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**INTERROGATING NGO STRUGGLES FOR ECONOMIC,
SOCIAL AND CULTURAL HUMAN RIGHTS IN
CONTEMPORARY UTAKE:
A PERSPECTIVE FROM UGANDA**

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The Human Rights and Peace Centre (HURIPEC) was established at Makerere University in 1993, and was designed among others to:-

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- 2) Provide a library and documentation unit, particularly concerned with the compilation, collation and development of materials and literature in the areas of human rights and peace.
- 3) Organize seminars, symposia and conferences in order to systematically propagate the message of human rights protection in Uganda and beyond.

NOTE ON WORKING PAPER AND AUTHOR

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I. INTRODUCTION AND BACKGROUND

Confusion and even conflict over the recognition, implementation and enforcement of economic, social and cultural rights (ESCRs) is an issue of historical dimensions, and has been one that has engaged scholars and activists since even before the two international human rights covenants were drafted in the mid-1960s. The International Covenant on Civil and Political Rights (ICCPR) is well known for the articulation of rights governing the protection of free speech, freedom of association, the prohibition of slavery, forced labour and freedom from torture. Although it was enacted slightly earlier, the International Covenant on Economic, Social and Cultural Rights (ICESCR) for many years remained on the back burner of international human rights attention and advocacy. To top it all, the manner in which rights issues were approached led to the erection of a literal ‘Chinese Wall’ between the two categories of human rights. Thus, very little connection was seen to exist between the realization of one category of rights (the civil and political) versus the other (the economic, social and cultural). This partially explains why the most prominent international human rights advocacy organizations—Amnesty International, Human Rights Watch and the Lawyers’ Committee for Human Rights, to mention a few—have only of recent begun to pay attention to ESCRs and their realization.¹ While this new attention to ESCRs may at first sight appear to be a welcome development, one of the main objectives of this paper is to ask whether it is the kind of attention that this arena of struggle really needs.

Each of the countries of East Africa—collectively described in this paper as *UTAKE*, (*viz.*, Uganda, Tanzania and Kenya)—have fairly elaborate constitutional instruments of governance. Tanzania conducted a debate on the need for a bill of rights in the early 1980s, and indeed introduced such a framework into its constitution in 1985. Both Kenya

and Uganda have had more recent extensive discussions on constitutional reform, resulting, for the latter, in a new Constitution promulgated in 1995. On its part, Kenya has been promised a constitution that is still in incubation, with a draft document stalemated between the Commission that produced it, the Courts of Law, Parliament and the office of the Minister of Justice and Constitutional Affairs. There is little doubt that the Kenyan process will probably go down in history as the most protracted constitutional review ever undertaken. Uganda has returned to the drawing board, having discovered that there was wide dissatisfaction with the first attempt that itself took seven years to complete. In sum, there is a great deal of activity on the front of constitutional and human rights development in the region. Unfortunately, that activity has generated considerably more heat than it has light.

Looking further back in history, none of the first generation (independence) attempts at constitutional promulgation made reference to the issue of ESCRs in any elaborate fashion. Indeed, aside from the issue of land and property rights—which in many respects belongs in a quite distinct category—and general concerns about employment (or the lack of it), very little has been said or done about this category of rights in Utake. Why is this so? How is it that a region of the world facing severe constraints in meeting the goals of social and economic progress is not engaged in serious deliberations over how best to achieve these objectives via the constitution? Do the governments feel that existing mechanisms are sufficient to do so? Are ESCRs of no concern to the general citizenry or to civil society? What of the phenomenon of globalization—a double-edged sword that has the ability to both empower and to marginalize individuals, communities and even whole countries? Finally, what has been done to protect languages in danger of extinction, or to ensure that minorities and indigenous peoples are secure in their livelihoods and cultural practices? Aren’t these rights, to paraphrase Jeremy Bentham, simply ‘nonsense upon stilts?’

¹ A special report in the *Economist* magazine several years ago analyzed why this was so. See, *Righting Wrongs* THE ECONOMIST, August 18, 2001, at 19-21.

Part of the answer to the above questions relates to the very issue of how ESCRs are conceptualized. Much confusion surrounds what exactly ESCRs entail: can you sue the government for failing to provide clean, drinkable and accessible water in the same way you can if you are tortured? What does a *right* to food actually entail? Who is responsible for enforcing the right to education: is it the state, educational institutions such as schools and universities, or is it teachers and parents? How, in the first instance, is such a right violated? Moreover, by focusing on the issue of poverty in its various manifestations, haven't these governments actually addressed ESCRs in a more fundamental and sustainable manner? Delving into these debates is one of the primary objectives of this paper. Understanding the conceptual dimensions of the struggle for the realization of economic, social and cultural rights, and distinguishing, or relating this to the overall quest for economic development is the other. A third, but intricately related objective of the paper is to understand the struggle for the realization of ESCRs as ultimately and intrinsically a political struggle. In the words of Professor Frederick Ssempebwa, Chairman of Uganda's Constitutional Review Commission (CRC) that submitted its report to government in late 2003:

The Commission's consultation gatherings have been very well attended. Whereas the people's respond (sic!) to the Commission guidelines or constitutional issues, the more spontaneous and passionate contributions are about welfare issues. Everywhere in the rural areas, talk is about poverty, inability to market produce and the burden of taxation. In summary, the state of the economy, the absence of growth and development are of primary concern raising questions about the relevance of constitution making... We have concentrated on the constitutional infrastructure for political liberalisation. What is needed is added emphasis on how the infrastructure can improve people's welfare.²

Such views make it abundantly clear that any examination of why ESCRs remain marginalized in East Africa must be linked to the broader issues of

globalization and economic reform in which the three countries have been embroiled since the early 1980s. This will illustrate that at the end of the day the question of the realization of ESCRs is intricately connected to questions of political economy. Put another way, to what extent can ESCRs be realized within a context of unbridled market liberalization, wide-scale privatization and the unmitigated promotion of international trade and foreign direct investment (FDI)? If the political will necessary to ensure that ESCRs are given constitutional recognition and enforcement is lacking, how can these rights be realized on a sustainable basis? Finally, how do we confront the various issues of discrimination (gender, social class and ethnic) in the realization of ESCRs unless there is a firm constitutional foundation on which they are constructed? Given all these factors, it is necessary not to fall prey to the assertion that because these are economic interventions they must follow a different, largely technocratic logic insulated from considerations of a non-economic (political or social) nature. In other words, such issues must be understood in terms of their manifestly *political* frameworks of operation.

To offer some response to these varied questions, this paper begins with a brief overview of the influence of the forces of globalization on contemporary human rights struggles, beginning with a survey of the economic policy framework. Part III of the paper examines the question of how ESCRs remain far from effective enforcement at both the international and the regional level. This comparative tour is coupled with an examination of the situation in Uganda prior to the enactment of the 1995 Constitution. Uganda is selected for particular attention principally on account of the fact that ESCRs have been incorporated to a greater extent within its constitutional framework than is the case with either of its two East African counterparts. Building on this analysis, Part IV of the paper specifically focuses on the fashion in which ESCRs are approached in the 1995 Constitution, with illustrations drawn from a look at the rights to health, food and

² E.F. Ssempebwa, *The Constitutional Review Process*, in Othman Haroub & Maria Nassali (eds.), *TOWARDS POLITICAL LIBERALISATION IN UGANDA: A REPORT OF THE UGANDA FACT-FINDING MISSION*, Fountain, Kampala, 2002, at 90-91.

education. Part V revisits the vexed question of the justiciability and enforcement of ESCRs, specifically in a situation in which resource constraints are a major factor in the debate. Finally, the paper concludes by offering some suggestions on what HROs in Utake need to do in order to end the marginalization of ESCRs in the region

II. SITUATING HUMAN RIGHTS STRUGGLES IN AN AGE OF GLOBALIZATION

2.1 *The Economic Policy Framework*

To fully comprehend the context in which ESCRs are sought to be realized in Utake, it is essential to first analyse the overall framework within which economic policy is designed and implemented. For both Uganda and Tanzania, the defining element in that policy since the early 1980s has been structural adjustment as dictated mainly by the country's multi- and bilateral donors, prominent among whom are the multilateral institutions—the World Bank and the International Monetary Fund (IMF). Structural Adjustment Programs (SAPs) emerged out of concern that the decades of the 1970s and 1980s had effectively been 'lost' because the countries of Sub-Saharan Africa had failed to emerge from the situation of abject poverty and marginalization, and to fully benefit from their emancipation from colonial domination. Under retired president Daniel arap Moi Kenya was relegated to pariah status within the international community. Consequently, while it pursued many of the same policies as its counterparts in the region, it was basically starved of donor assistance until Mr. Moi had departed the scene. The consequences of this action—a point we shall return to subsequently—are of considerable significance to the analysis in this paper.

SAPs were primarily concerned with the structural and institutional impediments standing in the way of effective development. Among these were foreign

exchange controls, tariff and trade barriers, high rates of inflation, inefficient and bloated state bureaucracies, and parastatal corporations that excelled in losing money. Known as the 'Washington Consensus,' the package of reforms were designed as a kind of shock-therapy intended to jump-start African economies.³ In response to this situation, SAPs included an emphasis on market forces rather than on state intervention, a promotion of the role of private capital rather than public expenditure, and the stimulation of export-led production versus import substitution. SAPs dictated that the state should be confined to the promulgation of policy frameworks that facilitated investment, trade and manufacture, rather than directly involving itself in any of these activities. In sum, SAPs favoured macro- versus microeconomic interventions.

The logical consequences of this ideology have been the privatization of previously state-owned and managed enterprise, cost-sharing in public (educational and health) institutions and the liberalization of state controls over trade and investment. Tanzania has generally led the way in this regard, with Uganda following, while Kenya still has a fairly large parastatal sector. Needless to say, the benefits of these measures can be the subject of extensive debate. Human rights principles place an emphasis on the situation of the individual, and on the principles of non-discrimination, equity and access. From this perspective, it is questionable whether SAPs have actually effected an overall improvement in the observation and protection of human rights, especially of the economic, social and cultural variety.

More recently, the economic policy framework has shifted (at least at the rhetorical level) to an emphasis on poverty alleviation, reduction or eradication, as part of the process of securing debt relief for countries that have a debt/service burden considered unsustainable. That shift comes in the wake of the

³ Cord Jakobeit, *The World Bank and Human Development: Washington's New Strategic Approach*, DEVELOPMENT & COOPERATION, No.6 (1999).

realization that debt levels after the many years of shock therapy were not sustainable. Thus, the Bank and the Fund began to speak the language of ‘poverty reduction,’ linking it, in 1996, to the introduction of the Highly Indebted Poor Countries (HIPC) initiative. HIPC—which came on the heels of criticism from civil society—represented the first time that a concerted effort was made to include MLIs in the search for a comprehensive debt-relief program for developing countries.⁴ In quantitative terms, HIPC could be considered fairly impressive, registering an easing of some of the burden of the debt stock of several African countries. Qualitatively, however, HIPC did not go far enough, and indeed, specifically in the case of both Uganda and Tanzania, debt-repayment burdens remain heavy.⁵

The emphasis on poverty and its consequences followed in the wake of the failure of SAPs to substantially reduce the incidence of poverty. To address this failure, a 1995 World Bank Report urged an improvement of the investment incentive regime, export facilitation and support for non-traditional agricultural exports as the key to poverty-reduction in the medium to long run.⁶ The emphasis on poverty has been sustained through the adoption in Uganda of the Poverty Eradication Action Plan (PEAP) which has been the blueprint for the Poverty Reduction Strategy Papers (PRSPs) deployed worldwide.⁷ However, there is a thread of continuity between the old policy stipulations and the new, in that the

‘fundamentals’ (including liberalization of the economy, rapid privatization and deregulation) have remained intact. Against this background, the problems of the poverty approach in relation to the improved observation and protection of human rights is captured in the following message of the Uganda Human Rights Commission on Constitutional Day:

Poverty, which has been and still is one of the major problems in this country, continues to rise or increase in areas where there is insecurity or instability. As a result, many people cannot afford the basic necessities for leading a decent life. However, in areas where there is stability, poverty levels have greatly reduced and people can afford to live fairly decent lives. This in itself contradicts the constitutional provision of equality among the citizens.⁸

Recent analyses of poverty in fact demonstrate that at least with respect to the case of Uganda it is on the increase despite what has been described as spectacular levels of growth.⁹ The country has also had problems in matching levels of GDP growth with the improvement of its overall human development—the latter illustrating the more qualitative dimensions of economic change in a country.¹⁰ To crown it all, a recent study of PRSPs and their impact has illustrated that there is little in the way of poverty alleviation that this new program has introduced.¹¹ But for both

⁴ See Peter Mijumbi, *Uganda’s External Debt and the HIPC Initiative*, Occasional Paper No.15, Economic Policy Research Centre, Kampala, 2001.

⁵ It is thus interesting to note that the United States has recently advocated debt cancellation for both Uganda and Tanzania. See, Kevin Kelley, “Cancel Uganda, Tanzania Debt, US Tells IMF,” *The East African*, September 20-26, 2004, at 1.

