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HOW HUMAN RIGHTS SHAPE SOCIAL CITIZENSHIP: ON CITIZENSHIP AND THE UNDERSTANDING OF ECONOMIC AND SOCIAL RIGHTS

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ABSTRACT

This Article reconceptualizes citizenship, a notion usually tied to the nation state, as "layered." Human rights may serve as the international "layer" of citizenship, addressing nationals and non-nationals alike. It took some time, however, for "social" citizenship to emerge as a human rights issue and, hence, for human rights to become an international layer for social citizenship rights granted on the national level. Around 1993, states started to accept a human rights-based obligation toward the poor, requiring social policies to focus on targeted, individual welfare.

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Nowadays, poverty mitigation is the human rights core of "social" citizenship.

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INTRODUCTION

As a theoretical concept, "citizenship" is familiar to sociologists, political scientists, and legal scholars. The meaning of citizenship, however, differs widely. Legal scholars and authors theorizing democracy tend to use a narrow notion, linking citizenship more or less strictly to political rights: Citizenship is supposed to describe the status of individuals who have the right to participate directly in decision-making in political matters or the right to choose representatives through elections.[1]

1. *See generally* David Held, *Democracy: From City-States to a Cosmopolitan Order?*, 40 POL. STUD. 10 (Supp. s.1 1992) (tracing the idea of democracy from city-states to liberalism and Marxism); Jürgen Habermas, *Citizenship and National Identity*, *in* THE CONDITION OF CITIZENSHIP 20 (Bart van

These active citizens are defined in a rather exclusionary manner, since participatory rights are believed to depend on citizenship acquired according to citizenship law (only nationals qualify for the status), although some notions of "responsible" or "participatory" citizenship may reach beyond decision-making or voting rights in a strict sense.[2] Scholars following T.H. Marshall's seminal 1950 essay[3] conceptualize citizenship as a legal status encompassing civil rights, political rights, and social rights. Whether narrowly or broadly conceived, citizens are often juxtaposed with opposites, at times with burghers or economic citizens,[4] but most frequently with aliens whose legal status differs considerably from the status of citizens.[5] Citizenship concepts transcending the nation state are either confined to the political in a narrow sense—"world citizenship" then refers to democratic participation on the global level[6]—or the concepts rely on the (individual) feeling of belonging to the planet.[7] In the latter case, global citizenship is not a legal status, but derives from

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Steenbergen ed., 1994) (stressing popular sovereignty and self-determination as the roots of citizenship); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (equating citizenship with full membership in a political community, a status regularly acquired under the rules of citizenship law).

2. *See, e.g.*, Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994) (contending that the notion of "responsible citizenship" encompasses the desirable activities of the "good citizens," independent of the formal legal status as citizen); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000) (differentiating between citizenship as a legal status and a broader view of citizenship as a collection of rights, duties, and opportunities for participation that define the extent of socio-political membership within a community); Ruth Lister, *From Object to Subject: Including Marginalised Citizens in Policy Making*, 35 POL'Y & POL. 437 (2007) (taking the normative stance of thinking about "inclusive citizenship," a concept that reaches out to marginalized groups, in particular, people living in poverty and children).

3. THOMAS HUMPHREY MARSHALL, *Citizenship and Social Class*, *in* CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 1 (1950).

4. Bart van Steenbergen, *The Condition of Citizenship: An Introduction*, *in* THE CONDITION OF CITIZENSHIP, *supra* note 1, at 1.

5. *See, e.g.*, Bosniak, *supra* note 1; Linda Bosniak, *Constitutional Citizenship through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002); Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES IN L. 489 (2007); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 1 (2004).

6. *See, e.g.*, Held, *supra* note 1, at 11, 23, 33 (arguing that national democracies require international democracy if they are to be sustained in the contemporary era; a "cosmopolitan model of democracy" is meant to rely, *inter alia*, on an international civil society, regional parliaments, or referendums cutting across nation-states); Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212 (2001) (investigating the call for greater citizen participation in the international order); Daniele Archibugi, *Cosmopolitan Democracy and its Critics: A Review*, 10 EUR. J. INT'L REL. 437 (2004) (defending the project of a cosmopolitan democracy based on global movements).

7. Archibugi, *supra* note 6, at 445; *see also* Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 448 (2000) (equating world citizenship with loyalty and a moral commitment to humanity at large).

the individual claim of being an Earth citizen. Either way, citizenship concepts seldom connect citizenship and international human rights.[8] For legal scholars, the connection between citizenship and human rights indeed seems far-fetched, given their narrow focus on political rights. Sociologists and political scientists are silent,[9] skeptical,[10] or simply equate world citizenship with human rights, yet abstain from reflecting upon the relation.[11]

Part I of this Article contributes to conceptualizing citizenship from the perspective of human rights law. Do human rights spell out some fundamental elements of citizenship that states need to take into account when defining (national) citizenship rights? I will argue that citizenship concepts can no longer ignore that the legal status of individuals is—to some extent—framed by international human rights law. Parts II and III of the Article contribute to the understanding of human rights, in particular the understanding of economic and social rights, often termed "second generation human rights."[12] Against the backdrop of the concept of citizenship, I shall ask: Do second-generation human rights promise what Marshall called "social citizenship," i.e., a particular legal status characteristic of the (modern) welfare state? Social citizenship has rarely been dealt with, especially in a global setting.[13] This Article concentrates on the rights regime established by the 1966 International Covenant on

8. *But see* YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 985 (2002); Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times*, 11 CITIZENSHIP STUD. 19 (2007).

9. *See, e.g.*, Held, *supra* note 1; MARSHALL, *supra* note 3; Bryan S. Turner, *Outline of a Theory of Citizenship*, 24 SOC. 189 (1990).

10. *See infra* Part I.A.

11. *See, e.g.*, John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62 AM. SOC. REV. 171, 182 (1997) (claiming "[w]orld citizenship is prominently codified in the Universal Declaration of Human Rights, which depicts a global citizen whose rights transcend national boundaries.").

12. *See generally* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982) (elaborating on the language of "generations" of human rights).

13. *But see* FRANZ-XAVER KAUFMANN, *Welfare Internationalism Before the Welfare State*, *in* EUROPEAN FOUNDATIONS OF THE WELFARE STATE 94 (John Veit-Wilson trans., 2012) (tracing the human rights angle of the welfare state); Hartley Dean, *Social Policy and Human Rights: Re-thinking the Engagement*, 7 SOC. POL'Y & SOC'Y 1 (2007) (contending that national welfare rights provide a clearer and more explicit basis for a progressive development of social policies than the human rights approach to poverty reduction, espoused, e.g., by the United Nations Development Program); Michael Keating, *Social Citizenship, Solidarity and Welfare in Regionalized and Plurinational States*, 13 CITIZENSHIP STUD. 501 (2009) (discussing whether boundary-opening and the decentralization of states imply a threat to national welfare state regimes by weakening social citizenship).

Economic, Social and Cultural Rights (ICESCR).[14] The ICESCR elaborates in greater detail what had already been proclaimed in the 1948 Universal Declaration of Human Rights (UDHR).[15] The ICESCR contains the very essence of U.N.-sponsored economic and social rights.[16] These rights are the prime candidates for directing social policies at the national level and, hence, for promising social citizenship. Part II of the Article argues that, historically, economic and social rights embraced a variety of state policies aiming at "social welfare." Marshallian social citizenship was not the dominant program. But things changed when U.N.-sponsored economic and social rights became the focus of states mandated to translate these rights into realities on the ground. Part III of the Article explores how the states parties to the ICESCR describe their policies when reporting to the committee established under the Covenant in order to watch over the implementation of economic and social rights.[17] I shall

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14. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR entered into force on Jan. 3, 1976. See U.N. SECRETARY-GENERAL, I MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 158, U.N. Doc. ST/LEG/SER.E/23, U.N. Sales No. E.05.V.3 (2005).

15. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/RES/217/III, at 71 (1948) [hereinafter UDHR].

16. The state representatives negotiating on the text of the ICESCR in the late 1940s and early 1950s did not specifically differentiate between "economic" and "social" rights. What the lawmakers used to summarily call "economic and social rights" was eventually listed in ICESCR Articles 6 to 12. For an early document, see the draft resolution proposed by the Drafting Committee, a sub-organ of the Commission on Human Rights. Drafting Committee on an International Bill of Human Rights, Rep. on its 1st Sess., June 9–25, 1947, U.N. Doc. E/CN.4/21 (July 1, 1947). Subsequent U.N.-sponsored human rights treaties rehearse the economic and social rights of the ICESCR, yet do so from their specific perspectives. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women arts. 11–12, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child arts. 24, 26–27, 32, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families arts. 25–28, 43–44, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW]; Convention on the Rights of Persons with Disabilities arts. 25, 27–28, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

17. U.N.-sponsored human rights treaties regularly include a chapter establishing independent review committees composed of experts in the field of human rights. The committees are supposed to monitor and examine the progress made by the states parties in achieving the realization of the rights recognized in the conventions. *See, e.g.*, International Covenant on Civil and Political Rights art. 28, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (establishing the Human Rights Committee); CEDAW, *supra* note 16, art. 17 (establishing the Committee on the Elimination of Discrimination against Women), CRC, *supra* note 16, art. 43 (establishing the Committee on the Rights of the Child), CRPD, *supra* note 16, art. 34 (establishing the Committee on the Rights of Persons with Disabilities). At the very least, the reviewing committees are meant to examine reports the states parties are to submit periodically. Often, U.N.-sponsored human rights treaties are supplemented by optional protocols empowering the review committees to deal with complaints lodged by individuals whose rights have, allegedly, been violated. For civil and political rights, see the Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR-OP]; for the rights of women not to be discriminated against, see the Optional Protocol to the

demonstrate that the states parties to the ICESCR nowadays increasingly talk about policies involving the ingredients of social citizenship. Through widespread shifts in the understanding of U.N.-sponsored economic and social rights, the granting of social citizenship is no longer just an option for implementing states, but about to become an obligation states parties cannot escape.

The arguments of Parts II and III rely on debates driven by state agents acting as either state representatives in United Nations lawmaking forums (U.N. documents from the 1940s and 1950s) or on reports submitted to the reviewing committee under the ICESCR by the states parties (state party reports from 1977 to 2011). The choice of sources underlying the Article reflects the rules of the 1969 Vienna Convention on the Law of Treaties (VCLT).[18] Inquiries into the meaning of a (human rights) treaty are meant to also have recourse to, *inter alia*, the preparatory work (*travaux préparatoires*) or state practice subsequent to the entry into force of the treaty which establishes the agreement of the parties regarding its interpretation.[19] For obvious reasons, scholarly work on state practice is usually confined to a limited number of case studies compiling domestic legislation or domestic jurisprudence.[20] In order to make the basis for the arguments of the Article as broad (and global) as possible, I chose to collect and evaluate all the state party reports submitted under the ICESCR from 1977 through 2011 (546 reports). These reports are not state practice per se, but purport to describe and reflect upon state practice; the reports provide firsthand information on the states' readings of their human rights

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Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83; for the rights of people with disabilities, see the Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611; for the rights of the child, see the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Dec. 19, 2011, U.N. Doc. A/RES/66/138 (not yet in force). For the rights laid down by the ICESCR, the monitoring framework is—formally—different. According to the wording of the ICESCR, states parties to the Covenant undertake to submit their reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized therein to the U.N. Economic and Social Council [hereinafter ECOSOC] for consideration. ICESCR, *supra* note 14, art. 16. Yet, since 1986, state party reports are to be filed with the Committee on Economic, Social and Cultural Rights, consisting of eighteen members who are experts with competence in the field of human rights and serve in their personal capacity. *See infra* Part III.A. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 10, 2008, U.N. Doc. A/63/435 [hereinafter ICESCR-OP] allowing for individual complaints (i.e., "communications" submitted by or on behalf of individuals or groups of individuals), entered into force on May 5, 2013.

18. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

19. VCLT, *supra* note 18, arts. 31(3)(b), 32.

20. *See, e.g.*, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008).

obligations and on how they present the situation on the ground in an international forum. If uniform, the reports may indeed indicate agreement among the states parties regarding the interpretation of the ICESCR. That source of information has never been explored before. Hence, Part II of the article provides a novel (historical) account on the birth of U.N.-sponsored economic and social rights. Part III presents new empirical data on how the states parties to the ICESCR read these rights, covering a period of almost four decades. Non-governmental organizations (NGOs), other civil society actors, or national judiciaries are not within the focus of the Article.[21]

I. CITIZENSHIP CONCEPTS REVISITED

A. State of the Art: Citizenship and Human Rights as Uneasy Companions

Studies into citizenship usually start from T.H. Marshall's essay on citizenship and social class.[22] In that essay, Marshall reflected upon the roots of the twentieth century (European) welfare state, just at the time when the British welfare state was about to be born. Marshall organized his historical narrative along three elements of "citizenship," a term used to denote three particular sets of rights which, he believed, had expanded over time.[23] For Marshall, citizenship clearly pertains to modernity; citizenship defines the (legal) position of the individual in a modern nation state.[24] Civil rights (e.g., liberty of the person, freedom of faith, right to own property) were the first to come; Marshall dates these rights back to the eighteenth century, when modern civil rights had begun to emerge.[25] Political rights (primarily voting rights) were added in the nineteenth century.[26] In the twentieth century and inspired by "the modern drive towards social equality,"[27] citizenship came to also include social rights, ranging "from the right to a modicum of economic welfare and security to

21. *But see* WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE" (2001); THE POWER OF HUMAN RIGHTS. INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999); Langford, *supra* note 20.

22. MARSHALL, *supra* note 3.

23. Marshall speaks of "parts," "elements," or "strands" of citizenship when describing and analyzing the content of citizenship. MARSHALL, *supra* note 3, at 10–11.

24. According to Marshall, the early twentieth century witnessed "the latest phase of an evolution of citizenship which has been in continuous progress for some 250 years." MARSHALL, *supra* note 3, at 10.

25. *Id*. at 14, 21, 41.

26. *Id*. at 14, 19.

27. *Id.* at 10.

the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society."[28]

For the purposes of this Part of the Article, the most interesting part of Marshall's essay is how he characterizes "rights." Four characteristics seem pertinent. First, unlike entitlements prevailing in the pre-modern era, citizenship rights do not relate to birth or class.[29] The rights are created, not god-given or inferred from reason. Secondly, the rights are individual rights, bestowed upon singular human beings (not upon groups or on account of group membership).[30] Thirdly, the rights are believed to be equal, i.e., the same for all who are full members of the community of citizens.[31] In other words, the rights are not *a priori* different for different societal strata, although some rights may depend on age, competence, or qualification, and although the actual rights of "rights holder A" might differ from the rights of "rights holder B" (e.g., because A owns property, while B does not). Marshall speaks of "a kind of basic human equality"[32] deemed compatible with social inequality caused by unequal abilities or fortune.[33] Fourthly, the rights Marshall conceptualized are bound to the state level.[34] Citizenship rights are fought for on the state level and granted by the nation state, the entity empowered to decide who is—via citizenship—included as citizen or, as non-citizen, excluded.

At the time of Marshall's writing, initiatives for the creation of an international human rights regime were well underway.[35] From early 1946

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28. *Id*. at 10–11.

29. Marshall made a strict difference between membership in a feudal society and modern citizenship. *Id*. at 12.

30. Marshall clearly envisioned individualized rights when he talked about citizenship rights. *See id.* at 12 ("civil rights of the individual"), 17 ("individual economic freedom"), 20 ("manhood suffrage"), 22 ("right to work where and at what you pleased under a contract of your own making").

31. "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed." *Id.* at 28.

32. *Id*. at 8.

33. Marshall deemed citizenship to be compatible with the inequalities instituted and generated by social class. For Marshall, citizenship implied equality in some respects ("basic equality"); in certain other respects, however, citizenship itself was considered "the architect of legitimate social inequality." *Id*. at 9.

34. "[The] citizenship whose history I want to trace is, by definition, national." *Id.* at 12.

35. For a historical overview on initiatives and post-war human rights lawmaking see A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 157 (2001); PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 135 (2d ed. 2003). For a contemporary legal perspective see HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (1945); Eleanor Roosevelt, *The Promise of Human Rights*, 26 FOREIGN AFF. 470 (1948); Benjamin V. Cohen, *Human Rights Under the United Nations Charter*, 14 L. & CONTEMP. PROBS. 430 (1949); Sanford Fawcett, *A British View of the Covenant*, 14 L. & CONTEMP. PROBS. 438 (1949); Arthur N. Holcombe, *The Covenant on Human*

through December 1948, U.N. forums negotiated on the text of the first catalogue of human rights ever agreed upon beyond the nation state, solemnly proclaimed as the "Universal Declaration of Human Rights" on December 10, 1948.[36] From 1949 through 1966, U.N. organs dealt with the texts of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, international treaties meant to be binding for member states and to complete the envisaged International Bill of Rights.[37] Still, Marshall chose to ignore the international dimension of rights, as did many other sociologists.[38] Some sociologists, however, take a skeptical stand. Bryan S. Turner, for example, proceeds from the assumption that human rights imply a universalistic human ontology that would be difficult to accept for sociologists.[39] For sociologists, so he claims, "a sociology of citizenship has functioned as a substitute for a sociology of rights."[40] Turner views "citizenship" and "human rights" as clearly opposed. Turner describes citizenship as culturally specific to

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Rights, 14 L. & CONTEMP. PROBS. 413 (1949); Frank E. Holman, *International Proposals Affecting So-Called Human Rights*, 14 L. & CONTEMP. PROBS. 479 (1949); HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION AND INTERPRETATION (1958); JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE (1984).

36. At its first session from January 23 through February 18, 1946, the ECOSOC established a "nucleus" Commission on Human Rights; at its second session from May 25 to June 21, 1946, the ECOSOC adopted the terms of reference for the (full) commission. Rep. of the Econ. & Soc. Council, Jan. 23–Feb. 18, May 25–June 21, Sept. 11–Oct. 3, 1946, ¶¶ 6, 46, U.N. Doc. A/125 (Oct. 21, 1946). The terms of reference for the Commission on Human Rights included, *inter alia*, to submit proposals, recommendations and reports to the ECOSOC regarding an "international bill of rights." *Id*. ¶ 47. From early on, there was consensus among the delegates to the Commission on Human Rights that the "international bill of rights" should first take the form of a—legally non-binding—resolution to be submitted to and approved by the U.N. General Assembly. *See* Rep. of the Comm'n on Human Rights, 1st Sess., Jan. 27–Feb. 10, 1947, ¶ 12, U.N. Doc. E/259 (1947). The Commission on Human Rights finished its preparatory work on the draft Declaration in the summer of 1948. *See* Rep. of the Comm'n on Human Rights, 3d Sess., May 24–June 18, 1948, U.N. Doc. E/800 (June 28, 1948).

