertaining to rights contained in international instruments, interpret the provisions, and determine reparations, in an efficient and effective manner.

### ***The experience at the international level***

A Forum participant noted that economic, social and cultural rights have long been considered the "poor cousins" of civil and political rights, although there has been an evolution towards equal recognition. The Universal Declaration of Human Rights (UDHR) encompassed all categories of rights, but the global political division during the Cold War led to the subsequent elaboration of two separate Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. In 1993, this division was largely overcome at the policy level at the World Conference on Human Rights and the resulting Vienna Declaration and Programme of Action. The establishment of a complaints procedure for violations of the ICESCR was recommended, but an intergovernmental open-ended Working Group (WG) only began its work in 2004. The success of the WG was thanks to many actors, especially the tireless efforts of then-Chairperson Catarina de

Albuquerque and a coalition of NGOs. The Optional Protocol to the ICESCR has now been ratified by twenty states.

The participant pointed out that many of the controversial issues that arose during the drafting process still have a bearing on the challenges faced today. Issues elaborated upon during the negotiations included general concerns about the justiciability of economic, social and cultural rights, the scope of the new mechanisms to be created, individual versus collective communications and exhaustion of domestic remedies. Although the adoption of the OP opened the way to a complaints procedure, it did not reconcile various doctrinal and political processes, resulting in the current low ratification numbers.

As to the scope of the mechanisms to be created, Article 2 of the Optional Protocol adopted a comprehensive approach, with all rights being subject to individual communications. This approach was preferred over other suggestions of a more limited nature. During the negotiations, some States parties favoured an *à la carte* approach, providing each State Party with the discretion to choose through declaration what rights might be subject to individual communication. This latter proposal was withdrawn at the end of the consultations, as it has never been used in UN human rights instruments (although it has been utilized in some international conventions and the European Social Charter). It was deemed unfavourable because it could lead to a hierarchy of rights. It also had the potential to weaken the ICESCR, because it would allow States to restrict the scope of their obligations, thereby contradicting the principle of interdependence and indivisibility of human rights.

During the negotiation process, it was proposed to exclude the right to self-determination and the right to freely dispose over national resources from the communications procedure. These were deemed collective rights, while under the OP only individuals can bring

claims. Initially, it had been proposed to have both collective and individual communications. The WG discussed at length the possibility of collective communications, following the model of the European Social Charter, under which registered NGOs or trade unions can bring complaints. In the end, this was rejected, although under the individual communication concept, victims, as a group, can also jointly claim their rights (but not institutionally).

Another item that was on the agenda of the negotiations for a long time, the participant said, concerned the exhaustion of domestic remedies. The United Kingdom wanted to add the obligation to exhaust regional remedies as an admissibility criterion. The proposal was rejected because such a requirement combined with inadmissibility of complaints under investigation by other means would hinder the work and result in a hierarchy between mechanisms. It is a normal rule in international law, but it is a problematic admissibility requirement when the application of such regional remedies is unreasonably prolonged or where regional mechanisms are not available.

The ICESCR has common features with other similar instruments, but it is unique in many regards, the participant said. He pointed to the principle of progressive realization, which entails that performance on the full realization of economic, social and cultural rights could be subject to the use of maximum available resources that State Parties have or can acquire through international cooperation and assistance. The Committee on Economic, Social and Cultural Rights (CESCR) adopted a statement in 2007, in order to inform the negotiations of the OP, on the evaluation of progressive realisation and how to assess "reasonableness" in this context. The statement elaborates upon the extent to which measures must be deliberate, concrete and targeted; the obligation for States Parties to comply with their obligations in a non-discriminatory manner and in accordance with international human rights standards; the obligation for States Parties to adopt the least restrictive option; the

time frame; and, whether the measures took into account the situation of marginalized and disadvantaged groups.

For the Optional Protocol, the WG eventually decided to include the concept of “reasonableness” as one standard of review for the CESCR in the context of the OP, in recognition of the fact that a State Party can adopt a range of policy measures in order to comply with the provisions of the Covenant. The WG considered the difficult economic situation in some States Parties, keeping in mind also that the mechanism could be strangled by too many communications (“floodgates”). It hence chose to include the option to declare inadmissible complaints where violations were not very significant. The formula for article 4 is that the Committee may decline to hear a complaint, if necessary, where the communication does not reveal clear disadvantage for the author, unless the Committee considers that this communication raises an important legal point. The “disadvantage” may mean grievance or harm. The Committee can take this decision at any stage of the proceedings. Since this is a new clause, the participant noted, there is no relevant jurisprudence to help interpret this provision.

With regard to “reasonableness”, another participant to the Forum noted that judicial review of retrogressive measures allows for stronger judicial control, because the State needs very convincing arguments as to why it takes the retrogressive measures, resulting in a stricter standard of review. Hence, he said, “reasonableness” can be developed differently depending on the forum or right. It is not necessarily an argument for non-action.

Another participant remarked that one of the objectives of incorporating the reasonableness standard into the OP, had been to engage common law countries. Canada, for example, had some success domestically applying the reasonableness standard to the adjudication of economic, social and cultural rights, for instance in the case of the provision of accommodation to persons with

disabilities, which required positive measures. It was remarked that efforts should be made to incentivize common law countries to become party to the OP. At the same time, another participant expressed frustration over common law countries that fiercely lobbied for the inclusion of the reasonableness standard at the time of the negotiations on the OP, considering that no common law country has yet become party to this instrument.

The OP provides that the Committee examines complaints in light of all documentation submitted to it. The use of the word "documentation", it was noted by a Forum participant, is remarkable, since other instruments usually use "information" (e.g. the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women). Some States however feared that "information" would open the door to informal information or media reports being submitted. When the NGO coalition for the OP at the time of the drafting proposed to include specific mention of amicus briefs, some States were skeptical and eventually the idea was abandoned. Nevertheless, the final wording appears to allow for the submission of amicus briefs, which could potentially be useful in complex matters. Additionally, the Committee is empowered under article 8 to consider relevant documentation from other UN bodies and other organizations, including those established in the regional human rights systems.

Another specific characteristic of economic, social and cultural rights is the general principle of non-retrogression. However, with the economic crisis, more States find themselves under resource constraints, and a May 2012 letter from the Committee to give guidance to States Parties recognized that, in times of crisis, some measures might be necessary, which may impede realization of economic, social and cultural rights and could lead to retrogression. Yet, the guidance elaborates that these could still be seen as compatible with State Party obligations if certain requirements are met, including that such measures should be temporary, necessary

and proportionate. Furthermore, they must be non-discriminatory and comprise measures to address inequalities so that marginalized and disadvantaged groups are not disproportionately impacted.

A final specific challenge of economic, social and cultural rights addressed by the Forum participant, relates to their extraterritorial application. The question of extraterritoriality has been raised by the Committee already including in the context of the review of States parties' periodic reports. In this regard, the Committee has issued a statement in 2011 pointing to the obligation for States Parties to take necessary steps to address violations abroad committed by companies under their jurisdictions. Nevertheless, scattered pieces of the Committee's jurisprudence on the issue of extraterritorial obligations as they relate to the conduct of business enterprises need to be comprehensively brought together. In this regard, the participant noted that the drafting of a General Comment on the issue of economic, social and cultural rights and business actors has begun.

By way of conclusion, the participant drew attention to the fact that, although the OP is still in its initial stages and only four communications have been received so far (one was declared admissible, while the others remain under consideration), there have already been two important decisions by the Committee in relation to its quasi-judicial functions.

First, in relation to complaints regarding facts that took place prior to the ratification of the OP and that continue afterwards, it was decided that the Committee will accept the communication but will only consider the violations that took place after ratification.

Second, in relation to the calculation of the time period for submission of a complaint, it was decided that the starting point is the moment when a legal representative has acquired the information necessary to submit a complaint.

### ***The experience at domestic level***

The Forum participants also discussed the domestic implementation and protection of economic, social and cultural rights. The discussion focused on judicial protection in different countries, of both common law and civil law traditions. One participant pointed out that the main relevant difference between both traditions in this regard is that common law is not codified, but instead consists of expressions and/or phrases, which over time develop significance and change in substantive meaning. English jurisprudence, for example, already recognizes that in certain cases of ambiguity, international law can be used as an interpretative tool for domestic legislation, insofar international law does not have the same ambiguity.

#### *Civil law traditions*

Many States, it was said, have ratified the ICESCR and/or have constitutional provisions reflecting the rights it contains. In Latin America, for example, some States (e.g., Argentina, Colombia, Costa Rica and recently also Peru) are progressive with regard to the justiciability of economic, social and cultural rights, while others (e.g., Chile and Uruguay) are more hesitant and lack the laws and regulations that concretize these rights. Still, it was pointed out that in theory there is no discussion: the challenge to protection is putting that theory into practice.

In some domestic jurisdictions, the idea of progressive realization of economic, social and cultural rights has ill-served many domestic litigants and a participant provided a few examples from Benin to illustrate this point.

Article 13 of the Constitution of Benin obliges the State to realize compulsory education progressively. The Benin government has

progressively made elementary school free, but at the moment only the first two years of secondary school are free. There was a constitutional challenge to this policy in 2012, in which the Court held that it is within the Executive's discretion to decide how to progressively realize this right.

Another example from 2009 concerned a constitutional challenge to the increase of the cost of drinking water by the government, allegedly causing a violation of the right to food and water contained in the ICESCR. In 2012, the Constitutional Court held that although this is a right, the government can only be expected to realize it in a progressive manner and that there is proof that the government is indeed making an effort. As an aside, it was noted that the government has since undertaken action to progressively realize this right by lowering the price of water.

In another example, the participant pointed to the Constitutional Court's declaration that in the context of the organization of the public service, the right to fair and just conditions of work imposes upon the government the obligation to commit resources, but not to achieve certain results. The decision arose from a dispute in which a female magistrate had challenged being moved to a constitution more than 50 km away from her place of residence with her husband.

Furthermore, the Constitutional Court has also decided, basing itself on jurisprudence from the CESCRC and ILO bodies, that while the right to strike is the ultimate tool in fighting for social rights, it is not an absolute right.

Questions regarding the implementation of economic, social and cultural rights become less about means and resources when the principle of equality is invoked, which makes it easier for the courts to find a violation. Continuing on the example of Benin, the participant pointed to several decisions on the right to equal access

to work that exemplify this pattern. For instance in 2011, a blind applicant's request to take a test in braille as part of a recruitment process was initially rejected by the State. The Constitutional Court however held that the obligation on the State to take "all necessary measures" entailed that rejecting the application was discriminatory, as the State had the obligation to put in place effective policies and tailored measures to ensure non-discrimination. In another successful discrimination claim in 2011, the Constitutional Court found a violation in a government's measure that raised the salaries of civil servants in the Ministry of Finance, but not other civil servants. The Court held that the State's obligations required that all civil servants be treated the same.

However, the participant noted, the Court has not always upheld discrimination claims in any situation of unequal treatment. The CESCR, in its General Comment No. 20, has interpreted article 2.2 of the Covenant in the same manner. In Benin, citing the constitutional provision that obliges the State to ensure the harmonious developments of all regions and to respect the balance between them, the Court has for instance held that it can be valid to limit rounds of recruitment for the public services to people coming from certain regions. The applicants in that case did not only rely on constitutional law, but also on international law.