⁶ World Bank, *UGANDA: THE CHALLENGE OF GROWTH AND POVERTY REDUCTION*, June 30, Report No.14313, IBRD, Washington DC, 1995.

⁷ See Remigius Munyonyo, *An Evaluation of Uganda’s Poverty Reduction Strategy Paper (PRSP) Using a Human Rights-Based Approach*, in Deuseddit Nkurunziza & Lewis Mugumya (eds.), *DEVELOPING A CULTURE OF PEACE AND HUMAN RIGHTS IN AFRICA*, Konrad Adenauer Stiftung, Kampala, 2003.

⁸ Constitutional Day message from the Uganda Human Rights Commission in *The Monitor* of October 8, 2003, at 30.

⁹ See, “Poverty Levels Soar,” *New Vision*, November 12, 2003 at 3. Although the economy is growing, the article argues that Ugandans are in fact becoming poorer, with the poverty level of 34% in 1999 increasing to 38% in 2002/03.

¹⁰ United Nations Development Program (2002), *UGANDA HUMAN DEVELOPMENT REPORT*, New Vision, Kampala, 2002, especially 14-20.

¹¹ Warren Nyamugasira & Rick Rowden, *Poverty Reduction Strategies and Coherency of Loan Conditions: Do the new World Bank and IMF Loans Support Countries’ Poverty-Reduction Goals? The Case of Uganda*, April 2002.

Uganda and Tanzania, the levels of donor influence over economic policy and direction are quite frightening as is illustrated in the following table:

**TABLE I
REGIONAL COMPARISON OF ACTUAL
REVENUE SOURCES: 2003/2004**

SOURCE	KENYA		TANZANIA		UGANDA	
	US\$ mill.	%	US\$ mill.	%	US\$ mill.	%
Internal Revenue	4,631	93.8	1,345	55.7	856	48.2
External Aid	308	6.2	1,071	44.3	920	51.8
Total Revenue	4,939	100.0	2,416	100.0	1,776	100.0
GDP Growth Rate %	1.8%		5.6%		6%	

Source: Richard Ndungu, Focus and Clarity in Budget Speeches! in *msafari*, Issue 48 (2004) at 31.

Consequently, while growth in both Tanzania and Uganda has been fairly robust in comparison to Kenya, it is important to ask a number of qualitative questions: who has benefited from this growth? Is it a sustainable model of growth? What consequences does this model of economic growth have for the realization of ESCRs? It is thus quite clear that with respect to the realization of ESCRs, significant questions of a global nature come into play. In other words, the phenomenon of globalization and its related consequences need to be given full consideration. Among the major issues of concern are the role and place of the operations of institutions such as the World Bank and the International Monetary Fund (IMF) in the arena of economic policy and its ramifications in the social sphere. Indeed, as John Pender has pointed out, the World Bank has seized the moral high ground as a result of its poverty ‘reorientation.’ It has thus “...gained legitimacy for greater regulatory interventions in poor country society than even during the now discredited regimes of structural adjustment.”¹² But rather than development as a goal,

the lowest common denominator has become the alleviation of poverty, which is effectively a downscaling of the horizons from which African progress is viewed. Likewise, the WTO agreements in areas such as agriculture, intellectual property rights (IPRs) and the provision of services, have serious implications for ESCRs.

2.2 Gender, Age and Minority Status

It is a trite observation that despite human rights principles applying to all categories of people, there are some groups that have faced historical marginalization in the observation and realization of their human rights much more than others. Among them we can speak about women, the youth (especially children), older people, ethnic minorities and indigenous peoples. With particular respect to ESCRs, there is still much that needs to be done to ensure that such marginalization is brought to an end. Whatever category of economic, social or cultural rights that can be selected—for example the rights to food, health and education—the situation of these groups largely tends to be worse than those of men who dominate the political arena. In this respect, all the countries of East Africa have tried to introduce programs of affirmative action in order to address this imbalance. For example, Uganda’s 1995 Constitution went some way in recognizing the specific situation of these groups. Thus, provisions in the Constitution cover equality and non-discrimination (Article 21), the rights of the family (Article 31), affirmative action (Article 32), the rights of women (Article 33), children (Article 34), people with disabilities (Article 35), and of minorities (Article 36). Older persons are not mentioned in the Bill of Rights, however, Principle VII stipulates that the state shall make reasonable provision for the welfare and maintenance of the aged. Clearly, a number of ESCRs are contained in this list and in doing work on women’s and children’s rights especially, most HROs are effectively engaging this category of rights.

¹² John Pender, *Empowering the Poorest? The World Bank and the ‘Voices of the Poor,’* in David Chandler (ed.) *RETHINKING HUMAN RIGHTS: CRITICAL APPROACHES TO INTERNATIONAL POLITICS*, at 112.

However, aside from children, virtually none of these groups has either legislation or designated institutional mechanisms that specifically addresses the many issues they face, least of all the ESCRs that are of most concern to them. In part, this is on account of the manner in which the state prioritizes those issues it considers most important. However, there is also the fact that conditions of discrimination and marginalization are difficult to remove, largely on account of vested interests and resilient institutions such as patriarchy. The fate of Uganda's domestic relations legislation is illustrative of this fact. Although attempts at reforming the structure of the family have been underway since soon after independence, 40 plus years later, legislation to address this issue is yet to reach the legislature. Moreover, judging by the initial reaction to the proposals in the draft Bill, it is by no means certain that the many issues facing these groups will be comprehensively addressed. Further still, communities that are a minority by virtue of ethnicity, such as the Batwa in Uganda; the Ogiek in Kenya, and the Maasai in Tanzania face serious problems of marginalization, especially with regard to their rights to food, land, culture, health, shelter and education.¹³ In Kenya, the recent protests by the Maasai over the issue of colonial land thefts demonstrate the varied dimensions of this issue. Likewise, Tanzania confronts similar problems, particularly against the continuing attempts to secure more land for private investment and the promotion of tourism.¹⁴

Needless to say, considerable problems remain with respect to the institutional framework for the realization of the ESCRs. For example, the institutional mechanism in Uganda that was envisaged under the

1995 Constitution to specifically address this issue—the Equal Opportunities Commission (EOC)—is the only constitutional body that has not yet been established.¹⁵ This is telling demonstration of the manner in which the rights of these groups are perceived by the state and other dominant members of society. In many respects Tanzania has buried its head in the sand over the issue of minorities—a legacy of Mwalimu Nyerere's emphasis on nationalism as opposed to ethnic particularity.¹⁶ Needless to say, despite the greater cohesion of Tanzanian society, there are serious minority questions that remain untackled. Kenya too, lacks any public institution directed towards these issues. Quite clearly, any strategy for the enhanced promotion and protection of ESCRs will seriously have to review the institutional mechanisms that exist or are designed to address their situation.

2.3 Globalization and the role of Human Rights NGOs (HROs)

At the end of the day, the issue of how effectively ESCRs will be implemented is mainly dependent on the degree to which society at large is concerned to ensure that they be so. In other words, to what extent can ESCRs be *politicized* in such a manner that they are not just the grist for the government rhetoric mill, but have become rights which the populace feels they have a duty to struggle for. There is little doubt that HROs have played an important and critical role in ensuring the progressive realization of ESCRs around the world.¹⁷ But on more critical reflection with regard to our own circumstances, what does the evidence show? In each of the countries of Utake, the predominant focus of HROs has been civil and political rights for

¹³ See Baker, G. Wairama, *Uganda: The Marginalization of Minorities*, Minority Rights Group International, London, 2001; Issa Shivji & Wilbert B. Kapinga, *Maasai Rights in Ngorongoro, Tanzania*, IIED/Haki Ardhi (1998).

¹⁴ Rugemeleza Nshala, *Granting Hunting Blocks in Tanzania: The Need for Reform*, Policy Brief No.5, Lawyer's Environmental Action Team (LEAT), 1999.

¹⁵ See ACFODE, *The Proposed Equal Opportunities Commission for Uganda: Recommendations from Civil Society Organizations*, February 2003.

¹⁶ For an incisive comment on this, see Michael Okema, "Alas, the Tribe is Dead, the Nation Stillborn..." *The East African*, September 6-12, 2004 at 13.

¹⁷ See Nadia Hijab, *Human Rights and Development: Learning From Those Who Act*, Background Paper for UNDP *Human Development Report 2000*, (November 4, 1999).

the more than two decades in which they have been in existence. The three most prominent human rights HROs in Utake—the Foundation for Human Rights Initiative (FHRI) in Uganda, the Kenya Human Rights Commission (KHRC) in Kenya, and the Legal and Human Rights Centre (LHRC) in Tanzania—consider civil and political rights issues as their bread and butter. Of the three, the LHRC appears to have devoted more attention to ESCRs, publishing studies on privatization, workers rights and the environment. KHRC did some impressive work on the situation of workers in the flower industry, while FHRI conducted a study on Uganda's UPE.¹⁸ There does not appear to have been a sustained follow up on these specific areas, nor do the groups appear to have charted new paths in the area of ESCRs.

Each of these groups is successful in its own right. However, their strategies and methods are largely a clone of western groups such as Amnesty International, Human Rights Watch (HRW) and the International Commission of Jurists (ICJ).¹⁹ In contrast however, a reorientation in the focus and strategies of international NGOs (INGOs) has already taken place, with one commentator observing that the shift has been “impressive.”²⁰ Thus, INGOs like Human Rights First (formerly the Lawyer's Committee for Human Rights) have begun work on the accountability of transnational corporations. Others are tracking the human rights obligations of the Bretton Woods group, and yet others are targeting the many ramifications of the trade liberalization agenda spearheaded by the WTO.

In all three countries today there is a re-emergence of civil society. Two factors are responsible for this, the first being the growing inability of the state to provide basic services, and the second being the resulting lacuna in employment: the NGO sector is a large employer. Susan Dicklitch also points to the Bretton Woods Organizations' New Policy Agenda (NPA) whereby the recent emergence of NGOs is “... reflective of international trends which embrace the dominant discourse of neo-liberal economics, as well as domestic responses to the withdrawal of the state from basic service provision.”²¹ A survey of Ugandan human rights and development organizations published in 2002 catalogued 245 organizations, of which 56 assert that they are working on human rights, ranging from those that work with prisoners, to those that deal with the rights of persons with disabilities.²² Of that number, fewer than 10 can be said to focus on ESCRs in any serious and consistent manner. Similarly, Professor Samuel Mushi has noted that despite the recent proliferation of civic groups in Tanzania their capacity to deliver even basic services is seriously impaired by a number of forces.²³

However, we would be remiss not to question the *modus operandi* and effectiveness of local HROs, especially given the fact that much of their energies are expended on hosting workshops and carrying out civic education—strategies that would more appropriately be left to academic institutions. Indeed, in a recent report on HROs in Uganda entitled *Beyond Workshops* views were expressed that such groups have adopted non-confrontational (even complacent) attitudes

¹⁸ Kenya Human Rights Commission, *Beauty and Agony: An Advocacy Research on the Working Conditions in the Flower Plantations in Kenya*, Nairobi, 2001. FHRI, *The Right to Education in Uganda: A Myth or Reality? Special Reference to the Universal Primary Education Programme (UPE)*, Kampala, 2001.

¹⁹ For a general critique of African human rights NGOs, see Makau Mutua, *The Politics of Human Rights: Beyond the abolitionist Paradigm in Africa*, Vol.17, No.3 MICHIGAN JOURNAL OF INTERNATIONAL LAW (1996), esp. 606-607.

²⁰ See Christian Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, Vol. XXIII, No.1 BOSTON COLLEGE THIRD WORLD JOURNAL (2003), 57-114, at 69.

²¹ Susan Dicklitch, *THE ELUSIVE PROMISE OF NGOS IN AFRICA: LESSONS FROM UGANDA*, Macmillan, Houndsmills, 1998 at 15.

²² HURINET, *A DIRECTORY OF HUMAN RIGHTS & DEVELOPMENT ORGANIZATIONS IN UGANDA*, Kampala, 2002, especially at 83-114.

²³ Samuel Mushi, *DEVELOPMENT AND DEMOCRATISATION IN TANZANIA: A STUDY OF RURAL GRASSROOTS POLITICS*, Fountain, Kampala, 2001.

towards the state, and focus primarily on peripheral issues to such an extent that the state takes scant notice of their activities.²⁴ In the case of Uganda, to the extent that HROs have been instrumental in pursuing the realization of ESCRs, unfortunately, this has been from a predominantly *welfarist* perspective. Indeed, religious and charity-based groups have been prominent in providing health, educational and nutritional services in Uganda for decades.²⁵ The same can be said of Kenya and also of Tanzania, albeit to a lesser extent given the much greater emphasis on state intervention in the latter country.

