ARTICLES

IS THE AGE OF HUMAN RIGHTS REALLY OVER? THE RIGHT TO EDUCATION IN AFRICA—DOMESTICIZATION, HUMAN RIGHTS-BASED DEVELOPMENT, AND EXTRATERRITORIAL STATE OBLIGATIONS

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ABSTRACT

It has recently been suggested that the age of human rights is over. The West, itself often not respecting human rights, is said to have abused the concept as a tool to retain control over the developing world. Human rights have remained a foreign construct in Africa, the Near East, and Asia. They have "underperformed," and the level of privation in many parts of the world is more intense than ever. This Article acknowledges elements of truth in these observations, but argues that the battle for human rights is not lost. Using the right to education in Africa as an example, three arguments will be presented to explain how human rights can regain their moral cogency and actually help change a world of misery for the better. First, human rights need to be "domesticized," made "home-grown" achievements with which local populations can identify. Regional human rights institutions need to give specificity to universal norms. These "locally-owned" norms must then be effectively enforced. Second, pure "development goal" approaches to reducing global poverty need to be debunked. Instead, a human rights approach needs to identify clear duty-bearers, including notably the World Bank, who, when they have failed to comply with specified duties, should be considered "human rights violators" and held accountable accordingly. Third, and perhaps most importantly, human rights must be recognized to give rise to extraterritorial state obligations. These are obligations of states, in appropriate circumstances, to respect, protect, and fulfill the human rights of those beyond their own territory. The extraterritorial human rights obligations of states must structure bilateral development assistance and cooperation, the lending operations of the International Monetary Fund and the World Bank, and free trade within and beyond the World Trade Organization (here, meaning the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights).

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I. IS THE AGE OF HUMAN RIGHTS REALLY OVER? THE RIGHT TO EDUCATION IN AFRICA

One of the most prolific African human rights scholars, Makau Mutua, has recently suggested that the age of human rights is over.[1] He argues that—although, at no point in history, have there been more norms, processes, and institutions seeking to promote human rights—human rights have lost their moral force. A number of factors are said

1. Makau Mutua, *Is the Age of Human Rights Over?*, *in* THE ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450, 450-58 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2015).

to have contributed to this erosion of the idea of human rights. On the one hand, human rights have been abused as part of a civilizing mission of the West against former colonies to "deliver primitive peoples into the Age of Europe."[2] These civilizing missions were pursued with the same mindset with which the colonial powers undertook their colonizing mission, thus leading to large-scale aversion to the idea of human rights in the countries concerned.[3] On the other hand, the West has never quite lived up to human rights standards itself, "preaching water, but drinking wine," hence undermining the credibility of those advocating human rights.[4] The so-called war on terror led by the United States, for example, has served to justify human rights violations on a grand scale in Afghanistan, Iraq, Libya, etc.[5] Human rights, Mutua says, have in many ways remained an essentially Western construct, rejected in many non-Western societies, notably in Asia and the Near East.[6] To this, one may further add that the human rights movement has generally "overpromised, but underperformed."[7] The level of privation resulting from war or unbridled capitalism has made the future of many in war-torn or poorer countries look bleaker than ever, with the rest of the world paralyzed and unable to do anything.[8]

There may be substantial truth to these sobering observations. However, even the author of these sentiments goes on to admit that "[t]he internationalization—universalization—of human rights principles and tenets is so deeply embedded in the psyches of states and cultures around the world that it is irreversible."[9] Hence, I suppose the only option available is to work with the concept of human rights but to try to reinvigorate the human rights idea and ensure that individuals' basic rights—very much in a Dworkian sense—are taken seriously, again.[10] How can this be achieved, though?

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2. *Id.* at 455.

3. *Id.*

4. *Id.* at 452.

5. *Id.*

6. *Id.* at 452-53.

7. *Id.* at 455.

8. *Id.* at 454-55.

9. *Id.* at 455-56. Elsewhere, the author says that he "[does not] agree with those who say that the human rights project 'is so over' that we must abandon it altogether." Makau Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, 51 AFR. STUD. REV. 17, 19 (2008) [hereinafter Mutua, *Human Rights in Africa*].

10. Ronald Dworkin asserts that, beyond the many legal rights expressly laid down to govern our daily lives, all individuals further hold legal rights of a stronger or moral quality against their governments, trumping law or conduct inconsistent with these rights. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977).