Another Forum participant noted that even in countries with favourable constitutions that explicitly recognize economic, social and cultural rights and that are monist in nature, there are challenges to their justiciability. For example, for Colombia he identified broadly five types of obstacles:

- A lack of normative stability, with no solid legal framework for the protection and realization of economic, social and cultural rights;
- Procedurally, judges are not competent to put infrastructure and policy into place. Moreover, even had they been

competent, judges may not be the right actors to set policy, considering criticism of “judicial activism”;

- Judges in the country are often conservative;
- Resources are limited; and,
- Lower classes do not have equal access to justice, which entails that “judicial activism” in practice weakens democracy, as it takes away power from marginalized and disadvantaged groups, whose interests may be better represented in the Legislature.

Hence, even if the rights are justiciable in theory, their realization and protection in practice lags behind.

The Forum’s participants discussed how courts sometimes must be strategically creative in their protection of economic, social and cultural rights.

In Colombia, courts for example protected them indirectly, through the protection of civil and political rights. It held that the right to life also comprises the right to health, thus demonstrating the importance of this right to the broader society.

This indirect approach proved insufficient, however, and the courts looked for more direct ways to ensure justiciability. The basis for such a more direct protection was mostly very technical in nature, such as *grosso modo* and procedural arguments. The *grosso modo* argument built on the indivisibility and interdependency of human rights, the essential nature of economic, social and cultural rights for human dignity and the direct effect of international law in Colombia, to lead to the conclusion that if indeed they are rights, they must be justiciable. With regard to the procedural arguments, the Court used the principle of progressive realization to make programmatic recommendations. Making creative use of the General Comments of the CESCR, the courts have held that the normative content of economic, social and cultural rights is fairly well defined and then elaborated these concepts further.

Furthermore, with regard to the review of compliance with the principle of non-retrogression, the Court has held that this must entail a more vigorous examination than a simple “reasonableness” check. Moreover the justiciability of economic, social and cultural rights cannot be denied on the sole basis that there is a lack of procedural tools.

Judges in Colombia have also developed creative methods to deconstruct arguments against justiciability of economic, social and cultural rights. For example, the fact that judges do not always have the required technical knowledge can be overcome. In a case concerning Internally Displaced Persons, the court set a minimum content of the rights, including the right to housing, acknowledged their full realization would be difficult, and then asked the State to demonstrate how it would implement its obligations and what indicators it would use to measure progress. Thereby, the court stimulated public discussion, established what is acceptable and what is not (i.e. a lack of resources is no excuse for inaction), and showcased that it is possible to respect the separation of powers, while holding the executive accountable. The Court allowed flexibility as to implementation, as long as there is progress, followed up on and verified by the court.

A number of participants discussed the financial aspects of economic, social and cultural rights. It was pointed out that many States hide behind “a lack of resources” to excuse their non-implementation of economic, social and cultural rights. Two participants said that perhaps the moral case for economic, social and cultural rights should be brought back, in order to improve the general public’s understanding. For example, when the right to food law was debated in India, there was an outcry in the public discourse denoting that many perceive policies to realize economic, social and cultural rights as “paying for the poor”. One participant noted that the moral case for welfare is not all that different from that for social rights, since they both attempt to prevent

exploitation of the poor and disadvantaged, who are often unprotected in the democratic process.

The financial and resource aspect of economic, social and cultural rights tugs on certain political and class-oriented strings, too. One participant noted that one of the biggest problems of affluent societies is that there are big parts of the middle class who believe that they are losing money by paying for the rights of minorities. However, when it becomes clear that not protecting economic, social and cultural rights does not necessarily save money, the argument gets reframed in terms of morality (e.g., they would reinforce dependency, or encourage laziness).

#### *Common law traditions*

The Forum participants discussed specific experiences implementing and protecting economic, social and cultural rights in common law countries. One participant elaborated upon the UK, as a unique example because of its dualist legal system with no written constitution, and the doctrine of parliamentary supremacy in which the courts cannot strike down a law. He noted that many believe that the system of checks and balances does not work in the UK, calling it an “elective dictatorship”. In stark criticism of the system, the participant said “the freedom to choose your own path in life is pretty hollow, when in reality you have few choices”. In this regard, the problem of the tyranny of majoritarian rule (both politically and economically) presents a real and present danger.

It was pointed out that the CESCR has routinely called for incorporation of the Convention into domestic law, but the UK (as New Zealand and many other common law countries) refuses to accept this recommendation. One can ask the question though: Is there in fact a problem, when the UK provides its citizens with many

social entitlements and there is a functioning judicial system to claim those entitlements?

As the Forum participant pointed out, the lack of a judicially enforceable right to an adequate standard of living in the UK common law system in practice prevents the courts from finding that the rates of entitlements are too low.

For example, in *R v Secretary of State*, the court heard arguments on benefit payments to a migrant, who was waiting for a decision on his application for asylum. As migrants in this situation are not allowed to work, they are awarded minimal cash payments. In 2013, the government had decided not to raise the rates of these payments from their 2011 level, despite a 25% decrease in effective purchasing power. The claimant sought that the courts quash this decision. They did, on the basis that the State in its decision failed to take into account items that are clearly basic living needs (such as washing powder and babies' goods) and that the Secretary of State did not take the steps necessary to verify whether the rates were indeed sufficient. Subsequently, the government took these steps to assess the adequacy of the rates ordered by the court, but then maintained the 2011 rates, as before.

This hands-off standard of review, which implies that the courts can only quash the Executive's decision if no sensible person could have reached it, is neither rational nor sensible, and in the participant's view defies morality. Defenders of this standard, however, hold that it is not for the courts to decide how to spend limited public means.

The entry into force of the 1998 Human Rights Act, which incorporated the European Convention on Human Rights (ECHR), had led to some English court decisions that incorporate the provision of substantial benefits under article 3 or 8 of the ECHR. However, such decisions are few and far between, and no substantial body of case law has been developed.

In *R (Limbuella) v. Secretary of State*, the Court ruled that article 3 of the ECHR was breached by the government's policy prohibiting migrants to work or receive benefits until they applied for asylum. The court noted that asylum seekers may have many reasons not to lodge their application at the moment of arrival, and have no means of looking after themselves. Thus, the policy pushed people into destitution and as such constituted a form of cruel, inhuman or degrading treatment, in breach of article 3 of the ECHR.

Regarding article 8 of the ECHR, in *R (Bernard) v. Enfield LBC* the issue of adequate housing for a disabled person arose. The court did not accept the time it took the public authorities to supply this entitlement and awarded damages to the applicant, having found a violation of the right to private life under article 8 of the ECHR.

The European Court of Human Rights (ECtHR) has also found violations of article 8 of the ECHR where State policy was lacking with regard to the realization of economic, social and cultural rights. For example, in *Vordanova v. Bulgaria* (2012), a decision concerning the right to adequate housing of Roma people, the ECtHR held that eviction would be a breach of article 8 of the ECHR, while however simultaneously asserting that the right to private life enshrined in the Convention does not imply the right to a home in the first place. In the specific case, however, it was deemed not proportional to evict the family concerned at that time. The case was cited as an example of the ECtHR trying to help marginalized groups while not having explicit and clear provisions for positive State obligations to realize these rights at its disposal, leading to this mangled decision.

Also at domestic level, a lack of explicit positive rights often hampers the courts' ability to protect economic, social and cultural rights. A number of decisions regarding discrimination cases in the UK can serve to illustrate this point.

For example, in 2010 the government announced a deficit reduction plan, including a so called “bedroom tax” and a benefit cap. The bedroom tax reduced housing subsidy, aiming to match the size of the accommodation with the needs of the individual or family. However, the tax failed to take into account the need of disabled people for more space. 440 thousand disabled persons were affected and the question arose whether they should have been treated differently. The benefit cap, for its part, massively penalized single mothers with more than three children, as well as people living in the southeast of the country, due to the relatively high rent.

Both of these policies were challenged as being unlawfully discriminatory, but both challenges failed. The court held that as long as there is a reasonable relationship between a measure’s goal and the outcome of its implementation (i.e., it is not “manifestly without reasonable foundation”), the measures are justified despite the fact that they had only a very minimal impact on budget.

The Forum participant noted that the UK government’s deficit reduction plan has been a failure on its own terms, to which the government responded by imposing more budget cuts. As a result, in January 2014 the European Committee of Social Rights concluded that the level of welfare payments was manifestly inadequate in relation to cost of living. As a result, one in four children in the UK live in relative poverty, a million people use food banks, there has been a 75% increase in hospital admissions linked to malnutrition, and two disabled persons have died after their benefits were cut because they were deemed not to be making an effort to work.

By way of conclusion to his presentation, the participant wondered whether one can really speak of progressive realization of economic, social and cultural rights in England, when the law does not provide for positive duties, and the country’s politicians need only make a tenuous link with budgetary savings to render lawful a measure that

worsens the circumstances of the marginalized and disadvantaged individuals and groups under their jurisdiction?

*Economic, social and cultural rights in recently adopted constitutions*

Some recently adopted constitutions incorporate more economic, social and cultural rights, but also give rise to specific challenges. One participant elaborated on the example of Kenya, where there are but few cases on economic, social and cultural rights, because the new Constitution is just now being implemented.

The 2010 Constitution is a product of experience, and right from its preamble expresses the aspiration for governance that embodies the essential values of democracy, human rights and the rule of law. Article 2(5) integrates norms of international law by giving international human rights law constitutional hierarchy and domesticating the general rules of international law, and article 2(6) establishes monism. Under the values and principles of governance in article 10, the Constitution includes the protection of marginalized groups, accountability, and sustainable development. Furthermore, the State is enjoined to promote and protect diversity. For example, article 44, expressing the belief that language is a component of culture, guarantees citizens' right to use the language and to participate in the cultural life of the person's choice and the State has a duty to support varied cultural expression. Under article 43, the Constitution protects a wide array of economic, social and cultural rights, including among others the right to the highest attainable standard of health, to accessible and adequate housing, to be free from hunger and to clean and safe water, to social security, and to education. This article is not just declaratory and places obligations on the State. Furthermore, article 45 protects the family and article 46 guarantees consumers' rights, applying to services provided by the State and by private entities. Article 28

provides the right of every person to have their inherent dignity respected and protected.

With regard to the enforcement of these provisions, article 19 gives prominence to the Bill of Rights as an integral part of Kenya's democratic State and provides that it forms the framework for policies meant to ensure dignity and promote social justice. These rights inherently belong to each individual and are not "granted" by the State. The enumeration in the Bill of Rights does not exclude the application of other rights and fundamental freedoms conferred by law, except to the extent that those are inconsistent with the Bill of Rights. Article 20 provides that the Bill of Rights applies to all laws and binds all State organs and all persons, resulting in a vertical and horizontal effect. In order to maximize the realization of these provisions, every person is entitled to their enjoyment to the greatest extent consistent with the nature of that right. With regard to economic and social rights protected in article 43, article 20(5) enumerates a number of principles to guide the courts: it is the responsibility of the State to show that resources are indeed not available when it is so claimed; in allocating resources, a priority must be given to the widest possible enjoyment of the rights, taking into account vulnerability of particular groups or individuals; and, the Court may not intervene, solely on the basis that it would have reached a different conclusion than the State organ concerning the allocation of available resources.

Pursuant to article 22 of the Kenyan Constitution, the courts are responsible for developing the enjoyment of the rights and freedoms contained in the Bill of Rights which, the participant noted, has served as a source of confusion. It means that where there is a legal provision affecting Constitutional rights and freedoms, the courts must interpret it in a way that maximizes its effect. This may result in a possible intrusion into the domain of the legislature, and has become a source of tensions between the judiciary and the current parliament. The judiciary is sometimes

seen as being activist, although this is not accurate, as it is in fact the Constitution that is activist by nature.