What the above implies is that there is a critical need for reorientation of the manner in which HROs have approached the realization of ESCRs. They must shift from a predominantly *welfarist* to an activist stance. Thus, for example, the dearth of cases on ESCRs both before the Uganda Commission on Human Rights and in respect of the courts of law of all three countries is partly explicable by the fact that HROs do not bring suits on these matters. It is certainly not because there are no violations on which to sue. This is whether one considers the health and food rights of IDPs, the employment rights of women workers in flower plants and other high-labour industries, or in relation to government plans on the privatization of essential services such as water, public housing, or tertiary education. In sum, HROs in Utake need to demonstrate that the poverty alleviation that they claim to be actively involved in is not simply directed internally to their own personnel. In this respect a leaf can be taken from the examples of HROs like the Treatment Action Campaign (TAC) in South Africa, or the Social and Economic Rights Action Centre (SERAC) in Nigeria. Both have been fairly active in the pursuit of ESCRs in their respective countries and have utilized different methods to do so. Finally, a note must be made on

the need for international action, whether at the regional level or beyond. HROs in the region need to consider how to pursue the realization of ESCRs in institutions like the African Commission on Human and Peoples' Rights, as well as within the framework of the United Nations. A brief examination of these two levels of intervention is considered in the following section of the paper.

III. ECONOMIC, SOCIAL AND CULTURAL HUMAN RIGHTS: A GLOBAL AND REGIONAL PERSPECTIVE

It is one of the great paradoxes of international human rights law that although attention to ESCRs preceded global concern with political and civil rights, the latter overtook the former as a primary focus of attention.²⁶ Thus, one of the most prominent and earliest human rights given legal articulation—the rights of working people—was in fact an economic right that witnessed few conceptual obstacles to its recognition. The establishment of the International Labour Organization (ILO) in 1919 saw the right to work become a well established human right by the time of the Universal Declaration of Human Rights (UDHR) in 1948, and even of the earlier formation of the United Nations (UN) organization in 1945. In his widely quoted *Four Freedoms* speech made to Congress in 1941, United States president Franklin D. Roosevelt included freedom from want among those essential conditions for the existence of humankind, alongside freedom of speech and worship, and freedom from fear. However, as the Cold War set in to dominate international relations and politics, ESCRs were a major victim of super power struggles. Principally because the United States and its western allies considered such rights to be 'communist' in inspiration and content, sharp resistance was leveled against attempts to foster

²⁴ Justice Resources, *Beyond Workshops: Challenges and Strategies in Human Rights Interventions in Uganda*, Kampala, 2002.

²⁵ K.T. Akoyi Makokha, "Working with Community Organizations and Civil Society: The Case of Uganda," paper presented to the European Forum on Rural Development Cooperation, Montpellier, 2002.

²⁶ For a history of ESCRs on the international scene, see Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in Asbjørn Eide, Catarina Krause and Allan Rosas, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, Martinus Nijhoff, Dordrecht/Boston/London, 2001, at 12-17.

their increased realization. A telling example of this resistance was the fact that the Covenant on civil and political rights was strengthened with a protocol to provide for the filing of individual complaints, while its counterpart on economic, social and cultural rights was left without one.²⁷ For a considerable period of time, international attention to ESCRs was lukewarm.

3.1 *The International and Regional Context*

Against the preceding backdrop, what has been achieved on the international scene concerning the realization of ESCRs? Aside from the promulgation of the ICESCR in 1966 and its eventual entry into force a decade later, ESCRs made little headway in the intervening years. However, in the wake of the Vienna Conference and Declaration of 1993, heightened attention has been paid to this category of human rights. Several reasons explain this development. First, in recognition of the marginalization of the latter category of rights, the declaration stated that civil and political rights on the one hand, and economic, social and cultural rights, on the other were *indivisible, interdependent, interrelated and interconnected*. Secondly, the Committee designated with the task of supervising implementation of the ICESCR began to progressively reconceptualize its function.²⁸ Through the issuance of ‘general comments’ on the provisions of the Covenant, the Committee began to provide both conceptual clarity as well as critical focus on how states should meet their obligations in a more comprehensive fashion.

Finally, the rise of the phenomenon of globalization, market and trade liberalization, and the operations of the international financial and trade institutions (the IMF, the World Bank and more recently, the WTO) has projected concerns about

enforcing ESCRs to a new level. Civil society actors have also been prominent in developing standards on ESCRs. The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987), and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) are particularly important in this regard.²⁹ At the present time, an optional protocol to allow for individual complaints about this category of rights is under consideration in the UN human rights mechanisms. Entering the new millennium, views about ESCRs have undergone a remarkable shift, spurred on in part by concern with the negative consequences of globalization. Former United Nations High Commissioner for Human Rights Mary Robinson pushed the organization to become more actively engaged in this category of rights. Institutions like the World Bank and the IMF—previously reluctant to be drawn in on the debate—also lay claim to a renewed commitment to the promotion and protection of human rights, especially those of an economic, social and cultural character.

In the African context, the struggle for ESCRs assumed a more prominent form through the promulgation of the African Charter on Human and Peoples’ Rights in 1981. According to Chidi Odinkalu the African Charter, “... represents a significantly new and challenging normative framework for the implementation of economic, social and cultural rights, placing the implementing institutions of the Charter and human rights advocates working in or on Africa in a position to pioneer imaginative approaches to the realization of these rights.”³⁰ Breaking new conceptual ground, the Charter brought ESCRs to the fore by including them in a single instrument.³¹ Through the articulation of so-called ‘third generation’ rights such

²⁷ For a background to the development of social and economic rights, see Henry Steiner & Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, Oxford University Press, Oxford, 2000, at 237-238.

²⁸ On the operations of the Committee see Allan McChesney, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A HANDBOOK*, AAAS/HURIDOCs, Washington DC, 2000, at 86-88, and Matthew Craven, *The UN Committee on Economic, Social and Cultural Rights*, in Eide, op.cit.

²⁹ See Eide *et al.*, op.cit., at 717-734.

³⁰ Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples’ Rights*, *HUMAN RIGHTS QUARTERLY*, Vol.23, No.2., 2001, at 335.

³¹ See U. Oji Umozurike, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS*, Martinus Nijhoff, Dordrecht/Boston/London. Umozurike, 199, at 45-50.

as the right to a healthy environment and the right to development, the Charter raised the international profile of this category of rights.³² For many years, however, the performance of the Commission designated with the task of enforcing ESCR rights, can only be described as lacklustre.³³ In more recent times, the Commission has paid more attention to this category of rights.³⁴ The culmination came in a recent decision on the plight of the Ogoni peoples of the Niger Delta region of Nigeria.³⁵ In that instance, the Commission made several observations concerning the despoliation of the environment and a score of violations done to ESCRs by the Nigerian government, together with several multinational corporations in the exploitation of the rich oil reserves of the region.³⁶ The African Commission strongly argued that it had the capacity to deal with any of the rights enshrined in the Charter regardless of categorization.³⁷ The Commission found that the Nigerian government together with several multinationals had violated, among others, the rights to life, housing, food, health, and the environment.³⁸ As the issue of governmental abuse of this category of rights is a major one in Africa, the *Ogoni* decision should be regarded as an important

landmark in the struggle to improve the protection of ESRs. The decision is also important because of the fashion in which the Commission demonstrated how and why it is essential to analyse these rights in their interconnection.

But what of the realization of ESCRs in the context of individual countries? Outside Africa, the decisions of the Indian Supreme Court have attracted most attention in terms of seeking appropriate mechanisms to ensure that ESCRs are actually enforced.³⁹ The Indian context is particularly important in relation to the issue of whether ESRs can be enforced by courts. That is, whether they are *justiciable*.⁴⁰ Secondly, it is important with respect to comprehending the fact that the protection of ESCRs are not necessarily or even primarily an issue of resources. Finally it points to the critical role of non-state actors in pushing the frontiers of civic and social change. Turning back to the African continent, ironically post-apartheid South Africa has blazed the most prominent trail in seeking to ensure that ESCRs are actually enforceable.⁴¹ I use the word 'ironic' because one of the recurring themes about the failure of most African governments to protect and

³² Manisuli Ssenyonjo, *Justiciability of Economic and Social Rights in Africa: General Overview, Evaluation and Prospects*, EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS, Vol.9, No.1, 2003 at 8-24.

³³ See, J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, Vol.26, No.1, 1995.

³⁴ See for example Communications 54/91, 61/91, 98/93, 164/97 and 210/98, *Malawi African Association and others v. Mauritania*

³⁵ See *Social & Economic Rights Action Centre (SERAC) and the Centre for Economic & Social Rights v. Nigeria*, Communication 155/96 (African Commission on Human & Peoples' Rights, October 27, 2001, accessed at: <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>)

³⁶ For an extensive analysis of the implications of this case, see J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-state Actors, and the Struggle for Peoples' Rights in Africa*, AMERICAN UNIVERSITY INTERNATIONAL LAW JOURNAL, Vol.18, No.4. (2003).

³⁷ SERAC decision, supra., note 11, paragraph 71.

³⁸ See Morné der Linde & Lirette Louw, *Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication*, AFRICAN HUMAN RIGHTS LAW JOURNAL, Vol.3, No.1, (2003).

³⁹ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, THIRD WORLD LEGAL STUDIES (1985).

⁴⁰ S. Muralidhar, *Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate*, in Yash Ghai & Jill Cottrell (eds.) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, London, 2004.

⁴¹ Rassie Malherbe, *A New Beginning: Introducing the South African Constitution and Bill of Rights*, NETHERLANDS QUARTERLY OF HUMAN RIGHTS, Vol.18, No.1, 2000.

promote ESCRs is that they are too poor to do so. While South Africa cannot be categorized as poor, the distortions in the distribution of income between black and white in effect mean that South Africa is really two countries in one—the white one very rich; the black extremely poor.⁴² Substantively, many parts of South Africa are thus little different from the other low-income countries around the continent. What the South African case illustrates is that half of the problem relates to whether or not a government has the political will to give ESCRs the priority they deserve. The other half of the problem is the extent to which civil and popular society are willing to push their governments to ensure that these rights are given protection. In this respect, the manner in which South African civil society has approached the realization of ESCRs and the response of government is of great importance to the current discussion.

Post-apartheid South Africa has approached ESCRs in several unique ways.⁴³ First, it has incorporated several of those rights that are normally confined to the section of the constitution on national objectives within the constitution itself. The argument about justiciability was thus immediately dealt with because the introductory provision of the Bill of Rights states:

*“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”*⁴⁴ Rights such as that to housing,⁴⁵ health care, food, water and social security⁴⁶ and education⁴⁷ are incorporated in the Bill of Rights together with those on freedom of expression and political rights. It thus became impossible to claim that a different mode of enforcement from the rest of the rights should be employed. More importantly, the South African Constitution places an obligation on the state to, *“...respect, protect, promote and fulfil the rights in the Bill of Rights.”*⁴⁸ These obligations imply different degrees or levels of enforcement and a lot will depend on the right in question and the level of violation complained of.⁴⁹ In cases ranging from whether a person had a right to kidney dialysis treatment,⁵⁰ to what the state is obliged to do with regard to access to housing,⁵¹ the South African Constitutional Court has demonstrated that ESCRs can indeed be made justiciable.⁵² This is irrespective of whether or not a state has resources.⁵³ In each of the judgments they have given on this category of human rights, the courts have made clear that issues such as the resources of the country, the practical enforceability of the right in question, and

⁴² Makau Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Disclosure*, HARVARD HUMAN RIGHTS JOURNAL, Vol.10 (1997).

⁴³ Liebenberg, Sandra & Karrisha Pillay, (eds.), (2000), SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA, Socio-Economic Rights Centre, University of the Western Cape, Cape Town.

⁴⁴ See Section 7(1) of the Constitution of South Africa.

⁴⁵ Ibid., Section 26.

⁴⁶ Ibid., Section 27.

⁴⁷ Ibid., Section 29.

⁴⁸ Ibid., Section 7(2).

⁴⁹ The respect, protect, promote and fulfil (RPPF) formulation was first articulated by Asbjorn Eide in an article on the right to food.

⁵⁰ *Soobramoney v. Minister of Health, KwaZulu-Natal* 12 BCLR, 1997, 1696 (CC). See also, Malherbe, op.cit., at 55.

⁵¹ *Grootboom v. Oostenberg Municipality*, 2000 (3) BCLR 277 (C).

⁵² See Geoff Budlender, *Justiciability of Socio-Economic Rights: Some South African Experiences*, in Ghai & Cottrell, op.cit., at 33-41.

⁵³ The recent Nevirapine case (where the litigants sought to get the South African government to provide free Nevirapine to all pregnant women with HIV/AIDS to prevent parent-to-child transmission (PTCT) of the disease) also highlighted how the right to health (especially the government obligation to take reasonable legislative and other measures), could be realized. See *Treatment Action Campaign and others v. Minister of Health and others*, Case No. 21182/2001. For an extensive comment, see Evarist Baimu, *The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African Nevirapine Case*, AFRICAN HUMAN RIGHTS LAW JOURNAL, Vol.2, No.1. (2003).

the implications of doing so are given full consideration in rendering their decision. This extends to a test of the reasonableness of the demand made by the litigant. Thus, the South African situation offers an important example of the way in which ESCRs can be effectively promoted and protected within an East African context, to which we can now turn.