The idea to write this Article arose in the context of research on the crucial role of the right of access to education in advancing Agenda 2063 of the African Union (A.U.). The Agenda, adopted at the 24th Ordinary Session of the Assembly of A.U. Heads of State and Government in Addis Ababa, Ethiopia on January 30, 2015, makes a pledge to accelerate integration, prosperity, and peace on the continent going forward to 2063.[11] There is, inter alia, an aspiration towards "[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law."[12] The stated research, organized within a framework provided by the U.S.-based Law and Society Association[13]—in which the author of this contribution did not participate, but on the findings of which he had been invited to comment[14]—involved a group of human rights scholars hailing from various African countries. These African human rights scholars were so enthusiastic about human rights, including the right to education, and so utterly convinced of their continued importance in achieving the integration, prosperity, and peace alluded to, that the question forcefully imposed itself: Is the age of human rights really over—or do human rights retain their significance? Whether such exuberance, when it comes to human rights, is in any way justified or not is one thing. Perhaps it is good, however, that such fervent support for human rights still exists with some. In the absence of any instrument better suited than human rights to realize noble goals such as respect for human dignity, freedom, equality, prosperity, or solidarity, it remains for all others to question how a renaissance of human rights may be achieved and what can be done to ensure that human rights are taken seriously, again. These questions may well be

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11. *See* African Union Comm'n, *Agenda 2063, The Africa We Want, Popular Version* (Apr. 2015), http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf; African Union Comm'n, *Agenda 2063, The Africa We Want, Framework Document* (Sept. 2015), http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf.

12. African Union Comm'n, *Agenda 2063, The Africa We Want, Popular Version*, *supra* note 11, at 2, 5-6 (aspiration 3).

13. The Law and Society Association is "an interdisciplinary scholarly organization committed to social scientific, interpretive, and historical analyses of law across multiple social contexts." *See* Law and Soc'y Ass'n, *About Us*, http://www.lawandsociety.org/commitments.html (last visited Dec. 23, 2017).

14. The research findings have been published as EDUCATION LAW, STRATEGIC POLICY AND SUSTAINABLE DEVELOPMENT IN AFRICA: AGENDA 2063 (Azubike C. Onuora-Oguno et al. eds., 2018). For the book, this author wrote the Foreword, entitled *Towards a New Era of Human Rights: The Right to Education in Africa*, which presents in succinct form the three arguments put forward in this Article. Klaus D. Beiter, *Towards a New Era of Human Rights: The Right to Education in Africa*, *in* EDUCATION LAW, STRATEGIC POLICY AND SUSTAINABLE DEVELOPMENT IN AFRICA: AGENDA 2063, *supra*, at vii, vii-xvii.

addressed in the very context of that research on the right to education in Africa.

The right to education is a so-called "hybrid" right, evidencing characteristics of civil and political, economic, social and cultural, and group or solidarity rights—therefore, of all three generations of human rights.[15] It covers classical freedoms, such as the absence of indoctrination in schools, the right to establish private schools, and academic freedom. It further encompasses positive duties of the state to set up and administer a comprehensive education system, providing infrastructure and resources. However, it also implicates the right to development as entitling a nation as a whole to socio-economic and political progress. The right to education is, moreover, what has been termed an "empowerment right," *i.e.*, a human right itself whose enjoyment only makes the exercise of most other human rights possible. It constitutes the basis for each person's human rights awareness, promotes civil and political enlightenment, facilitates each person's socio-economic success in life, and makes it possible for him or her to take part in cultural life.[16]

Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 contains the most prominent formulation of the right to education at the regional African level.[17] If there can be said to be a common denominator in the way that international human rights treaties, such as the ACRWC, protect the right to education, then it can be represented as follows:[18] There is usually a provision defining the aims of education, notably emphasizing that education should be

15. On the right to education as a "hybrid" right, see KLAUS D. BEITER, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW: INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 37-43 (2006).

16. On the right to education as an "empowerment" right, see *id.* at 28-30.

17. African Charter on the Rights and Welfare of the Child art. 11, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter ACRWC].

18. Other prominent formulations of the right to education roughly following the stated outline may be found in the International Covenant on Economic, Social and Cultural Rights arts. 13, 14, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR], (UNESCO) Convention against Discrimination in Education arts. 4, 5, Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962), Convention on the Rights of the Child arts. 28, 29, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC], and Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") art. 13, Nov. 17, 1988, 28 I.L.M. 161 (1989) (entered into force Nov. 16, 1999). For a comprehensive treatment of the protection of the right to education by international law, providing detail on and mentioning relevant literature with regard to all the aspects raised here, see Beiter's monograph on the right to education, *supra* note 15. It also includes the texts of all the provisions on the right to education mentioned here.