The participant noted that the courts in Kenya have made good strides to ensure the implementation of the Bill of Rights. For example, the government was restrained from implementing forced evictions in which it has no particular legal interest, even in the case of squatters. Furthermore, the courts have also given guidelines and timetables to the government for the implementation of its obligations under supervision of Court, as in the judgment in the case of *Satrose Ayuma [and 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others]*, which enjoined the government to develop policies to protect the rights of those who seek employment outside of the country while they are outside of the country. In another example, regulations that required operation of public transport to stop at 6pm, regardless of where one was, were nullified.

Despite these examples of progress, the participant concluded that in Kenya it will take a long time for the new constitutional provisions to sink into the consciousness of the Executive.

*Judicial enforcement of economic, social and cultural rights in a variety of tribunals*

Forum participants also discussed specific experiences of judicial enforcement of economic, social and cultural rights in administrative and social law tribunals, juvenile courts, commercial and industrial courts, focusing on the experience in Germany, Guatemala, the Philippines and Botswana.

With regard to the German experience, one participant elaborated on the functioning of the social courts. As one of the five autonomous jurisdictions in the German judicial system, their

jurisdiction encompasses nearly all aspects of the social security system. The courts, operating at three levels, are composed of judges and experts with specific professional experience acting as lay judges. The procedure is very applicant-friendly: the claimant need only to express his or her case orally to one staff member, which obliges the court to investigate the issue; the proceedings are free of charge; there is no compulsory representation by a lawyer at the lower two court-levels and authorized agents can represent the applicant; and, as a matter of principle, an oral hearing is always held and all parties can make statements.

Generally, the participant noted, German courts have been quite reserved in their application of the ICESCR in domestic legal cases. There are nevertheless at least fifty decisions in the German jurisprudence that have examined its provisions, mostly in the social jurisdiction, which however demonstrate skepticism regarding the applicability of the Covenant. For example, the Federal Administrative Court in a case concerning the imposition of university tuition fees found a violation of the German Constitution, but did not find the ICESCR directly applicable. In another case concerning the reform of unemployment and welfare entitlements under the so-called "Hartz IV" policy, the Court similarly based its judgment on the Constitutional right to basic subsistence needed in order to live a dignified life, rather than directly invoking the ICESCR. The Court held that a life in dignity did not just comprise physical existence, but also participation in culture and political life, and further that children's particular needs must be accounted for and that the amount of the entitlements must be regularly reassessed.

Sometimes the courts have applied the ICESCR, for example in a case that challenged the fact that refugees received lower benefits under the Asylum Seekers Act. The court, while mostly addressing the issue through constitutional law, also referred to and utilized articles 9 and 15 of the ICESCR to interpret national law provisions.

By way of conclusion of his analysis of the German experience, the participant noted that constitutional rights and the Covenant cannot be considered separately. Covenant rights should serve to determine the content of domestic basic social rights. Already, the refinement of jurisprudence through the application of Covenant rights has contributed greatly to the elaboration of minimum requirements for social subsistence as provided by the German Constitution. Only time will tell how this will be further developed.

With regard to judicial enforcement of economic, social and cultural rights of children and adolescents, one participant elaborated on the experience from juvenile and other specialized courts in Guatemala, in particular the Zapaca Children's Court, which has currently been given jurisdiction by the Supreme Court to deal with cases arising in three of the country's departments. The protection of economic, social and cultural rights has come to the forefront mainly in two areas: in cases of violations of the human rights of children, and with regard to the rights of children involved in criminal proceedings. It has given rise to a number of problems, many related to a lack of understanding of the protection process.

The participant noted that, along with concerns over the justiciability of economic, social and cultural rights, lack of familiarity with human rights in general presents a major challenge to their judicial protection. As currently human rights protection is an unfamiliar concept in Guatemala, a fundamental change in the way of thinking is required. Many judges and lawyers are not even familiar with their own domestic legislation, let alone international law. More recently, incentives have been established for courts to deal with cases of gender-based violence, which are beginning to bear fruit. However, it was felt that judges in the juvenile justice system are being treated as the "poor cousins", as they are frequently left out in terms of participation in training and workshops that are made available.

With regard in particular to economic, social and cultural rights, in the Zapaca Children's Court five claims have been made concerning the right to food (two of which were joined as they came from the same family). Although these complaints were submitted in 2011, it took until 2013 for these cases to be resolved. In these emblematic cases, which concerned not only the right to food, but also the rights to life and to health, the Court found a complex series of rights had been violated.

The participant noted that in Guatemala, article 51 of the Constitution enshrines social protection for minors and, among others, their rights to housing and to health. However, the political class does not accord these rights their actual legal weight, and rather treats social programmes as political campaign tools, used to target specific interest groups.

With regard to the status of the law, the participant noted that a violation of children's rights can be by act or by omission. In practice, it often boils down to a lack of effective policies: whereas there is plenty of legislation and often, implementing programmes are available, these do not target the sections of the population that need it the most. For example, the more serious violations of the right to food result from this type of inaction. She noted that supervision of the implementation of these programmes is needed, notably as some of these programmes have been ordered as a result from judicial rulings. However, the participant thought that it may prove necessary to take the issue to the Inter-American Court of Human Rights (IACtHR) in order to achieve the implementation of such programmes and the enforcement of domestic rulings.

Another participant discussed the role of commercial courts in the judicial enforcement of economic, social and cultural rights, focusing on the experience in the Philippines. In these courts, she remarked, one of the most important issues regarding the implementation of

economic, social and cultural rights is their fit with trade regulations and economic regulations. A major problem on a global scale is that the economic rules, bilateral investment treaties, intellectual property regulations, etc. do not take account of economic, social and cultural rights. For example, access to medication is approached through the lens of economic and trade regulations, which are seen as hard law; human rights meanwhile are seen as soft law, resulting in difficulties with enforcement. The participant argued that it is important to overcome this separation of economic, social and cultural rights and commercial and business regulation. Commercial courts, as State institutions, have a duty to protect economic, social and cultural rights and should not just consider the interests of the parties in their jurisprudence.

An example was cited concerning the restructuring of a large poly-metallic mining project in the northern Philippines. When the case was filed in 2008, the scenario looked bleak, however the rehabilitation was successfully terminated in October 2011. In its analysis of the case, the court took into account the need to balance safeguarding the right to work of the more than 800 employees who risked losing their jobs, and the impact of the industry on the host community (including primarily environmental impact). In its orders, the court required the petitioner to comply with (and include in its corporate policies a check with regard to) health, safety and environment regulations. Following their implementation of these recommendations, the company has now received several awards and is seen as a model for others.

Balancing the protection of economic, social and cultural rights and development goals has proven challenging in the Philippines. In the past, development projects have resulted in human rights violations of the indigenous populations and the Government's aggressive liberalization of mining rights has led to conflict between the population and the government. However, the participant said, imposing countermeasures can provide more balance. Although

States are primarily responsible for the protection and realization of the human rights of the people on their territory, under the concept of corporate social responsibility, claims are generally addressed to anyone who can help. Some view corporate social responsibility as a pittance against the earnings of (mining) corporations, which meanwhile continue to cause environmental damage. However, the participant noted, regulation is not the courts' task, but at least they can promote economic, social and cultural rights when given the opportunity.

With regard to intellectual property (IP) cases, the participant elaborated on the balance between access to medication on the one hand, and the importance of protection of IP for the development of medicine. She said the latter's effect on prices must be monitored, and cited the 2013 Novartis case in India as an example for the Philippines to follow in balancing the public good, innovation and affordability. In her opinion, only real innovation deserves patent protection.

Another participant shared his views on the judicial enforcement of economic, social and cultural rights in industrial courts, focusing on the experience in Botswana. The country has a classic post-colonial constitution, which entrenches civil and political rights, but nothing more. It contains no reference to socio-economic rights or directive principles of State policy and no reference to international law. The 2008 Children's Act is the only piece of legislation that comes close to including economic, social and cultural rights. Furthermore, Botswana has not ratified the ICESCR or the African Charter, and it is a dualist State.

Overall, this unfavourable legal framework for the enforcement of economic, social and cultural rights in Botswana results in a heavy burden on judges who attempt to enforce them. Despite this environment, the judiciary has been willing to proactively expand the contents of the Constitution: it is viewed as a living document

and judges have given purposeful and generous interpretation to its contents. The participant said that judicial activism is encouraged and even imposed by the paucity of the legal framework, which leaves it to the judiciary to develop the law so that it keeps up with the development of society.

There have been few occasions of direct application of international law. By way of example, in *Dow v Attorney General*, the court held that it is obligatory for the courts to interpret the Constitution, legislation and common law in a manner that is consistent with the country's international obligations. Pursuant to the Interpretation Act, the use of international treaties is allowed and is moreover not limited to ratified treaties. This is in line with the Bangalore Principles, which state that it is permissible to use international law in order to deal with ambiguity in domestic law and to deal with gaps in the legislation.

The High Court of Botswana tends to be strict adherent to legal positivism, and are reluctant to apply international law. Cases are rarely framed in light of protection or realization of economic, social and cultural rights, as those are not recognized in domestic law. The Industrial Court, which is a court of law and equity, has however applied international labour standards and international human rights law since its inception.

There has been a number of notable HIV cases. In *Diau v BSB*, a security guard who was on a six-month probation period was told to undergo an HIV test, a few weeks into his contract. He refused and the contract was not confirmed. The Court held that an employer cannot dismiss an employee the basis of his or her refusal to undergo an HIV test. This decision was cited as a very direct enforcement of the right to work and the prohibition of discrimination. In *Lemo v Northern Air Maintenance*, an employer had initially tolerated prolonged absence of work by an employee. Eventually, the employee disclosed a positive HIV status, and the

next day was terminated because of “prolonged absence”. The Court found that the real reason for dismissal was the employee’s HIV status disclosure and held that being HIV positive does not mean the employee is incapacitated to work and that health status cannot be a ground for discrimination.

In conclusion, the participant noted that in some areas, the Industrial Court’s use of international law has served to protect aspects of economic, social and cultural rights. However, he stressed that it is also the role of the lawyers to bring relevant case law and instruments before the judge.



## **Session II**

### **Respecting the separation of powers while ensuring effective judicial protection of economic, social and cultural rights**

In the next session of the Forum, the participants discussed the role of the courts, both domestic and international, in protecting and realizing economic, social and cultural rights, in light of the principle of the separation of powers.

Justiciability of economic, social and cultural rights is often contested, among other reasons, because it is seen as always involving public expenditure, decisions on which are posited to be the exclusive prerogative of the executive or legislature. However, the provision of positive measures involving expenditure of resources is only one aspect of enforcing economic, social and cultural rights. Complying with the duty to respect or the duty to protect, for instance, are obligations which may not require mass expenditure.

Furthermore, within the confines of judicial review, while recognizing the ability of the courts to establish a framework for the realization of economic, social and cultural rights, the other branches of power retain critical latitude with regard to expenditure, while the judiciary acts as a check on their powers.

#### ***Experiences from domestic courts***

One participant elaborated on the experience in India, where the Supreme Court has mandated a Special Commissioner to supervise the implementation of its landmark judgement on the right to food.

In India, the strength and complexity of social and gender inequality make the issue of malnutrition very problematic. The participant pointed out that while violations of economic, social and cultural rights may not visibly create stories of blood on the ground, the violence of poverty is more violent than that of war. He recalled a mother telling him that the hardest lesson was to teach her child how to sleep hungry. Conservative figures estimate that in India two million people per year die of completely avoidable causes. A lack of access to water, sanitation facilities, and health services have a bigger impact than natural disasters. The government's response to these issues is hence important.