3.2 *ESCRs within the East African Arena: A Broad Overview*

The advent of independence in the early 1960s came against the backdrop of a colonial experience in which the state had paid attention to ESCRs largely by default.⁵⁴ Take for example the rights within the context of work or employment. Colonial rule commenced on the basis of the extraction of forced labour as an institutional practice, illustrating that the notion of workers in a colony having rights was alien. Labour unions in Utake were a post-World War 2 phenomenon, and even then, severe restrictions were imposed on activities that were considered central to effective working class organization and expression.⁵⁵ Thus, the right to strike was severely proscribed. As a consequence, labour rights activists were routinely subjected to punitive and even criminal sanctions, extending from fines to internal exile and even deportation.⁵⁶ Names such as Makhan Singh and Tom Mboya in Kenya, Bibi Titi Mohammed in Tanzania and James Miti in Uganda were prominent in such struggles. With respect to the provision of economic and social services in the broader sense, colonial policy never recognized that this was a fundamental obligation of the state. Rather, those services provided came from the largesse of the Crown, as part of the overall mission of bringing civilization to the blighted poor natives of the colony.

From the imposition of foreign languages to the desecration of indigenous artifacts, sacred practices and religions, the colonial state paid scant attention to cultural rights.

Even more importantly, there was never the acknowledgement that the colonized had any rights to express themselves regarding the provision of such services or the lack thereof. There is little doubt that the colonial economy performed well in general terms and in respect of ensuring that overall access to social services (hospitals, schools and housing) improved over time. However, there was a glaring disparity—grounded primarily in considerations of race—affecting the distribution of these resources. A reading of both the legal regimes as well as a critical consideration of the manner of resource expenditure of the peoples of the colonies will evince distinctly disproportionate expenditures based on social categorization. In sum, the colonial era was marked by a legal and factual apartheid.

It thus comes as some surprise that none of the independence Constitutions made any mention of ESCRs, as such.⁵⁷ With the lone exception of the right to property, the Bill of Rights sections of the Kenyan and Ugandan Constitutions focused almost exclusively on civil and political rights.⁵⁸ Nothing was said about education, health, shelter, or even about an adequate standard of living, despite the fact that the inspiration for the new constitutional dispensation came from the international human rights instruments. Moreover, the manner in which property rights were articulated was clearly not intended to cover those most in need of it, i.e. socially marginalized and disenfranchised groups and communities. Rather, it was inserted in the constitutions in order to protect the property of the

⁵⁴ Ramkrishna Mukherjee, *THE PROBLEM OF UGANDA: A STUDY IN ACCULTURATION*, Akademie Verlag, Berlin, 1956.

⁵⁵ John-Jean Barya, *Trade Unions and the Struggle for Associational Space in Uganda: The 1993 Trade Union Law and Article 40 of the Constitution*, CBR Working Paper No.63, Kampala, (2001).

⁵⁶ Mahmood Mamdani, *Pluralism and the Right of Association*, in M. Mamdani & J. Oloka-Onyango, *UGANDA: STUDIES IN LIVING CONDITIONS, POPULAR MOVEMENTS AND CONSTITUTIONALISM*, Jep Books, Vienna, 1994.

⁵⁷ See *The Constitution of Uganda*, 1962.

⁵⁸ Nyangabyaki Bazaara, *Mixed Results in Uganda's Constitutional Development: An Assessment*, in Kivutha Kibwana *et al*, *CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 1999*, Fountain, Kampala, 2001.

nationals of the departing colonial power, and to ensure that in the event of expropriation, prompt and adequate compensation would be guaranteed. Especially with respect to Kenya—given the expropriation that had taken place in the ‘White’ highlands—the protection of private property interests was an issue of special concern to the departing colonial power. Tanganyika and Zanzibar were exceptions, with TANU objecting to the inclusion of a Bill of Rights in its Constitution, while the revolution did away with the same in the case of the latter. This omission that was only corrected two decades later.⁵⁹

Both the 1966 and 1967 Ugandan Constitutions contained formulations similar to that in the earlier independence instrument, although the latter is better known for the numerous additional restraints it imposed on the exercise of fundamental rights and freedoms, particularly those of assembly, association expression and movement.⁶⁰ Again, it is important to point out that it was the UPC government that was responsible for these instruments. This is because soon after enacting them, the UPC was to make a radical turn to the ‘left’ in a bid to ‘capture’ the commanding heights of the economy and transform it primarily into a state-run one. It is thus rather surprising that ESCRs did not feature in the later instruments. Indeed, a careful inspection of the manner in which the UPC government dealt with workers’ rights illustrates regression rather than improvement. This from a government asserting a socialist orientation. In Kenya, although the rather strange claim was made that ‘African Socialism’ was to be the guiding ideology of the Kenyatta government, neither the legal regime nor the practice of the government reflected this. While Tanzania’s version—embodied in the philosophy of ujamaa—was certainly more socialist in orientation, it was much more state-centred; top down, rather than from the grassroots up.

However, the more important reason for the non-inclusion of ESCRs must be viewed against the

backdrop of the international context referred to above. That context did not give pride of place to ESCRs. Moreover, it was a context in which the conceptualization of this category of rights was underdeveloped. To cap it all, there were few examples from elsewhere on the continent or in relation to countries of a similar situation in Asia or South America where ESCRs had been given priority attention. As a subject even of academic attention, ESCRs were clearly considered of secondary importance to the protection of civil and political rights. Indeed, even the dearth of court cases, or political agitation on the front of ESCRs (with the possible exception of worker’s rights) illustrates that public concern with this category of rights assumed secondary importance. Again, it is also part of the strategy of governance not to encourage the notion that ESCRs were indeed rights because in a class-stratified society, considerations of equity are given short shrift. Has the the 3rd phase of constitution making been any different? We answer this question by first comparing Uganda and Kenya and then turning to a more detailed examination of specific rights in Uganda’s fourth Constitution—the 1995 Constitution.

IV. ECONOMIC, SOCIAL AND CULTURAL RIGHTS: REVISITING UTAKA’S CONSTITUTIONAL ORDER

4.1 Enacting ESCRs: Comparing Uganda and Kenya

A quick examination of Uganda’s 1995 Constitution will reveal a number of interesting things concerning ESCRs. First, there are several new rights that derive their source and inspiration from the international categorization of ESCRs. These include the right to education, rights within the context of employment, and the right to a clean and healthy environment.⁶¹ There is also an extensive reformulation of the clauses on equality and non-discrimination in order both to expand the category of persons protected, as well as to deal with different forms of treatment. With particular

⁵⁹ For the history of the bill of rights in Tanzania see Chris Maina Peter, *HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS*, Rüdiger Köppe Verlag, Köln, 1997 at 2-4.

⁶⁰ Bazaara at 41-45.

⁶¹ See Chapter 4 of the 1995 Constitution.

respect to the situation of women—a social category who suffer most acutely from the deprivation of ESCRs—the 1995 Constitution broke many conceptual and practical barriers.⁶² Likewise, the Constitution pays special attention to the rights of the family (inheritance, marriage and parental duties),⁶³ the rights of children,⁶⁴ the rights of persons with disabilities,⁶⁵ and the protection of minorities.⁶⁶ Turning to the case of Kenya, the 2004 ‘zero’ draft produced by the Constitution of Kenya Review Commission (CKRC) and modified by the Bomas (National Conference) discussion, contains a host of new ESCR provisions. Among the rights covered are social security, health, education, housing, food, water, sanitation and consumer rights.⁶⁷ To crown it all, a whole chapter has been devoted to the articulation of the phenomenon of culture, surely the most elaborate development of the subject in any constitutional instrument.⁶⁸ Although the document still retains the traditional hierarchy by starting with civil and political rights, the content of the ESCRs in the document and the attempt to deal with many of the criticisms about justiciability and resources provides a solid foundation on which activism in the area can be built.⁶⁹

The enactment of Uganda’s 1995 Constitution was preceded by the establishment of a Constitutional Commission in 1988. Among other issues addressed was how to incorporate the new category of rights

that had come to prominence since the earlier instruments had been enacted, and how to improve on the old ones. In its report of 1993, the Commission reaffirmed the need to ensure that the Bill of Rights section of the constitution gives effect to the basic needs and rights of the people.⁷⁰ Having criticized the failings of the earlier instruments and governments, not all rights were, according to the Commission, amenable to enforcement or judicial review in the same way. Hence, the idea that there should be general principles to guide the implementation of the Constitution.⁷¹ In this way, the discussion on economic and social rights was relegated to the section on National Objectives and Directive Principles of State Policy. The specific examples the UCC gave related to cultural, social and economic rights. Of these, the Commission concluded that, “... it is also clear that these cannot all be realised and given full effect immediately.”⁷² The only other category of economic and social rights that were given extensive attention in the report were the rights of workers.⁷³ Thus, ESCRs were relegated to the chapter on principles and objectives of socio-economic development, attended by the often-repeated caution that such rights were not enforceable and would only be used as a yardstick to measure governmental performance in improving overall development.⁷⁴

⁶² See Sylvia, R. Tamale, *Gender and Affirmative Action in post-1995 Uganda: A New Dispensation or Business as Usual?*, in J. Oloka-Onyango (ed.), *CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES*, Fountain, Kampala, 2001.

⁶³ Article 31 of the 1995 Constitution.

⁶⁴ Article 34.

⁶⁵ Article 35.

⁶⁶ Article 36.

⁶⁷ See draft articles 67 to 73 and 76 of the draft Constitution of Kenya, adopted by the National Conference on 15 March, 2004; accessed at: <http://www.kenyaconstitution.org/docs/constitutionbychapters.htm>

⁶⁸ See Chapter Five, *ibid.*

⁶⁹ See articles 51 to 66, *ibid.*

⁷⁰ Uganda Constitutional Commission (1993),

THE REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION: ANALYSIS AND RECOMMENDATIONS, UPPC, Entebbe, para. 7.60 at 147.

⁷¹ *Ibid.*, para. 7.102 at 159, and para. 7.194 at 193.

⁷² *Ibid.*

⁷³ *Ibid.*, para. 7.148, at 177-178. Indeed, the marginal note that covers workers rights in the Constitution is entitled ‘Economic Rights.’

⁷⁴ See chapters 23 and 24.

⁷⁵ *Ibid.*, at 99.

Consequently, although the Commission stated that its recommendations went further than those in a number of countries such as India, Nigeria, Sri Lanka, Bangladesh and Papua New Guinea, and were a “liberating innovation,” they stipulated that these principles and objectives would only “provide direction.” They were, in the submission of the Commission, unenforceable and non-binding on the state.⁷⁵ The only ESCRs that in the opinion of the Commission were enforceable and should be included among the fundamental rights of individuals and groups were the following:

- (i) the rights of farmers and workers to join or form economic or trade associations to protect their economic rights and interests, including farmers’ associations and trade unions;
- (ii) the right to strike or withhold labour;
- (iii) the right of children to be protected from exploitation and dangerous occupations, and
- (iv) the right to equal treatment between women and men in employment, remuneration, economic opportunities and social advancement.⁷⁶

The list of ESCRs excluded from the Bill was much longer, and covered, among others, the right to a decent standard of living (including adequate food, water, clothing, housing and medical care).⁷⁷ With respect to the Constituent Assembly (CA)—the body elected to debate the draft constitution—only a few delegates spoke of human rights in terms broader than the well-known civil and political rights. Of course, employment rights featured most prominently. Not only were these rights given fairly extensive coverage both in the report and in the draft constitution, but the labour movement was also able to effectively organize and strategize on the further articulation and promotion of these rights in the CA. Thus, in contrast to many of the other ESCRs in the draft, the provisions on workers rights attracted considerable debate—both those in favour and those opposed.⁷⁸

To illustrate the situation since the enactment of the 1995 Constitution, we have selected the rights to health, to food and to education as focal points for analysis. This is because when seen in combination, these rights cut to the core of an understanding of why it is important to improve our approach to enforcing ESCRs. With respect to the first two, both appear in the National Objectives and Directive Principles of State Policy, while the right to education is enshrined in the Bill of Rights (Chapter 4) of the Constitution.⁷⁹ Needless to say, the issue of health is a critical matter in contemporary Uganda given the HIV/AIDS pandemic and its impact on human life; to what extent has the government adopted a rights-sensitive approach to the realization of this human right? The right to food is selected for consideration on account of the fact that Uganda is predominantly an agricultural economy, and is largely regarded to be food secure; to what extent would an approach to food as a human right alter the fashion in which it is approached today? Finally, we consider the right to education, both because it is the only other social right enshrined in the Constitution, but also on account of the policy of Universal Primary Education (UPE) that was adopted shortly after the enactment of the 1995 Constitution. That policy has had significant ramifications on the realization of this right.⁸⁰ Finally, each of these rights resonate within the specific situations of Kenya and Tanzania for a variety of reasons. Both face a similar HIV/AIDS crisis, and at the present time Kenya is not only emerging from a serious bout of drought, but famine continues to afflict many parts of the country. Kenya has also recently introduced a program on UPE.

4.2 Whither the Right to Health?

The Right to Health (RTH) is protected in both the UDHR as well as in the ICESCR. Under the 1995 Constitution, health issues (with the exception of the right to a healthy environment in Article 39) are covered

⁷⁶ See Recommendation 31.2 at 833.

⁷⁷ Ibid.

⁷⁸ See, for example, the debate on draft Article 67; ROU, 2116 to 2132.