37. Deliberations in the Commission on Human Rights on what would become the ICCPR, the ICESCR, and the ICCPR-OP continued until the spring of 1954. See the final drafts in Rep. of the Comm'n on Human Rights, 10th Sess., Feb. 23—April 16, 1954, U.N. Doc. E/2573 (April 1954). Thereafter, the drafts were dealt with by the ECOSOC and the General Assembly. The drafts were eventually adopted by the General Assembly on December 16, 1966. G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200(XXI) (Jan. 1, 1967).

38. *See*, *e.g*., Michael Ignatieff, *The Myth of Citizenship*, 12 QUEEN'S L.J. 399 (1987) (using an ideal type of citizenship to criticize neo-liberal thinking as an attack on national citizenship rights); Michael Mann, *Ruling Class Strategies and Citizenship*, 21 SOC. 339 (1987) (pointing to some shortcomings of Marshall's theory from the perspective of comparative historical analysis of nation-states). *See also* Rhiannon Morgan, *Introduction: Human Rights Research and the Social Sciences*, *in* INTERPRETING HUMAN RIGHTS: SOCIAL SCIENCE PERSPECTIVES 1 (Rhiannon Morgan & Bryan S. Turner eds., 2009) (generally reflecting on the neglect of human rights in the social sciences).

39. Bryan S. Turner, *Outline of a Theory of Human Rights*, 27 SOC. 489, 495–96 (1993).

40. *Id*. at 496.

Western traditions,[41] as bound to the nation-state,[42] and as contingent.[43] Human rights, on the other hand, are supposed to be universal, not tied to the nation-state, and progressive.[44] Yet, even though Turner favors citizenship, he accepts human rights as "a necessary supplement to citizenship."[45] Human rights, he contends, may be useful to counterbalance the erosion of citizenship on the state level and to protect against state power.[46] Kate Nash, another prominent critic, asserts that human rights fail to effectively protect the weak.[47] Nash concedes that, nowadays, human rights are no longer mere aspirations, but legalized through binding international treaties and, therefore, part of what could be called "cosmopolitan law," i.e., law guaranteeing rights regardless of (national) citizenship status.[48] Nash is nonetheless suspicious of human rights because, in practice, human rights would contribute to "the institutionalization of new and very complex inequalities"[49] and to a protracted "complication of citizenship."[50] Nash contends in particular that "a proliferation of statuses" is being "produced out of the interplay of citizenship and human rights."[51] In her analysis of the different types of status produced by the interplay of citizenship and human rights, she makes out five classes of citizens: super-citizens, marginal citizens, quasi-citizens, sub-citizens, and un-citizens.[52] According to Nash, the group of super-citizens consists of highly mobile citizens in secure employment able to move freely across borders.[53] Marginal citizens are citizens who could not enjoy full citizenship on account of poverty or racial discrimination.[54] Quasi-citizens are resident denizens whose status remains precarious.[55] Sub-citizens are non-citizens who are not allowed to have paid employment and are denied access to state benefits (e.g., asylum

41. *Id*.
42. *Id*. at 497.
43. *Id*. at 498.
44. *Id*.
45. Bryan S. Turner, *Preface*, *in* CITIZENSHIP AND SOCIAL THEORY ix (Bryan S. Turner ed., 1993).
46. *See* Bryan S. Turner, *A Sociology of Citizenship and Human Rights: Does Social Theory still Exist?*, *in* INTERPRETING HUMAN RIGHTS: SOCIAL SCIENCES PERSPECTIVES, *supra* note 38, at 177, 184–85.
47. Kate Nash, *Between Citizenship and Human Rights*, 43 SOC. 1067, 1075 (2009).
48. *Id*. at 1070–71.
49. *Id*. at 1070.
50. *Id*.
51. *Id*. at 1072.
52. *Id*. at 1073.
53. *Id*.
54. *Id*.
55. *Id*. at 1076–78.

seekers).[56] Finally, the group of un-citizens comprises undocumented migrants or people detained in "non-places," such as Guantanamo Bay.[57] For most of these more or less unfortunate classes of citizens, human rights would simply be irrelevant.[58]

The reasons given for keeping citizenship and human rights separate or for being suspicious of human rights are not very forceful in either Turner's or Nash's contentions. Turner's assumption that theorizing human rights presupposes a universalistic human ontology is simply an overstatement. A sociological theory concentrating on human rights law as a starting point avoids these difficulties.[59] Turner's juxtapositions are even more problematic. Human rights are also frequently classified as "Western" by a wide range of scholars.[60] Human rights are also tied to the nation-state,[61] and human rights are also historically contingent.[62] Nash's objections are not convincing either. It might be true that there is a recent proliferation of statuses instead of an equalization of the rights of nationals and non-nationals. But these inequalities can hardly be attributed to human rights law. Very often, the inferior status of non-nationals (and also of nationals) is created by state action that contradicts constitutional guarantees or international human rights law. The United States, for example, faces strong criticism by national courts and relevant human rights treaty bodies under the ICCPR or the Committee Against Torture (CAT) for detaining suspects indefinitely and without access to an adequate remedy at Guantanamo Bay or other theaters of armed conflict, such as Iraq or Afghanistan.[63] A more convincing objection is that human

56. *Id*. at 1078.

57. *Id*. at 1078–79.

58. *Id.* at 1075.

59. ANTHONY WOODIWISS, MAKING HUMAN RIGHTS WORK GLOBALLY 15 (2003).

60. *See, e.g.*, R. Panikkar, *Is the Notion of Human Rights a Western Concept?*, 30 DIOGENES 75 (1982); Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303 (1982); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984); Abdullahi An-Na'Im, *What Do We Mean by Universal?*, 4/5 INDEX ON CENSORSHIP 120 (1994); Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000); Anthony Woodiwiss, *Human Rights and the Challenge of Cosmopolitanism*, 19 THEORY, CULTURE & SOC. 139 (2002).

61. *See infra* Part III.

62. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010) (contending that, historically, there is not one universalism of rights, but only a rivalry of universalisms).

63. For criticisms on the national level, see, in particular, the opinion of the U.S. Supreme Court in Boumediene v. Bush, 553 U.S. 723 (2008) (confirming that detainees held at Guantanamo Bay have the constitutional privilege of habeas corpus enabling them to contest the lawfulness of their detention); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that newly established military

rights do not sufficiently protect certain groups from being marginalized, because pertinent norms are missing or ineffective. However, the lack of norms does not (necessarily) invalidate the protection afforded by existing norms. And ineffectiveness is a problem, for human rights law and for citizenship. The effectiveness of international human rights as well as of national citizenship rights depends on the existence of legal norms, institutions, the commitment of state organs to favor law over politics, and a cultural environment that is conducive to adherence to international and domestic rights.[64]

B. Moving Forward: "Layered" Citizenship

This Article proposes to fill in Marshall's blind spot and, when conceptualizing citizenship, to acknowledge that "rights" have been adopted into international law, primarily through the ICCPR and the ICESCR as the main pillars of the International Bill of Rights, but also by

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commissions were deficient from the perspective of national law and international humanitarian law); Rasul v. Bush, 542 U.S. 466 (2004) (holding that statutory law conferred on the district court jurisdiction to hear habeas corpus challenges by non-nationals detained at the Naval Base at Guantanamo Bay); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (emphasizing that the citizen-detainee, seeking to challenge his classification as an enemy combatant, was entitled to receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker). For an overview on domestic legal debates see Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805 (2007); James Park, *Effectuating Principles of Justice in Ending Indefinite Detention: Historical Repetition and the Case of the Uyghurs*, 31 WHITTIER L. REV. 785 (2010); Susan Akram, *Do Constitutions Make a Difference as Regards the Protection of Fundamental Human Rights? Comparing the United States and Israel*, *in* THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION 89 (Morly Frishman & Sam Muller eds., 2010); Kristine A. Huskey, *Guantanamo and Beyond: Reflections on the Past, Present and Future of Preventive Detention*, 9 U.N.H. L. REV. 183 (2011); Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Rules of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173 (2012). On the international level, the indefinite detention without charges of "unlawful enemy combatants" and under circumstances involving allegations of maltreatment was reproached by both the review committee under the ICCPR and the review committee under CAT. *See* Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm., United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), and Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (rejecting the contention put forward by the Bush administration that human rights lacked applicability outside the territory of the United States).

64. On processes of "internalization" and compliance see generally Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599 (1997) (stressing transnational interactions between states and non-state actors conducive to obedience and rule compliance); Kiyoteru Tsutsui & Hwa Ji Shin, *Global Norms, Local Activism, and Social Movement Outcomes: Global Human Rights and Resident Koreans in Japan*, 55 SOC. PROBS. 391 (2008) (emphasizing the importance of local social movements).

subsequent U.N. human rights treaties focusing on individuals or groups deemed particularly vulnerable, such as individuals discriminated against on account of race, color, descent or national or ethnic origin,[65] women,[66] children,[67] migrant workers,[68] and people with disabilities.[69] Prima facie, these rights share the basic characteristics of citizenship rights described by Marshall; they are framed as individual rights, they are instituted by international lawmakers, and they are, basically, equal rights. The existence of (international) human rights law may have important bearings on the concept of citizenship.

First, and generally, states are no longer the sole creators of citizenship rights, and they are no longer free to decide on whether or not they want to grant rights. Instead, states may be obliged by human rights law to accord certain rights (such as property rights, the right to marry, or freedom of religion) or to ensure certain institutional outcomes sketched by international human rights treaties (such as the availability of effective remedies or of affordable housing), a situation often described as a loss of sovereignty.[70] From the individual perspective, one could poignantly say, "[i]nternationally based citizenship entails the right to have rights," to pick up on Hannah Arendt's famous dictum.[71] Given the state of international law, however, this right is—on the global level—not enforceable through international litigation initiated by the individuals concerned. An international court of human rights has not (yet) been established. The term "human rights" rather denotes duties of states backed by an international control mechanism operating independently of individual complaints, such as state reporting and monitoring by a panel of independent experts; more and more frequently, however, that basic

65. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD] (obliging states to pursue a policy of elimination of racial discrimination, in particular to eradicate racial segregation and apartheid).

66. CEDAW, *supra* note 16 (obliging states to pursue a policy of eliminating discrimination against women, *inter alia*, by embodying the principle of the equality of men and women in their national constitutions or other appropriate legislations or other means).

67. CRC, *supra* note 16 (specifying the rights proclaimed in the International Bill of Rights for "every human being below the age of eighteen years").

68. ICRMW, *supra* note 16 (obliging states to grant certain rights to migrant workers).

69. CRPD, *supra* note 16 (obliging states to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity).

70. *See, e.g.*, Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001*, 23 SOC. FORUM 724, 725 (2008). *See also* Bosniak, *supra* note 8, at 1001 (contending that citizenship is taking increasingly "postnational" form).

71. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1958).

mechanism is supplemented by a mechanism involving the assessment of individual cases.[72] The lack of enforceability has led legal scholars to question whether human rights are indeed rights in a legal sense.[73]

Secondly, states have nonetheless not been dethroned when it comes to defining citizenship rights. Human rights law circumscribes what states owe to individuals in a very rudimentary manner; often, human rights language deliberately allows for differing interpretations when states move to fulfil the promises made by human rights provisions.[74] Still, discretion of the implementing states is not unlimited. When adhering to international human rights treaties, states accept some form of external review. At the very least, states agree to regularly report to committees composed of experts and to engage with their "observations."[75] States may also accept a mechanism allowing for individual complaints that may lead to (non-judicial) "views" by the committees.[76] Either way, reviewing

72. On the mechanisms securing the implementation of U.N.-sponsored human rights by the states parties, see *supra* note 17. The assessment of an individual case usually starts with a "communication" lodged by the individual concerned. After the examination of the case, the reviewing committee issues a "view." These views are not legally binding for the parties involved. On the complaints procedure and the legal character of the "view," see CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 220 (2d ed. 2008); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 894 (2d ed. 2005).

73. See, in particular, the early contributions to the discussion by E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 73–74 (1978) (stressing that "real rights" presuppose enforceability in a court of law); Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425, 438–446 (1979) (cautioning against too narrow a notion of "rights" and suggesting to also accept claims as deriving from legal rights when the claims are recognized by law as valid and bolstered by remedies in the hands of other forces, such as states or reviewing committees).

74. Economic and social rights are, by their very nature, deemed to escape attempts to formulate their content with precision. *See, e.g.*, Myres S. McDougal & Gerhard Bebr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603, 620 (1964). Yet even civil and political rights sometimes resort to vague and ambiguous language and, hence, need to be interpreted and concretized, for instance, by the states parties to the ICCPR that seek to implement these rights in their various domestic venues. On the states' responsibilities in the context of implementation (and their discretion), see generally WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 125, 184 (2009).

75. *See* ICCPR, *supra* note 17, arts. 28, 40; ICESCR, *supra* note 14, arts. 16, 23; and ESC Res. 1985/17, Resolutions & Decisions of the Econ. & Soc. Council Supp. No. 1, U.N. Doc. E/1985/85 at 15 (1986). The documents establishing the reviewing committees under the ICCPR and the ICESCR did not explicitly envisage the committees formally adopting "concluding observations" when reviewing state party reports. At the beginning of the 1990s, however, the adoption of "concluding observations" was already a common practice. For the committee under ICESCR see Comm. on Econ., Soc. & Cultural Rights, Rep. on its 5th Sess., Nov. 26—Dec. 14, 1990, ¶¶ 20–46, U.N. Doc. E/1991/23 (1990) (giving a detailed account on the working methods of the committee).

76. For the rights laid down by the ICCPR, see ICCPR-OP, *supra* note 17, art. 5.

committees may, following their own interpretation, criticize state practice as incompatible with human rights law.[77]

Hence, citizenship is best conceptualized as "layered." In so far as international human rights treaties embody individual rights, they are the same for all human beings staying in the territories of member states. And, since U.N.-sponsored human rights treaties are by now almost global in scope, the international layer of citizenship is close to universal, some important non-ratifiers notwithstanding.[78] The international layer of citizenship may then be complemented by a national layer of rights. The national layer includes the rights states create in the process of implementation. The committees under the ICCPR and the ICESCR insist that these rights be, in principle, enforceable by (national) courts.[79]

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77. The reporting mechanisms established by human rights treaties are generally thought to be ineffective in comparison to remedies involving court litigation, such as the remedy available under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 (application to the European Court of Human Rights). That assumption, however, proves quite doubtful when tested against the willingness of states to comply with the rulings of the European Court of Human Rights. *See* Ulrike Davy, *Welche rechtlichen Grundregeln müssen für einen wirksamen Menschenrechtsschutz gelten? Bedeutung gerichtlicher und außergerichtlicher Schutzverfahren [What are the prerequisites for an effective human rights protection]*, *in* GRUND-RECHTSMONITORING. CHANCEN UND GRENZEN AUSSERGERICHTLICHEN MENSCHENRECHTSSCHUTZES [HUMAN RIGHTS MONITORING. PR0S AND CONS OF A NON-JUDICIAL MECHANISM FOR THE PROTECTION OF HUMAN RIGHTS] 238 (Christoph Gusy ed., 2011) (exploring arguments and giving empirical details on reporting mechanisms and individual complaint procedures).

78. The number of ICCPR member states, for instance, reaches 167; the number of the ICESCR states parties equals 161. *See* U.N. Secretary-General, *Multilateral Treaties Deposited with the Secretary-General Ch. IV: Human Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en (last visited Mar. 30, 2014). The United States, South Africa, Mozambique, Botswana, Oman, Saudi Arabia, Qatar, the United Arab Emirates, Malaysia, Myanmar, and Cuba stand out among the ICESCR-non-ratifiers. The ICERD is, as of now, ratified by 176 states; CEDAW has 187 states parties; the number of the states parties of CRC reaches 193; the ICRMW has been ratified by 46 states; and the membership count of the most recent human rights treaty—the CRPD—is already 138. *Id.*

79. Human Rights Comm., General Comment No. 31 on the Nature of the General Obligation Imposed on States Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (elaborating on the nature of the general legal obligation imposed on states parties to the Covenant, finding that the ICCPR includes a duty of the states parties to ensure that individuals have accessible and effective remedies to vindicate their rights in the domestic sphere); General Comment No. 3 on the Nature of States Parties Obligations, ¶ 5 (Dec. 11, 1990) (underlining the importance of judicial remedies for the appropriate promotion of economic, social and cultural rights), *in* Comm. on Econ., Soc. & Cultural Rights, Rep. on its 5th Sess., Nov. 26–Dec. 14, 1990, at 83, U.N. Doc. E/1991/23 (1991).

II. HUMAN RIGHTS LAWMAKING: SOCIAL CITIZENSHIP GOING INTERNATIONAL?

This Part of the Article turns from theorizing citizenship to human rights law—more specifically, to U.N.-sponsored economic and social rights—and it does so from the perspective of citizenship. When economic and social rights were incorporated into the first human rights catalogs (UDHR, ICESCR), the rights were considered to be "new" rights compared to civil and political rights and their longstanding history.[80] This Article asks: Are U.N.-sponsored economic and social rights the international layer of "social citizenship," or, put differently, do U.N.-sponsored economic and social rights oblige states to grant rights qualifying for "social citizenship"? A layered concept of citizenship indeed suggests *prima facie* that U.N.-sponsored economic and social rights have implications for social citizenship. The substantive articles of the ICESCR constantly refer to "rights." The right to work, for instance, is a "right of everyone."[81] The same holds true for the right to the enjoyment of just and favorable conditions of work,[82] the right to social security,[83] or the right to an adequate standard of living.[84] Yet what the implications are is far from obvious. Human rights language may be deceptive. For one, the notion of social citizenship usually captures the emergence of the European welfare state early in the twentieth century.[85] It seems improbable that a Western-born idea simply travelled to the international level. For another, it is to be expected that the formulas adopted for circumscribing economic and social rights are particularly broad in meaning. States were deeply at odds over these rights when the texts were negotiated.[86] A proper answer to the question hence requires an investigation into, first, the concept of "social citizenship" and, second, the

80. Hernan Santa Cruz, delegate of Chile to the Commission on Human Rights, was one of the most persistent champions for the insertion of economic and social rights into the International Bill of Human Rights. As early as the summer of 1947, Santa Cruz insisted that the UDHR "should include all the points that humanity expects to be included at this point of our history," and that meant, in particular, "that economic and social rights be assured." Drafting Committee on an International Bill of Human Rights, 7th mtg. at 3, U.N. Doc. E/CN.4/AC.1/SR.7 (June 17, 1947).

81. ICESCR art. 6

82. *Id.* art. 7.

83. *Id.* art. 9.

84. *Id.* art. 11.

85. *See, e.g.*, FRANZ-XAVER KAUFMANN, *Introduction: A Sociological Perspective*, *in* EUROPEAN FOUNDATIONS OF THE WELFARE STATE, *supra* note 13, at 1, 20, 28.