In 2001, after four years of recurring drought and starvation deaths, a case was filed before the Supreme Court, challenging the policies through which fifty million tons of grain in government warehouses had been left undistributed. The government's defence listed a range of welfare programmes, stating that they cannot do more. The claimant however evidenced how badly the government was performing on its obligations. In its judgment, the Supreme Court held that the right to life is a positive right, and must be seen as the right to live a life with dignity, implying entitlement to that which is required to make such a life possible. This holding is line with the interpretation of the right to life by the Supreme Court in a series of cases and has opened a whole set of litigation opportunities.

By way of example, concerning the provision of school meals, a judgment has held that the government cannot withdraw or reduce existing schemes, effectively converting them into entitlements the provision of which is a binding obligation for the State. The Court then elaborated upon the contents of the entitlement, specifying an amount of calories and nutritional values, and then universalized the standard throughout the country, regardless of cost, for 120 million children. Expressed in monetary value, this court order is worth more than all NGO and charity budgets allocated to assisting

the poor combined. Furthermore, the judgment also established an independent system of enforcement, with independent monitoring of the implementation of the judgement. The Indian government was unhappy and tried to starve the Commission, set up to supervise the judgements' implementation, out of existence. "Sufficient" resources for the Commission were minimized by the government, which however was compensated by the Commission raising external funds.

Eventually, in 2009 the Government said they would pass legislation to protect the right to food and a national advisory council headed by Sonia Gandhi was mandated to draft a law. The ambitious draft took a number of years to complete, but the Government then proved reluctant to commit to it, and the draft law was sent to the Parliamentary Standing Committee. In September 2013, the right to food law was eventually passed by Parliament. The law guarantees 75% of rural and 55% of urban households almost free grain, guarantees the provision of school meals, infant feeding for all children under 6 years and pregnant women, as well as universal maternity benefits for all. The law however has angered parts of the population, who perceived it using the middle class' tax money to feed the poor, a group that is widely stigmatized as being lazy.

India has since passed series of rights-based legislation. By way of example, the participant noted the "extraordinary" right to work law, which provides that each person has to be given a hundred days of work a year within five kilometres from one's residence, within fifteen days of the demand. This law was characterized as better than an unemployment bill, as it is anchored in the notion of dignity. However, the participant noted that the legislation has seen extremely poor enforcement. The judiciary must be empowered to enforce these laws, as for now the enforcement mechanisms are often officials who are closely affiliated with the Government.

Another participant made a presentation on shaping the boundaries of public interest and general welfare, from the example of forced evictions in Mexico. In that country, she noted, the State prioritizes business interests, as exemplified in a recent reform that resulted in mass appropriation of communal land for use by the extractive industries. However, lawyers have been using strategic litigation to bring about real structural change by litigating against powerful economic actors and the State. The chances of success are adversely affected by the economic importance of these huge development projects, as challenges to companies' marginalization of disadvantaged populations equates to challenges to the status quo and the interests of the economic elite. Resistance to litigation on economic, social and cultural rights is particularly evident in lower courts, exemplified by magistrates' lack of impartiality, siding clearly with transnational corporations.

By way of example, the participant raised litigation in which an indigenous community filed a grievance concerning land lease contracts awarded to a Spanish wind energy company. They requested the rescission of the contract awarding land with the aim of constructing a wind farm, as it failed to recognize the indigenous people's ownership of the land. Their case was found by the judge of first instance to be inadmissible *ratione materiae*. This decision was overturned on appeal, which was however delayed by about seven months. The participant noted that it would actually be in the company's interest to settle, in order to prevent setting a precedent, which could generate more similar lawsuits.

The delaying tactics frequently employed by companies in these proceedings entail that access to justice is anything but prompt. By way of further example, the participant raised a case involving a Canadian mining company that was sued for multiple breaches of a land lease contract with indigenous peoples. The proceedings were held up for more than a year, following the party's refusal to submit expert reports. The applicants claimed that the company had

violated property rights, the right to a healthy environment, and the right to freedom of assembly. The company refused to build a water treatment plant to stop contaminated water being dumped, and did not pay the rent that was due to the indigenous community. The judge did not protect the indigenous community; this decision is currently being appealed.

In the Mexican context, the participant further elaborated, women human rights defenders face unique risks, including becoming the target of smear campaigns. These challenges are not limited to lawyers: members of the communities also experience arbitrary arrests, among other human rights violations. The climate of impunity needs to be addressed and safety must be ensured for community-based defenders, especially for indigenous human rights defenders in Oaxaca. Holding perpetrators of reprisal actions accountable, is essential.

Furthermore, Mexico's economic reform of June 2014 has created another context for human rights violations. The reform included nine new laws and a reform of twelve existing ones. While the fine print of the constitutional reform provides that activities for exploration and exploitation of carbon resources are not to be considered of public order and social interest, preventing *de facto* expropriation, the Electricity Law does establish several routes for expropriation. In relation to projects developed in indigenous communities, the law provides for consultation with these groups, but if mediation between the company and the indigenous groups fails, the interested company can request the Federal Minister to provide for the establishment of a legal instrument to expropriate. This reform poses a problem for over half of Mexican land that is community-owned. This ownership has been recognized by the IACtHR as an essential basis for the exercise of indigenous culture and economic survival.

Another participant elaborated on the issue of judges and lawyers facing threats and pressures as a consequence of acting in cases concerning the protection of economic, social and cultural rights, from the example of the Philippines. In the country, she noted, the implementation of the constitutional provisions and laws protecting economic, social and cultural rights has been problematic. Although a whole chapter of the Constitution is dedicated to social justice and human rights, urban land reform and housing, protecting among other things the right to health, the rights of women, as well as human rights organisations, these provisions are not implemented.

As a case study, the participant elaborated on a dispute in the Cantilan municipality, which is considered an essential area for rice production, which has however been under threat from mining companies. In the region, the National Irrigation Administration has acted to protect critical watershed, including in areas of agriculture covered by the provisions of a national law concerning the “rice basket” provinces. The filing by two companies of a Mineral Production Sharing Agreement within the critical watershed area triggered objections by the local communities, churches and farmer organizations, and the local Government requested the President to cancel the agreement and to protect the community from future mining exploitation. The agreement was however not cancelled, and moreover both companies have breached its terms and conditions.

The communities protested in the form of a citizens’ petition, which is intended to be a tool to ensure respect for all stakeholders’ rights under the Constitution, including those of the local Government, indigenous peoples, farmers, etc. As a result, an official petition was brought before the Department of Environment. The community filed an injunction to the court, and an environmental protection order and temporary restraining order were issued on the same day. Yet, the company continued its operations and in response filed harassment suits against the Mayor, civil society representatives and others, in administrative, civil and criminal cases.

Unfortunately, the court chose to reject its jurisdiction on the basis that it is not a specialized “green court”. The case has now moved to the Court of Appeal, and the protection order has subsequently been lifted. Further, the judges have been reluctant to act, witnesses have withdrawn, and some fear reprisals from the companies. Meanwhile, the health- and pollution-related problems persist, as well as the lack of registration of the companies (which they however claim is a minor administrative issue). The fact that no lawyers specialized in environmental law live in the area has complicated finding adequate legal representation for the alleged victims.

### ***Experiences from international bodies***

The participants discussed judicial protection of economic, social and cultural rights by international bodies and issues regarding the separation of powers arising in that process with States questioning the “intrusion” of international bodies into their economic, social or cultural policy space. Illustrations of this that were discussed included decisions related to austerity measures in times of economic crisis; examples of (increasing) reliance by States to arguments of national sovereignty or to notions of cultural relativism; or poor records of implementation of regional decisions.

One participant elaborated on judicial enforcement of economic, social and cultural rights in times of austerity following the economic crisis, which was characterized as particularly challenging, as illustrated by the most recent economic recession in Europe.

The European system is multi-leveled, simultaneously national and regional. The fundamental rights catalogues at regional level that have regional judicial bodies to adjudicate them are the European Convention on Human Rights and the EU Charter of Fundamental Rights. While they largely have the same contents, they do not

always match, which in light of both texts' binding status can pose challenges. Within this multi-leveled framework, a key issue with regard to the protection of fundamental rights is the issue of which level should have priority: national or transnational? In addition, the diffuse framework raises the question whether there is a need for harmonization between the different levels.

Moreover at EU level, the participant noted, it is not easy for citizens to challenge national measures. There is no direct access to the Court of Justice of the European Union to challenge the legality of legislative measures taken by the Member States. Therefore, the individual must go through the national court and the preliminary question procedure. She noted it is hence "easier" to go to the European Court of Human Rights (ECtHR) when fundamental rights are violated.

At the ECtHR, several domestic austerity measures have been challenged, for example their effect on salaries and pensions and the public policy in this regard in Greece. The Greek measures were challenged on the basis that they violated the right to property and did not meet the criteria of proportionality, namely legitimacy, suitability and necessity. The Court approached "public interest" broadly, analysing legal origin, proportionality and public utility. In both 2013 Greek cases, the Court held that the measures fell within the margin of appreciation of the legislature, as the measures' specific objectives and the State's obligations regarding budgetary discipline fully justified them.

The ECtHR also adjudicated on the Portuguese austerity measures, especially those imposed through judicial decisions adopted since 2010 in the context of the right to social security. Whereas the domestic judges in Portugal did not evaluate the legality of these measures in light of the right to property (instead referring to principles of equality and proportionality, the dignity of the human person and State responsibilities in this regard, and protection of

the principle of trust), the European Court did, with reference to Protocol 1 to the Convention. In its analysis, it took into consideration the period of the measures (which were limited in time, as opposed to Greece's) and their quantity (the reductions only went up to a reduction of 10% of the benefits). The Court held that the exceptional nature of the economic crisis could justify this public interest.

Another participant elaborated on the complication of the enforcement and protection of economic, social and cultural rights by issues related to the independence of the courts and the resurgence of the national sovereignty arguments. This, it was noted, is particularly visible in the Inter-American Court of Human Rights.

At the Inter-American level, economic, social and cultural rights are enshrined in the Charter of the Organization of American States (OAS) and the American Convention on Human Rights (ACHR). The ACHR contained mainly civil and political rights at its adoption, although it did also include a clause on progressive realization of economic, social and cultural rights. A protocol on economic, social and cultural rights to the ACHR was adopted twenty years later (the Protocol of San Salvador), which is however very restrictive in terms of justiciability, which was limited to the right to education and the right to assembly (trade unions). Nevertheless, the Inter-American Commission on Human Rights has used several means to advance the protection and realization of economic, social and cultural rights from the very beginning, including in its country reports, thematic reports, and through its application of the American Declaration of the Rights and Duties of Man.

As noted, article 26 of the ACHR provides for the progressive realization of economic, social and cultural rights. The IACtHR has never found a State in violation of this provision. However, the Court has taken it into account in its interpretation of other

Convention rights, stating as general principle the obligation to adopt positive measures aiming to achieve this progressive realization. The Court also applies high scrutiny with regard to the permissibility of retrogressive measures. The IACTHR has also addressed economic, social and cultural rights through the lens of civil and political rights.

The right to life, for example, has both an individual and collective dimension. In a case against Peru (*Five Pensioners case*), the Court held that State policy should be measured in terms of its impact on the whole group that it affects. The Court clearly accepted its competence to check whether measures adopted by the State are in accordance with this principle.

In another example the Court has protected the right to work mainly through fair trial rights, which entitles workers to procedural protection against arbitrary dismissal. The Court has ordered reinstatement of dismissed public servants.