⁷⁹ See Article 30, 1995 Constitution.

⁸⁰ See Lewis Mugumya, *Human Rights: An Insight Into Uganda’s Education Sector*, in Nkurunziza & Mugumya, op.cit.

in the National Objectives and Principles of State Policy. These include Principle VII (protection of the aged), XV (recognition of the role of women in society), and XVI (on persons with disabilities). Principle XX stipulates that the state shall take all practical measures to ensure the provision of basic medical services to the population. There is no explicit provision on the right to health enshrined in the bill of rights section of the Constitution. In this respect, Uganda is similar to most other countries that do not recognize the right at all, or simply confine it to the ‘non-justiciable’ section of the Constitution. A few countries, most notable among them South Africa, have nevertheless included the right within the main body of their Constitution. It is also important to recall that several additional rights—the right to life, freedom from torture and the protection of bodily integrity—are also of relevance to the protection of the right to life.

Needless to say, there is little need to emphasize how critical the observation and protection of the right to health is, particularly in an underdeveloped context such as Uganda’s. Indeed, in the observation of Richard Ssewakiryanga, ill-health and disease are the most frequently cited causes of poverty: “Time lost, when sick and, for women especially, time spent taking care of the sick, reduces productivity while the cost of care uses up savings and leads to the sale of assets.”⁸¹ However there continues to be much contention over the exact meaning and content of the right, and over the nature of the obligations that flow therefrom.⁸² Health, in the rights conceptualization, does not merely imply the absence of disease. Rather, it entails a state of complete physical, mental and social well-being.⁸³ Against this background, the right to health must therefore be interpreted as the enjoyment of a variety

of essential facilities, goods, services, and conditions necessary for the attainment of the highest level of health—mental and physical.

As with other ESCRs, the conditions necessary to ensure that the right to health is progressively realized, translate into what have been termed the ‘four A’s’ i.e. Availability, Accessibility, Acceptability and Appropriateness (Quality). Thus, *availability* entails that there exist functioning public health care facilities, goods, services and programs. *Accessibility* encompasses non-discrimination, physical access and economic and informational equity. *Acceptability* relates to the cultural and religious dimensions of health care, which need to be designed in such a way as not to offend these sensibilities. Lastly, the issue of *quality* covers the protection of health care users, in relation to drugs, mechanisms of oversight of health sector institutions and actors, and the response to the pressure of international actors such as pharmaceutical companies. When the right to health is viewed through the poverty paradigm, it becomes clear that poor people should not be disproportionately burdened with health expenses in comparison to those who are better off, and thus more able to meet them.⁸⁴

In the case of Uganda, there are several dimensions relating to the RTH that are critical in the debate, especially when viewed against the backdrop of the economic policies that have been in place since the early 1980s. Public health facilities in Uganda suffer greatly from inadequate and poorly remunerated health personnel—both medical and support. To make matters worse the facilities are run-down, out-dated and inappropriate, and the absence of sufficient drugs and other medical necessities has become chronic in many hospitals, particularly those outside a very narrow radius of the capital city.⁸⁵ Moreover, both on account

⁸¹ Richard Ssewakiryanga, “Applying RBA to Poverty Assessment: The Experience of the Ministry of Finance,” *Your Rights*, Vol.VI, No.3 (July 2003), at 15-16.

⁸² Sisule F. Musungu, *The Right to Health in the Global Economy: Reading Human Rights Obligations into the Patent Regime of the WTO-TRIPS Agreement*, Unpublished LL.M dissertation, University of Pretoria, 2001.

⁸³ See the Constitution of the World Health Organization (WHO) 14 U.N.T.S 186 reproduced in *Basic Documents of the World Health Organization* (1981).

⁸⁴ See para.12 of General Comment of the Committee on Economic, Social and Cultural Rights (General Comment No.14; July 2000).

⁸⁵ Paul Hutchinson, *Combating Illness*, in Ritva Reinikka & Paul Collier, *UGANDA’S RECOVERY: THE ROLE OF FARMS, FIRMS, AND GOVERNMENT*, Fountain, Kampala.

of the expenses involved in securing formal health care, as well as due to cultural and other beliefs, non-formal (traditional) avenues of health care have grown. While traditional health care methods may in fact be superior to those of the formal sector in several respects, the problem is the lack of oversight and regulation, effectively compounding the problem of quality. This combination of factors makes for a situation in which the realization of the RTH has for the vast majority of the population in Uganda become a chimera.

Quite clearly however, the most critical issue in terms of the RTH facing Uganda today relates to the scourge of HIV/AIDS. On the one hand, there can be little doubt that Uganda has made tremendous strides in both profiling the dangers of the disease as well as in the creation of the necessary framework for its treatment and in addressing the situation of sufferers and their dependents.⁸⁶ It is for this reason, that the Ugandan example is so often cited as a trailblazer not simply on the African continent, but around the world. Organizations such as The Aids Support Organization (TASO) have provided templates for the operation of community-based organizations and have been duplicated by CSOs in numerous other countries. The rates of infection are believed to have reached a plateau, and new infections are falling.

On the other hand, there is a certain degree of ambivalence about the state and some its main functionaries, such as President Museveni with respect to the disease. George Muwanguzi has conducted an extensive study of the degree to which the policies of the Ugandan government match the international guidelines on the response to the disease. The study has demonstrated that there is some degree of inconsistency and even contradiction with respect to Uganda's policies on the treatment of persons with HIV/AIDS.⁸⁷ For example, there is still no comprehensive legislation specifically addressing the rights of people living with HIV/AIDS (PLWHAs).

Discrimination in the workplace and at institutions such as schools is not uncommon. There are still problems in terms of accessing essential drugs, especially in relation to cost, although a great deal has been done to effect a reduction. Although President Museveni is often praised for highlighting the manner in which the disease has ravaged Uganda, during the presidential election campaigns of 2001, he made the claim that his main opponent (Dr. Kizza Besigye) was afflicted by AIDS. The President made the remark with the intention of discrediting Besigye. Needless to say, it was quite revealing of what the President's true views of the disease and those suffering from it were. It is thus clear that while the overall environment is a positive one, individual cases of discrimination and marginalization are affected by the lack of a comprehensive legislative framework within which the rights of persons affected by the disease can be effectively protected.

While there is a proliferation of civil society organizations that have emerged in response to the pandemic, their predominant approach to the issues raised by HIV/AIDs is either humanitarian/welfarist or medical/public health. A short-lived coalition of groups that came together around the issue of access to essential drugs collapsed when US President George Bush set up an international fund to provide free drugs to the worst affected countries. However, serious issues remain, not least of which was the conditionality that the Bush government has imposed on the use of the fund monies, including restricting drug purchases to American companies. Domestically, there are still several rights issues that require attention, but little has been done to focus on this dimension of the issue. Traditional HROs do not appear interested in the issue. How much better is the situation with respect to a related right, the Right to Food?

⁸⁶ Ibid., at 415-418.

⁸⁷ George Muwanguzi, *HIV/AIDS, Human Rights and the Legal Sector in Uganda: An Assessment of Compliance with the International Guidelines*, Unpublished LL.M dissertation, Makerere University, Kampala, 2003.

4.3 Food and its realization in the Ugandan Context

Article 11 of the ICESCR lays down the specific elements of the right to food (RTF). On its part, in General Comment No.12, the Committee overseeing the Covenant has also laid down the key components of the right and the steps necessary to achieve its progressive realization. However, discussions on the right to food in Uganda suffer from the same conceptual problems as those regarding the right to health, but with the added dimension that most people believe that such a right means the right to be fed!⁸⁸ In addition, discussions on the RTF are also affected by the belief that Uganda is a food secure country, leading to the assertion that the state should play no role in ensuring that individuals have a right to food because it is only the lazy who are unable to provide for themselves. In the Constituent Assembly, both these perspectives were apparent. The 1995 Constitution covers several aspects of the right to food, albeit, as in the case of the right to health, only in the National Objectives section of the instrument. Indeed, Objectives XIII (Protection of Natural Resources), XXI (Clean and Safe water), and XXII (Food Security and Nutrition) cover various aspects of the RTF.

A considerable amount of work has been conducted at the governmental level in the articulation of a national policy in this area. In July 2003 the Ministries of Agriculture, Animal Industries and Fisheries (MAAIF) and Health published the Uganda Food and Nutrition Policy. The document covers a number of subjects, extending from Food supply and accessibility to Research, and includes topics such as External Food Trade, Food Standards and Quality Control and Gender, Food and Nutrition. The policy takes off from the approach articulated in General Comment No.12 and the various dimensions of food and nutrition outlined in the 1995 Constitution. It also identifies the basic problems that the country has

encountered in ensuring that all people are free from hunger, particularly the problems of malnutrition, famine and hunger. A special focus of the policy is the situation of marginalized groups of persons who may not be fully enabled to ensure that their right to food is adequately realized.

From a rights perspective, problems nevertheless still persist with both government policy and practice on the right to food. Among them is the fact that the right is not incorporated in the Bill of Rights chapter of the constitution. This is so despite the assertion by Human Rights Commissioner Aliro Omara that its inclusion in the National Objectives is, "... a powerful constitutional reminder that the government has an obligation to be mindful of that right."⁸⁹ Aside from the issue of the legal positioning of the right, as Apollo Makubuya has stated, despite Uganda's abundant rainfall and bountiful food production, there are cases of food scarcity and famine.⁹⁰ Over half the population lacks access to safe drinking water and adequate sanitation. While Uganda has been engaged in a long-standing debate over the issue of land tenure rights, neither the 1995 Constitution nor the Land Act of 1998 have resolved many of the tensions that the struggle over property rights has led to over the years. Moreover, recent proposals by the Cabinet seeking to increase the power of appropriation of land to the state are a sure recipe for further dispossession and marginalization, with dire implications for the realization of the right to food. To cap it all, the situation of internally displaced persons (IDPs) in the northern and north-eastern parts of the country has assumed a humanitarian crisis of immense proportions. All of these problems are compounded by the fact that the legal framework and the institutional mechanisms designed to ensure that the right to food is actually realized, are either outmoded or functionally deficient.

⁸⁸ In dealing with this issue, the UN High Commissioner for Human Rights has explicitly stated that the RTF should not be considered as the right to be fed, but rather as the right to feed oneself: "The right to be free from hunger is the minimum essential level of the right to adequate food. See United Nations High Commissioner for Human Rights (2002), *GUIDELINES ON A HUMAN RIGHTS APPROACH TO POVERTY REDUCTION STRATEGIES*, Geneva.

⁸⁹ Aliro Omara, *The Right to Food: National Implementation, the Uganda Experience*, unpublished paper presented at the national seminar on the right to adequate food; April 10-11, 2002, Oslo at 30.

⁹⁰ Apollo Makubuya, "The Right to Adequate Food: Examining Uganda's Legal and Institutional Framework," paper presented at a National Seminar on the Implementation of the Right to Adequate Food, January 23, 2003 at 3.

In recent years, the nexus between the forces of globalization and the realization of the RTF has assumed prominence with respect to two issues that affect the debate in the case of Uganda.⁹¹ First, is the issue of the development of Genetically Modified Organisms (GMOs), especially foods, while the other issue relates to the debate about the privatization of water services, and thus its relationship to the right to water (RTW)—an intrinsic aspect of the RTF. In line with his belief in the efficacy of trade liberalization, President Museveni's opinion is that exploitation of GMOs would help to boost Uganda's productive capacity, and especially our ability to export more competitively. In this regard, he has encouraged further experimentation with GMOs and has also not offered any resistance to external offers of assistance from countries like the USA that are heavily dependent on GMOs, in helping Uganda develop a capacity in this respect. However, the National Policy on the issue of GMOs is very clear. Pointing out that there are dangers in imported foods being sub-standard and expired, and also of introducing foreign diseases, the Policy states: "At the same time, genetically-modified (GM) food, seeds or livestock, which are still controversial, should be discouraged because of their unknown effects on agriculture, health and the environment."⁹² Consequently, the President's actions in this regard are in direct contradistinction from government policy on the issue.

Needless to say, there is considerable pressure, especially from the United States, for countries like Uganda to adopt this technology, and also to be a more ready market for the goods of food and agro-multinationals like Monsanto and Nestlé.⁹³ However, there is world wide resistance to the increased adoption of this technology, not least of which comes from the countries of the European Union (EU). There are clear dangers involved in allowing for the increased

use of GM crops both in terms of food security as well as in relation to food dependency. Moreover, a country like Uganda has considerable potential in developing an industry based on organically-produced goods, which, although specialized, has a growing and profitable market. That market ensures that environmental considerations are fully taken into account. It is also less technology dependent, and more in tune with traditional methodologies of food production in the country.