86. For an overview on the debates leading up to the adoption of the UDHR, see JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT 157, 191 (1999).

rights language of the ICESCR and the UDHR, which is, in its historical dimension, accessible through the *travaux préparatoires*.

A. Social Citizenship

To better grasp the meaning of "social citizenship," it seems helpful to go back to Marshall's essay on citizenship and social class.[87] According to Marshall, social rights were late-comers on the national level; they were introduced only after civil and political rights had already been guaranteed—in particular, after the working class had gained voting rights.[88] Social rights imply what Marshall called an "absolute right" to a certain standard of civilization (provided for by the state).[89] The rights do not depend on the economic value of the claimant.[90] On the contrary, social rights in their modern form are deemed to "imply an invasion of contract by status" and to symbolize the "subordination of market price to social justice, the replacement of the free bargain by the declaration of rights."[91] In their normative background, Marshall asserted, social rights differed significantly from the old poor laws of the sixteenth and seventeenth centuries.[92] From the perspective of the poor laws, poverty was an irritation of the good order. Poor laws were about abating "the nuisance of poverty without disturbing the pattern of inequality of which poverty was the most obvious unpleasant consequence."[93] Social rights—that is, Marshall's contention—were based on a different understanding of equality. Social rights became a political issue when the (normative) idea of equality had come to encompass not just formal legal equality, but also socioeconomic equality; social rights signify the "abolition" of inequality, at least with respect to "the essentials of social welfare."[94] Marshall expected social rights to have the potential for far-reaching consequences: the aim of social rights was not only to raise the "floor-level in the basement of the social edifice," but to "remodel the whole building."[95] Politically, Marshall attributed social rights to the struggle of workers for more equality, a struggle that began when citizenship and capitalism had

87. MARSHALL, *supra* note 3.
88. *Id*. at 46–47.
89. *Id*. at 43.
90. *Id.*
91. *Id*. at 68.
92. *Id.* at 22–24.
93. *Id*. at 46.
94. *Id*. at 47.
95. *Id*.

come to be perceived as opposing concepts, with citizenship promising equality and capitalism furthering inequality.[96]

Marshall's picture of social rights is clearly marred by historical contingencies. That is true for the alleged order of the emergence of civil, political, and social rights, the contention that social rights coincided with the rise of a powerful labor movement, and the assumption that social rights were intrinsically linked to developing capitalist economies first as friends, then as foes. All of this may be correct for Great Britain at the turn of the nineteenth century.[97] Marshall's account certainly does not capture the situation of the global players engaging in human rights lawmaking after 1945. Therefore, this Article proceeds from a definition that retains just three (more abstract) elements of Marshall's description. Social rights constituting social citizenship principally envision individuals as rights holders, not groups (though they may include trade union rights); the duty to fulfil the right is on the side of the state, though the state may, when fulfilling those rights, create duties for employers, trade unions, providers of health services, or even family members; the rights aim at moderating inequalities, especially in the socioeconomic sphere; the rights are embedded in some notion of social justice calling for more equality; the rights bypass the laws of the market; and the rights are not accorded on account of the market-value of the rights holder's labor.

The definition discards the contingencies of Marshall's concept, yet still retains the main characteristics of social policy under the Western welfare state Marshall had in mind when elaborating on "social citizenship."[98] Do the rights enshrined in human rights law imply such a notion of social citizenship?

B. Economic and Social Rights: The Making of the UDHR

U.N. forums dealt with the three pillars of the International Bill of Rights—UDHR, ICCPR, and ICESCR—between February 1946 and December 1966. In February 1946, a nucleus Commission on Human

96. *Id.* at 29.

97. The historical accuracy of Marshall's account is, in fact, contested. *See, e.g.*, Mann, *supra* note 38 (giving a more differentiated picture of the emergence of modern citizenship). I do not want to go into the details of accuracy here.

98. For a detailed (theoretical and comparative) analysis of the various Western welfare regimes see FRANZ-XAVER KAUFMANN, VARIATIONS OF THE WELFARE STATE: GREAT BRITAIN, SWEDEN, FRANCE AND GERMANY BETWEEN CAPITALISM AND SOCIALISM 28–45 (Springer Science+Business Media 2013) (arguing that welfare states are primarily characterized by a politics of inclusion, whereby the state resumes a collective responsibility for welfare of the citizens, without abolishing the market forces).

Rights was established.[99] Based on the report of the commission,[100] the U.N. Economic and Social Council (ECOSOC) transformed the nucleus commission into the regular eighteen-member Commission on Human Rights in June 1946.[101] In December 1966, the Covenants were finally adopted by the U.N. General Assembly.[102] Most of the hard drafting work took place in the Commission on Human Rights. From the spring of 1946 through the end of 1948, the Commission on Human Rights dedicated a great deal of time to discussing drafts and compromise formulas with respect to the text of the UDHR.[103] From 1949 through the spring of 1954, the Commission on Human Rights debated and finalized the drafts of the Covenants.[104]

From early on, the members of the Commission on Human Rights agreed that the International Bill of Rights would reach beyond the rights traditionally laid down by national rights catalogs—soon to be termed "civil and political rights." The bill was also supposed to include what were called "economic and social rights" or "social rights."[105] The reasons given for the inclusion of this new set of rights remained rather vague, though. Economic and social rights were simply thought to symbolize a "stage in development" (per René Cassin of France),[106] "modernity" or

99. ESC Res. 5 (I), U.N. Doc. E/27 (Feb. 16, 1946) (establishing a Commission on Human Rights and a Sub-Commission on the Status of Women).

100. Rep. of the Comm'n on Human Rights, Apr. 29–May 20, 1946, U.N. Doc. E/38/Rev.1 (May 21, 1946).

101. ESC Res. 9 (II), U.N. Doc. E/56/Rev.2 (July 1, 1946) (on the Commission on Human Rights).

102. The texts of the ICESCR, the ICCPR, and the ICCPR-OP were adopted by resolution of the General Assembly on December 16, 1966. *See* G.A. Res. 2200 (XXI), *supra* note 37.

103. So far, the most comprehensive historical account is provided by MORSINK, *supra* note 86. *See also* Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44 (2001) (arguing that the main narrative of the human rights historiography neglects the contributions of small states); Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23 THIRD WORLD Q. 437 (2002) (deconstructing four myths relating to the political history of the UDHR); MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001) (elaborating on the personal contributions of the main actors in the relevant U.N. forums); ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008) (giving a political and historical overview on the emergence and the development of the human rights movement in the twentieth century).

104. See the final drafts in Rep. of the Comm'n on Human Rights, *supra* note 37, at 62, 65.

105. In December 1947, the Commission on Human Rights decided, based on a report of its Drafting Committee, to proceed to the consideration of all suggested draft articles, including articles pertaining to the right to work, the right to good working conditions, the right to rest and leisure, the right to health, and the right to social security. Comm'n on Human Rights, Rep. on its 2d Sess., Dec. 2–17, 1947, at 4, U.N. Doc. E/600 (Dec. 17, 1947); Drafting Committee on an International Bill of Human Rights, *supra* note 16.

106. Comm'n on Human Rights, 72d mtg. at 8, U.N. Doc. E/CN.4/SR.72 (June 14, 1948)

"progress" (per Enrique V. Corominas of Argentina),[107] or were accepted because personal liberty required some form of economic security (per Eleanor Roosevelt of the United States of America).[108] Still, reaching consensus on how to formulate these rights proved difficult. The various positions put forward in the debates can clearly be attributed to four groups of states, and each group had a distinct take on economic and social rights. The groups encompass the Latin American states, the United States and its Western European allies, the Eastern European countries, and the Arab and Asian states.

The Latin American states were the first to make a strong move in favor of a new set of rights. Cuba submitted a draft in February 1946,[109] Panama followed suit in October 1946,[110] and Chile in January 1947.[111] The Latin American move was obviously inspired by newly enacted Latin American constitutions that the delegates deemed more advanced than the United States or the European constitutions.[112] The early twentieth century Latin American constitutions had indeed struck a quite unique balance between liberalism and socialism.[113] The Latin American constitutions contained civil and political rights, allowing for and framing "the market" for goods and services. The (traditional) rights were then supplemented by policy goals and a set of rights that were "social" in the Marshallian

(addressing social security: "[Social security] represented a stage in human development; its inclusion would strengthen the whole document.").

107. U.N. GAOR, 3d Sess., 89th mtg. at 35 (Sep. 30, 1948).

108. Comm'n on Human Rights, 3d Sess., 64th mtg. at 5, U.N. Doc. E/CN.4/SR.64 (June 8, 1948).

109. Comm'n on Human Rights, Draft Declaration on Human Rights, transmitted by letter dated Feb. 12, 1946, from the Cuban Delegation to the President of the Economic and Social Council, U.N. Doc. E/HR/1 (Apr. 22, 1946) [hereinafter CUBAN DRAFT].

110. U.N. General Assembly, Statement of Essential Human Rights Presented by the Delegation of Panama, U.N. Doc. A/148 (Oct. 24, 1946) [hereinafter PANAMANIAN DRAFT].

111. Inter-American Juridical Committee, Draft Declaration of the International Rights and Duties of Man, Submitted by the Delegation of Chile, U.N. Doc. E/CN.4/2 (Jan. 8, 1947) [hereinafter CHILEAN DRAFT]. The Chilean proposal was an early draft of the American Declaration of the Rights and Duties of Man. The declaration was eventually adopted by the Ninth International Conference of American States at Bogotá, Colombia, on May 2, 1948, *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949) and Comm'n on Human Rights, American Declaration of the Rights and Duties of Man, U.N. Doc. E/CN.4/122 (June 10, 1948).

112. *See* Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27 (2003) (tracing the ideational backgrounds of the Latin American drafts).

113. *See* Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281 (2003) (arguing that the Latin American human rights movement of the early twentieth century had its own genuine outlook drawing on humanism, foreign labor legislation, and Catholic social doctrines, the importance of French and United States models notwithstanding).

sense.[114] Some examples may illustrate these pioneering constitutional "goals" and "rights."

A number of Latin American constitutions explicitly promised to the people the continuous betterment of their living conditions, a goal—later epitomized in the concept of development[115]—envisioning collective welfare, to be realized through increasing levels of production or employment or the advancement of infrastructure. Under the heading "Social Guarantees," the 1871 Constitution of Costa Rica (as amended in 1944), for instance, promised in article 51: "The state will work for the greatest well-being of Costa-Ricans, protecting in a special way the family, the basis of the Nation; . . . organizing and stimulating production and the most adequate distribution of wealth."[116] The 1945 Constitution of Guatemala opened the chapter on "Individual and Social Guarantees" by declaring in article 22: "It is a function of the State to conserve and improve the general conditions of the nation, to procure the well-being of its inhabitants and to increase wealth by means of the creation and encouragement of institutions of credit and social welfare."[117] These articles testify to (an assumed) state responsibility with respect to the "social welfare" of all residents or to "social justice," notions that later reoccurred in the 1986 Declaration on the Right to Development.[118]

The early twentieth century Latin American constitutions also enshrined individualized rights that were, in U.N. parlance, economic and social rights.[119] The 1940 Constitution of Cuba,[120] for instance, included a

114. On the notion of social citizenship *see supra* Part II.A.

115. "Development" became a human rights law issue only in the late 1970s, not earlier. See the first reference to a "right to development" in the Commission on Human Rights during a debate on the question of the realization of the economic, social, and cultural rights contained in the UDHR and the ICESCR, in Comm'n on Human Rights, Rep. on its 33d Session, Feb. 7–Mar. 11, 1977, 11, U.N. Doc. E/5927 (1977).

116. CONSTITUCIÓN POLÍTICA DE COSTA RICA DE 1871, art. 51, *translated in* AMOS J. PEASLEE, I CONSTITUTIONS OF NATIONS: THE FIRST COMPILATION IN THE ENGLISH LANGUAGE OF THE TEXTS OF THE CONSTITUTIONS OF THE VARIOUS NATIONS OF THE WORLD, TOGETHER WITH SUMMARIES, ANNOTATIONS, BIBLIOGRAPHIES, AND COMPARATIVE TABLES 503, 507 (1950).

117. CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA DE 1945, art. 22, *translated in* AMOS J. PEASLEE, II CONSTITUTIONS OF NATIONS: THE FIRST COMPILATION IN THE ENGLISH LANGUAGE OF THE TEXTS OF THE CONSTITUTIONS OF THE VARIOUS NATIONS OF THE WORLD, TOGETHER WITH SUMMARIES, ANNOTATIONS, BIBLIOGRAPHIES, AND COMPARATIVE TABLES 71, 74 (1950).

118. See Declaration on the Right to Development, G.A. Res. 41/128, art. 2(3), U.N. Doc. A/RES/41/128 (Dec. 4, 1986) (declaring that states have the right and duty to formulate policies that "aim at the constant improvement of the well-being of the entire population and of all individuals").

119. Latin American constitutions of that time often "constitutionalized" principles or standards that had, at that time, already been enacted through an extensive body of (non-constitutional) legislation promoted by the International Labor Organization (ILO). *See* A. Tixier, *The Development of Social Insurance in Argentina, Brazil, Chile, and Uruguay*, 32 INT'L LAB. REV. 610, 751 (1935);

"title" on "labour and property." Article 60 of the Cuban Constitution read: "Labour is an inalienable right of the individual."[121] Article 61 promised a minimum wage, stating: "Every . . . worker . . . shall be guaranteed a minimum wage or salary."[122] Article 66 proscribed that a "maximum day's work cannot exceed eight hours."[123] And Article 65 of the Cuban Constitution stated: "Social security is established as . . . [a] right of workers . . . in order to protect [them] . . . against disability, old age, unemployment, and other contingencies of labour."[124] The 1886 Constitution of Colombia (as amended in 1945) even promised some kind of social assistance for the destitute, declaring in its section on "Civil Rights and Social Guarantees" in article 19: "Public aid is a function of the state. It must be given to those who, lacking the means of subsistence and the right to demand it of other persons, are physically unable to work."[125] All these constitutional rights envision individuals as rights holders; the rights were introduced in the course of the Latin American revolutions of the early twentieth century, aimed at pacifying the rural poor and the urban working class (the rights promise more equality); and the rights are not strictly dependent on the holders' participation in the workforce.

The Latin American drafts tabled at the U.N. level in the mid-1940s mirrored these constitutional provisions and the ongoing regional debates on the draft Declaration of the Rights and Duties of Man, eventually adopted by the Organization of American States in Bogotá on May 2, 1948.[126] Cuba, Panama, and Chile proposed to proclaim a right to work and a right to social security. The proclamation was to be accompanied by a list of state duties. The Chilean draft, for instance, first stated in article XVI: "Every person has the right to social security."[127] The second sentence of the draft article specified what states were supposed to do, stating:

> The state has the duty to assist all persons to attain social security. To this end the state must promote measures of public health and

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D.H. Blelloch, *Latin America and the International Labour Standards*, 43 INT'L LAB. REV. 377 (1941).

120. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CUBA DE 1940, *translated in* PEASLEE, *supra* note 116, at 526.

121. *Id*. at 537.

122. *Id*.

123. *Id*. at 538.

124. *Id*.

125. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COLOMBIA DE 1886, *translated in* PEASLEE, *supra* note 116, at 469, 471.

126. Ninth Int'l Conference of American States, *supra* note 111.

127. CHILEAN DRAFT, *supra* note 111, at 9.

> safety and must establish systems of social insurance and agencies of social cooperation in accordance with which all persons may be assured an adequate standard of living and may be protected against the contingencies of unemployment, accident, disability and ill-health and the eventuality of old age.[128]

Cuba and Panama moreover wanted the International Bill of Rights to include references to adequate food and living conditions, particularly with regard to housing. The list of human rights proposed by Cuba thus included the "right to adequate food," the "right to hygienic living conditions and to clothing suitable for the climate," and the "right to live in surroundings free from avoidable diseases."[129] Panama suggested including an article on "food and housing," stating, first, that "[e]very one has the right to adequate food and housing" and, second, that it is the state's "duty to take such measures as may be necessary to [e]nsure that all its residents have an opportunity to obtain these essentials."[130] The Panamanian delegation left no doubt that this right had developmental implications. A comment attached to the draft referred to a U.N. Conference on Food and Nutrition recommending that states accept their obligation vis-à-vis "their respective peoples and to one another to raise levels of nutrition and standards of living to improve the efficiency of agricultural production and distribution."[131]

Next in line to submit drafts for the International Bill of Rights was the United States, represented by Eleanor Roosevelt, who was also chairing the Commission on Human Rights. Four important U.S. drafts were filed between January and November 1947.[132] The U.S. drafts of 1947 were the first to explicitly use the term "social rights."[133] But the U.S. drafts were

128. *Id*.
129. CUBAN DRAFT, *supra* note 109, at 4.
130. PANAMANIAN DRAFT, *supra* note 110, at 11–12.
131. *Id*. at 12.
132. Comm'n on Human Rights, United States Proposals Regarding an International Bill of Rights, U.N. Doc. E/CN.4/4 (Jan. 28, 1947) [hereinafter January 1947 U.S. Draft]; Comm'n on Human Rights, United States Proposals Regarding an International Bill of Rights, U.N. Doc. E/CN.4/17 (Feb. 6, 1947); Drafting Committee on an International Bill of Rights, United States Suggestions for Redrafts of Certain Articles in the Draft Outline E/CN.4/AC.1/3, U.N. Doc. E/CN.4/AC.1/8 (June 11, 1947); Comm'n on Human Rights, Proposal for a Declaration of Human Rights Submitted by the Representative of the United States on the Commission on Human Rights, U.N. Doc. E/CN.4/36 (Nov. 26, 1947).
133. The January 1947 U.S. Draft suggested considering four categories of rights for their insertion into an international declaration of rights, namely "personal rights" (freedom of speech, religion, and property), "procedural rights" (safeguards for persons accused of a crime), "social rights" (right to employment and social security, right to enjoy minimum standards of economic, social, and

still very different from the Latin American ones. Eleanor Roosevelt was prepared to admit that "[m]en in need were not free men."[134] Yet, she also insisted that the declaration be confined to enunciating rights and not try "to define the methods by which Governments were to ensure the realization of those rights," as the methods would necessarily vary from country to country.[135] U.S. drafts consistently kept to brief statements, stressing individual liberties rather than detailed state duties. The June 1947 draft, already a compromise text, proposed in article 38 the following wording for a "right to economic security":

> Everyone has a right to a decent standard of living; to a fair and equal opportunity to earn a livelihood; to wages and hours and conditions of work calculated to [e]nsure a just share of the benefits of progress to all; and to protection against loss of income on account of disability, unemployment, or old age. It is the duty of the State to undertake measures that will promote full employment and good working conditions; provide protection for wage-earners and dependents against lack of income beyond their control; and assure adequate food, housing, and community services necessary to the well-being of the people.[136]

To some extent, the wording of the June 1947 draft took up the developmental approach of the Latin American countries. The draft talked broadly about the "well-being of the people," it referred to some identifiable rights with respect to labor and to protection against loss of income, and mentioned state duties. Still, the U.S. draft lacked any specification persistently attached to the Latin American drafts, such as a reference to a minimum wage, to trade unions, or to social insurance.