Furthermore, the right to personal integrity has been essential for the protection of the right to health. For example, the Court has ruled that suffering and anguish stemming from human rights violations fall within the scope of violations of personal integrity. In about a third of its judgments concerning cases where the victim's personal integrity was affected, remedies have included the obligation for the State to provide free mental and psychological treatment for the victims.

The Court has also analysed cases concerning social security through the right to judicial protection and the principle of non-discrimination. The Court has found the latter to be jus cogens.

In another case, the Court has held that the guarantee for a dignified existence entails the obligation on the State to guarantee minimum living conditions compatible with human dignity. The Court has established that access to food and clean water has a

major impact in this regard. In extreme cases, mostly involving indigenous communities, the Court has ordered the State to supply drinking water and sufficient food.

Organs of the state, beginning with the judiciary, have the obligation to guarantee and implement the American Convention in accordance with case law of the IACtHR, which has been creative to protect rights that are not explicitly part of the Convention. Although in recent years, the participant noted, the “judicial dialogue” between high domestic courts and the bodies in the Inter-American system has in some respects been strengthened, there is nevertheless an emerging trend of undermining the Court’s jurisprudence, through raising national sovereignty arguments. He said this trend is moreover not limited to the Americas, but forms part of a more general attack on international law and international justice systems.

The resurgence of national sovereignty arguments is exemplified in the *Belo Monte* case. In April 2011, the Inter-American Commission issued precautionary measures at the request of indigenous and other communities, ordering the suspension of the construction of a major hydroelectric dam complex in Brazil until the concerns of the communities were addressed. The authorities, however, reacted very defensively and did not comply with these precautionary measures, instead starting a process at OAS attempting to weaken the Commission’s powers.

There have been several other setbacks since *Belo Monte*. In a number of countries, the State has used the concept of national sovereignty and the primacy of the Constitution in the domestic legislative hierarchy to diminish the higher level of protection of human rights, including economic, social and cultural rights, afforded by international treaties. Within the OAS, Brazil, Venezuela, Nicaragua, and Ecuador have requested the General Assembly to review the regulations pertaining to the functioning of the Inter-American Commission, supposedly in order to

“strengthen” (but in fact with a view to weaken) its power. Some of the resolutions requesting amendments contain contradictions. For example, one resolution asked States to undertake measures towards universal adoption of the American Convention but at the same time ignored the fact that Venezuela had denounced the Convention. Also, States on the one hand asked for full financing, but on the other reduced the budget, of which in any case they only pay half while the rest is provided through international cooperation.

Several cases meanwhile show setbacks in the protection of human rights, including in the protection of economic, social and cultural rights. In Venezuela, the Constitutional Chamber of the Supreme Court decided that IACtHR rulings were not enforceable, because they were deemed to be in violation of the Constitution, using arguments of national sovereignty. The ruling was a reaction to the IACtHR’s judgment concerning the arbitrary dismissal of judges and the independence of the judiciary (*Apitz Barbera et al.*). The executive branch denounced the American Convention, claiming that the Inter-American Commission and IACtHR’s case law usurped the State’s sovereign functions. There was no reaction by the OAS or any of its Member States.

In another example, in *Gelman v. Uruguay* the IACtHR held that an amnesty law was in violation of the Convention because it impeded investigation and punishment of enforced disappearances. As part of the remedy, the Court ordered the State to provide psychological treatment for the families of victims. The executive and legislature attempted to implement these measures, but the Supreme Court of Justice of Uruguay declared this implementation unconstitutional. The participant noted that this is yet another example of using a constitution as an argument to impede the proper implementation of international obligations, of which effectively the Uruguayan court declared itself the final interpreter. The IACtHR took note of this decision and said its decisions are binding, implying that the

Uruguayan Constitutional Court decisions are not in line with the duty to implement.

A case concerning Brazil's amnesty laws (*Gomes Lund et al.*) was cited as another example of how impeding the implementation of ACtHR judgments can obstruct the realization of economic, social and cultural rights. In the case, the Inter-American Court had ruled that an amnesty law violated the personal integrity of the surviving victims of the guerrilla war and their families and ordered the State to provide health services to them. Brazil did not annul the amnesty law or provide the health services.

In another example, the IACtHR has on several occasions ruled on the protection of the rights of Haitian descendants in the Dominican Republic, where about 400 thousand people have been deprived of access to basic services, including health and education. *Yean and Bosico Children v. Dominican Republic* concerned the domestic court's retroactive retraction of *jus soli*, which effectively stripped the citizenship of tens of thousands of people, in many cases leaving them stateless and without access to services and rights including education. The IACtHR held that these measures violated the Convention and in addition that when measures disproportionately affect one vulnerable group, they are in violation of the principle of non-discrimination.

In a more recent case concerning the Dominican Republic, the right to life and personal integrity were linked to economic, social and cultural rights, including education, health and housing. On 6 November 2014, however, the Constitutional Court of the Dominican Republic declared the judgement unenforceable and declared the jurisdiction of the IACtHR null and void. The participant noted that the Constitutional Court's undermining of the Inter-American system through the use of the hierarchy of laws and the primacy of the Constitution once again had a detrimental effect on the realization and protection of economic, social and cultural rights.

To illustrate how poor records of implementation of decisions by regional bodies can undermine the protection and realization of economic, social and cultural rights, another participant provided a number of illustrations from the African system.

In 1996, the African Commission had an opportunity to set out how economic, social and cultural rights should be interpreted in the African system. In *SERAC v Nigeria*, the Commission elaborated how issues of how corruption and disregard for the law affect the protection and realization of economic, social and cultural rights in Nigeria.

Most African constitutions, the participant explained, spell out the separation of powers. In practice, however, the executive is often more powerful than the other two branches. It controls the security forces and in many cases citizens cannot enforce their rights in the courts, at least with any prospect of success. International civil society often litigates cases with local communities domestically, merely with a view to exhausting local remedies and thus have standing before the bodies of the African Union.

However, the African Commission has no power to implement its own decisions, and must go through the African Union's political bodies. Therefore, it takes political will to render Commission decisions enforceable, even if they are binding. In practice, there have been more than thirty holdings, yet none has been properly implemented. Hence even when an independent judicial or quasi-judicial body is willing to issue robust human rights judgments, it is clear that political willingness is still required for them to result in meaningful change.

The resurgence of "cultural relativism" also poses a challenge to the enforcement of economic, social and cultural rights in international and regional systems, as elaborated upon by another Forum participant. Cultural relativism, he said, invites one to make

international human rights standards subordinate to local or regional particularities. These national protection standards can be the same as the international, or impose a higher or lower degree of protection.

The countries of ASEAN, an organization that was not established with a view to serve as a forum for the protection and realization of human rights, are not all democracies. Civil and political rights, which are very much about democracy, are hence approached hesitantly. But, the participant wondered, if there any room for the protection of economic, social and cultural rights within this framework.

He noted that there are two "tools" that concern human rights within the system: the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Human Rights Declaration. The former does not take complaints or make recommendations and serves promotional purposes only. With regard to the protection and realization of economic, social and cultural rights within the latter, the participant noted that the ASEAN Human Rights Declaration refers to humane treatment of HIV cases as part of right to health, thus is on this point it is more specific than the international standard and creates room for good local standards. However, there are major conceptual difficulties around the right to health and to an adequate standard of living.

The ASEAN Human Rights Declaration, it was pointed out, contains elements of relativism, including the concept of a balance between rights and responsibilities, which undermine human rights protection. The Declaration obliges States to take into account cultural standards, which is in contrast to the 1993 Vienna Declaration, which holds that the duty of States is to promote fundamental rights and freedoms even at the expense of cultural particularities. Furthermore, the Declaration contains a large list of exceptions to rights. During the drafting process, there was a

debate about the inclusion of “public morality”, resulting in exceptionalism as the argument does not require the application of a reasoned margin of appreciation. Lastly, the Declaration declares the minimal rights of non-nationals with regard to economic, social and cultural rights subject to national law, thus creating discrimination rather than reducing it.

The participant noted that with regard to the realization of economic, social and cultural rights, the performance of some of the ASEAN countries is encouraging. For example, there is a high standard of living in Singapore, public services in Brunei and Malaysia are well functioning, and the Thai universal health care coverage has been a significant progress. At domestic level, the courts have also intervened to protect human rights, sometimes in relation with environmental issues. For example, in the *Manta Point* case regarding the detrimental impact on health and environment of a big economic development plan in Indonesia, the Court ruled that the activities had to be suspended until further environmental and health impact assessments were conducted.

By way of conclusion the participant noted that, while they can be inspired by religious and local traditions, human rights are secular and universal, and hence cultural relativism is acceptable only insofar it is compatible with or complimentary to international law.

***Main tensions and issues regarding the separation of powers and effective judicial protection***

The Forum participants discussed various other issues pertaining to the separation of powers and effectiveness of judicial protection of economic, social and cultural rights, reflected below.

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In the Southern African region, a participant noted, two main arguments have been raised against the justiciability of economic, social and cultural rights: democratic deficit, which implies that these are policy issues or matters relating to the utilization of national resources, which need to be decided upon by the executive or legislature; and institutional incompetence, which rests on the claim that the court is not technically capable to decide on these matters.

With regard to the argument of democratic deficit, the participant argued that this is adequately addressed by giving the courts the power to review executive action and enforce accountability for the decisions of the executive and the legislature. This is not judicial activism that usurps the other branches' prerogatives.

With regard to institutional competence, the participant pointed to a number of interesting decisions of the South African Constitutional Court with regard to very technical matters. In *Government of the Republic of South Africa v Grootboom*, the Court advanced the reasonableness principle, although the judgment stops short of explaining how this plays out in complex issues of distribution of national resources. Another case, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, dealt with the claim of an applicant who contested a government decision to impinge on his fishing rights. The Court used three main criteria to weigh the reasonableness of the government's decision in the case: Was the decision taken by a technically competent body? Does it have a logical connection with the intended goal? Does it limit the protection or realization of fundamental rights beyond what is necessary? The underlying point is that the Court cannot refrain from executing its judicial review function simply because it is of a highly technical nature or has budgetary implications.

Another participant said that competence arguments are often not sufficiently interrogated by the courts themselves, who must be

more mindful of their own prejudices. By way of example, he raised rulings by Canadian courts regarding access to health care: both in a challenge that alleged a violation of the right to life by reducing access to private health care, and in another challenge alleging the same in relation to reduced access of asylum seekers to public health care, the courts said that it was not their role to intervene with the government's policy on complex social measures designed to protect universal healthcare. However, the participant pointed out there is no real argument to support the claim that the courts' role is proper when dealing with a negative right, but improper when deciding on a positive right. Moreover, it entails that some rights may not be enforceable because that might place positive obligations on governments, and dealing with social exclusion and discrimination is thus left to the governments' own interpretation. However, the legitimacy of the courts comes from their comprehensive role.

Another participant agreed, stating that while judges cannot decide on public policy and budgets, this does not entail that they can shy away from their responsibility to play a role in the protection and realization of economic, social and cultural rights. He noted that also the protection of civil and political rights can entail positive obligations, citing by way of example the right to counsel as part of due process and fair trial rights. If the US Supreme Court can rule on this matter, then why not on access to health care services?

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Several participants elaborated on the need to strengthen local and national systems in the interest of effectively implementing international rulings.

Unfortunately, in practice often when an international decision is seen as a threat, ranks are closed displaying behaviour reminiscent of a dictatorship, thus threatening the integrity of the international

human rights system. What measures can we take in order to ensure that decisions and rulings handed down internationally can filter through and be implemented nationally?

In this regard, one participant expressed concern about the European system, noting that the national systems may not always be strong enough to implement international rulings. She pointed out the need for a system to oversee implementation. In this respect, she noted that the European Union system is stronger than the Council of Europe's, as fines can be imposed for non-implementation.