It is quite clear that Uganda has not fully internalized the threat that the development of GM technology has for food security in the country, and that HROs are yet to develop a coherent approach to the issue. In the heat of the debate about GMOs, Opiyo Oloya wrote an article urging the introduction of legislation that would, inter alia, do the following:

- *spell out how indigenous organic seeds that have been cultivated by generations of Ugandan farmers will be protected from contamination by the new technology;*
- *outline measures to safeguard traditional farmers who use organic seeds from undue pressure to switch to GMO seeds, and*
- *deal specifically with the problem of farmers who choose to buy GMO seeds one season, but who later save some harvest to plant in the next season.*⁹⁴

As yet, the government has still not pursued this issue further, leading to a fairly stark lacuna in the protection of food rights. At the same time, the debate about GMOs very clearly illustrates the nexus between the two categories of rights—the civil and political, and the economic and social. The position of the Ugandan government on these issues is greatly affected by the manner in which we have sought to position ourselves in the global economy. The forces of globalization—especially as represented in the WTO—are exerting

⁹¹ See Jacqueline Omara, (2002), *The Right to Food: Globalization and Its Impact on Food Security in Uganda*, Unpublished LL.B dissertation, Makerere University, Kampala, at 25-33.

⁹² Republic of Uganda, *The Uganda Food and Nutrition Policy*, Kampala, Government Printer, 2003, at 11.

⁹³ See, for example, Gerald Tenywa, *Ugandan Scientists in Spirited Fight for Genetic Engineering*, *New Vision*, July 9, 2003, at 27, and Patrick Luganda, *GMO Foods Safe*, *New Vision*, August 27, 2003, at 35.

⁹⁴ Opiyo Oloya, 'GMOs: Monsanto had their agenda,' *New Vision*, September 17, 2003, at 10.

pressures that will have significant consequences on the realization of the right to food in future. Amongst these forces are those pushing for the privatization of water services, increased food exportation, and the diversification of food production, with a focus on the so-called non-traditional industries such as horticulture, essential oils, vanilla and seeds. While such policies may boost incomes in the short and medium term, the longer run implications for overall food security and the improvement of standards of human development are low. Thus, in virtually every country where water services have been privatized problems relating to access and the situation of the poor have been compounded, with Tanzania being the latest victim. We shall return to this point after concluding our examination of the state of ESCRs in Uganda with a look at the right to education.

4.4 Education as a Human Right

The centrality of education to humankind today cannot be underestimated. Countries that have invested in education are more likely than not to witness improved levels of human development and overall social progress. This also implies that they are better empowered to exercise their fundamental rights, whether of a civic and political nature or with respect to the economic, social and the cultural. Furthermore, a more enlightened population will ultimately be less of a burden to the state, whether in terms of social welfare, or in relation to physical mobility and their prospects for employment. In the age of globalization and the information revolution, it is quite clear that those societies best equipped to cope are those that have invested in educating their people.⁹⁵ While there is considerable debate about the most appropriate or

‘developmental’ forms of education, there is little doubt that education today is a central component of an holistic existence. The linkages between education and the two preceding rights we have reviewed—health and food—have also been established very clearly. The better educated a population, the better equipped it is to feed itself and to remain healthy.

It is in this regard that the story of the education sector in Uganda must be reviewed. In many respects there is a fairly typical correlation between the education sector and the political development of the country. Thus, it was grossly affected by the political and economic instability of the 1970s and 1980s. When the NRM came to power in 1986, the government view was that the education sector was not a priority, especially when placed against the critical issues the new government confronted at the time, including security, rehabilitation of the economy, and reconstruction of basic infrastructure. At the time, the number of government-aided primary schools was a little under 8,000, the number of teachers nearly 73,000 and student enrolment stood at 2.31 million.⁹⁶ This meant that the student/teacher ratio was 32:1. Following the introduction of the policy of UPE in 1997, you had a dramatic alteration in the figures, to wit: schools, 10,000; teachers, 98,700, and students, 5.3 million.⁹⁷ The student/teacher ratio dropped to 54:1. In 2002, the number of students had risen to 7.4 million, and although the number of teachers had risen to above 130,000, the student/teacher ratio remained at 54:1, demonstrating the sector was faced by a serious crisis.⁹⁸

There can thus be little doubt that UPE has dramatically increased the number of primary school student enrolments, with respect to the ‘4As’ test that we

⁹⁵ See Katrina Tomasevski, *EDUCATION DENIED: COSTS AND REMEDIES*, Zed Press, London/New York, 2003.

⁹⁶ See Ritva Reinikka, *Recovery in Service Delivery: Evidence from Schools and Health Centres*, in Ritva Reinikka & Paul Collier, *UGANDA’S RECOVERY: THE ROLE OF FARMS, FIRMS, AND GOVERNMENT*, Fountain, Kampala, (2001), Table 1, at 347.

⁹⁷ Ibid.

⁹⁸ See UNDP, 2002, op.cit., at 9.

⁹⁹ Simon Appleton, *What Can We Expect from Universal Primary Education?*, in Reinikka & Collier, op.cit.

¹⁰⁰ The 2000 Uganda Human Development Report noted that the quality of primary education had declined. See Table 13 at 38.

¹⁰¹ Fundamental rights questions (such as the use of corporal and other forms of inhuman treatment and punishment) still remain. See Mugumya, op.cit., at 121.

articulated as applying to the realization of ESCRs. UPE has greatly boosted both the availability of and the accessibility to education in the country.⁹⁹ The more intricate question, and the one that is certainly of greater relevance from a human rights perspective, is the qualitative impact of the policy.¹⁰⁰ In other words, what is the acceptability and the quality of the education services that have been made available as a result of these changes in government policy? Furthermore, while the issues of availability and accessibility might have been addressed fairly comprehensively at the primary level,¹⁰¹ there is no doubt that post-primary educational facilities will be placed under tremendous stress once the first UPE graduates move on in 2004. It is quite clear that as of the time of writing this paper, the secondary school sector is ill-equipped to handle the expected influx of qualified student numbers. The implications of this fact are quite stark, not only in terms of the UPE policy itself, but also in relation to overall human development.

Dramatic developments have also take place at the tertiary level. In 1986, Makerere University was the only publicly funded university. Conditions were so dire that strikes of both students and staff were commonplace.¹⁰² It is illustrative that the strikes were principally linked to issues of welfare; in the case of staff, the demand for a 'living wage,' and on the part of students, resistance to the imposition of cost-sharing measures. Since that time, university education has been changed dramatically principally through the introduction of private schemes for university entrance, as well as the liberalization of the sector to allow for alternative private actors to offer university education. Both measures have boosted student enrolments, with Makerere jumping from less than 5,000 students at the turn of the decade to over 30,000 today. Needless to say, the impact of these developments have been highly mixed. Pressure on classroom and library facilities, plagiarism and staff 'burn-out' on account of high

numbers are just a few of the most obvious consequences of the policy of liberalization. Virtually on a daily basis, complaints about the state of Makerere find their way into the letters pages of the daily *papers*. The implications on academic freedom are manifest, especially as moonlighting and consultancies have become the preferred modus for university personnel, leaving little time for active engagement with social issues. Part of this is related to the shift in international aid to the funding of basic education, thereby starving universities of public funds. Simultaneous to this development was, "... the transfer of education from public law and its redefinition from a public good to a freely traded commodity."¹⁰³ As Katarina Tomasevski succinctly points out:

Distribution of public funds within education is seen as—by necessity rather than choice—a zero-sum game. It pits beneficiaries of public funding for education against each other. This makes concerted strategies for halting the decrease of public funding for education even more difficult. There is always too little funding available for all levels and types of education, everywhere. Increased allocations to primary education deplete higher levels of education of public funding, increasing direct costs for students and their families. An acquired right to free university education is criticized as depriving young children of access to any education whatsoever. However, where university students are paying the full cost of their education there is no evidence that primary school children benefit.¹⁰⁴

Against this postulation, it is important to note that donor funding in Uganda has been central to the development of the education sector, and particularly to UPE since the policy was introduced. Indeed, the Poverty Action Fund (PAF) that was launched in June 1998 as an initiative to mobilize resources for spending in the social sector (including education, health, roads, water and sanitation) is largely donor driven.¹⁰⁵

¹⁰² See the Makerere University Academic Staff Association (MUASA) Special Issue Newsletter, *The Laying Down of Tools*, 2nd – 18th May, 1989.

¹⁰³ Katarina Tomasevski, Report of the Special Rapporteur on the Right to Education, UN Doc. E/CN.4/2000/6/Add.1 (Addendum: Mission to Uganda, June 26 to July 2, 1999), at 111.

¹⁰⁴ *Ibid.*, at 111-112.

¹⁰⁵ Zie Gariyo, *Uganda: Aid and Education Development*, in Judith Randel & Tony German (eds.), *THE REALITY OF AID: AN INDEPENDENT REVIEW OF POVERTY REDUCTION AND DEVELOPMENT ASSISTANCE*, Earthscan, London, 1998.

Although there can be no doubt about the dramatic quantitative improvements in the provision of primary education since the introduction of UPE, there are several issues of a qualitative nature that require further attention. As Gariyo points out, access to education is still, "... biased in favour of the rich, of males and towards urban areas."¹⁰⁶ Additionally, there is a lack of sufficient classroom space, trained teachers, scholastic materials and teaching aids.

As a final note of concern, it is important to point out that the scourge of corruption has greatly affected the degree to which government and other resources actually reach their intended beneficiaries. Aside from the large scandals in the Ministry of Defence and the Uganda Revenue Authority (URA), the misappropriation of finances at the local level (and especially funding for education) can only be described as criminal. From shoddy classroom construction to the padding of salary schedules with 'ghost' teachers, the extent of financial vice at the district level directly affects the realization of the right to education.

The bigger picture in this regard is the overall dependency on external funding from which the country suffers. In a study of this issue, Katarina Tomasevski, the United Nations Special Rapporteur on the Right to Education found that "... the priority attached to debt repayment can jeopardize investment in human rights."¹⁰⁷ She points out that in a situation where internally generated revenues are "... insufficient for both debt repayment and implementation of human rights obligations, the priority for debt repayment undermines investment in human rights."¹⁰⁸ Tomasevski goes on to point out that it is erroneous to make the equation between the policies of international financial institutions like the World Bank and the IMF, and poverty eradication:

*...defining education solely as an instrument for poverty reduction and or economic growth does not conform to the definition of the right to education in international human rights law. Investment in education therefore does not necessarily facilitate effective recognition of the right to education and the impact of such investment ought to be carefully assessed.*¹⁰⁹

There are of course additional issues that relate to the entrenchment of the right to education in Uganda. Despite appearing in the Constitution, the right has not been translated into legislation. This means that even the much-touted UPE policy does not have any legislative underpinning. It also means that the specific rights of students within the education process are not comprehensively articulated. Why this is important is first, because UPE is highly donor-supported. If that support is either reduced or terminated, what is the binding obligation on the state not to deviate from the policy? Secondly, a legislative framework would stipulate the parameters of non-discrimination, equity and access that all Ugandans would be entitled to as of right. As it is, such provisions remain at the level of policy which is an instrument that is not enforceable in the same manner as legislation. With respect to ESCRs, examining the policy framework helps to come to grips with the degree to which rhetoric matches, or departs from reality. As Manisuli Ssenyonjo has argued, while it is important to consider what legislative and other measures have been adopted, there is a need to look further.¹¹⁰ In the absence of such specific legislation, policies such as UPE remain in place at the pleasure of the state, and are viewed not as an obligation, but as a gift. Furthermore, issues such as gender or other forms of discrimination are not grounded within a framework that ensures that they cannot be tampered with.

¹⁰⁶ Ibid., at 206.

¹⁰⁷ Tomasevski, op.cit., para.29.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., at para.28.

¹¹⁰ Ssenyonjo, op.cit., at 25.

It is interesting that even though the RTE is embodied in the Bill of Rights, no HRO has devoted significant attention to any of the issues recounted above. The exception already noted—that of the Foundation for Human Rights Initiative (FHRI) did not have any follow up. And yet, there is a clear need for the design of mechanisms to monitor the implementation of UPE within a rights framework. For example, what is the extent to which budgetary allocations to the sector meet the obligation of making education available? Why do some children remain out of school? What is the quality of education on offer and what needs to be done to improve it? HROs devoted to seriously implementing an agenda on ESCR can use the arena of education as a useful starting point.

V. JUSTICIABILITY, IMPLEMENTATION AND ENFORCEMENT: A CRITICAL INQUIRY

Arguments about the justiciability of ESCRs have affected discourse over this category of rights virtually since they were first translated into binding international instruments. Such arguments have unfortunately been collapsed into unresearched claims about the cost of ensuring that rights such as the right to health and education are realized. Urging for a critical rethink on the character of constitutional reform, Prof. Ssempebwa of the CRC reported that the exercise of collecting peoples views on the subject demonstrated that something was lacking in the fashion constitutional reform had hitherto been approached. According to Ssempebwa: “We have concentrated on the constitutional infrastructure for political liberalisation. What is needed is added emphasis on how the infrastructure can improve people’s welfare.”¹¹¹ Ssempebwa’s argument is clear: unless a different approach is taken towards the enforcement of human

rights, the majority of people will remain marginalized. In sum, how can the Constitution adequately address the enforcement and protection of ESCRs, especially since Uganda’s 1995 Constitution fell short on this very same issue? We need to begin addressing this question first by revisiting the issue of the justiciability of ESCRs.