The European countries sided firmly with the United States. Some of the Europeans were even more skeptical than the United States. The representative of the United Kingdom time and again argued that "freedom from want" fell into the competence of specialized U.N. organs, such as the International Labour Organization (ILO) or the Food and Agriculture

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cultural well-being), and "political rights" (right to citizenship and right of citizens to participate in their government). January 1947 U.S. Draft, *supra* note 132, at 2. Mary Ann Glendon attributes the insertion in the United States drafts of social rights mainly to the initiative of Eleanor Roosevelt. GLENDON, *supra* note 103, at 43, 45.

134. Comm'n on Human Rights, 3d Sess., 64th mtg. at 5, U.N. Doc. E/CN.4/SR.64 (June 8, 1948).

135. *Id.*

136. June 1947 U.S. Draft, *supra* note 132, at 6–7.

Organization of the United Nations (FAO),[137] or that economic and social rights were best served through the granting of civil and political rights, primarily the freedom of speech and the right to association.[138] Even René Cassin, representing France and charged with mediating compromises among the delegates, believed that economic and social rights were, by their very nature, more difficult to define than classical rights,[139] and that states would not agree on specifics.[140] In May 1948, India and the United Kingdom launched the shortest of all drafts concerning economic and social rights.[141] The draft suggested replacing three lengthy articles on the right to receive adequate pay, the right to favorable working conditions, the right to join trade unions, the right to the preservation of health through the highest standard of food, clothing, housing, and medical care, and the right to social security with one single article simply stating: "Everyone has the right to a standard of living adequate for health and well-being, including security in the event of unemployment, disability, old age or other lack of livelihood in circumstances beyond his control."[142]

Contrary to popular belief, the Eastern European countries were not the ones who made sure that economic and social rights were included into the UDHR. The Eastern European countries, led by the Soviet Union, abstained from the debates on the UDHR (starting in the Spring of 1946) for more than two years. In 1946 and 1947, the representatives of the Soviet Union had to confess time and again that they were unable to state any opinions.[143] The Soviet delegates were obviously left without instructions from Moscow. In 1947, Eastern European delegates were even openly hostile to the idea of establishing rights on the international level. In the summer of 1947, Vladimir Koretsky provided a "personal impression" that the International Bill of Rights must not create an international social system where international government does not exist,[144] a barely concealed admission of the fear that international human

137. Comm'n on Human Rights, 1st Sess., 8th mtg. at 2, U.N. Doc. E/CN.4/SR.8 (Jan. 31, 1947) (Charles Dukes, United Kingdom).

138. Comm'n on Human Rights, 2d Sess., 42d mtg. at 14, U.N. Doc. E/CN.4/SR.42 (Dec. 16, 1947) (Lord Dukeston, United Kingdom).

139. Comm'n on Human Rights, 3d Sess., 48th mtg. at 7, U.N. Doc. E/CN.4/SR.48 (May 26, 1948).

140. Drafting Committee on an International Bill of Rights, 1st Sess., 5th mtg. at 3, U.N. Doc. E/CN.4/AC.1/SR.5 (June 12 1947).

141. Comm'n on Human Rights, 3d Sess., India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights, U.N. Doc. E/CN.4/99 (May, 24, 1948).

142. *Id*. at 6.

143. *See, e.g*., Drafting Committee on an International Bill of Rights, 1st Sess., 2d mtg. at 5, U.N. Doc. E/CN.4/AC.1/SR.2 (June 11, 1947).

144. *Id*.

rights might be used as a pretext to intervene in what the Soviet Union considered its domestic affairs.[145] When the Eastern European countries fully stepped into the human rights debate in the third session of the Commission on Human Rights (during the summer of 1948), they rejected the assumption underlying many drafts that the individual and the state were somehow at odds. Under socialist doctrine, governments were supposed to serve the individuals' needs, not to threaten their existence.[146] Eastern European countries were also scornful about the idea that implementing measures, especially measures relating to economic and social rights, could be left to the discretion of states. Eastern European representatives fought fiercely to get economic and social rights more elaborated. With regard to the right of work, they pressed for a clear statement that the state was responsible for the prevention and the elimination of unemployment[147] and for explicitly listing measures ensuring that unemployment would vanish.[148] Some of the statements of the Eastern European delegates seemed to imply that states should and could effectively resume control over the means of national production. With regard to the right to social security, Eastern European delegates pushed for a clause explicitly mentioning social insurance as the preferred measure of protection and a statement that social insurance was to be organized at the expenses of the state and employers only.[149]

Asian and Arab states did not develop a common, coherent position and, hence, did not form one single block. The group comprised six countries, namely Egypt, Iran, Lebanon, China, India, and the Philippines. The delegates of these countries had a voice and, at certain points, even an important one. Charles Malik (representing Lebanon), for instance, served as the Commission's rapporteur. But the influence of these delegates was

145. See also the more outspoken statements of some Eastern European delegates in Comm'n on Human Rights, 2d Sess., 38th mtg. at 8 (Alexander Bogomolov, USSR), 10 (Vladislav Ribnikar, Yugoslavia), 15 (Michael Klekovkin, Ukrainian SSR), U.N. Doc. E/CN.4/SR.38 (Dec. 15, 1947).

146. *See, e.g.*, Comm'n on Human Rights, 3d Sess., 51st mtg. at 7, U.N. Doc. E/CN.4/SR.51 (May 28, 1948) ("In a modern democracy, the State was not a power imposed on society by force. It was a product of the society which had given it birth." (Alexei Pavlov, USSR)).

147. See, e.g., the remarks of Michael Klekovkin in Comm'n on Human Rights, 3d Sess., 64th mtg. at 8, U.N. Doc. E/CN.4/SR.64 (June 8, 1948): "Unemployment had become an every-day phenomenon . . . . [He] could not understand that some members opposed the mention of the State as responsible for the prevention of unemployment."

148. See, e.g., the statement of Alexei Pavlov in Comm'n on Human Rights, 3d Sess., 49th mtg. at 9, U.N. Doc. E/CN.4/SR.49 (May 27, 1948): "Instead of merely making a general statement about the right to work, the relevant article should list measures to be taken to ensure that right."

149. See, e.g., the draft put forward by the representative of the USSR in Comm'n on Human Rights, 3d Sess., 71st mtg. at 4-5, U.N. Doc. E/CN.4/SR.71 (June 14, 1948).

primarily due to their impressive personalities,[150] not to group strategy. Peng Chun Chang (of China) favored the idea of human dignity and education. Hansa Mehta (of India), a Gandhian activist, was interested in questions of equality and discrimination. Charles Malik kept stressing the sanctity of the individual vis-à-vis a powerful state. In the conflict between Western liberalism and Eastern socialism, all of them declined to join the ranks of the Eastern European countries, as did the Latin American countries. When the drafting of economic and social rights was on the Commission's agenda, Asian and Arab countries tended to support the position of the Latin American states. That support proved particularly important in the summer of 1948 during the third session of the Commission on Human Rights. In June 1948, strong Latin American advocates for the inclusion of these rights were absent from the Commission's debates. The debates were dominated by Eastern European delegates and their statements praising the achievements of socialism.[151] In that crucial phase, China, Egypt, Lebanon, and the Philippines successfully defended some of the Latin American ideas, such as the idea that the article on the right to work should to some extent specify duties incumbent on the state or societal groups (employers),[152] or the idea that the right to food and housing should be mentioned in the human rights catalog.[153] When doing so, the Asian and Arab delegates faced objections raised by the United States and its allies (who disliked the idea of references to state responsibilities) and by the Eastern European delegates (who wanted to strengthen the role of the state even more).[154]

Eventually, the economic and social rights proclaimed in the UDHR were a compromise based on the firm position of the Latin American delegates and the equally firm position of the United States, with supporting or moderating contributions by European, Asian, and Arab delegates.

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150. See the detailed accounts in GLENDON, *supra* note 103.

151. *See, e.g.*, the statements in United Nations, Econ. & Soc. Council, Comm'n on Human Rights, 3d Sess., Summary Record of the Sixty-Fourth Meeting, 8 (Michael Klekovkin, Ukrainian SSR), U.N. Doc. E/CN.4/SR.64 (June 8, 1948), and United Nations, Econ. & Soc. Council, Comm'n on Human Rights, 3d Sess., Summary Record of the Sixty-Sixth Meeting, 14 (Alexei Pavlov, USSR), U.N. Doc. E/CN.4/SR.66 (June 9, 1948).

152. *See, e.g.*, the debates on the right to work in United Nations, Econ. & Soc. Council, Comm'n on Human Rights, 3d Sess., Summary Records of the Sixty-Fourth Meeting and the Sixty-Fifth Meeting, U.N. Doc. E/CN.4/SR.64-65 (June 8–9, 1948).

153. For the debates on the right to food and housing see United Nations, Econ. & Soc. Council, Comm'n on Human Rights, 3d Sess., Summary Record of the Seventy-First Meeting, 2–3, 13–14, U.N. Doc. E/CN.4/SR.71 (June 14, 1948).

154. *See, e.g.*, the debates on the right to work in Comm'n on Human Rights, 3d Sess., 64th and 65th mtg., U.N. Doc. E/CN.4/SR.64-65 (June 8–9, 1948).

C. Economic and Social Rights: The Making of the ICESCR

Debates on the ICESCR differed from the debates on the UDHR on two accounts. For one, the Commission on Human Rights invited specialized agencies to participate in the discussions—in particular, the ILO, the FAO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization.[155] The specialized agencies gained a significant influence on the final wording of some rights, such as the right to social security. Additionally, the delegates to the Commission on Human Rights formed new coalitions. The United States kept fighting attempts to specify state duties. The Europeans were once again its closest allies. The Eastern European countries continued moving for inserting clauses specifying state duties. But this time, Latin American, Asian, and Arab delegates often joined the Eastern European countries. Australia emerged as a new player, especially with respect to social security. The following examples are meant to underpin these points.

The first example relates to the right to work. In April 1952, the Soviet Union tabled an amendment explicitly stating that the right to work "should be guaranteed by the State, with the object of creating conditions precluding the threat of death from hunger or inanition."[156] The United States and France objected instantaneously. Eleanor Roosevelt asserted that state intervention was not the first option; the right to work might better be served by "calling for private action rather than State intervention, since in many countries labour was not under absolute State control as in the USSR."[157] Cassin feared that an "absolute undertaking" with regard to the right to work by states might imply a right for the states to force people to work.[158] Chile and Uruguay supported the Soviet Union approach. Chile submitted an amendment generally requiring states to adopt measures to "guarantee concretely" the enjoyment of the right to work and the ensuing state obligations.[159] Uruguay joined Yugoslavia in

155. *See* Comm'n on Human Rights, 6th Sess., Draft International Covenant on Human Rights, Draft Resolution Concerning Economic, Social and Cultural Rights, Submitted by Denmark, Egypt, France and Lebanon, U.N. Doc. E/CN.4/485 (May 10, 1950), and, for amendments and votes, Comm'n on Human Rights, 6th Sess., 187th mtg. at 3, U.N. Doc. E/CN.4/SR.187 (May 11, 1950).

156. Comm'n on Human Rights, 8th Sess., Draft International Covenants on Human Rights and Measures of Implementation, Draft Amendment to Article 20, Submitted by the USSR, U.N. Doc. E/CN.4/L.45 (Apr. 25, 1952).

157. Comm'n on Human Rights, 8th Sess., 269th mtg. at 6, U.N. Doc. E/CN.4/SR.269 (Apr. 25, 1952).

158. *Id*. at 4.

159. Comm'n on Human Rights, 8th Sess., Draft International Covenants on Human Rights and

proposing an amendment similar to the one of the Soviet Union.[160] Facing fierce resistance, the United States yielded to a compromise text, submitted jointly with Lebanon,[161] conceding that the "steps to be taken by a State party" shall include policies to "achieve steady economic development and full and productive employment safeguarding fundamental political and economic freedoms of the individual."[162] That is almost the exact wording of the final version of ICESCR Article 6(2) pertaining to the right to work. The paragraph bears the imprint of a broad coalition against the United States.

The second example concerns the right to social security. The Soviet Union and Australia took the lead in filing drafts relating to that right. In 1949 and 1950, both countries came forward with proposals. The 1949 Soviet Union proposal[163] expressly mentioned "social insurance," stressing that "[s]ocial security and social insurance for workers and employees shall be effected at the expense of the State or at the expense of the employers in accordance with the laws of each country."[164] The 1949 Australian draft[165] abstained from referring to "social insurance" and financial responsibilities, yet briefly circumscribed the content of "social security" as encompassing "medical care" and "safeguards against the absence of livelihood caused by unemployment, illness or disability, old age, or other reasons beyond . . . control."[166] Also, the draft did not only address workers or employees. The wording of the 1950 Australian proposal was even more elaborate, reading:

> Everyone shall have the right to social security which shall be guaranteed by the provision of social benefits, either in cash or in kind, assuring to every person at least the means of subsistence and, when necessary, adequate treatment in any common contingency

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Measures of Implementation, Draft Amendment to Article 20, Submitted by Chile, U.N. Doc. E/CN.4/L.53 (Apr. 25, 1952).

160. Comm'n on Human Rights, 8th Sess., Draft International Covenants on Human Rights and Measures of Implementation, Revised Amendment to Article 20, Submitted by Uruguay and Yugoslavia, U.N. Doc. E/CN.4/L.58/Rev.1 (May 2, 1952).

161. Comm'n on Human Rights, 8th Sess., Draft International Covenants on Human Rights and Measures of Implementation, Lebanon and United States of America: Joint Amendment to the Amendment Submitted by Chile to Article 20 (E/CN.4/L.53), U.N. Doc. E/CN.4/L.93 (May 5, 1952).

162. *Id*.

163. Comm'n on Human Rights, Rep. on its 5th Sess., May 9–June 20, 1949, at 48, U.N. Doc. E/1371 (June 23, 1949).

164. *Id.* The 1950 USSR proposal was identical to its 1949 proposal. *See* Comm'n on Human Rights, Report on its 6th Sess., Mar. 27–May 19, 1950, at 27, U.N. Doc. E/1681 (May 29, 1950).

165. Comm'n on Human Rights, Rep. on its 5th Sess., *supra* note 163, at 50.

166. *Id*.

> occasioning the involuntary loss of income or its insufficiency to meet family necessities. The State may prescribe that all or any of such benefits may be provided under a general contributory system.[167]

Consensus on the Soviet Union drafts proved impossible to reach. The drafts were supported by other Eastern European countries only.[168] The Australian draft was skillfully defended by the Australian delegate, who kept stressing the vices of *laissez-faire* policies and the need to counteract increasing social inequalities.[169] In the end, the Australian draft was discarded because the specialized agencies, particularly the ILO, cautioned against giving too many details; giving details might in effect weaken the right to social security.[170] After some deliberation, the majority of the delegates to the Commission on Human Rights agreed that fleshing out the content of "social security" was basically to remain the business of the ILO. That is why ICESCR Article 9 contains but one brief sentence: "The States Parties . . . recognize the right of everyone to social security, including social insurance."[171]

The third example involves ICESCR Article 11, i.e., the right to an adequate standard of living, including adequate food, clothing, and housing. Article 11 is reminiscent of the Latin American drafts of 1946.[172] The article is, nonetheless, based on a draft filed not by Latin American countries, but by the United States.[173] The early, steady, and conciliatory involvement of the United States secured a broad cross-country consensus on article 11, whatever the intentions of the United States' delegates may

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167. Comm'n on Human Rights, Report on its 6th Sess., *supra* note 164, at 26.

168. For an account on the discussions see Comm'n on Human Rights, 6th Sess., 184th mtg., U.N. Doc. E/CN.4/SR.184 (May 9, 1950); Comm'n on Human Rights, 6th Sess., 185th mtg., U.N. Doc. E/CN.4/SR.185 (May 10, 1950); Comm'n on Human Rights, 6th Sess., 186th mtg., U.N. Doc. E/CN.4/SR.186 (May 11, 1950); Comm'n on Human Rights, 7th Sess., 220th mtg., U.N. Doc. E/CN.4/SR.220 (Apr. 30, 1951); and Comm'n on Human Rights, 7th Sess., 221st mtg., U.N. Doc. E/CN.4/SR.221 (May 1, 1951).

169. *See, e.g.*, the statement of H.F.E. Whitlam of Australia, in Comm'n on Human Rights, 6th Sess., 184th mtg., *supra* note 168, at 4.

170. *See, e.g.*, the statement of Wilfred Jenks, ILO, in Comm'n on Human Rights, 7th Sess., 221st mtg., *supra* note 168, at 9–11.

171. ICESCR, *supra* note 14, art. 9.

172. *See supra* Part II.B.

173. In April 1951, the United States proposed to insert into the draft covenant an additional article stating, *inter alia*: "Each State party to this Covenant undertakes, with due regard to its organization and resources, to promote conditions of economic, social and cultural progress and development for securing . . . b) improved standards of living." Comm'n on Human Rights Working Group on Economic, Social and Cultural Rights, 7th Sess., Compilation of Proposals Relating to Economic, Social and Cultural Rights at 5, U.N. Doc. E/CN.4/AC.14/2/Add.3 (Apr. 27, 1951).

have been when they first submitted the draft in April 1951. The April 1951 draft of the United States apparently responded to the proposals on economic and social rights put forward by the Soviet Union and Australia,[174] suggesting instead a text simply highlighting a number of policy goals formulated as state "undertakings," thought to be dependent on the organization of the state and the resources available. According to the April 1951 U.S. draft, the primary state undertaking was to relate to "economic, social and cultural progress and development,"[175] secondary undertakings were meant to relate to a number of sub-goals, such as the "opportunity for all freely to engage in occupations,"[176] "just and favourable conditions of work,"[177] "measures of social security for all in need of such protection,"[178] and "improved standards of living and health."[179] The United States draft triggered immediate criticisms, especially from Chile and Egypt, for avoiding language referring explicitly to "rights." Vaguely talking about "progress and development" was, the Egyptian delegate argued, very different from defining rights.[180] The delegates to the Commission agreed, though, that economic and social rights necessarily involved state duties, and that these duties needed to be addressed and, to some extent, specified. Once the delegates to the Commission had decided to combine the language of economic and social rights with a language of state duties,[181] they proceeded to dealing with the various drafts relating to the right to social security, to special provisions concerning women and children, to the right to living accommodation, and, eventually, the right to an adequate standard of living, a right that was at that time only backed by the April 1951 United States draft and an

174. *See supra* notes 163, 165, 167.