Another Forum participant noted that in the Inter-American system, the Convention contains the obligation to implement the Court's rulings. The Court also oversees the implementation of its decisions and invites parties and victims to make submissions.

The participant noted, however, that there are in practice major shortcomings in monitoring compliance in the Inter-American system. For example, if a State does not implement a decision, that State's domestic court should report this. To correct the poor record of implementation, he suggested instead a mechanism of collective oversight, as in the European system through the Committee of Ministers, which highlights the fact that all Member States have a legitimate interest in ensuring that human rights are guaranteed and protected in any of the States Parties to the Convention.

Currently, he said, the concept of absolute sovereignty, as advanced by some Latin American States, prevents the effective implementation of decisions handed down from international courts when they deal with issues, such as impunity, that have not yet been resolved at the national level. It is of concern that there is no collective reaction to draw attention to cases of non-implementation of the Inter-American Court's judgment, as it gives the impression that there are no consequences to non-compliance. Although the

United Nations sometimes responds, it should be the Latin American countries that speak up.

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Another issue that impedes effective judicial protection of economic, social and cultural rights is the lack of transparency and engagement with civil society while creating new international human rights instruments and mechanisms.

For example, a participant noted that in March 2014, a Statute was adopted for an Arab Court of Human Rights, which was approved in September of the same year. The Statute now needs seven ratifications to enter into force. However, the adoption process was opaque: even the membership of the drafting commission was not made public, and attempts by civil society to engage with the League of Arab States were unsuccessful.

In the drafting process, the effectiveness of the mechanism was undermined. For example, in the first draft of the Court's Statute, individuals, NGOs and States had access to the Court. In the final version, however, this was limited to only States and State-approved NGOs (only if the State accepts this at ratification).

The need for an Arab Court was exemplified by the Arab Spring and demands from victims for effective remedies and reparations, delivered through an effective regional mechanism, as the domestic courts were unable to deliver. It was deemed unfortunate that the access to the Court has been reduced, and the possibility to challenge local laws and provisions that are not compatible with international human rights standards has been cut.

The participant pointed out that moreover the Arab Charter itself is not fully in line with international standards, for example, on equality between men and women. Additionally, cruel, inhuman and degrading treatment is sometimes permissible under the Charter,

when national law provides for it. He expressed the hope that the Court will be able to interpret the Charter in a way that is compatible with international standards.

With regard to the seat of the Court, another participant noted that Bahrain must modify its human rights conditions before it can host the Court, especially in light of its reaction to the 2011 events. Thousands have suffered violence at the hands of State agents, hundreds have been deprived of their nationality, and many are in jail for the peaceful expression of their opinions. Although all Arab countries are to an extent in the same situation, Tunisia was suggested as a more appropriate country to host the Arab Court.

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Another issue discussed by the Forum participants was the need for more material support for the protection and realization of economic, social and cultural rights. Potentially recalcitrant States and big companies have large if not unlimited resources, which creates a David and Goliath scenario, in which international cooperation needs to be reoriented. This notion enjoyed the support of several participants, who pointed out the need for more resources for NGOs so they can pursue their work defending human rights. Experience has shown that creativity is one way to correct these imbalances. In Colombia, for example, the Constitutional Court has created a follow-up commission made up of academics and representatives from civil society with a high level of expertise, which was able to challenge the State's policy following up on a Court ruling regarding Internally Displaced Persons (see above, p. 21).

A participant noted that civil society can play a role not only in litigation on economic, social and cultural rights, but also in supporting the implementation of judicial decisions. One example that showcases this well is the *Endorois* case in Kenya. In 2010, the

African Commission recommended in the case, which concerns the eviction of indigenous communities in the 1970s, that the land be restituted and losses compensated. After having played a major role in the litigation, civil society joined hands to work for the implementation of the decision. Many Kenyan organizations and minority rights groups conducted research and surveys, advocated with the authorities and conducted workshops with community leaders, in order to firstly ascertain and then defend the communities' best interests. The participant noted that building coalitions had proved key in this experience.



### **Session III**

## **Challenges and obstacles in the judicial enforcement of economic, social and cultural rights**

At the international level, the CESCR has developed its interpretation of the Covenant through the elaboration of General Comments, and the Optional Protocol has entered into force. In the African regional system, a number of high profile cases have directly recognized among others the right to culture, the right to adequate housing and the right to health, while in the Inter-American system the protection and realization of economic, social and cultural rights have been advanced indirectly through the right to life, to physical integrity and to property, among others.

Additionally, there have been advances in implementation of economic, social and cultural rights through domestic judicial decisions. By way of example, a participant raised a September 2014 decision by the Constitutional Court of Paraguay, which held that a decision to return expropriated land from a farmer to the indigenous community was constitutional. Innovative decisions in Nepal (with regard to the right to health) and South Africa (concerning the right to adequate housing) have also advanced the protection and realization of economic, social and cultural rights.

At the domestic level, economic, social and cultural rights are also increasingly recognized as judicially enforceable fundamental rights in new Constitutions, including in Kenya, Zimbabwe and Brazil. States have also been quite creative in establishing new institutions, such as for example the inter-ministerial committee in Brazil, which oversees the implementation of affirmative action in higher education, and a commission that was set up in Argentina to implement a court ruling in the *Matanza-Riachuelo river* case,

concerning pollution caused by 44 corporations along a river in Buenos Aires.

***Protection of lawyers and judges as human rights defenders working on economic, social and cultural rights***

Human rights defenders (HRDs) who work on economic, social and cultural rights face particular dangers, a Forum participant noted, as they challenge social structures, traditional practices and religious dogma.

The 2007 report to the Human Rights Council of the UN Special Representative of the Secretary General on human rights defenders sets out an analysis of the reasons for growing impunity with regard to attacks on defenders of economic, social and cultural rights, noting the lack of adequate interest or action at national, regional and international level to protect these defenders.

Defenders of economic, social and cultural rights are often targeted in their professional capacity as trade unionists, NGO leaders, peasants, environmental activists, leaders of indigenous communities, students, or teachers. Judges, lawyers, prosecutors, members of Parliament and ombudspersons are likewise targeted, often when they try to protect human rights defenders who face reprisals because of their work on economic, social and cultural rights. Hence, a broad category of people is affected.

By way of example, land and environmental rights were raised as increasingly difficult to promote and protect, especially when going against the interests of extractive industries. Human rights defenders face killings, abductions, torture, excessive use of force and abuse of the criminal law, among other things, which aim to silence the defenders or prevent them from doing their work. In the context of indigenous communities, many who defend their rights

are harmed as a consequence of their collective engagement, asserting sovereignty rights of the community.

Perpetrators of these violations include, among others, the police, local authorities, undercover security agents, and public officials, especially those working in land or revenue departments. Many of these officials speak publicly against HRDs with impunity. Furthermore, the participant noted an increase in the number of non-State actors perpetrating the abuses, including transnational corporations, private security companies, media, religious groups, and traditional authorities. Moreover, in particular the rights of minorities, whether religious or ethnic, are further undermined by negative public perception and prejudice they face in everyday social life. When there are situations of violence or discrimination against these minorities, there is little public outcry. HRDs often take on unpopular cases and subsequently they frequently go against powerful societal forces.

In many cases, the independence of the judiciary comes into question, including State failure to take measures to protect judges and lawyers. By way of example, a case was cited involving the defence of a twelve-year old Christian boy against blasphemy charges in Pakistan. The High Court judge who overturned the initial conviction was murdered, and the trial court judge refused to issue a judgment because he was receiving threatening phone calls. Neither the superior judiciary nor the state actors took any action to protect the judges or lawyers. Quite often in Pakistan, lawyers defending blasphemy cases are exposed to the greatest risks, including death threats and attacks against themselves or their families.

Also in situations of transitional justice, HRDs are often particularly targeted, especially with regard to the occupation of land by the military and its restoration to the owner. The often security-obsessed environment encourages the establishment of special

courts and parallel judicial bodies in the name of counter-terrorism, which however often do not serve to punish terrorists, but instead focus on, among others, persecuting peasants involved in land claims or communities protesting for water and food rights. The whole environment is built around State power and exemplifies that while the State has gathered a lot of power to control, it has not in parallel expanded its capacity to fulfil its human rights obligations.

With regard to the protection of HRDs who specifically work on economic, social and cultural rights, the participant noted that the regional human rights courts are producing some good jurisprudence. By way of example, in the 2009 case of *Kawas-Fernandez v Honduras* before the Inter-American Court, environmental rights activists were not only given recognition and the right to be protected by the State, but the Court also gave legitimacy to the work of the activists, which it noted is not only of legal benefit, but also contributes to changing mind-sets. The Forum participant noted that economic activity can have social benefits for all and that any actions potentially impeding dialogue must be countered. However, some economic growth policies carry unacceptable social consequences, such as undermining people's labour rights.

Overall, the participant argued that there is a need for a stronger framework for the enforcement of economic, social and cultural rights, whether through judicial forums or otherwise. The legal framework must also be strengthened, specifically through access to information, and expanding constitutional guarantees beyond the categorization of economic, social and cultural rights as non-enforceable "principles of state policy". Meanwhile, Bar Associations should mobilise in order to limit individual lawyers' exposure to threats and other interference with their work in defence of HRDs who work on economic, social and cultural rights. The international community should support these HRDs, giving them legitimacy and a voice.

**Implementation of judicial decisions: enforcement and monitoring**

Economic, social and cultural rights, as a participant stated, are political in nature and have to be interpreted in context. For example, South Africa is an upper middle-income country, as categorized by the World Bank, but it is also one of the most unequal countries in the world, remaining highly racialized even after Apartheid. Large unemployment and salary gaps between whites and blacks persist. The Constitutional Court has declared economic, social and cultural rights justiciable from the outset, yet the country still has to become party to the ICESCR (at the time of the Forum; on 12 January 2015, South Africa finally ratified, after having signed the Covenant in 1994).

South Africa has a large and mobilised civil society and many non-governmental organizations engage in litigation. The vast majority of the cases pertaining to economic, social and cultural rights are on the right to adequate housing, as it is a top concern for the country's poor communities. This litigation has resulted in extensive, coherent jurisprudence. Notably, the courts' decisions on remedies have always had elements of positive obligations. Beyond the right to adequate housing, however, many economic, social and cultural rights have not yet been litigated.

Through litigation, several strategic frontiers have been achieved regarding the right to adequate housing. First, the Constitutional Court has formulated a right to a reasonable government programme that progressively realises the right to adequate housing. However, in *Grootboom* the Court held that there is no minimum core and that needs are context-specific and must be assessed on a case-by-case basis. In a series of other cases the Court has, among other things, held that ordinarily courts must not grant eviction orders if that leads to homelessness; that the State cannot by-pass the obligation to protect and realize economic, social

and cultural rights by claiming an emergency; that the courts have to oversee sales in execution of homes as an eviction process; and, that unreasonable increases in rent will not be tolerated.

In the 2011 *Blue Moonlight* case, the Constitutional Court had the opportunity to rule on the State's role in evictions by private landlords. Until then, if a violation was found the State simply stopped the evictions, but people were often left in intolerable conditions. In the case at hand, the Johannesburg city authorities argued that they had no obligations as regards private evictions. The Court, however, held that this was not true. In consequence, it imposed a two-stage order to apply in private evictions: (1) grant of eviction in principle, but with instructions to the landlord to be patient until alternative accommodations can be provided; and, (2) State-supervised alternative accommodation search. Unfortunately, ever since this positive obligation was formulated, the State has stopped complying with the Court's orders in this regard.