5.1 *Revisiting the debate on Justiciability: Confronting the Challenges*

In Uganda, the issue of justiciability proved to be the major impediment to a more holistic approach to the recognition of ESCRs, and to their inclusion in the body of the instrument, rather than in the section on National Objectives. CA delegates largely took their cue from the Constitutional Commission report, which in turn was reflective of a long-held position among both legal scholars and practitioners. In the flowery words of Nigerian author, Toriola Oyewo, such objectives and principles,

... are responsibilities enumerated without sanction as far as the fundamental obligations of the Government are concerned and to us they look like sterile law notwithstanding the fact that it places observance and conformity of its provisions on all organs of government, with all authorities and persons, exercising legislative, executive or judicial powers.¹¹²

However, several other jurisdictions that have national principles or objectives similar to those in the 1995 Constitution are given considerable weight. For example, in the case of *Société United Docks v. Government of Mauritius*,¹¹³ the Mauritius Supreme Court and the Privy Council stated that the initial declaratory section of the constitution was not a mere preamble or introduction. The Indian Supreme Court has made

¹¹¹ Ssempebwa, *op.cit.*, at 90.

¹¹² Oyewo, Toriola (2000), *CONSTITUTIONAL LAW AND PROCEDURE IN NIGERIA*, John Archers, Ibadan, 2000, at 87.

¹¹³ [1985] LRC (Const.) 801.

famous an approach to National Objectives that has seen the enforcement of numerous rights that are only covered in this introductory, ostensibly ‘non-justiciable’ section of the instrument.¹¹⁴ Following the same spirit, the Papua New Guinea Supreme Court has stated: “Although they are said to be non-justiciable, the National Goals and Directive Principles must be given effect wherever it is fairly possible to do so without violating the meaning of the words used.”¹¹⁵ Closer to home is the important opinion of Justice Egonda-Ntende in the famous case of *Tinyefuza v. Attorney General*, in which he stated, *inter alia* that the principles and objectives outlined in the Constitution, “... ought to be our first canon of construction of this constitution. It provides an immediate break or departure with past rules of constitutional construction.”¹¹⁶

What these judicial opinions all point to is that there are ways in which the section on National Objectives in a Constitution can indeed be made justiciable. What this therefore entails is first of all, a much less rigid approach to the issue of justiciability than has previously been in practice among our courts. Secondly, it is to see these principles in linkage to the justiciable rights embodied within the Constitution. This would allow for both a broader construction of the constitution, as well as for the development of a symbiotic relationship between the two parts of the instrument. As the Court in the South African *Grootboom* case stated,

There can be no doubt that human dignity, freedom and equality, the fundamental values of our society, are denied to those who have no food, clothing or shelter. Affording socioeconomic rights to all people therefore enables them to enjoy the other rights

*enshrined in Chapter Two (the Bill of Rights).*¹¹⁷

It thus goes without saying that ESCRs can indeed be made a justiciable part of the constitution. The most important question is how? To answer this question, we need to turn to a more critical examination of the instrumentalities within a constitution that are supposed to oversee the enforcement of these rights.

5.2 Assessing State Enforcement Mechanisms: The Role of Courts and Government Commissions

Generally speaking, the institutional mechanisms for the enforcement of human rights under the 1995 Constitution are fairly developed and mark a significant development on the 1967 instrument, especially in terms of access, available options (courts, commissions, and civil action) and even conceptualization. Among these mechanisms are the Courts, the Uganda Human Rights Commission (UHRC), the Electoral Commission, the National Planning Authority, the Service Commissions (on health and education) and the Inspectorate of Government, to mention only the most important. Moreover, to the extent that the doctrine of *locus standi* has been largely negated by the provisions of Article 50, the scope for the enforcement of rights is very wide. This means that an action for the enforcement of rights within a court or other similar body does not have to go through the previously vigorous test of ensuring that the litigant had a direct interest in the matter. The new formulation enshrined in Article 50 basically means that any person (even the proverbial ‘busybody’) can bring an action either on their own or on the behalf of another. We shall return to the issue

¹¹⁴ Thus in the case of *Minerva Mills Ltd & Ors. v. Union of India & Ors* (1981) (1) SCR 206, Chief Justice Chandrachud stated that the rights in the body of the Constitution need to be read together with the principles which form the ‘edifice’ on which the Indian Constitution is built. And further: “Those rights are not an end in themselves but are the means to an end. The end is specified in the Directive Principles.” See judgment at 257.

¹¹⁵ *NTN Pty Ltd & NBN Ltd. v. The State* [1988 LRC (Const) 333 at 352, per Barnett, J.

¹¹⁶ See judgment of Egonda-Ntende in *Tinyefuza v. Attorney General* [Constitutional Petition No.1 of 1997], at 18.

¹¹⁷ See para.23, *Grootboom* decision.

of court action subsequently. For the present, let us examine how well the Uganda Human Rights Commission has fared in giving life to the Bill of Rights provisions of the Constitution, and specifically to ESCRs.

The UHRC effectively began operations in 1997. Since that time, however, it has largely been preoccupied with addressing violations of civil and political rights. Its flagship magazine *Your Rights* mainly carries articles that cover the same category of rights, even though issues such as the rights of people with disabilities have on occasion featured in its pages.¹¹⁸ Since inception, the UHRC has issued six annual reports, the essence of which is to act as a mechanism of reportage to Parliament on the activities of the Commission. The quality of the reports have improved over time, and demonstrate a growing ability to bring to light human rights violations of varying kinds. At the same time, the extent to which these reports have made an impact on the body to which the report is made, is questionable. Indeed, a practice that has become almost a ritual is for the chairperson of the Commission to request Parliament to implement the recommendations of previous reports!

What has been the approach of the Commission to the realization and enforcement of ESCRs? What is almost immediately apparent is that ESCRs do not enjoy a place of prominence in the reports, with the first report (of 1997) paying ‘much less attention’ (in the words of Apolo Makubuya) to ESCRs than it does

to civil and political rights.¹¹⁹ According to Makubuya, “It [the report] states in generic fashion that the challenges of realizing economic and social rights are “very grave” without substantiating the point. Such a position on these fundamental rights is quite disheartening and unacceptable.” Moreover, there initially appeared to be a conceptual problem with understanding the character of these rights. That misconception is partly reflected by the statement in the 1998 report claiming that the enjoyment of ESCRs “... are mainly dependent on resources and the state of the economy,”¹²⁰ a contention that we have argued in this paper is basically incorrect.¹²¹ Three years later, there was only marginal improvement, with the 2000-2001 report devoting a scant six pages out of over 80 to ESCRs.¹²² A section on the state of vulnerable groups in society that covers refugees, women, children, and persons with disabilities (PWDs) considers the rights of these groups broadly.¹²³ A second chapter is devoted to rights at work and deals with a number of economic and social issues in this regard.¹²⁴ The most recent report of 2001-2002 adopts a different approach to the rights, and they are spliced throughout the document.

It must be conceded that the Commission’s annual reports may not be fully reflective of the amount of attention given to problems associated with the realization of ESCRs. Among the many issues that emerge before the Commission include the case of children, who may petition the body with a variety of

¹¹⁸ See for example, the article entitled, *UHRC Lends Special Ear to Disability Issues*, *YOUR RIGHTS*, Vol.III, No.10 (November 2000), at 3-14.

¹¹⁹ Apollo Makubuya, *Breaking the Silence: A Review of the Maiden Report of the Uganda Human Rights Commission* *EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS*, Vol.5, No.2, 217, (1999).

¹²⁰ UHRC Annual Report 1998, at 41.

¹²¹ The key question in the realization of ESCRs is not resources. It is demonstrating a broad, constant and progressive movement towards the full realization of rights. In the words of the World Health Organization: “Any deliberately retrogressive measures require the most careful consideration and need to be fully justified by reference to the totality of rights provided for in the human rights treaty concerned and in the context of the full use of the maximum available resources. In this context, it is important to distinguish the *inability* from the *unwillingness* of a State Party to comply with its obligations.” World Health Organization, (2002), 25 *Questions and Answers on Health and Human Rights*, Health & Human Rights Publication Series, Issue No.1, Geneva, 2002 at 14.

¹²² See UHRC Annual Report 2000-2001.

¹²³ See chapter 4.

¹²⁴ *Ibid.*, at 62-68.

issues that require adjudication, including abandonment, ill treatment and the violation of their educational rights. In this respect, however, the Commission runs the danger of overlapping with the operations of other bodies, among them the National Council on Children which has the statutory brief to oversee the implementation of the Children's Statute, and by implication the Convention on the Rights of the Child. There is also an overlap with the Family and Children's courts, and in order to avoid a conflict, the Commission as much as possible attempts to invoke mechanisms of alternative dispute resolution (ADR) such as mediation and conciliation between the parties.

With respect to worker's rights, the Commission faces the same problem. While its operational guidelines stipulate that the Commission should not handle matters of a contractual nature, it often finds itself dealing with matters related to employment. Its preference is to refer most of these matters to the courts or to the Labour department, and to only handle small claims, issues of discrimination and sexual harassment. However, a problem confronted in this respect once mediation has failed, is the evidentiary proof required to support the claims made. While the rules of procedure in the Commission are less stringent than those in court, petitioners still find problems in collecting sufficient evidence to support their claims.

Of recent the UHRC has avidly adopted and promoted the Rights Based Approach (RBA) to development. According to the Commission that approach,

...seeks to add value to the work of the lawyers and economists by providing an entry point for duty bearers and right holders to work together in a consistent and sustaining manner. This is possible because a human rights based approach is hinged on principles of legal obligations, participation,

accountability and specific identification of who is vulnerable in a specific target so that they are given priority in the planning process. The rights-based approach is effective because it makes development an obligation of States and not charity dependent on the goodwill of the government in power.¹²⁵

Emphasis on the RBA has led the Commission to some new areas of activity in the field of ESCRs, most prominent among which is the right to food. Thus, a seminar held at the beginning of 2003 brought together the various stakeholders with an interest in the area and developed a strategic framework through which the progressive realization of the right was to be pursued. The seminar reviewed the policy and legal framework on the right to food, and proceeded to make several recommendations on the way forward. Among the results that are counted as a positive outcome of the seminar is the involvement of the Commission in the formulation of the government food and nutrition policy.¹²⁶ It is also expected that the Commission will be involved in the process of drafting legislation specifically relating to food. One of the functions of the UHRC that has come to prominence since the enactment of the 1995 Constitution is its power of adjudication and to make decisions regarding claims that rights have been violated. While, the Commission tends to encourage Alternative Dispute Resolution (ADR) over the more adversarial contestation common in the courts, at times it does adjudicate matters. Needless to say, the number of cases it has handled that touch on ESCRs is rather low. The two decisions that have been made on ESCRs illustrate the approach of the Commission to the realization of this category of rights. In *Emmanuel Mpondi v. The Chairman, Board of Governors Nganwa High School et al*,¹²⁷ the Commission dealt with the right to education. The brief facts of the case were that Mpondi who was a student in the defendant's school

¹²⁵ Editorial of *Your Rights*, Vol.VI, No.3 (July 2003) at 2.

¹²⁶ See, Republic of Uganda, 2003.

¹²⁷ Reported in [1999-2002] UHRR 68; Complaint No.210 of 1998.

was severely punished by two teachers, leading to his hospitalization. Following his treatment and return to school, he was sent home to collect school fees. His sponsor however refused to pay his school fees until the school administration had either punished the two teachers, or clearly indicated the specific action they would take against them. As a consequence, Mpondi was forced to leave school for good. In dealing with the issue of the claimant's right to education, the tribunal made the following remarks:

*In our view the evidence shows that Mpondi's education at Nganwa High School was interfered with. We hold the respondents responsible for this interference. We find on a balance of probabilities that Mpondi's right to education was violated by the respondents.*¹²⁸

The *Mpondi* case is of interest for several reasons. In the first instance, the Commission viewed the violation done to the student in rights terms, rather than as simply a tortious (negligent) wrong. Secondly, it awarded damages for the specific violation of the complainant's right to education, aside from the award it made relating to the cruel and inhuman treatment to which the complainant had been subjected. On the other hand, the case tackles the right to education issue in rather rudimentary fashion. No reference is even made to the specific constitutional provision on which the decision was based. Furthermore, there is no elaboration of the reasons on which the Commission based its findings that there had indeed been a violation of the right to education. For both jurisprudential and practical reasons, this would have been important, as the case does not ultimately assist much as a reference point of strong precedential value.