175. Comm'n on Human Rights Working Group on Economic, Social and Cultural Rights, 7th Sess., Compilation of Proposals Relating to Economic, Social and Cultural Rights, 2, U.N. Doc. E/CN.4/AC.14/2 (Apr. 27, 1951).

176. *Id.* at 3.

177. Comm'n on Human Rights, Working Group on Economic, Social and Cultural Rights, 7th Sess., Compilation of Proposals Relating to Economic, Social and Cultural Rights, 2, U.N. Doc. E/CN.4/AC.14/2/Add.2 (Apr. 27, 1951).

178. Comm'n on Human Rights, Working Group on Economic, Social and Cultural Rights, 7th Sess., Compilation of Proposals Relating to Economic, Social and Cultural Rights, 2, U.N. Doc. E/CN.4/AC.14/2/Add.3 (Apr. 27, 1951).

179. *Id.* at 5.

180. Statement of Mahmoud Azmi Bey, Egypt, in Comm'n on Human Rights Working Group on Economic, Social and Cultural Rights, 7th Sess., 1st mtg. at 23, U.N. Doc. E/CN.4/AC.14/SR.1 (Apr. 26, 1951).

181. See, in particular, the various statements of the delegates to the Commission on Human Rights in Comm'n on Human Rights, 7th Sess., 216th mtg., U.N. Doc. E/CN.4/SR.216 (Apr. 27, 1951).

Australian draft that differed slightly in wording.[182] The Australian proposal was eventually adopted by fourteen votes to none (with four abstentions).[183] Unanimity of the votes was extremely rare.

D. International Social Citizenship?

The debates in the Commission on Human Rights demonstrate that the genesis of U.N.-sponsored economic and social rights is anything but clear-cut or unequivocal. First, all articles of the UDHR and the ICESCR are couched in the language of rights. Still, the articles primarily imply duties, notably of the state, at least in the last resort. References to duties became quite inevitable when the members of the Commission on Human Rights moved to elaborate on what was meant by the economic and social "rights" proclaimed in the UDHR. Many of the specifications of the ICESCR expressly resort to a language of duties.[184] Secondly, economic and social rights were meant to cover a wide range of state strategies aimed at the realization of the rights and duties. From the perspective of the lawmakers, the undertakings incumbent on states may, yet need not, exclusively relate to individualized citizenship rights in a Marshallian sense. In fact, U.N.-sponsored economic and social rights draw on three major ideologies, and two of them have no place for "social citizenship."

Economic and social rights have developmental roots rehearsing Latin American constitutions of the early twentieth century. Latin American constitutions made it a general responsibility for the state to progressively advance the living conditions of the people in their territories.[185] Individualized economic and social rights were supposed to evolve alongside modernization and economic growth. The post-war rights have roots in liberalism. The United States stood for a strict version of liberalism. At times, Eleanor Roosevelt contended that human rights law was also about securing freedom from want.[186] More often, however, she engaged in rejecting attempts to elaborate further what states ought to do

182. The Australian proposal read: "Each State party to this Covenant recognises that everyone has the right . . . to an adequate standard of living." Comm'n on Human Rights, Working Group, Compilation of Proposals, *supra* note 173.

183. *See* Comm'n on Human Rights, 7th Sess., 223d mtg. at 8, U.N. Doc. E/CN.4/SR.223 (May 2, 1951). Draft article 24 of the Covenant then read: "The States Parties to the Covenant recognize the right of everyone to an adequate standard of living and the continuous improvement of living conditions." Comm'n on Human Rights, Rep. on its 7th Sess., April 16–May 19, 1951, at 23, U.N. Doc. E/1992 (May 24, 1951).

184. *See* ICESCR, *supra* note 14, arts. 2–3, 6(2), 8, 10–11.

185. *See supra* Part II.B. and text accompanying note 115.

186. *See supra* Part II.B. and text accompanying note 134.

when implementing that freedom. Latin American states (and some others, such as Australia) preferred a milder version of liberalism. These delegates pressed for provisions (e.g., on social security) that gave some details, even if that meant proscribing state intervention in market forces.[187] And the post-war rights have roots in socialism. When the Eastern European countries joined the drafting effort in the summer of 1948, they too insisted on making state duties more concrete.[188] But, unlike the Latin Americans, their proposals often resounded socialist thinking. This made it difficult for others to follow suit, and most of the proposals were rejected.

Only one of these strands possibly implied a notion of "social citizenship," based on individual rights, a distinct understanding of equality, and the aim of bypassing the market, i.e., the core of Marshall's concept.[189] Developmental and socialist approaches fail at least on one account. Developmental policies primarily envisage the betterment of all inhabitants, i.e., collective welfare; they are not specifically addressed to "weaker" sections of the population. Socialist policies proceeded from the assumption that the plague of social inequality belonged to the past. Social benefits responded to merit, work, sacrifice, or the legitimate inability to fulfill the expectations of society due to sickness or disability; rights and duties were tightly connected.[190] Liberal approaches acknowledged that market-based modernization generates risks that threaten segments of the population, especially the labor force.[191] Liberal approaches acknowledged that traditional individual rights need, to some extent, to be supplemented, since civil and political rights alone would not suffice to render protection, for example in the case of unemployment.[192] Economic and social rights inspired by liberalism also bypass the market-forces; they do so, however, in a specific manner. From the point of view of liberalism, economic and social rights are not meant to guarantee everyone some kind of basic income free of conditions. If the rights promise individualized benefits in cash or in kind, they promise benefits that are either targeted, requiring the

187. *See supra* Part II.C and text accompanying note 167.

188. *See supra* Part II.B and text accompanying note 147.

189. *See supra* Part II.A.

190. Eastern European delegates constantly stressed that individual rights and duties were to be construed as reciprocal. See, e.g., the statement of Valentin Tepliakov in Comm'n on Human Rights, 1st Sess., 14th mtg. at 3, U.N. Doc. E/CN.4/SR.14 (Feb. 4, 1947): "There could be no right to work without a corresponding duty to the community. . . . He asked that the Bill include the individual's obligation to work for the community, by which he meant his country as well as the United Nations."

191. *See supra* Part II.C and text accompanying note 169.

192. See, e.g., the statement of Ronald Lebeau (Belgium) in United Nations, Econ. & Soc. Council, Comm'n on Human Rights, 1st Sess., Summary Record of the Ninth Meeting, 4-5, U.N. Doc. E/CN.4/SR.9 (Feb. 1, 1947).

lack of self-help or of the help of others, or depend on one's own contributions.

In short, U.N.-sponsored economic and social rights were not intended to exclusively provide an international layer for state-accorded social citizenship rights. Social citizenship is certainly one way for the states to fulfill their undertakings under the ICESCR. But states parties may choose other effective strategies. Social rights combine and allow for many readings, according to ideational background and context. The right to work (ICESCR article 6), for instance, obliges states to enact laws protecting the workers from excessive powers of the employer (and that most certainly implies the granting of individual rights vis-à-vis the employer), but article 6 also obliges states to resort to adequate employment policies (not necessarily involving individual rights).[193] Also, the extent to which states intervene in the labor market or even the institutional framework of the labor market itself may vary from country to country (e.g., the role of trade unions or the role of the state with respect to fixing minima for wages). Finally, to give another example, ICESCR Article 9 (the right to social security) is obviously prone to granting individual rights (how else could access to social benefits in cash be organized?).[194] ICESCR Article 11, however, seems to primarily address policies aiming at collective welfare. And states are free to relate social rights to individual duties as they think fit (as long as the duties do not collide with other human rights).

III. STATES TALK UNDER THE ICESCR: SOCIAL CITIZENSHIP GOING GLOBAL

The meaning of human rights guarantees is not fixed once and for all by what their lawmakers had in mind. On the contrary, human rights are meant to be "living instruments," as the European Court of Human Rights frequently puts it.[195] The content of human rights is concretized and constantly negotiated anew by way of implementation and review, actions necessarily involving the interpretation of human rights clauses. International law on treaties acknowledges these processes. Under the relevant rules, interpreters must first explore the ordinary meaning of the

193. *See* ICESCR, *supra* note 14, art. 6(2).

194. For the notion of "social security" and the individualization of benefits see, e.g., ILO Convention No. 102 on Social Security (Minimum Standards) Convention, June 28, 1952, at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312247:NO.

195. *See*, *e.g.*, Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) 1, 15–16 ¶ 31 (1978).

terms of the treaty in their context and in the light of the treaty's object and purpose, paying attention to the *travaux préparatoires* (VCLT Articles 31 and 32).[196] In addition to textual interpretation, subsequent agreements between the states parties or subsequent practice in the application of the treaty shall also be taken into account.[197] Subsequent practice certainly includes official enunciations of the human rights bodies established by the treaties; these bodies are specifically commissioned to watch over the implementation of the rights laid down in the treaties and to state their opinions.[198] Yet the major players in international law are still the states parties, and their reading of human rights law, though more difficult to collect on a global basis, also contributes to subsequent state practice. From the focus of this Article—states reconstructing U.N.-sponsored economic and social rights in global arenas—the state party reports submitted under the framework of the ICESCR seem particularly pertinent, as these reports provide insights into how states read and re-read these rights. Additionally, if widespread and translated into action, the states' reading may feed back into the meaning of the rights recognized under the Covenant.[199] Accordingly, this Article now turns to states reporting under the ICESCR. How do states talk about economic and social rights and the measures they employ to realize the rights? Did the idea of "social citizenship" gain more adherents over the last decades or, in other words, did "social citizenship" go global?

A. The Setting: Human Rights Machinery Under the ICESCR

The ICESCR sets up a distinct framework for member states to talk about the implementation of the rights recognized in the Covenant.[200]

196. According to article 32 of the Convention, recourse to the preparatory work and the circumstances of its conclusion may in particular be had when—as is the case for U.N.-sponsored human rights law—the interpretation under article 31 leaves the meaning ambiguous or obscure. VCLT, *supra* note 18, arts. 31–32.

197. *Id*. art. 31(3)(a)–(b).

198. *See also* Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905 (2009) (making a convincing case for the view that human rights treaty bodies play an important role in establishing the normative content of human rights).

199. VCLT, *supra* note 18, art. 31(3)(b).

200. For details on the reporting procedure under the ICESCR that constantly evolved over time, see Philip Alston & Bruno Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747 (1987); Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603 (1988); Scott Leckie, *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 545 (1991); Philip Alston, *The Committee on Economic, Social and Cultural Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 473 (Philip Alston ed., 1992); Matthew Craven, *Towards an Unofficial Petition Procedure: A Review on the Role*

States parties are obliged to regularly report in writing to a panel of reviewers (ICESCR Articles 16 and 17). The states parties are then invited to orally present their report. State representatives face questions by the reviewing panel, and the panel may request additional information. Each reporting round concludes with observations by the panel, evaluating the report and the human rights situation prevailing in the country concerned.[201] From 1978 through 1985, the panel was composed of state delegates.[202] Since 1986, the panel—now called the Committee on Economic, Social and Cultural rights (the "Committee")—is composed of eighteen independent experts with competence in human rights.[203] For more than a decade, states parties were requested to submit their reports in three biennial stages; the first stage was supposed to cover the rights laid down in ICESCR Articles 6 to 9, the second stage the rights laid down in ICESCR Articles 10 to 12, and the third stage the rights laid down in ICESCR Articles 13 to 15.[204] In May 1988, the ECOSOC introduced a new reporting program.[205] Henceforth, states parties were requested to submit, at five-year intervals, one single report covering all three principle groups of rights plus the provisions contained in ICESCR Articles 1 to 5.

Reporting under the ICESCR is certainly an exercise in rhetoric by states confronting an international human rights body empowered to assess their performance under the Covenant. Reporting is nonetheless more than that. The state party reports reveal whether the authors are willing to comply with their reporting obligations, whether they accept the language of human rights and corresponding duties, whether they speak freely about

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of the UN Committee on Economic, Social and Cultural Rights, *in* SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE 91 (Krzysztof Drzewicki, Catarina Krause & Allan Rosas eds., 1994).

201. For an overview on the working methods of the Committee established under the ICESCR *see* Committee on Economic, Social and Cultural Rights, Report of the Fourth Session (15 January–2 February 1990), 6–11, U.N. Doc. E/1990/23 (1990), and, recently, United Nations, Econ. & Soc. Council, Committee on Social and Cultural Rights, Report of the Forty-Second and Forty-Third Sessions, 4–22 May 2009, 2–20 Nov. 2009, ¶¶ 26–66, U.N. Doc. E/2010/22 (2010).

202. E.S.C. Res. 1988 (LX), U.N. Doc. E/5850 (May 11, 1976) (on procedures for the implementation of the ICESCR); E.S.C. Dec. 1978/10, in Resolutions and Decisions of the Econ. & Soc. Council 1978 at 34, U.N. Doc. E/1978/78 (1978), (on the composition of the sessional working group on the implementation of the ICESCR).

203. E.S.C. Res. 1985/17, *supra* note 75, on the review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights. The activities of the Committee can be traced through its sessional reports, from its seventh session, in 1992, until the present, via U.N. Dag Hammarskjöld Library, United Nations Bibliographic Information System (UNBISNET), http://www.unbisnet.un.org.

204. E.S.C. Res. 1988 (LX), *supra* note 202.

205. E.S.C. Res. 1988/4 (on the ICESCR), in Resolutions and Decisions of the Econ. & Soc. Council, Org. Session for 1988 & 1st Sess. Of 1988 at 8, U.N. Doc. E/1988/88 (1988).

their difficulties or believe that their human rights record is flawless, whether they appropriate the concepts propagated by the Committee or other global human rights bodies, and what they believe to be adequate measures for implementing the rights under the ICESCR. As a whole, these regular exercises in self-description and reflection may well advance the gradual internalization of human rights values in countries across the globe.[206]

B. The Sample: State Party Reports from 1977 to 2011

The following analysis builds on a newly created database (the ICESCR-SPR 2011, revised in 2012) encompassing data drawn from the reports under the ICESCR from the beginning of 1977, when the first state party reports were submitted following the entry into force of the Covenant in January 1976, through the end of 2011.[207] The reports predating 1993 have been photocopied and scanned; post-1993 reports have been retrieved via the "Treaty Body Database," a database maintained by the Office of the United Nations High Commissioner for Human Rights.[208] As of December 31, 2011, the ICESCR-SPR included data drawn from 546 reports submitted under the ICESCR.[209] The reports were authored by 124 states parties; four no longer exist (Czechoslovakia, German Democratic Republic, People's Democratic Republic of Yemen,

206. On the concept of "internalization" see, e.g., Koh, *supra* note 64; Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975 (2004).

207. I created the ICESCR-SPR 2011 database in the context of FLOOR, a research group headed by Benjamin Davy, Lutz Leisering, and me. *See* Principal Investigators, FLOOR, http://www.floor group.raumplanung.tu-dortmund.de/joomla/index.php/team/principal-investigators (last visited Oct. 4, 2013). The ICESCR-SPR 2011 database draws on a comprehensive questionnaire I have developed and expanded since 2008 and data collected by Luise Buschmann, Nina-Claire Himpe, and myself in 2011 and 2012. Based on the variables listed in the questionnaire, we coded the state party reports on paper. The data extracted from the reports were then imported into a spreadsheet. I updated and revised the raw data in 2012. I am grateful to Lutz Leisering, Petra Buhr, and Susann Kunadt for valuable inputs on how to conceptualize a questionnaire, to Anne Casprig for introducing Nina-Claire Himpe to the world of epidata, and to Nina-Claire Himpe for translating the paper-data into spreadsheet-data. Christiane Hastaedt was the most reliable administrator of the primary data. I could not have done without her! My gratitude also extends to Tina Fahr, Hacer Bolat, Jens Hanschmidt, Aylin Alexandra von Radziewski, Gülsah Seyfeli, and Charlotte Strauch for their inputs along the way.

208. The database is accessible through the United Nations High Commissioner for Human Rights (UNHCHR) website. *All Reports by Convention*, UNHCHR, http://www.unhchr.ch/tbs/doc.nsf/Rep Statfrset?OpenFrameSet (last visited Jan. 1, 2012).

209. A report covering (only) one (or more) of the "stages" described in E.S.C. Res. 1988 (LX), *supra* note 202, has been counted as one report. The number 546, hence, includes single reports covering all the provisions of the ICESCR and reports relating to arts. 6–9, to arts. 10–12, or to arts. 13–15 only. A list of all reports included in the analysis is on file with author.

and Yugoslavia). One report was submitted by a U.N. administrative mission.[210] Four states parties extended their reports to various dependent territories (totaling 119 reports).[211] China reported separately on Hong Kong and Macao (three reports). From the perspective of regional representation, developed Organization for Economic Cooperation and Development (OECD) countries, countries from Europe and Central Asia, Arab States, and countries from Latin America and the Caribbean score high.[212] Twenty-seven out of twenty-eight developed OECD countries participated in the reporting mechanism under the ICESCR.[213] Participation also extends to twenty-two out of twenty-three countries from Europe and Central Asia,[214] twelve out of seventeen Arab States,[215] and twenty-two out of thirty-two countries from Latin America and the Caribbean.[216]

The break-down of the reports submitted from 1977 through 2011 reveals that the sample is, to some extent, unbalanced. For one, reports authored by developed OECD or developed non-OECD countries make up more than 30% of the sample, reports from Latin American or Caribbean countries reach almost 15%, and reports from countries in Europe or Central Asia make up 11%. Reports from other regional groupings are underrepresented. The regional breakdown of the reports relating to metropolitan territories is as follows:

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210. Upon request of the Committee established under the ICESCR, the United Nations Interim Administration Mission in Kosovo (UNMIK), acting under the authority of S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), filed a report with respect to the Kosovo in October 2007. Econ. & Soc. Council, Implementation of the ICESCR, Document Submitted by UNMIK Under Articles 16 and 17 of the Covenant, Kosovo (Serbia), U.N. Doc. E/C.12/UNK/1 (Oct. 16, 2007).

211. The Netherlands reported on the Antilles and Aruba (seven reports), New Zealand on Niue and Tokelau (four reports), Portugal on Macao (one report), and the United Kingdom on Antigua, Belize, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Dominica, Falkland Islands, Gibraltar, Gilbert Islands, Montserrat, Pitcairn, Solomon Islands, St. Christopher-Nevis-Anguilla, St. Helena, St. Lucia, St. Vincent, Turks and Caicos Islands, Guernsey, Isle of Man, Jersey, and Hong Kong (107 reports).

212. This Article follows the country groupings suggested by the UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2010 236–37 (2010), *available at* http://hdr.undp.org/sites/default/files/reports/270/hdr_2010_en_complete_reprint.pdf.