This serial non-compliance with orders has given rise to numerous challenges beyond the *Blue Moonlight* case. The Forum participant noted in this regard that it is hard to have to litigate three more times in three different forums in order to get the State to finally follow the Court's orders' spirit. For example, one challenge concerned the State's provision of alternative accommodations run by evangelical shelters, which were designed for "socially disruptive people" and had draconian regulations, such as gender segregation and lockouts. The State eventually moved the evictees into a shelter, but the circumstances there were found to be a violation of privacy and dignity. In these sets of litigation, it has proved problematic that ever since *Grootboom*, the Constitutional Court has not defined "reasonableness" beyond just having a house policy. It is key, the participant pointed out, to imbue reasonableness with substantive meaning.

Non-compliance with judicial orders and decisions is not limited to housing cases, either. The participant linked this evolution to a developing political crisis after twenty years of increasingly defensive single-party rule by the African National Congress (ANC), which includes hostility vis-à-vis judicial rulings. Dissent is clamped down on, and securitization of the State has become an issue as the ANC is trying to cling to power in the context of increasingly clear failure of redistribution of resources under its rule.

The participant opined that the only way forward for the courts and civil society is to robustly engage with the State authorities. Being cognizant of the State's unwillingness to implement its orders, the judiciary has to change its deferential attitude towards the Executive in matters concerning economic, social and cultural rights. Furthermore, the judges need to understand that litigation on economic, social and cultural rights is essentially about accountability of the executive in light of its obligations under domestic law and ratified international agreements. She furthermore suggested an enhanced role for civil society in monitoring implementation through engagement with judicial monitoring orders. And lastly, the participant recommended revisiting contempt of court, which should enable holding individual office-bearers directly responsible for non-implementation of court orders.

### ***Territorial and extraterritorial jurisdiction in times of globalization and growing interdependences***

The ICESCR makes no mention of jurisdiction or territory. In 2007, civil society organizations and academics formed the ETO Consortium, in order to address the gaps in human rights protection that opened up through the neglect of extraterritorial obligations. In 2011, international legal experts issued the Maastricht Principles on

Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

In terms of the obligation to “respect” economic, social and cultural rights, territory does not matter.

With regard to the obligation to “protect”, however, the traditional notion of “effective control” triggering State liability for human rights violations or abuses falls short. Accordingly, pursuant to the Maastricht Principles, beyond “effective control”, State liability also flows from its acts or omissions that bring about foreseeable effects in situations where it could exercise meaningful influence. This is different from the UN Guiding Principles on Business and Human Rights, which stipulate that the home State must regulate the behaviour of its companies. The Maastricht Principles instead formulate the State’s legal obligation to protect rights against corporate abuse, by companies that have their seat in that State and any company which behaviour it is in a position to influence. Among other things, this entails that the State must create an enabling environment and has coordination duties, the bottom line being that the State has an obligation to provide international assistance.

In practice, the participant stressed that a lot of considerations regarding the duty to protect are contextual. For example, the Canadian scholar Sara Seck has examined the case of TVI Pacific, a Canadian mining corporation which operations in the Philippines caused massive environmental degradation. Filipino activists petitioned the Canadian government, who eventually decided not to act because it would put Canadian corporations at a competitive disadvantage. The participant argued that if, however, TVI had committed the same violations in say France, they would have been shut down.

To illustrate that ETO can also encompass positive obligations, the Forum participant raised a hypothetical example. Suppose a wealthy country (A) decides to support disability work in a poor country (B). If then a decision by (A) to withdraw such support would entail closure of schools for disabled children in (B), the latter's disabled children could sue country (A). It was argued that they would be within the jurisdiction of country (A) pursuant to the notion of "decisive influence", and that (A) would have violated its obligations under the CRPD, as its sudden reduction of aid led to a retrogression in human rights protection.

With regard to extraterritorial obligations on economic, social and cultural rights, the duty to fulfil has however been the most problematic to develop. States continue to argue that their money is for them to spend. However, as illustrated also by the above hypothetical example, the participant stressed that the act of giving is not mere charity. Ideally, the participant noted, the CESCR would better define the extraterritorial aspect of the duty to fulfil, for example linking it to international commitments including those made in declarations and at summits.

### ***Next steps and good practices***

The Forum discussion on next steps centred around three main topics: the need to strengthen domestic judiciaries, the establishment of specialized human rights tribunals, and the (de)politicization of economic, social and cultural rights.

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In order to further advance the judicial protection of economic, social and cultural rights, several suggestions were made regarding strengthening domestic judiciaries.

Participants, with some exceptions, largely agreed that there is a need for more training of the members of the judiciary on economic, social and cultural rights. One participant noted the urgent need for such education in countries in transition in particular.

One participant suggested that some of the frustration about the courts' failure to protect economic, social and cultural rights stems from the judges' ignorance and that training efforts, also involving civil society and associations of legal professionals, could resolve part of the problem. Another participant noted that in this respect, we must move beyond rhetoric and theoretical discussions and assist States who may wish to do the right thing, but lack the capacity to do so. An example was provided from Guatemala, where civil society organizations as well as legal professional associations have supplied concrete training programmes to the judiciary.

Beyond building knowledge, these training programmes can also help to change the judiciary's mind-set. One participant noted that politically speaking, judges often have conservative tendencies, which take time to change. Another participant said that continued exposure to international best practices could help in this respect.

Furthermore, several participants pointed out that there is a need to ensure that the judiciary, as a whole, is pluralist, with judges coming from all layers of society. It is necessary to take account of (prospective) judges' social bias, and ensure that recruitment is competitive and leads to a judiciary that is reflective of the people it serves.

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Several Forum participants discussed the option of establishing specialized human rights jurisdictions at the domestic level, expressing a variety of opinions with some in favour, where other preferred mainstreaming human rights throughout all jurisdictions.

One participant argued that economic, social and cultural rights should be embedded in the constitution. If they are, there would be no need for specialized courts of human rights, as the issue would then fall within the jurisdiction of constitutional courts. In addition, there is a need for a radical transformation of judges' mind-sets, who must value not only the positivist application of the law but also the protection and enforcement of human rights.

On the other hand, another participant expressed concern about leaving economic, social and cultural rights to constitutional courts. For example, in the *Zahra Kazemi* case in Canada, an Iranian businessman's claim against the Iranian government alleging torture was ultimately dismissed for reasons of sovereign immunity protection. It was pointed out that in some countries the courts are no better than the executive or the legislature in advancing human rights.

Another participant expressed the opinion that creating new mechanisms is not the answer if this does not go hand in hand with the creation of an environment in which it can function. For example, the military dictatorship in Pakistan greatly resisted the establishment of independent human rights commissions. Any body it may have established, would have likely been ineffective and yet another body to monitor.

Another participant agreed, noting that the creation of specialized jurisdictions contributes to a distinction between human rights law and the rest of the body of law. She deemed it better to integrate human rights jurisdiction into the normal courts system. Doing otherwise may create an entity incapable of enforcing its decisions.

This was echoed by another participant, who argued that there is already a level of defiance by some States, resulting in the refusal to adhere to court decisions. There is a complex challenge of mismatched commitments, in which States take advantage of

ambiguous commitments, which could be exacerbated by the creation of new specialized jurisdictions.

In any case, another participant added, national human rights institutions already play an important role in promoting justiciability of economic, social and cultural rights and present an efficient alternative to the establishment of specialized domestic jurisdictions. The most obvious path, he suggested, is to strengthen their capacity.

More generally, independent of the institutional setting in place to ensure judicial and quasi-judicial enforcement of economic, social and cultural rights, mechanisms have to be accessible to alleged victims, including financially accessible. In that respect, another participant also reiterated the importance of considering the right to free legal aid. In addition, it was highlighted that still too many citizens themselves do not know their rights, especially in regards to the environment, or to medical care.

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Lastly, Forum participants also discussed the sometimes-politicized nature of the struggle to protect and advance economic, social and cultural rights. In this regard, one participant noted that while perhaps it is perceived by some as a left-wing agenda, ultimately victims do not care. Essentially, the protection and realization of economic, social and cultural rights are about improving people's lives and surpassing varied political and legal contexts to ensure the delivery of such rights. For human rights defenders, it does not matter where these rights are placed on the political compass.

Moreover, one participant remarked, exclusively focusing the discussion on the link between poverty and economic, social and cultural rights creates the false impression that only the poor suffer from violations. However, in fact all individuals and indeed all of

humanity is affected. A narrow focus on poverty issues risks reducing the breadth of the importance of economic, social and cultural rights for all human beings, regardless of economic status.

One participant said that he used to be worried that economic, social and cultural rights were distracting from genuine political movements of social justice, because they risk legitimizing political settlements in countries that insufficiently redistribute resources. However, he noted, we arrived at this point because of political failure to realize social justice in the first place. Another participant added that litigation is politics by other means, which is particularly important in countries that face problems with the representation of minorities in formal politics. Litigation in those circumstances can empower people in a very genuine way by providing tools for claiming their rights.

Another participant partially disagreed. He pointed at insufficient exploration of applying a preventative strategy, involving talking with policy-makers. In his opinion, many violations are the result of ignorance or misplaced ideas of the effects of certain policies on particular groups and territories. Taking just the judicial approach, he said, makes it difficult to resolve the problems in a way that supersedes the specificities of the case at hand. The realization of economic, social and cultural rights is closely linked with the process of the economic development of a country and has aspects that are perhaps better addressed through politics.

One strategy that was suggested as a way for the judiciary to engage with policy-making, is for them to formulate standards and rules derived from their jurisprudence, to provide guidance to those who elaborate public policies. For example, the Ombudsperson in Colombia, who is a national human rights institution, has put out several publications with rules from case law in the area of social rights, the right to health, education and water. The Ombudsperson

has converted this guidance into indicators that are used to monitor public policy.



## **Concluding remarks**

To an extent, the theoretical debate whether economic, social and cultural rights are justiciable has been settled, not least because of the adoption and entry into force of the Optional Protocol. Nevertheless, although the obstacles for the judicial enforcement of economic, social and cultural rights are now largely the same as those for civil and political rights, courts continue to be more cautious when addressing the former.

In this regard, it is important to be aware that the judicial protection and enforcement of economic, social and cultural rights is already taking place. There is a need to demystify the roles that courts do and can play to protect and guarantee these rights. The experiences of national and regional judicial and quasi-judicial bodies show that courts have in practice employed a variety of techniques and methods to protect economic, social and cultural rights.

The debate on justiciability should be reframed in light of the victims' right to an effective remedy and reparation. Reparation under international law does not only include compensation or restitution, but also satisfaction. It is important not only to enforce judicial decisions, but also prior to that, to ensure that victims of violations of economic, social and cultural rights can be recognized as such. Procedural arrangements, including legal aid, waiver of fees or the victims' right to counsel, can play an important role in the effective availability and accessibility of remedies.

Constitutional or statutory recognition of economic, social and cultural rights and the guarantee of judicial remedies create the most favourable environment for judicial enforcement.

With regard to the separation of powers, there is no basis for excessive judicial deference to the expertise of the other branches of power, which in practice serves to deprive victims of access to justice and an effective remedy. Adjudicating on economic, social and cultural rights similarly does not equate “judicial activism”: the choices are left to the executive and legislature, and the judiciary is responsible for checking their legality. If the government responds in good faith to judicial decisions, this “dialogue” can in fact reinforce the separation of powers.