The conceptual failings manifested in the *Mpondi* case were nevertheless addressed in the later decision of *Kalyango Mutesasira v. Kumsa Kimanuka et al.*¹²⁹ a case involving a claim against the government

(although it was erroneously filed against the officers of the Ministry of Public Service) for the payment of pensions. First, the case clearly laid down the legal basis on which the UHRC derived its power to investigate human rights violations and to award remedies in the event of a violation. That provision (Article 53(2)(c) of the 1995 Constitution), does not make a distinction between civil and political rights, in which enforceable action is usually envisaged, and ESCRs in which, as we have already seen, it is argued that they are not. Secondly, the Commission stated that the provisions of the Constitution, specifically Article 254 plainly and categorically establishes the *right to pensions*. In the considered opinion of the Commission:

*This provision of the Constitution establishes a right to receive pensions to persons who retire from the public service. It does this in plain language to the effect that a person who retires from the public service or is retired from the public service must be paid pension calculated according to his or her rank, salary and length of service. This Article is expressed in mandatory terms such that pension must be paid to a public servant who qualifies.... In my view Article 254 is expressed in terms which make pensions an entitlement. It becomes property. Persons who qualify for it can claim it as a right. I therefore conclude that refusal, neglect or delay in the payment of pension is a violation of human rights.*¹³⁰

A review of the *Mutesasira* decision will demonstrate how far the Commission has come in articulating how ESCRs can be made enforceable, whether or not they are enshrined in the Bill of Rights of the Constitution. In the first instance, the decision points out that although the Constitution does not provide social

¹²⁸ Ibid., para.11 at 71.

¹²⁹ Complaint No.501 of 2000.

¹³⁰ Ibid., at 4. Emphasis added.

A review of the *Mutesasira* decision will demonstrate how far the Commission has come in articulating how ESCRs can be made enforceable, whether or not they are enshrined in the Bill of Rights of the Constitution. In the first instance, the decision points out that although the Constitution does not provide social security, Clause VII of the National Objectives and Directive Principles calls upon the state to make reasonable provision for the welfare of the aged. The decision went on to cite Uganda's international obligations under the ICESCR, among which is the right of everyone to social security, including social insurance: "Pension, being a social security is therefore a human right under international law. Refusal or non-payment of pensions to those who qualify under the law would therefore violate the right to social security which is recognized as a right by Uganda."¹³¹ The judgment is not only of importance to the jurisprudence of the Commission, but it could even offer a framework of guidance for higher courts.

Against the above performance, a question that has recently arisen is whether there is a need for a Commission when it would be most appropriate to seek the enforcement of ESCRs through the courts of law and other mechanisms such as the National Children's Council and the Industrial dispute system? This is an issue that is continuously raised with respect to the Commission. There is certainly a need to clarify the roles and functions of both the Constitutional bodies, as well as the other instruments and mechanisms that the 1995 Constitution put in place to give effect to the rights enshrined therein. What one respondent described as a need for creating 'strategic alliances' among these bodies is required, because they all certainly perform necessary functions, even if there is some overlap and duplication. That process would involve a clarification of the roles of these bodies, which needs to be done in order to both reduce costs, as well as to create well-demarcated spheres of operation. It is also important to take into account issues of access to these bodies in terms of cost, delay, and legal representation.

If we turn our attention to the state of ESCRs litigation in the courts of law, one is met by a similar story of inadequacy.

A survey of constitutional litigation since the enactment of the 1995 Constitution reveals that this has been scanty, with the possible exception of litigation relating to the right to property¹³² and the right to a healthy environment.¹³³ Thus, for example, in the case of *The Environmental Action Network (TEAN) v. National Environmental Management Authority (NEMA)*,¹³⁴ Justice Ntabgoba made a declaration to the effect that smoking in a public place constitutes a violation of rights of the non-smoking members of the public. This, in the ruling of the judge, denied them the right to a clean and healthy environment in terms of Article 39 of the 1995 Constitution.¹³⁵

In the case of *Joyce Nakacwa v. AG et al*,¹³⁶ among the several issues involved was that Article 33(3) of the Constitution had been infringed because the 2nd respondent (the Kampala City Council—KCC) had failed to provide medical and/or maternity care for the petitioner who was a resident in their charge. The article in question stipulates that the State "... shall protect women and their rights, taking into account their unique status and natural maternal functions in society." In this way the Constitution invokes a social right specific to the maternal function of women.

The petition also alleged contravention of the Public Health Act in that the Minister (of Health) was under a duty to make rules for the proper control of clinics, and specifically, "... for the welfare and care of children or the care of expectant or nursing mothers," and had failed to do so.¹³⁷ The specific case was concerned only with the preliminary matters raised in objection to the suit by the AG.

¹³¹ Ibid., at 5.

¹³² See, for example, *Salvatori Abuki & Anor., v. AG*, Constitutional Petition No.2 of 1997; confirmed in *AG v. Salvatori Abuki*, Constitutional Appeal No.1 of 1998.

¹³³ Among the several cases concerning the right to a healthy environment, see *BAT Ltd. v. TEAN* (Misc. Appl. No. 27 of 2003), *Pastor Martin Sempa v. AG* (Misc. Appl. No. 71 of 2002), and *Greenwatch v. AG* (Misc. Appl. No. 140 of 2002).

¹³⁴ Miscellaneous Application No.39 of 2001.

¹³⁵ But see also *British American Tobacco Ltd. v. Environmental Action Network Ltd.*, Civ. Appl. No.27 of 2003.

¹³⁶ Constitutional Petition No.2 of 2001.

¹³⁷ Ibid., p.3.

Fortunately, the Constitutional Court overruled the preliminary objections, setting the stage for a substantive hearing of the merits of the case. Once again, fate intervened against the petitioner who died before the case could resume in a substantive manner before the Court.¹³⁸

The later case of *Dimanche Sharon et al v. Makerere University*,¹³⁹ saw the Court consider aspects of the right to education, although the issues principally related to freedom of expression and religion. The case concerned an action by Seventh Day Adventist students who averred that Makerere University was violating their rights by holding classes and other academic activities, including tests and examinations on Saturday (the Sabbath). In dismissing the action, Lady Justice Kikonyogo, in the lead judgment of the Court made the following observation:

I wish to emphasize that, the provisions of Article 30 notwithstanding, University education is not compulsory and is not obtainable only from the respondent. The petitioners had an option to join other Universities and other tertiary institutions. With regard to the alleged unconstitutional burden, the respondent's policy did not prohibit the petitioners or hinder them from practising, or believing or participating in any religious activities. The policy did not hinder any promotion of their creed or religion in Community with others under Article 37.¹⁴⁰

In short, the claim that the rights of the claimants had been violated was given short shrift. Unfortunately, the judgment does not elaborate on what the right to education as enshrined in the Constitution actually means in concrete terms. This was therefore an opportunity lost for the Court to give content to a right that is very broad and general as articulated in the Constitution.

5.3 *Popularizing ESCRs: Seizing Opportunities*

Recognize, respect, protect, promote and fulfil. Our basic conclusion is that a strategy that seeks to invigorate the approach to the realization of ESCRs, needs to use these five elements as the basic operational framework directed at achieving these fundamental rights. First, there is a need to *recognize* ESRs as rights, and to incorporate them in the Bill of Rights section of the Constitution. Of the three countries of Utake only Kenya has comprehensively attempted to do this in its draft constitution. Uganda has made a half-hearted attempt while Tanzania needs to have a full-scale constitutional *baraza* that will bring its constitution into line with those of its neighbours. Uganda also needs to move those ESCRs included among the National Objectives and Principles of State Policy and transfer them to the Bill of Rights section. Aside from the rights to health and food that we have examined in this study, there is the right to clean and safe water. Not included in the section, but rights that have also gained international recognition include the right to shelter (or housing), and the right to an adequate standard of living including social security. The first course of action in Uganda must thus be to redraft the Bill of Rights section of the Constitution in order to incorporate these rights which are fundamental to the full existence of a whole human being. For all three countries, policy is of utmost importance because it provides an indication of the general parameters within which governmental activity is both conceptualized as well as executed. This is the first opportunity that HROs should seize. Thus, HROs need to begin engaging work on ESCRs by investing in well-grounded multidisciplinary research, including human rights impact assessments (HRIAs) rather than post-mortem analyses of situations gone awry. By so doing, HROs can insert themselves directly into the policy debate in such a manner as to critically influence the ultimate direction that debate assumes.

¹³⁸ Counsel for the respondent sought to keep the action alive in the public interest following the death of the petitioner, but the Court ruled that he was not entitled to do so. See *Phillip Karugaba v. AG* (Const. Petition No.11 of 2002). The court's ruling has been appealed to the Supreme Court.

¹³⁹ Constitutional Cause No.01 of 2003.

¹⁴⁰ Judgment of Justice L.E.M. Mukasa-Kikonyogo, at 17-18.

In recognizing and incorporating these rights in an amended constitution for both Uganda and Tanzania the South African example can serve as inspiration, as can the Kenyan draft. This is with respect to the formulation of these rights, as well as in relation to the articulation of the nature of the state's obligation in ensuring their progressive realization. Transferring the rights from the National Objectives section of the constitution is not simply symbolic; it represents a recognition that this category of rights stands on the same level as those civil and political rights that have long been accorded enforceable status. At the same time there needs to be a serious review of the notion that rights enshrined in the National Objectives section of a constitution are not justiciable. This can be done in two ways. First of all this can be done by the courts invoking the section whenever they are faced by an issue involving the interpretation of rights issues. Secondly, HROs should use these principles when articulating the case for their more comprehensive enforcement. Thus, recognition and the continuous reference and use of the rights will develop further into their continuous respect, guaranteeing that all institutions and individuals give fidelity to their enforcement. Needless to say, the objective of recognition needs to apply to the other side of the table—to the activists in civil society, many of whom still do not regard ESCRs as essential to the human rights struggle. Consequently, the research referred to above must of necessity be deployed in advocacy.

A recent study on the right to food that focuses on the example of South Africa has laid out four phases of civil society involvement in the agitation of this right than could be applied across the board to all ESCRs.¹⁴¹ The first is in raising public awareness about the right in question, i.e. sensitization and mobilization. Secondly, there must be a stock-taking exercise wherein HROs and other civil society actors interested in the right are brought in to make an assessment of the state of a particular right, especially when placed against its international obligations.

The third phase will be when (if) a move is made to enact framework legislation on the right in question, and finally, HROs must monitor the legislation once it has been enacted. In other words, it is not sufficient to simply lobby for a particular policy of legislation unless there is an active process of ensuring that it is followed in both letter and spirit.

The obligation to *protect* implies an active role on the part of the state and its institutions to ensure that all policies and actions taken in order to effect government programs are done in conformity with the obligations that have been undertaken with respect to ESCRs. Here, the Human Rights Commissions of the three countries can play a more active role in providing human rights impact assessments of government policies and legislation while still in their draft form. This would minimize the negative consequences of such policies, and also ensure that the damage does not come after the fact and can be addressed before implementation.¹⁴² In the absence of such action, it is imperative for HROs to institute a kind of “ESCR-watch.” This would be a system of oversight of all governmental agencies that on a regular (annual or biannual) basis reviews the operations of all state organs with regard to the steps they have taken in the struggle to ensure that ESCRs are fully realized. Here, Kenyan HROs are certainly better placed than their two counterparts, in part because the agenda of economic liberalization has not extended as far as it has in Uganda and Tanzania. As Table I demonstrated, Kenya survived (if with some bruises) without the IFIs. At the present time, the country needs to carefully consider how to reengage with them. It does not have to be on the scale that was done in the other two countries, especially given that the percentage of donor dependency in Kenya is still low. Furthermore, Kenya has more resources than either of the two countries which means that it can build a stronger foundation for reform, as well as for home-grown interventions that do not simply ape the prescriptions made by the IFIs.

¹⁴¹ Fons Coomans & Kofi Yakpo, *A Framework Law on the Right to Food: An International and South African Perspective*, Vol.4, No.1 African Human Rights Law Journal, (2004) at 25-28.

¹⁴² See the analysis by Ann Seidman and Robert Seidman, *Assessing a Bill in Terms of the Public Interest: The Legislator's Role in the Law-Making Process*, in Vol.1 THE WORLD BANK LEGAL REVIEW: LAW AND JUSTICE FOR DEVELOPMENT, (2002) at 207-256.

The protection of ESCRs is of course largely a state duty. However, it is obvious that such a role cannot be effectively carried out unless the violations (potential and actual) are brought to the attention of the state or to the agencies given the function to protect rights under the constitution. This calls for a renewed emphasis on the role of advocacy by HROs in relation to the protection of ESCRs. Logically, it is civil society that must play this role. Organizations currently involved in traditional human rights work must begin to take on more activities in the economic, social and cultural arena. They must also forge a linkage between their traditional activities with regard to civil and political rights and the struggle to ensure that ESCRs are better protected. Aside from increasing litigation over these issues, such organizations should engage more directly in processes such as the PRSPs and in the debate about budgetary allocations in order to ensure that government is involved in the progressive improvement and realization of these rights, rather than in their deterioration. In the final analysis unless the vigilance over ESCRs matches the oversight of civil and political rights they will remain relegated to a secondary level in the struggle for the overall protection of human rights. The pursuit of this objective must include the incorporation of ESCRs into the work of groups that see their work as primarily in the area of civil and political rights (e.g. prison reform, non-discrimination or questions of access).¹⁴³ HROs also need to extend the struggle for human rights to other sectors of civil society and not exert a monopoly over knowledge and strategy. In particular, it is necessary to work with organizations in the area of development and community outreach, not only to sensitize them to rights issues, but also to infect their work with an approach that does not simply take the context for granted.

¹⁴³ See Shadrack C. Agbakwa, *Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights*, in Vol.5 Yale Human Rights & Development Law Journal (2002), 177-215, esp.210-212.