213. The United States of America has signed, but not ratified, the ICESCR. U.N. Secretary-General, *supra* note 78.

214. Montenegro became a state party to the ICESCR on October 23, 2006. A state party report has been submitted on December 23, 2011. The report was not available as of Dec. 31, 2011. *See All Reports by Convention*, *supra* note 208.

215. Reports have been submitted by Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syrian Arab Republic, Tunisia, and Yemen. *Id.*

216. The countries filing reports under the ICESCR include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *Id*.

TABLE 1: STATE PARTY REPORTS RELATING TO METROPOLITAN TERRITORIES

AUTHORS BY COUNTRY GROUPINGS	REPORTS	PERCENT
Developed OECD	146	26.7
Developed non-OECD	22	4
Latin America and Caribbean	80	14.7
Europe and Central Asia	60	11
Sub-Saharan Africa	35	6.4
Arab States	32	5.9
East Asia and the Pacific	19	3.5
South Asia	14	2.6
Countries that no longer exist	17	3.1
Country replacement (UNMIK)	1	0.18
	426	

Source: ICESCR-SPR 2011, revised 2012

Additionally, reports filed with respect to dependent territories or a special administrative region (such as Macao) reach 22% (120 reports). Finally, the number of reports authored by countries that, at the time of submission, considered themselves "socialist" or had a socialist past is considerable. In the former case, the number of reports reaches 85 (16% of all reports); in the latter case, the number reaches 67 (12% of all reports). If one decided to set the total number of reports at 426 (in disregard of the reports filed with respect to dependent territories or a special administrative region), the significance of reports authored by socialist or post-socialist states is, of course, even higher. The overall total then is 36%.

C. Economic and Social Rights: The Reading of the States Parties

For decades, economic and social rights laid down by human rights law have been met with skepticism by Western scholars. Often, the rights have been called weak and distinct from civil and political rights. Some pointed out that the pertinent provisions merely pronounced lofty goals without creating obligations for states.[217] Under ICESCR Article 2(3), so they argued, states were expressly empowered to realize the rights progressively, according to available resources; that would make the "rights" clearly distinguishable from the rights set forth in the ICCPR.[218] The obligations deriving from ICESCR "rights" appeared to be "sharply" limited.[219] Others stressed that the realization of economic and social rights required the availability of financial resources, and occasionally even a massive reallocation of resources.[220] In general, states would not be able or not be willing to commit themselves to doing so; hence, social rights pertained to "the twilight world of utopian aspiration."[221] And still others emphasized that "positive" state obligations were inherently non-

217. *See, e.g.*, Robert Starr, *International Protection of Human Rights and the United Nations Covenants*, 1967 WIS. L. REV. 863; Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 HUM. RTS. Q. 255 (1985).

218. Starr, *supra* note 217, at 868–69.

219. Siegel, *supra* note 217, at 257.

220. *See, e.g.*, Maurice Cranston, *Human Rights, Real and Supposed*, *in* TALKING ABOUT WELFARE: READINGS IN PHILOSOPHY AND SOCIAL POLICY 133 (Noel Timms & David Watson eds., 1976) (contending that, for a government to provide social security, it had to have access to great capital wealth, and many governments in the world were still poor); Seymour J. Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 AM. U. J. INT'L L. & POL'Y 67 (1986) (arguing that economic and social rights were of no practical value; progress was achieved through the work of specialized agencies, such as the ILO or the FAO, rather than through human rights bodies).

221. Cranston, *supra* note 220, at 142.

justiciable and, therefore, unenforceable.[222] The proper allocation of resources and the adequate distribution of wealth were to remain the genuine realm of politics; courts were not supposed to meddle.

An analysis of the ICESCR state party reports filed from 1977 through 2011 casts doubt at least on certain aspects of these master narratives.[223] The data suggest that states increasingly commit to ICESCR rights and that states indeed engage in shaping what has, for the purposes of this Article, been termed "social citizenship."[224] To argue these points in detail, this Article now focuses on the right to social security[225] and the right to an adequate standard of living.[226] These rights belong to the core of the social rights of the ICESCR.

1. States Commit to Economic and Social Rights

Four indicators signal that the states parties to the ICESCR are prepared to formally and rhetorically accept the commitments deriving from the Covenant.

First, the number of ratifications by states (160) is impressive, even if some states have, so far, abstained from joining the states parties. In the three decades following the first ratification in 1968, the number of new ratifiers was forty-five, forty-five, and forty-nine, respectively.[227] Since 1997, the numbers have declined significantly.[228] The last ratifiers joined in 2008.[229] After 2008, ratifications came to a halt.[230] Developed countries numbered high in the first and second wave (1968 to 1987), countries from Eastern Europe and Central Asia in the first and the third wave (1968 to 1978 and 1988 to 1997); countries from Sub-Saharan Africa participated significantly in each wave. Countries from East Asia and the Pacific were underrepresented in each of the three waves. Still, the important point here is that most states of the world have been willing to ratify the ICESCR, the existence of non-ratifiers notwithstanding.[231]

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222. E.W. Vierdag, *supra* note 73, at 83–94.

223. For a sociological perspective on the legal narratives, see Anthony Woodiwiss, *supra* note 60.

224. *See supra* Part II.A.

225. ICESCR, *supra* note 14, art. 9.

226. ICESCR, *supra* note 14, art. 11.

227. The first wave of ratifications (1968 to 1977) included forty-five countries, the second wave (1978 to 1987) included another set of forty-five countries, the third wave (1988 to 1997) comprised forty-nine countries. ICESCR-SPR 2011, revised 2012.

228. The fourth wave of ratifications (1998 to 2007) extended to twenty-one ratifiers. *Id.*

229. Last in line were the Bahamas, Papua New Guinea, and Pakistan. *Id.*

230. *Id.*

231. Among the East Asian non-ratifiers are Brunei Darussalam, Malaysia, Myanmar, and

Secondly, the popular assumption that article 2(3) of the ICESCR—obliging states to achieve the realization of the rights "progressively"—weakened the states' undertakings, allowing them to openly opt out of their duties, is not confirmed by the data drawn from the state party reports. In fact, in their reports to the Committee, states parties rarely rely on the escape clause of ICESCR Article 2(3). From 1977 to 2011, only 10 of 546 reports (less than 2%) somehow mentioned the clause. The 2001 Benin report contended that, given the prevailing economic difficulties in the country, the government had taken measures in order to "progressively, and to the extent of its capacities, to achieve" the goal of safeguarding the rights enshrined in the ICESCR.[232] The 2009 report of Ethiopia held that certain (domestic) constitutional guarantees are "believed to ensure the progressive realization of the rights incorporated in the Covenant."[233] The 2006 report of Kenya noted, even more acutely, that a draft constitution "provided for progressive realization of rights in line with available resources."[234] The 2007 report of the Republic of Korea expressly admitted that Korea had "not yet complied with the requirements laid down in the Covenant."[235] But the report quickly added that Korea was nonetheless "committed to doing its best to improve economic, social and cultural rights to the extent that available resources permit."[236] A similar reasoning can be found in the 1983 report of Mexico,[237] the 1993 report of Morocco,[238] the 1994 report of El

Singapore. Botswana, Mozambique, and South Africa are the major African non-ratifiers. Oman, Qatar, Saudi Arabia, and the United Arab Emirates are among the major Arab non-ratifiers. Cuba and Haiti are missing from the list of Latin American ratifiers. And the United States of America is the only developed country that did not ratify the ICESCR. ICESCR-SPR 2011, revised 2012.

232. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Benin, Feb. 5, 2001, ¶ 6, U.N. Doc. E/1990/5/Add.48 (Sept. 5, 2001).

233. Comm. on Econ., Soc. & Cultural Rights, Implementation of the ICESCR, Combined Initial, Second and Third Periodic Reports, Ethiopia, ¶ 10, U.N. Doc. E/C.12/ETH/1-3 (July 28, 2009).

234. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Kenya, ¶ 27, U.N. Doc. E/C.12/KEN/1 (Sept. 7, 2006).

235. Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Republic of Korea, ¶ 4, U.N. Doc. E/C.12/KOR/3 (June 27, 2007).

236. *Id*.

237. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: Mexico, ¶ 147, U.N. Doc. E/1984/6/Add.10 (Nov. 25, 1983).

238. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Morocco, ¶ 8, U.N. Doc. E/1990/5/Add.13 (Mar. 16, 1993).

Salvador,[239] the 1995 report of Zimbabwe,[240] and the 2001 and 2009 reports of the government of the still non-self-governing territory of Tokelau (formally submitted by New Zealand).[241] Where these reports admit to non-compliance, the authors are keen to stress that they want to fare better and improve their records. Apart from this handful of reports, the escape clause of ICESCR Article 2(3) is a non-issue.

Third, the commitment of the states parties to the ICESCR does seem weak from a procedural perspective. Forty out of the 160 member states have so far abstained from filing reports altogether, among them 24 Sub-Saharan African states.[242] On average, almost all reports are delayed by forty-two months. The number of months is lower for countries classified as developed OECD countries or European and Central Asian countries (thirty months) and considerably higher for Sub-Saharan African countries or countries in South Asia (eighty months). Very often, the substantial parts of the reports are evasive, inconclusive, or lack data. The first report of Costa Rica, for instance, simply contained a list of legal provisions without any comments.[243] The first report of Iceland quoted—under the heading of ICESCR Article 9 (right to social security)—from an incomprehensible earlier report filed with the ILO.[244] The first Jordanian report merely asserted that a social security scheme had been incorporated in the Labour Act applying to all workers over sixteen years of age, yet

239. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: El Salvador, ¶ 28, U.N. Doc. E/1990/5/Add.25 (Dec. 16, 1994).

240. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Zimbabwe, ¶ 8, U.N. Doc. E/1990/5/Add.28 (June 30, 1995).

241. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: New Zealand, ¶ 721, U.N. Doc. E/1990/6/Add.33 (Sept. 30, 2001), and Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, New Zealand, ¶ 772, U.N. Doc. E/C.12/NZL/3 (Apr. 4, 2009).

242. The group of the Sub-Saharan African states refraining from reporting includes Burkina Faso, Burundi, Cape Verde, Central African Republic, Congo, Côte d'Ivoire, Equatorial Guinea, Eritrea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Lesotho, Liberia, Malawi, Mali, Namibia, Niger, the Seychelles, Sierra Leone, Swaziland, Togo, and Uganda. ICESCR-SPR 2011, revised 2012. On the implementation of the ICESCR rights in Africa generally, see J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1 (1995) (making the case that implementation differs between the "North" and the "South" of Africa and that, in either case, implementation remains poor).

243. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Costa Rica, U.N. Doc. E/1990/5/Add.3 (Mar. 1, 1989).

244. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Iceland, ¶¶ 143–44, U.N. Doc. E/1990/5/Add.6 (May 25, 1991).

said nothing about benefits.[245] Luxembourg, whose fourth report has been due since June 2008, basically submitted the same short report in 1988, 1995, and 2001.[246] However, the willingness of the member states to report comprehensively has improved considerably over time. From 1977 through 1986 (the first decade of reporting), the state party reports reached 27 pages on average (n = 225 reports).[247] From 2000 through 2009 (the last decade of reporting), the average number of pages was 118 (n = 144 reports). Presently, reports provide more and more robust information. States also started to speak freely about failures with respect to compliance. Sometimes, their criticism is levelled at previous governments. The 1995 report of Guyana, for example, claimed that the structural adjustment program adopted by the former government had "been fraught with many contradictions and difficulties,"[248] a situation that had allegedly been aggravated further by corruption, mismanagement, extravagance, and the lack of democracy.[249] In order to turn the tide, the new government, so the report went on, had moved to reordering priorities and "directing more resources to the critical areas of health, education and housing."[250] Sometimes, state party reports are self-critical. The 2005 report of Hungary, for instance, conceded that the current measures tailored to combat poverty had, so far, missed out on their goals.[251] The Hungarian report concluded: "Because of the large number of beneficiaries . . . , cash transfers [providing social assistance] are of an inadequate amount when they are most needed."[252] The remedy announced in the report was to tie the level of benefits "much more carefully . . . to

245. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant, in Accordance with Council Resoultion 1988 (LX), Concerning Rights Covered by Articles 6–9, Jordan, at 6, U.N. Doc. E/1984/6/Add.15 (Oct. 1, 1986).

246. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Luxembourg, U.N. Doc. E/1990/5/Add.1 (May 22, 1989); Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Luxembourg, U.N. Doc. E/1990/6/Add.9 (Nov. 29, 1995); Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Luxembourg, U.N. Doc. E/1994/104/Add.24 (July 13, 2001).

247. In empirical research, "n" is used to refer to the size of the relevant sample, given in natural numbers. In the context of this article, "n" relates to state party reports under the ICESCR.

248. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Guyana, ¶ 3, U.N. Doc. E/1990/5/Add.27 (June 28, 1995).

249. *Id.* ¶ 2.

250. *Id.* ¶ 3.

251. Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Hungary, ¶¶ 352–61, U.N. Doc. E/C.12/HUN/3 (Sept. 28, 2005).

252. *Id.* ¶ 361.

need."[253] Recent state party reports certainly contribute substantially to the human rights dialogue directed and structured by the ICESCR Committee.

Fourth, the analysis of the state party reports from 1997 to 2011 testifies to a remarkable tendency of "appropriation" by the states parties to the ICESCR of the human rights concept. Under ICESCR Article 16, the states parties undertake to submit to the Committee "reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."[254] When filing their reports with the Committee, states face three options of how to present their domestic policies. For one, states may choose to address international human rights law in an introductory remark, where they generally concede the fact that, as states parties to the ICESCR, they have recognized "rights" deriving from a legal order that is not domestic and that these "rights" need to be implemented, realized, ensured, or guaranteed through actions on the national level. In that vein, the 2006 report of Benin, for example, noted in an "introduction" that the report "describes the measures taken and the progress made by the State of Benin to guarantee enjoyment of the rights recognized in the Covenant."[255] The report clearly speaks of "rights" pertaining to the international legal order ("recognized in the Covenant") and also addresses ensuing state responsibilities ("progress made . . . to guarantee"). Additionally, states may choose to (also) lean on human rights language when elaborating on the measures designed to concretize the rights specified in the ICESCR. The 1977 report of the Federal Republic of Germany, for instance, started the section concerning ICESCR Article 9 by announcing: "In the Federal Republic of Germany the guarantee of the right to social security is based on an extensive social system which protects . . . nearly the entire population . . . in the event of sickness, maternity, industrial accidents and occupational diseases, invalidity, old age and death."[256] The report of the Federal Republic of Germany acknowledges the existence of a non-domestic "right" in the specific context of ICESCR Article 9 ("guarantee of the right to social security") as well as a state duty to provide for its realization in the national arena ("guarantee . . . is based on an extensive social

253. *Id*.

254. ICESCR, *supra* note 14, art. 16.

255. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Benin, ¶ 10, U.N. Doc. E/C.12/BEN/2 (Dec. 19, 2006).

256. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, Federal Republic of Germany, 22, U.N. Doc. E/1978/8/Add.11 (Feb. 13, 1978).

system . . .").[257] Finally, the states parties may choose to ignore the international order of human rights and instead focus on national law and, as the case may be, on national rights. The 2009 report of Ethiopia[258] provides a good example of an exclusively domestic focus. The first paragraph under the heading of ICESCR Article 9 reads:

> Provision of social security by government within the limit of available resources is one of the social objectives enshrined in the Constitution . . . . The Constitution imposes obligation [sic] on the State to allocate resources . . . to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.[259]

The Ethiopian report lacks any reference to an international order of rights or an international order of state responsibilities requiring measures on the national level. Instead, the report solely relies on duties imposed by the Constitution. Reports drawing on the first or the second choice take a relational view (as they "relate" domestic law or action to international human rights law), though only the second choice implies a strong relational view, as it seems more difficult to opt for a human rights language in a specified context. Reports drawing on the third choice abstain from expressly reflecting on the relationship between the human rights order and the domestic order.

The actual choices of the states parties vary along two dimensions: time and content. There is a significant trend towards accepting human rights language as an "own" language over time, and that trend is different for different articles of the ICESCR; in particular, the trend is different for ICESCR Articles 9 and 11. Content obviously matters. To pinpoint the trends in numbers: Of all the reports submitted in the first decade, from 1977 to 1986 (n = 99 reports), 34% expressed relational views with respect to the "right" under ICESCR Article 9 (right to social security), yet only 24% of the reports took a strong relational stance. For the reports of the last reporting decade (2000 to 2009), percentages are up 50 and 30 respectively (n = 144 reports). In the context of ICESCR Article 11, scores are much higher, even in the early days of the reporting mechanism. Of the reports filed from 1977 to 1986 (n = 73 reports), 60% showed relational views, 52% even strong relational views. Again, the numbers are up for the last reporting decade. Of the 144 reports submitted from 2000 to 2009,

257. *Id.*
258. Combined Initial, Second and Third Periodic Reports, Ethiopia, *supra* note 233.
259. *Id.* ¶ 116.

72% acknowledged the "rights" under ICESCR Article 11 (right to adequate standard of living, the right to housing, or the right to food), and 63% did so strongly, that is, in the immediate context of ICESCR Article 11.

These data invite two conclusions. First, distrustfulness of international economic and social rights has—to some extent—given way to a general acceptance of these rights and to a willingness of the states parties to join the international community of states and its standards. Second, the intensity of the willingness depends on what the "rights" imply. Basic social rights, such as the right to food or the right to housing (article 11), are apparently much easier to accept than the right to social security, including social insurance (article 9).

2. States Engage in Reinterpreting Social Rights

When the states parties to the ICESCR report to the Committee they regularly disclose their social policies and their reading of the rights they have recognized when adhering to the Covenant. The analysis of the reports from 1977 to 2011 shows that, over time, descriptions of domestic social policies became more and more homogenous, and the reading of social rights more and more similar. The shift is visible from a comparison involving the reports of the first reporting decade (1977 to 1986) on the one hand and the reports of the last reporting decade (2000 to 2009) on the other.

The reports submitted in the first reporting decade (1977 to 1986) regularly covered only a part of the articles of the ICESCR.[260] The rights laid down in article 9 were (and had to be) dealt with by state party reports covering the rights of ICESCR Articles 6 to 9 (first set of rights reports). The rights laid down in article 11 were dealt with by reports covering the ICESCR rights of Articles 10 to 12 (second set of rights reports). The total number of first set of rights reports was ninety-nine; the total number of second set of rights reports was seventy-three. The regional breakdown of these sets of reports is as follows:

260. On the early rules for submitting state party reports see *supra* Part III.A.

TABLE 2: REPORTS PERTAINING TO ICESCR ARTICLES 9 AND 11, 1977 TO 1986

REGIONAL GROUPINGS / DEPENDENT TERRITORIES	ARTICLE 9 REPORTS	ARTICLE 11 REPORTS
Central, Eastern, Southern Europe	22	19
OECD	21	21
Latin America and Caribbean	11	5
East Asia and the Pacific	5	3
Arab States	4	4
Sub-Saharan Africa	3	5
South Asia	2	1
Dependent Territories	31	15
	99	73

Source: ICESCR-SPR 2011, revised 2012

The reports from 1977 to 1986 covering the rights under ICESCR Articles 9 and 11 can easily be grouped according to differing approaches and understandings. Socialist states, Latin American states, and OECD states were the main contributors.