However, such good faith is sometimes wanting. For example, governments do not meaningfully implement the remedy, flat-out ignore the court, or even persecute the judges, lawyers and litigants involved. Must the judiciary, in these cases, simply leave a vacuum? Or should the judiciary move in to fill this vacuum even if this means substituting its judgment for that of the other branches of government, for example through monitoring the implementation of its decisions?

Judicial independence, in this regard, is of key importance. Institutional and financial independence are necessary preconditions for the effectiveness of the judiciary. Moreover, judges are better equipped to adjudicate the claims before them if the judiciary is composed in a manner that reflects the society it serves, including those communities who have been affected by violations. It is necessary to have an independent legal profession, too. Importantly, both judges and lawyers must be protected from threats and other interferences. Training can help to raise awareness and knowledge of international and regional law and standards on economic, social and cultural rights, and advance their application.

In order to advance the justiciability of economic, social and cultural rights, the horizontal exchange of experience and engagement at national and regional level must continue.

A lot remains to be done to encourage the exchange of knowledge between judiciaries in different countries. There is a need for the development of practical advice in this respect. In particular as regards the reticence or unwillingness by the legislature to take normative steps, it is important to exchange good practices. Courts in several countries have successfully addressed situations in which the legislature failed to act, and useful lessons can be drawn from those experiences.

Lastly, even if some political currents may have more affinity with economic, social and cultural rights than others, it is not helpful or correct to approach them through this politicized lens. Economic, social and cultural rights were recognized in the Universal Declaration of Human Rights, to which almost all governments regardless of political view have agreed. Essentially, just as civil and political rights, economic, social and cultural rights serve to reinforce the position of the individual against a concentration of power or arbitrariness, no matter its political inclination.

## **Annex 1**

### **Participants list**

Alejandra Ancheita (Mexico)  
Alejandro Salinas (Chile)  
Benjamin Müller (Switzerland)  
Bruce Porter (Canada)  
Carla Edelenbos (the Netherlands)  
Carlos Ayala (Venezuela)  
Chafi Bakari (the Gambia)  
Daniela Ikawa (USA)  
Dzidek Kedzia (Poland)  
Elvin Gutiérrez Romero (Guatemala)  
Faith Mushure (Zimbabwe)  
Francesca Lois Sarenas (Philippines)  
George Odunga (Kenya)  
Gerhard Reissner (Austria)  
Gilles Badet (Benin)  
Harsh Mander (India)  
Hina Jilani (Pakistan)  
Jacqueline Dugard (South Africa)  
Jamie Burton (UK)  
Justice Mavedzenge (Zimbabwe)  
Kassoum Kambou (Burkina Faso)  
Loubna Ouazzani (Morocco)  
Malek Adly (Egypt)  
Marco Sassoli (Switzerland)  
Maria de Mesquita (Portugal)  
Mark Gibney (USA)  
Martin Rogel Zepeda (El Salvador)  
Mohammed Bouzlafa (Morocco)  
Nizar Saghieh (Lebanon)  
Oagile Dingake (Botswana)  
Philippe Texier (France)

Radmila Dacic (Serbia)  
Reem Khalaf (Bahrain)  
Remington Huang (Taiwan)  
Rhona Modesto San Pedro (Philippines)  
Rodrigo Uprimny (Colombia)  
Rubenia Galeano (Honduras)  
Thomas Voelzke (Germany)  
Vitit Muntarbhorn (Thailand)  
Walid Melki (Tunisia)

## **Annex 2 Programme**

### **Day 1**

9:00 – 9:20

#### **Welcome addresses:**

Mrs. Sandra Ratjen, ICJ Senior Legal Adviser, Economic Social and Cultural Rights programme

Justice Philippe Texier (France), ICJ Commissioner, former judge of the French Cour de Cassation, former Member of the UN CESCR

9:20 – 10:00

#### **Keynote address – Judicial independence and the right to an effective remedy for violations of Economic, Social and Cultural Rights (ESCR)**

Mr. Alejandro Salinas (Chile), Lawyer, former Ambassador of Chile to the UN in Geneva (Chairperson-Rapporteur during negotiations for the Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law), CIJL Advisory Committee member

10:30 – 11:15

**Legal and judicial enforcement of ESCR, progress to date at the international level**

**Moderator:** Mrs. Sandra Ratjen, ICJ Senior Legal Adviser, Economic Social and Cultural Rights programme

*The way towards the Optional Protocol to the ICESCR and Exploring remaining challenges in the defense of ESCR*

Professor Zdzislaw Kedzia (Poland), Chairperson of the UN Committee on Economic, Social and Cultural Rights, Poland

Discussion

11:15 – 13:15

**The current state of legal (including judicial) protection of ESCR at the national level – A comparative overview of conventional and constitutional guarantees and protection**

**Moderator:** Professor Rodrigo Uprimny (Colombia), former auxiliary Magistrate of the Constitutional Court of Colombia, ICJ Commissioner

*Global Stocktaking with focus on Latin America*

Professor Rodrigo Uprimny (Colombia), former auxiliary Magistrate of the Constitutional Court of Colombia, ICJ Commissioner

*Experiences of legal protection in civil law countries*

Dr. Gilles Badet (Benin), Special Adviser to the President of the Constitutional Court of Benin

*Experience of legal protection in common law countries, with a focus on the United Kingdom*

Mr. Jamie Burton (United Kingdom), Lawyer

*Experience with recently-adopted constitutions*

Justice George Odunga (Kenya), High Court

Discussion

14:30 – 16:00

**Judicial enforcement of ESCR -  
Mainstreaming enforcement of ESCR  
into the widest variety of courts and  
tribunals**

**Moderator:** Justice Kassoum Kambou  
(Burkina Faso), Cour de Cassation

*Experiences from administrative and social law tribunals – Germany*

Justice Thomas Voelzke (Germany), Judge of the Federal Social Court

*Experiences from juvenile and other specialized courts – Guatemala*

Justice Elvin René Gutiérrez Romero  
(Guatemala), Zacapa Children's Court

*Experiences from commercial courts –  
Philippines*

Justice Rhona Modesto-San Pedro  
(Philippines), Presiding Judge, Regional Trial  
Court, Pasig City

*Experiences from industrial courts –  
Botswana*

Justice Dingake (Botswana), High Court,  
Gaborone

Discussion

16:30 – 18:00

**Respecting separation of powers while  
ensuring effective judicial protection of  
ESCR: Domestic courts**

**Moderator:** Dr. Matt Pollard, ICJ Senior  
Legal Adviser, CIJL and UN programmes

*Food from the Courts: the Indian Experience*  
Mr. Harsh Mander (India), Special  
Commissioner to the Indian Supreme Court  
for Right to Food

*Shaping the boundaries of “public interest”  
and “general welfare”: The example of  
forced evictions*

Ms. Alejandra Ancheita (Mexico), Lawyer,  
Executive Director of ProDESC, Martin Ennals  
Award Laureate 2014

*Judges and lawyers who face threats and  
pressure for acting on ESCR cases involving  
businesses*

Ms. Francesca Lois Sarenas (Philippines),  
Lawyer, Sentro NG Alternatibong Lingap  
Panligal (SALIGAN)

Discussion

18:00 – 19:30

**Reception**

Remarks by:

Dr. Matt Pollard, ICJ Senior Legal Adviser,  
CIJL and UN programmes

Dr. Ibrahim Salama, Director Human Rights  
Treaties Division, Office of the High  
Commissioner for Human Rights

Mr. Olivier Coutau, Délégué à la Genève  
Internationale, République et Canton de  
Genève

Mr. Remington (Jui-Ming) Huang, Senior  
International Partner (Baker & McKenzie),  
Past President, Taipei Bar Association  
(Taiwan)

## **Day 2**

9:15 – 10:45

### **Respecting separation of powers while ensuring effective judicial protection of ESCR: International bodies**

**Moderator:** Dr. Ian Seiderman, ICJ Legal and Policy Director

*Protection in the context of austerity: the experience of the European system*

Justice Maria José Reis Rangel de Mesquita (Portugal), Constitutional Court Judge and Professor at the Faculty of Law - University of Lisbon

*Issues of independence and ability to protect, and the resurgence of "national sovereignty": The experience of the Inter-American system (after Bello Monte, where are we?)*

Professor Carlos Ayala (Venezuela), ICJ Commissioner and former member of the Inter-American Commission on Human Rights

*Imbalance of powers and contempt of courts as challenges to enforcement: The experience of the African system*

Mr. Chafi Bakari (The Gambia), expert member of the Working Group on Economic, Social and Cultural Rights of the African Commission on Human and Peoples' Rights

*The resurgence of "cultural relativism" in emerging systems – The case of ASEAN*  
Professor Vitit Muntarbhorn (Thailand),  
Professor of international law, Chulalongkorn  
University, Bangkok; *Co-Chair of the Civil  
Society Working Group for an ASEAN Human  
Rights Mechanism*

Discussion

11:15 – 12:30

Further discussion of the main tensions and  
issues identified in the two sessions on  
separation of powers and effective judicial  
protection

**Moderator:** Dr. Ian Seiderman, ICJ Legal  
and Policy Director

14:00 – 15:00

**Overcoming ongoing challenges and  
obstacles**

**Moderator:** Ms. Daniela Ikawa (USA),  
Programme Officer, ESCR-Net

*Protection of lawyers (and judges) as human  
rights defenders working on ESCR*

Ms. Hina Jilani (Pakistan), ICJ Commissioner  
and lawyer and former UN Special  
Rapporteur on Human Rights Defenders

*Problems of enforcement of decisions,  
monitoring of implementation of orders*

Ms. Jackie Dugard (South Africa), Associate  
Professor in the Wits School of Law and  
Senior researcher at SERI

*Territorial and Extraterritorial jurisdiction in times of globalization and growing interdependences (ETO)*

Professor Mark Gibney (USA), Belk Distinguished Professor at UNC-Asheville, and the Raoul Wallenberg Visiting Chair of Human Rights and Humanitarian Law

15:00 – 16:30

Discussion with all participants of steps and good practices to be taken and promoted

**Moderator:** Ms. Daniela Ikawa (USA), Programme Officer at ESCR-Net

17:00 – 18:00

**Conclusions and summing up of recommendations**

**Moderators:** Ms. Sandra Ratjen, ICJ Senior Legal Adviser, Economic Social and Cultural Rights programme and Dr. Matt Pollard, ICJ Senior Legal Adviser, CIJL and UN programmes

## **What they said**

*"Although I have always been cognizant of Human Rights, I honestly was not familiar with the concept of ESCR until I had the privilege of being invited by ICJ to share the experience of a Commercial Court Judge in the Philippines. In preparing my Report, it was a pleasant surprise to discover that although the concept was not known to me then, I had actually been promoting such rights in my role as Judge. As I mentioned during my presentation, while I humbly acknowledge my kindergarten stage in ESCR, I do look forward to being an active student and conscious advocate of this from now on. My heartfelt thanks to ICJ for having me in the Forum."*

**Rhona Modesto San Pedro**

*"As a young Zimbabwean lawyer and an emerging ESC rights academic, I benefited a lot from the proceedings at this Forum. For example, the discussions around how ESC rights can be enforced in countries that have not yet fully protected ESC rights under their domestic Constitutions shaped the focus of my PhD thesis. The forum also provided me with an exciting opportunity to meet and learn from some of the world's most distinguished experts in the area of ESC rights adjudication."*

**Justice Alfred Mavedzenge**

*"The Forum was very enlightening. The exchange of experiences from different jurisdictions was clearly remarkable and I look forward to future forums."*

**George Odunga**



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Ms Hina Jilani, Pakistan

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Prof. Andrew Clapham, UK

Justice Radmila Dacic, Serbia

Justice Elisabeth Evatt, Australia

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