Socialist states, particularly those in Eastern and Central Europe, used to emphatically welcome the rights secured by the ICESCR. Socialist states had no problem with the binding character of economic and social rights. However, their enthusiasm had little practical impact. Socialist states were convinced that they need not change anything since the rights were already fully secured in their territories. Two examples may underpin this point. The 1978 report of the Soviet Union starts with the assertion that the Soviet Union had ratified the ICESCR already in 1973 and was, therefore, "the first of the great Powers to express . . . its willingness to assume the obligations set out in the Covenant."[261] The following sentence reads: "It should be noted in particular that neither the ratification of the Covenant by the Soviet Union nor its entry into force on 3 January 1976 required any changes in or additions to Soviet legislation."[262] The Czechoslovak Socialist Republic (CSSR) similarly claimed in its 1978 report that the rights of the ICESCR were, for quite a while, perfectly safeguarded: "The rights referred to in Articles 6–9 . . . had been

261. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the ICESCR Concerning Rights Covered by Articles 6 to 9, Union of Soviet Socialist Republics, 1, U.N. Doc. E/1978/8/Add.16 (Apr. 10, 1978).

262. *Id.*

guaranteed in [the CSSR] even before the [ICESCR] entered into force . . . These rights are respected and also in practice fully observed."[263] Most of the Eastern European countries were, consequently, only weak relationalists. That holds true, e.g., for Bulgaria, the CSSR, the German Democratic Republic, Mongolia, Romania, and the Soviet Union.[264] These countries spoke of the rights of ICESCR Articles 9 and 11 just briefly in their introductory remarks; the remainder of the report was then confined to only national law.[265]

According to socialist states, the implementation of ICESCR Article 11 required a persistent policy of economic development based on planning and agrarian reform, expressed and made known publicly through growing numbers of goods produced, dwellings built, and state services rendered.[266] From a socialist perspective, social security under ICESCR Article 9 was strictly construed as the flip side of the right and duty to work. In its essence, socialism was about uniting workers (and peasants) in a common effort to enhance the material basis of society. Under such an order, individual security rested primarily on work and the remuneration thereby gained. Everyone contributed to economic growth (and was expected to do so), and everyone gained personally from the growth of the economy (minimum wages, rising wages).[267] Social security, in turn, focused on either contingencies making work impossible (sickness, care for other persons, pregnancy, industrial injury, disability, and old age) or exceptional individual efforts deemed valuable for the common good (bravery in combat or an emergency, multiple motherhood).[268] In short, under socialism individuals received social security benefits because they deserved them.[269] The reports barely referred to people in need, and at

263. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted by States Parties Concerning Rights Covered by Articles 6 to 9 of the Covenant Accordance with Council Resolution 1988 (LX), Czechoslovak Socialist Republic, 1, U.N. Doc. E/1978/8/Add.18 (June 8, 1978).

264. Source: ICESCR-SPR 2011, revised 2012.

265. *See, e.g.*, United Nations, Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports (Articles 10 to 12), German Democratic Republic, 1, U.N. Doc. E/1980/6/Add.6 (Oct. 16, 1979); United Nations, Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports (Articles 10 to 12), Mongolia, 2, U.N. Doc. E/1980/6/Add.7 (Dec. 6, 1979).

266. *See, e.g.*, Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Mongolia, 1, U.N. Doc. E/1980/6/Add.7 (Jan. 7, 1980).

267. For an overview on the socialist "heritage" see Igor Tomeš, *Ten Years of Social Reform in Countries of Central and Eastern Europe*, *in* TRANSFORMATION VON SYSTEMEN SOZIALER SICHERHEIT IN MITTEL- UND OSTEUROPA. BESTANDSAUFNAHME UND KRITISCHE ANALYSE AUS DEM BLICKWINKEL DER RECHTSWISSENSCHAFT 21, 22–27 (Bernd Baron von Maydell & Angelika Nußberger, eds., 2000).

268. *Id.*

269. The 1985 report of the German Democratic Republic addresses reciprocity of social security

times states bluntly denied that such groups existed.[270] In the early 1980s, at least some reports seemed to imply that income security in old age had become a problem.[271]

Latin American states sometimes stressed that they were the first to constitutionalize economic and social rights. The 1985 report of Mexico, for instance, proudly stated:

> To a large extent, the modern vision of law and the progressive character of the [ICESCR] coincide with the principles that emerged from the Mexican Revolution, which began in 1910. . . . [Our] Political Constitution [of 1917] fully recognized individual rights and freedoms, but at the same time, in a broader perspective, it embodied social rights, according priority to the collective interest over individual or private interests and promoting the enjoyment of fundamental rights in the field of social well-being.[272]

Latin American states did not hesitate to accept that the ICESCR entailed rights and obligations based in international law.[273] Most of the reports did so in a strong relational manner. The 1983 report of Chile, for instance, started its chapter on article 9 quite unequivocally: "Article 9 of the [ICESCR] provides that the States Parties . . . recognize the right of everyone to social security, including social insurance. In conformity with [that] article, Chile's Constitution recognizes the right to social security of

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quite openly: "On the one hand, [social security] rests on socialist society's concern for the development of the individual and on friendly co-operation, aid and mutual support and, on the other hand, on the individual's responsibility for matters of public interest." Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: German Democratic Republic, ¶ 75, U.N. Doc. E/1984/7/Add.23 (Sept. 13, 1985).

270. *See* Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Poland, 15, U.N. Doc. E/1980/6/Add.12 (Feb. 21, 1980).

271. *See*, *e.g.*, Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: Ukrainian Soviet Socialist Republic, ¶ 134, U.N. Doc. E/1984/7/Add.9 (Mar. 13, 1983). For an overview on the developments with respect to social security in the Soviet Union from 1985 through 1991 and the early years after the transition, see Lillian Liu, *Income Security in Transition for the Aged and Children in the Soviet Union and in the Russian Federation*, 56 SOC. SEC. BULL. 60, 74 (1993) (discussing state-operated and private programs directed at helping growing numbers of people living below subsistence levels).

272. Econ. & Soc. Council, *supra* note 237.

273. Six of eleven initial reports covering articles 6 to 9 unmistakably accepted the binding character of the rights guaranteed by the ICESCR (Ecuador, Chile, Jamaica, Mexico, Peru, and Venezuela). ICESCR-SPR 2011, revised 2012.

all inhabitants of the Republic without distinction."[274] The first sentence of the quotation paraphrases what is written in article 9; the second sentence contends that Chile has incorporated a non-domestic right (the right to social security under article 9) into domestic law and that, in doing so, Chile conformed to an international obligation ("in conformity with" ICESCR Article 9). The 1979 report of Jamaica declared: "Provisions are made for the realization of rights to social security through national insurance and public assistance benefits."[275] The Jamaican report also refers to non-domestic rights that need to be "realized" and asserts that that realization is effectuated through national enactments (social insurance law, social assistance law).[276]

When presenting their policies under ICESCR Article 11, early Latin American reports talked about a policy of economic development, yet this policy relied primarily on market forces and private initiatives. The 1985 report of Venezuela, for example, referred to "the State's obligation to promote economic development and the diversification of production in order to create new sources of wealth" and, at the same time, also stressed "the parents' obligation to care for and support their children."[277] With respect to housing, the 1979 report of Chile talked about specific policies that were compatible with the policies of urban and socio-economic development, but also noted: "The State should play a secondary role in housing. It is for the private sector to marshal resources and means to meet aspirations for housing."[278] With respect to the realization of the right to food, Latin American states relied on private farming; state intervention remained confined to agrarian land reforms ensuring that workers would own the land they worked.[279] Hence, policies reported under ICESCR

274. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Council in its Resolution 1988 (LX), Chile, ¶¶ 92–93, U.N. Doc. E/1984/7/Add.1 (Jan. 19, 1984).

275. Econ. & Soc. Council, Implementation of the ICESCR, Reports Concerning Rights Covered by Articles 6 to 9 of the Covenant Submitted by States Parties to the Covenant in Accordance with Council Resolution 1988 (LX), Jamaica, 25, U.N. Doc. E/1978/8/Add.27 (Oct. 11, 1979).

276. *Id*. at 20, 22.

277. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12 in Accordance with the Second Stage of the Programme Established by the Econ. & Soc. Council in Resolution 1988 (LX), Venezuela, ¶ 9, U.N. Doc. E/1980/6/Add.38 (Nov. 14, 1985).

278. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Chile, 6, U.N. Doc. E/1980/6/Add.4 (Dec. 21, 1979).

279. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Panama, 9, U.N. Doc. E/1980/6/Add.20 (Oct. 27, 1980).

Article 11 basically concentrated on the framing of private activities through legislation (family law, planning law, and land reform), the provision of low-interest loans, tax incentives for investors, and, as the case may be, need-specified cash benefits (housing assistance). Social security under article 9 was described as mainly financed through the contributions by the employees and the employers and, sometimes, by the state. With respect to ICESCR Article 9 as well as 11, early Latin American reports tended to be outspoken on shortcomings. Some reports conceded openly that vast groups of the rural or urban population (especially rural workers and domestic workers) were not covered by their regimes of social insurance,[280] that established social security regimes failed to cover certain contingencies, such as unemployment,[281] or that employers and employees failed to pay their contributions. As a consequence, employees were left without protection.[282] Finally, some Latin American reports explicitly addressed socioeconomic inequalities, especially with regard to rural people. Panama, for instance, talked about the establishment of "super-kiosks" in marginal areas, where staple foodstuffs were offered to low-income families at moderate prices to improve family nutrition.[283] Nicaragua talked about directing social policies towards "the needs of the socially disadvantaged."[284] Colombia talked about the introduction of a family allowance program that would reach "the lowest-income families."[285]

OECD states (Western European states, Australia, Canada, and Japan) make up the third group. These states, in particular the Western European states, were reluctant to expressly relate their legal regimes to individual rights or state obligations deriving from the ICESCR, particularly in the

280. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, Ecuador, ¶ 24, U.N. Doc. E/1978/8/Add.1 (Jan. 3, 1978); Economic and Social Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Venezuela, ¶ 54, U.N. Doc. E/1984/6/Add.1 (Feb. 10, 1984).

281. Econ. & Soc. Council, *supra* note 237, at ¶ 147.

282. Econ. & Soc. Council, *supra* note 275, at 26.

283. Econ. & Soc. Council, *supra* note 279, at 13.

284. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council Resolution 1988 (LX), Addendum: Nicaragua, 22, U.N. Doc. E/1984/6/Add.9 (Apr. 1, 1985).

285. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: Colombia, ¶ 206, U.N. Doc. E/1984/7/Add.21/Rev.1 (Feb. 26, 1986).

context of article 9. Only five out of twenty-one reports expressly adopted the international right to social security into their language.[286] The states rather chose to describe their domestic orders under the heading of the Covenant's article, without commenting on the relation between their legal regimes and the rights under the Covenant.[287] The 1977 report of the United Kingdom, for instance, started the section on article 9 (right to social security) by saying: "The legislation listed in the United Kingdom Art. 22 reports on ILO. Convention 102 relates to the following fields: Medical Care, Cash Sickness Benefit, Old Age Benefits, Survivors' Benefits, Unemployment Benefits, Family Benefits."[288] The report then went on describing these various fields in greater detail, without any reference to the ICESCR. Denmark proceeded similarly in the 1977 report,[289] and so did Finland in the 1978 report.[290] The 1979 report of the Federal Republic of Germany opened the section on article 11 (right to an adequate standard of living) by stating: "This objective is realized above all in the field covered by articles 6 and 9 . . . . Persons who are capable of working should . . . be given the opportunity . . . . Social security benefits are to be granted to persons who are not capable of working."[291] The German report cautiously spoke of an "objective," not of a "right," when addressing the content of article 11.

The reports of the OECD states never expressly mentioned "development" as a policy goal. Under the heading of ICESCR article 11, the states instead talked of "economic policy" and "social policy."[292] Unemployment and the prevention or mitigation of unemployment had their full attention. Food and housing was to be organized through the

286. Source: ICESCR-SPR 2011, revised 2012.

287. The situation is different in the context of ICESCR Article 11. Of the twenty-one reports submitted by OECD states, fifteen opted for a strong relational language and six abstained from doing so. Source: ICESCR-SPR 2011, revised 2012.

288. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted by States Parties Concerning Rights Covered by Articles 6 to 9 of the Covenant in Accordance with Council Resolution 1988 (LX), United Kingdom of Great Britain and Northern Ireland, 75, U.N. Doc. E/1978/8/Add.9 (Jan. 19, 1977).

289. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, Denmark, 5, U.N. Doc. E/1978/8/Add.13 (Feb. 13, 1978).

290. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, Finland, 9, U.N. Doc. E/1978/8/Add.14 (Mar. 13, 1978).

291. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Federal Republic of Germany, 19, U.N. Doc. E/1980/6/Add.10 (Feb. 4, 1980).

292. *See, e.g.*, United Nations, Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports (Article 10 to 12), Austria, 17, U.N. Doc. E/1980/6/Add.19 (July 31, 1980).

market, and income from employment was certainly key to having access to these markets. As a last resort, the adequate standard of living—access to food, housing, and clothing—was to be secured through state-financed cash benefits (social assistance). In that vein, the 1983 report of the Netherlands started the section on ICESCR Article 11 by declaring: "The right to an adequate standard of living is guaranteed for every citizen of the Netherlands by the National Assistance Act . . . which laid down new provisions on government assistance to meet the cost of subsistence."[293] When detailing their measures under ICESCR Article 9, OECD states mainly elaborated on their regimes of social insurance, often with some brief references to social assistance as the last safety net. The 1983 report of Denmark, for instance, had a lengthy chapter on the Danish pension policy; in the context, the report also mentioned state-financed "personal allowances" for pensioners "whose situation is particularly difficult."[294] The 1984 report of Finland, to take another example, concluded a paragraph on unemployment benefits remarking that, if the unemployed would no longer qualify for the insurance benefit, it was "for the social welfare authorities to secure his livelihood."[295]

Around 1993, state discussions under the heading of the (social) rights laid down in ICESCR Articles 9 and 11 gained unprecedented momentum. The new dynamic paralleled with changes in national and global politics.

One center of events was Eastern Europe. Eastern European states experienced the demise of socialism. Another center of events was, again, Latin America. Latin American states became disillusioned with the structural readjustment programs the World Bank and the International Monetary Fund had been favoring for more than a decade. As early as 1988, a Mexican state party report reasoned gloomily: "Notwithstanding the progress achieved, problems subsist; some have not been solved by economic growth, others have been caused by the process of development

293. Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Netherlands, ¶ 49, U.N. Doc. E/1980/6/Add.33 (Nov. 8, 1983).

294. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Denmark, ¶ 164, U.N. Doc. E/1984/7/Add.11 (Feb. 3, 1983).

295. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council Resolution 1988 (LX), Finland, ¶ 40, U.N. Doc. E/1984/7/Add.14 (Feb. 14, 1984).

itself."[296] The 1988 report of Jamaica was more to the point, although still clinging to the continuation of the adjustment program.[297] The Jamaican report asserted that, despite "progress," the "overall economic framework" would still be "fragile," as the balance of payments remained vulnerable, the real interest rates high, and the external debt large.[298] The 1988 Jamaican report also asserted that "there has been a deterioration in the social infrastructure and the provision of a variety of social services."[299] Commenting on the structural adjustment programs imposed in the 1980s in order to strengthen macroeconomic stability, the 2006 Costa Rican report lamented in retrospect: "[T]he weak link over [the decade of the 1980s] has been Costa Rica's sustainable human development. There has been growth, but it has been volatile and erratic in origin."[300] As a consequence, so the Costa Rican report contended, the country had suffered "a drop in social investment especially in health and education, and a significant rise in poverty, which affected almost 50% of Costa Rican households."[301]

In late 1990, in a development which might have added to the new momentum, the Committee under the ICESCR issued revised guidelines on how to structure state party reports.[302] The guidelines adopted by the Committee at its fifth session held in November and December of 1990 specifically required reporting states to "supply information on the current standard of living" of their populations, in particular in respect of "different socio-economic, cultural, and other groups."[303] States parties of the ICESCR were, moreover, asked to "indicate the per capita GNP for the poorest 40 per cent" of their population and provide information on the "poverty line" established in their countries and on the situation of

296. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12 in Accordance with the Second Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Mexico, ¶ 11, U.N. Doc. E/1986/3/Add.13 (Dec. 9, 1988).

297. Economic and Social Council, Implementation of the ICESCR, Second Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9 in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: Jamaica, ¶ 15, U.N. Doc. E/1984/7/Add.30 (Aug. 23, 1988).

298. *Id*.

299. *Id*.

300. Econ. & Soc. Council, Implementation of the ICESCR, Fourth Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Costa Rica, ¶ 71, U.N. Doc. E/C.12/CRI/4 (June 22, 2006).

301. *Id*. ¶ 21.

302. Comm. on Econ., Soc. & Cultural Rights, Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the ICESCR, Annex, U.N. Doc. E/C.12/1991/1 (June 17, 1991).

303. *Id*. art. 11(1)(a).

"especially vulnerable or disadvantaged groups."[304] These suggestions suited well with the interest in poverty announced by the World Bank in 1990[305] and, later, with the debates on the link between poverty and human rights initiated by the World Bank,[306] the United Nations Development Programme (UNDP),[307] the U.N. Commission on Human Rights,[308] and the U.N. Office of the High Commissioner for Human Rights.[309]

Against that backdrop, state party reports under the ICESCR changed dramatically in focus and tone. Until the mid-1990s, states parties barely touched upon issues of socioeconomic inequality, rare exceptions apart, such as Tanzania, India, Iraq, Rwanda, and Colombia.[310] Around 1980,

304. *Id*. art. 11(1)(c), 2(b).

305. *See* EHTISHAM AHMAD ET AL., WORLD BANK, WORLD DEVELOPMENT REPORT 1990 (focusing on poverty), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2013/02/28/000425962_20130228141712/Rendered/PDF/PUB85070REPLACEMENT0WDR01990.pdf.

306. *See* ANTHONY GAETA ET AL., WORLD BANK, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK (1998).

307. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1997, *available at* http://hdr.undp.org/sites/default/files/reports/258/hdr_1997_en_complete_nostats.pdf; UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, *available at* http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf.

308. In 1998, the Commission on Human Rights appointed the first special rapporteur on human rights and extreme poverty. A.-M. Lizin submitted her first report in 1999, suggesting, *inter alia*, that all states provide for "a guaranteed minimum income" and thus facilitate access to essential social services, such as social and medical welfare, food, housing, employment, training, schooling, education and culture. Comm'n on Human Rights, Econ., Soc. & Cultural Rights: Human Rights and Extreme Poverty, Rep. Submitted by Ms. A.-M. Lizin, Independent Expert Pursuant to Commission Resolution 1998/25, 33, U.N. Doc. E/CN.4/1999/48 (Jan. 29, 1999).

309. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, DRAFT GUIDELINES: A HUMAN RIGHTS APPROACH TO POVERTY REDUCTION STRATEGIES (2002), *available at* http://www.refworld.org/docid/3f8298544.html. For a recent take, see Hum. Rts. Council, Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, U.N. Doc. A/HRC/21/3 (2012).

310. *See, e.g.*, Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, United Republic of Tanzania, 3, U.N. Doc. E/1980/6/Add.2 (Dec. 21, 1979) (succinctly claiming that the country was now set for a struggle against ignorance, poverty and diseases). The 1983 report of India gave a list of government efforts with a view to improving the standards of living of all people in the country and then went on, saying, "[i]t has been estimated that nearly 48 per cent of the population live below the poverty level and are in no position to afford adequate quantities of food. The elimination of poverty, therefore, finds the highest priority in the Government's development plans." Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant, Concerning Rights Covered by Articles 10 to 12, India, ¶ 47, U.N. Doc. E/1980/6/Add.34 (Nov. 15, 1983). *See also* Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, Iraq, 5, 19-20, U.N. Doc. E/1980/6/Add.14 (Jan. 27, 1981); Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12, in Accordance with the Second Stage of the Programme Established by the Economic and Social Council in its Resolution 1988 (LX),

Eastern European countries and other socialist countries had firmly believed in the steady progress "of all their people" induced by socialism; they saw no need to rank and compare people according to wealth or income.[311] OECD countries preferred to speak of people in need of state support, of people without the necessary means of sustenance, or of people who were unable to support themselves.[312] People in need were meant to receive state-financed support in cash or in kind (social assistance), and their numbers appeared to be marginal. Early in the 1990s, the states parties to the ICESCR started to talk increasingly about "poverty," a phenomenon they conceived of as a problem that needed attention. Mexico and Nicaragua made the start.[313] The two countries were, in 1994, joined by Portugal, Sweden, the Philippines, and Paraguay.[314] Many others followed suit. The rise of poverty as a global issue again coincided with

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Addendum: Rwanda, ¶ 52, U.N. Doc. E/1986/3/Add.1 (Jan. 28, 1986); Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, in Accordance with the First Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Colombia, ¶ 206, U.N. Doc. E/1984/7/Add.21/Rev.1 (Jan. 28, 1986).

311. The 1986 report of the Democratic People's Republic of Korea, for instance, opens with a statement reading: "Today the Democratic People's Republic of Korea has been turned into a people's paradise, where all the people are leading a happy life while working and studying to their heart's content without any worries about food, clothing and medical treatment." Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant, in Accordance with Council Resolution 1988 (LX), Concerning Rights Covered by Articles 10 to 12, Democratic People's Republic of Korea, ¶ 1, U.N. Doc. E/1986/3/Add.5 (Nov. 5, 1986). That perspective negates the existence or even the possibility of socioeconomic inequalities.

312. *See, e.g.*, Econ. & Soc. Council, Implementation of the ICESCR, Reports Submitted in Accordance with Council Resolution 1988 (LX) by States Parties to the Covenant Concerning Rights Covered by Articles 6 to 9, Canada, 312, U.N. Doc. E/1978/8/Add.32 (Aug. 7, 1981).

313. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties Under Article 16 and 17 of the Covenant in Accordance with the Programme Established by Econ. & Soc. Council Resolution 1988/4, Addendum: Mexico, ¶ 3, U.N Doc. E/1990/6/Add.4 (Jan. 20, 1993); Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12 in Accordance with the Second Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Nicaragua, ¶ 3, U.N. Doc. E/1986/3/Add.16 (June 14, 1993).

314. Econ. & Soc. Council, Implementation of the ICESCR, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Portugal, U.N. Doc. E/1990/6/Add.6 (July 22, 1994); Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant in accordance with the Programmes Established by Econ. & Soc. Council Resolution 1988/4, Addendum: Sweden, U.N. Doc. E/1994/104/Add.1 (July 29, 1994); Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties to the Covenant Concerning Rights Covered by Articles 10 to 12 in Accordance with the Second Stage of the Programme Established by the Econ. & Soc. Council in its Resolution 1988 (LX), Addendum: Philippines, U.N. Doc. E/1986/3/Add.17 (Sept. 15, 1994); Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Paraguay, U.N. Doc. E/1990/5/Add.23 (Jan. 24, 1995).

shifts in the social policies states discussed in their reports. After a transformation, Eastern European states came to appreciate market mechanisms, individualism, and multiparty democracy.[315] Western-type welfare statism quickly became a model for their social policies. "Social insurance" was turned into a contribution-based scheme, relying on individual initiative and responsibility.[316] "Poverty" was to be addressed through regimes of social assistance or social welfare targeting the "poor" or the "vulnerable" sections of the population.[317] Latin American countries moved to reinterpret their policies of development. The policies geared toward "economic development" gave way to policies aiming at "economic and social development," "social development," or "human development." Colombia, for instance, addressed the change quite openly. According to the 1994 report of Colombia, its new policy was about dealing with "the problem of poverty" and accelerating "economic growth."[318] When doing so, the report went on, Colombia needed to concentrate on the "most essential social obligations" and "the poorest people" as the beneficiaries of government spending.[319] The 1995 report of Guyana spoke of "reordered priorities," and the government's will to "direct[] more resources to the critical areas of health, education and housing."[320] Argentina, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Nicaragua, Paraguay, Uruguay, and Venezuela took a similar stance, as did India, China, Cambodia, the Philippines, Sri Lanka, Afghanistan, Nepal, Iran, Syria, Yemen, Libya,

315. *See*, *e.g.*, Tomeš, *supra* note 267, at 22, 40–46 (describing the major changes the Eastern European social security systems went through after transformation).

316. See, e.g., the comments of Estonia on the pension reform of the late 1990s that was supposed to reorganize the pension system along three different "pillars" involving various degrees of state and private party involvement. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Estonia, ¶¶ 240–50, U.N. Doc. E/1990/5/Add.51 (Oct. 2, 2001).

317. See, again, *id*. ¶ 305, stating: "Subsistence benefit is paid to persons who reside on the territory . . . and whose monthly income is below the minimum subsistence level set by the Government." Similar with respect to family allowances, see the 1998 report of Kyrgyzstan, declaring: "State social protection of the family is currently very closely targeted, and takes the form of payment of a monthly benefit to poor households." Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Kyrgyzstan, ¶ 134, U.N. Doc. E/1990/5/Add.42 (Feb. 26, 1998).

318. Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Colombia, ¶ 126, U.N. Doc. E/1994/104/Add.2 (Aug. 15, 1994).

319. *Id*. ¶ 127.

320. Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Guyana, ¶ 3, U.N. Doc. E/1990/5/Add.27 (Aug. 7, 1995).

Tunisia, Morocco, Kenya, Senegal, Rwanda, and Madagascar.[321] All these countries adhered, in one way or the other, to "social development."

Three indicators capture these shifts in numbers. The first indicator is the incidence of the word "poverty" appearing in state party reports. The word "poverty" is rarely used in the first decade of the reporting mechanism (1977 to 1986). Only 8% of the reports (n = 225) did so, most of them in passing. In the last reporting decade (2000 to 2009), 83% of the reports dealt with poverty, and they did so extensively. The average word count per report reached 30 (n = 144) in the last period. States made an effort to describe who the "vulnerable" groups were, to elaborate on regional particularities, to outline the macroeconomic context of the phenomenon (GNP, income per capita), and to go into the causes of poverty (e.g., armed conflict, weak economy, lack of human capital, or ineffectiveness of national policies). States even engaged with the technicalities of poverty research, such as absolute or relative poverty lines, the depth of poverty, poverty coefficients, definitions of basic needs, the features of poor households, the gender breakdown, or the spatial dimension of poverty. The second indicator is the incidence of references to policies or instruments designed to mitigate socioeconomic inequalities. That indicator indeed suggests that socialist planning or developmental thinking left little room for acknowledging inequalities. The reports of the first reporting period (1977 to 1986) include 60 reports relying on socialist planning or economic development (n = 175). Only 18% of these reports mentioned policies counterbalancing social inequalities, in comparison to 50% of the other reports. The balance is very different for the reporting period from 2000 to 2009 where only 5 reports still expressly drew on economic development (n = 144). Of the 144 reports, almost 90% talked about policies mitigating socioeconomic inequalities. The third indicator is the incidence of references to social cash transfers (as a particular instrument intended to accommodate people in poverty). That indicator points in the same direction. The incidence grew significantly. Of all the reports commenting on ICESCR Article 9 from 1977 to 1986 (n = 99), only 30% mentioned targeted cash transfers in comparison to 72% of the reports submitted from 2000 to 2009. For the reports commenting of ICESCR Article 11 the numbers are 31% and 71% respectively.[322]

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321. Source: ICESCR-SPR 2011, revised 2012.

322. For an overview on the emergence of state policies relying on social cash transfers, see Lutz Leisering, *Extending Social Security to the Excluded: Are Social Cash Transfers to the Poor an Appropriate Way of Fighting Poverty in Developing Countries?*, 9 GLOBAL SOC. POL'Y 246 (2009);

D. International Social Citizenship?

The shift of states' talk under ICESCR Articles 9 and 11 is significant from the perspective of both politics and law.

The states parties to the ICESCR clearly recalibrated their reading of the core content of social rights. The (former) faith in economic growth as the motor of social justice is almost completely gone. Policies were now directed towards combating poverty, aiming at the weak, the ones defined as the most vulnerable. "Targeting" became a buzzword for states across the globe as they increasingly paid attention to individual welfare. Still, the measures employed by the states vary greatly. For OECD states and Eastern European transformation states, "targeting" mainly relates to social cash transfers meant to secure individual subsistence (social assistance). Social assistance laws usually carefully circumscribe the beneficiaries in order to make sure that public money is directed towards people in need only. For developing countries, "targeting" primarily extends to assistance in kind. Developing countries target beneficiaries when it comes to access to training for employment or food production, support for micro-enterprises, health care, the hand-out of nutrition-supplements, access to land (land reform), water or sanitation, the provision of means of production, or to specifically earmarked cash transfers, such as food allowances, housing allowances, or family benefits. Moreover, the mechanisms for targeting differ. OECD states and transformation states tend to rely on means testing, whereas developing countries tend to rely on targeting that is group-based (e.g., indigenous people or large families), age-based (children under the age of three or five or the elderly), gender-based, or region-based. Finally, targeted measures seem particularly volatile in developing countries. State party reports seldom describe their legal background. States simply refer to "programs," and it remains unclear whether these programs have a firm basis in law. Targeted measures may be financed by international donors administered by national or international NGOs, or by state-dominated charities, such as the Zakat House located in Kuwait City.

From the perspective of law, the recalibration of state policies under ICESCR Articles 9 and 11 reflects upon the meaning of these rights.[323] For

JOSEPH HANLON, ARMANDO BARRIENTOS & DAVID HULME, JUST GIVE MONEY TO THE POOR: THE DEVELOPMENT REVOLUTION FROM THE GLOBAL SOUTH (2010).

323. *See* Mechlem, *supra* note 198 (elaborating on VCLT article 31(3) in greater detail and against the backdrop of three examples taken from the work of the Committee established under the ICESCR).

one, "poverty" has emerged as the eminent issue of social rights for states all over the globe. The mitigation of poverty has become a human rights goal that is also backed by major global actors such as the World Bank, the International Monetary Fund, and the UNDP. States have to pay attention to this goal as they design their domestic policies or cooperate internationally with a view to "achieving . . . the full realization of the rights recognized in the present Covenant."[324] In addition, the recent emphasis on "targeted" policies strengthens the "individual rights-element" enshrined in those rights. That is particularly true for the rights under ICESCR Article 11 (adequate standard of living). The mixed package of economic planning, policies of economic development, and Western welfare policies seems to have given way to policies that concentrate on the welfare of individuals belonging to groups deemed vulnerable (individual welfare). If the reports picture state practice accurately, states must no longer neglect individual welfare over collective welfare when it comes to mitigating poverty, not even in the context of ICESCR Article 11.[325] The latter shift bolsters the international layer of "social citizenship." The measures states talk about are individualized (as they concentrate on targeted individuals). The measures are basically state-orchestrated (though in weak states state bureaucracies may still be substituted by other bureaucracies or even self-help); the measures moderate inequalities, at least with respect to the "floor level in the basement of the social edifice,"[326] to quote T.H. Marshall one last time. The measures are not conceptualized as a *quid pro quo* for the market value of the beneficiaries' labor. In short, the reports indicate that the granting of social citizenship is about to become an obligation states must adhere to, at least when they confront poverty. Measures targeting the poor certainly fall short of the technical characteristics of contribution-based "social insurance," yet may be summarized under the legal term "social

324. ICESCR, *supra* note 14, art. 2(1). On the obligation of states parties under article 2(1) to take steps to progressively realize the rights recognized herein "individually and through international assistance and cooperation," see Magdalena Sepúlveda, *Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 24 NETH. Q. HUM. RTS. 271 (2006) (discussing the misconceptions underlying article 2(1) and the attempts by the Committee under the ICESCR to give guidance as to the meaning of these obligations).

325. *See generally* Philip Alston & Mary Robinson, *The Challenges of Ensuring Mutuality*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 1 (Philip Alston & Mary Robinson eds., 2005) (reflecting on the added value of a rights-based approach to development policies).

326. MARSHALL, *supra* note 3, at 47.

security" (ICESCR Article 9) or the term "adequate standard of living" (ICESCR Article 11).[327]

CONCLUSIONS

This Article investigates the relevance of U.N.-sponsored economic and social rights for social citizenship. When Marshall theorized "citizenship" back in 1950, his contention was that the expansion of rights on the national level, from civil to political to social rights over the course of two centuries, eventually culminated in the birth of the European welfare state. According to that narrative, the welfare state was born when nation-states moved to grant social rights, i.e., social citizenship. Do U.N.-sponsored economic and social rights similarly advance social citizenship and, per implication, some notion of welfare statism? This Article rejects easy assumptions in the affirmative, but also ignorance and skepticism common among sociologists and legal scholars. Since 1993, social citizenship has emerged as a human rights tenet.

First, this Article proposes to acknowledge that U.N.-sponsored human rights law may have an impact on citizenship rights on the national level. Often, human rights recognized on the international level oblige states to translate these rights into national rights enforceable in a court of law. Citizenship may hence rightly be conceptualized as "layered," i.e., as a status combining an international layer of rights with a national layer of rights. However, "social citizenship" is a highly specified notion, and it is still quite open to interpretation whether U.N.-sponsored economic and social rights indeed include such a dimension.

Secondly, this Article elaborates the meaning of U.N.-sponsored economic and social rights in their historical context. Based on the *travaux préparatoires* of the ICESCR, the Article demonstrates that the advocates of these rights can be grouped along three ideological lines: liberalism,

327. The global consensus on a human rights-based need to fight poverty was eventually formalized when the Committee under the ICESCR adopted its General Comment No. 19 late in 2007, stressing that measures under ICESCR Article 9 included, *inter alia*, non-contributory schemes specifically targeted to those in a situation of need. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 19 on the Right to Social Security, ¶ 4(b), U.N. Doc. E/C.12/GC/19 (Nov. 23, 2007). For the most recent initiatives on the global level, see SOCIAL PROTECTION FLOOR ADVISORY GROUP, ILO, SOCIAL PROTECTION FLOOR FOR A FAIR AND INCLUSIVE GLOBALIZATION (2011), *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_165750.pdf; ILO, Social Protection Floors Recommendation, ILO No. R202 (June 14, 2012); OLIVIER DE SCHUTTER & MAGDALENA SEPÚLVEDA, UNDERWRITING THE POOR: A GLOBAL FUND FOR SOCIAL PROTECTION (2012), *available at* http://www.ohchr.org/Documents/Issues/Food/20121009_GFSP_en.pdf.

developmental thinking, and socialism. Each ideology left traces in clauses of the ICESCR; the compromises found were supposed to leave much leeway to the implementing states. Historically, social citizenship was not the dominant program for the realization of these rights.

Third, this Article explores whether the understanding of U.N.-sponsored economic and social rights changed subsequently, in particular through re-reading of the clauses by the states parties to the ICESCR. Such a change in reading would, if backed by state practice, change the meaning of the clauses of the ICESCR. The analysis of the 546 reports submitted under the ICESCR from 1977 to 2011 clearly shows that around 1993 the states' perception and understanding of social rights changed significantly. At that point in time, socialism and developmental thinking were in retreat. Liberalism was on the rise in the Eastern European transformation states, but also in Asian and African states. The reports testify to a new ideational consensus, cross-cutting former ideological groups and shared by states around the world. When describing their policies under ICESCR Article 9 and Article 11, states nowadays focus on individual welfare ("targeting"), on inequality ("poverty"), and on measures providing help where markets fail to do so. These are the ingredients of social citizenship. Yet international social citizenship has distinct features. Social policies concentrate on the poor and cash transfers known from European contexts are not necessarily the instrument states resort to. Cash transfers often combine with provision in kind (food), access to services (health services, care, or training), or access to land.[328]

Social citizenship as a human rights tenet, recognized worldwide in the course of the 1990's, is certainly minimal. Its content is limited to subsistence, i.e., some basic floor of a human existence in dignity. And yet, the emergence on the global level of an individual right to a livelihood in dignity is a major and unexpected development. As recorded in this Article, the "social" encapsulated in the ICESCR was deliberately kept vague in the 1950's and 1960's. Today, we witness a broad consensus among states that state responsibilities under the ICESCR with respect to welfare also extend to individual welfare. Each human being living in poverty indicates that the human rights standard of the ICESCR has not been met.

328. For the aspect of access to land, see generally BENJAMIN DAVY, LAND POLICY: PLANNING AND THE SPATIAL CONSEQUENCES OF PROPERTY (2012) and Benjamin Davy & Sony Pellissery, *The Citizenship Promise (Un)fulfilled: The Right to Housing in Informal Settings*, 22 INT'L J. OF SOC. WELFARE S68 (2013) (emphasizing the creation of non-state welfare through economic and social practices at the margins of society).