directed to "the full development of the human personality."[19] Then there would be a provision calling upon states parties to make education at the primary, secondary, tertiary, and fundamental or adult levels available and accessible to varying degrees, with state obligations formulated in a more rigorous fashion for the lower or basic levels and a less rigorous fashion for the higher or advanced levels. Primary education must usually be "compulsory and . . . free to all."[20] Authoritative interpretations point out that education at all these levels must further be acceptable and adaptable. In simplified terms: *"Availability"* refers to the provision of schools and teachers. *"Accessibility"* refers to the abolition or reduction of school or university fees and also to the elimination of other impediments to access, such as race or gender discrimination. *"Acceptability"* requires ensuring that education itself conforms to established human rights standards, is relevant, of good quality, and culturally appropriate. *"Adaptability,"* finally, signifies that, rather than it being expected that the learner must adapt to whatever educational program has been designed for him or her, it should be education that adapts to the particular situation of the learner, who may, for example, be disabled or a working child. Whereas the provision of infrastructure and resources constitutes the social or positive aspect of the right to education, there would usually be further provisions setting out the freedom or negative aspect of the right to education. These provisions would recognize the right of individuals and bodies to establish and direct (private) educational institutions conforming to minimum standards laid down by the state. Parents, in turn, are granted the right to send their children to such educational institutions, and also a more or less robust right "to ensure the religious and moral education of their children in conformity with their own convictions."[21] Granted, the above amounts to an over-simplification of the far more complex regulation of the right to education at the global and regional level in actual fact, but it suffices for purposes of the discussion that follows.

Hence, to pose the question again: How can the right to education reclaim its moral significance as a human right in the African context and be taken seriously in what appears to be a post-human rights era? Among the possible solutions, three will be singled out here: *first*, human rights need to be domesticized; *second*, pure "development goal" approaches should be debunked; and, *third*, extraterritorial state obligations under international human rights law must be recognized.

19. *See, e.g.*, ICESCR, *supra* note 18, art. 13(1).

20. *See, e.g.*, *id.* art. 13(2)(a).

21. *See, e.g.*, *id.* art. 13(3).

The latter is perhaps the most important, and more attention will therefore be given to it.

II. Domesticizing Human Rights

A. *A Cosmopolitan Face of Globalization*

One of the reasons for the failure of human rights in non-Western societies has been that they have been experienced as an alien construct superimposed on such societies. No effort has been made to embed human rights in the specific context in which they are to operate by permitting and encouraging their diversification in the light of differing cultural specificities. This remains the primary obstacle to the acceptance of human rights in the Near East and Asia, and it used to be true for Africa, too. Some ten years back, Makau Mutua remarked as follows with regard to Africa:

> Third World scholars like myself come to the study of human rights with a considerable degree of discomfort and an in-built sense of alienation. Neither human rights, nor liberalism, has been germinated in the African garden. To be sure, my native ears are not deaf to many of the substantive issues addressed by both disciplines. I have a keen interest in the relationships between states and citizens. My alienation comes not from these facts, but from the particularized historical, cultural, and intellectual traditions and tongues in which both human rights and liberalism law are steeped. It is in that sense that I am an outsider.[22]

It is submitted, however, that, meanwhile, significant steps have been taken in Africa to make human rights a "home-grown" achievement, at least at the regional level. The regional African human rights system, with its norms (the African Charter on Human and Peoples' Rights of 1981,[23] the Protocol thereto on the Rights of Women in Africa of 2003,[24]

22. Mutua, *Human Rights in Africa*, *supra* note 9, at 18.

23. African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter Banjul Charter].

24. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, O.A.U. Doc. CAB/LEG/66.6. (entered into force Nov. 25, 2005) [hereinafter Maputo Protocol].

the ACRWC,[25] *etc.*) and its institutions (African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, African Court on Human and Peoples' Rights), has been used as the basis for this process. Its norms "ensure greater normative legitimacy by addressing the specific real-life concerns of Africans and African cultural conceptions of human rights,"[26] and its institutions have shown themselves to be "relatively credible and progressive" human rights bodies.[27] Even Mutua himself admits that bridges between human rights and African traditions have been built (even if essentially by Africans themselves) to make human rights more universally acceptable. He has commented that "[t]he African human rights system, which is anchored in the African Charter on Human and Peoples' Rights, expands the normative reach of the human rights corpus beyond its narrow Eurocentric roots."[28] Among the distinctive features characterizing African human rights discourse, note may be taken of the prominence accorded to economic, social, and cultural rights, which require states to allocate resources to advancing national development; the imposition of duties on individual members of African societies; and the recognition of third-generation peoples' or solidarity rights.[29] One should probably agree with Manfred Hinz, when he says:

> The fact that cultural relativism as it was framed by leading anthropologists lost appeal does not mean that it also lost all its potential for fruitful provocation. However, relativist provocations cannot deny that times have changed. . . . Indeed, there are good reasons to refer to the *return of justice*, . . . with the increasing public relevance of practical philosophy and its search for the ethical foundation of societies—a search which, today, can only be understood as an inter- or multicultural project, i.e. an anthropological one: globalization is unavoidable; and anthropological jurisprudence is applied anthropology—

25. ACRWC, *supra* note 17.

26. Frans Viljoen, *Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness*, 18 S. AFR. J. INT'L AFF. 191, 209 (2011).

27. *Id.* at 200 (statement made with regard to the African Commission on Human and Peoples' Rights).

28. Mutua, *supra* note 1, at 452-53.

29. Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 339-80 (1995). The Banjul Charter "codifies the three generations of rights, including the controversial concept of peoples' rights, and imposes duties on individual members of African societies." *Id.* at 339-40.

> the aim of which is to contribute to the *cosmopolitan face of globalization.*[30]

This reflects an argument in favor of "soft" universalism or "soft" relativism. Soft universalism or relativism, frankly, constitutes the only viable option because it accommodates both the global and the particularist, ensuring that the global incorporates a particularist perspective and ensuring that the particularist does not deviate too much from the global. Human rights may perhaps be said to be *relatively* universal,[31] and, these days, this seems to be accepted by most African commentators, too.[32] There is ample scope for "domesticizing" human rights in Africa that may and should be used. Domesticization implies, of course, that regional norms, to the extent that they do not merely replicate global norms, must complement, but not contradict, uncontentious corresponding global norms.[33] Complementarity and contradiction often do not operate in an either-or fashion, but would constitute opposing ends on a sliding-scale of possibilities.

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30. Manfred O. Hinz, *Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalizing World*, *in* HUMAN RIGHTS IN AFRICA: LEGAL PERSPECTIVES ON THEIR PROTECTION AND PROMOTION 3, 26-27 (Anton Bösl & Joseph Diescho eds., 2009).

31. Without intending to go into any depth here, reference may just be made to the famous Jack Donnelly–Michael Goodhart polemic on the topic. *See* Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 306 (2007) ("[T]he relative universality of [human] rights is a powerful resource that can be used to help to build more just and humane national and international societies."); Michael Goodhart, *Neither Relative nor Universal: A Response to Donnelly*, 30 HUM. RTS. Q. 183, 193 (2008) ("Human rights are neither relative nor universal. They are legitimate because of their global appeal. That is enough.").

32. *See, e.g.*, Bonny Ibhawoh, *Restraining Universalism: Africanist Perspectives on Cultural Relativism in the Human Rights Discourse*, *in* HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA 21, 38 (Paul T. Zeleza & Philip J. McConnaughay eds., 2004) ("[C]ultural differences may justify some deviations from universal human rights standards. However, cultural relativism must function as an expression and guarantee of local self-determination rather than as an excuse for oppression, arbitrary rule, and despotism."); Nyameko Barney Pityana, *Toward a Theory of Applied Cultural Relativism in Human Rights*, *in* HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA, *supra*, at 40, 44 ("International standards are important because they settle some key principles and set norms and standards. And yet, national insights and experiences must continue to improve and perfect international standards, revise them or establish new ones as necessity determines.").

33. *See* Viljoen, *supra* note 26, at 193 ("[A] distinction should be drawn between [regional] supplements (or 'deviations') that differ from but are still *consistent with* universal norms, and *contradictory* norms that are in conflict with universal standards. [Contradictory norms] . . . may work to undermine the legitimacy of the 'universal consensus.'").

B. *The Right to Education under the African Human Rights System*

The first expression of the right to education under the African human rights system is found in Article 17(1) of the African Charter on Human and Peoples' Rights (Banjul Charter) of 1981.[34] This provision rather succinctly provides that "[e]very individual shall have the right to education." Article 17 contains two further equally brief statements. Article 17(2) entitles "[e]very individual [to] freely take part in the cultural life of his community," and Article 17(3) proclaims that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." Commenting on Article 17 some fifteen years ago, Fatsah Ouguergouz noted that, as formulated, Article 17(1) strictly covered only the obligation of states parties to ensure equal access to existing educational institutions and an obligation to eliminate illiteracy.[35] He further noted that Article 17(3) "might be seen as a general interpretation clause"[36] and thus "may prove dangerous, as there is a fine line between the promotion and protection of certain values and censure in the name of those values."[37] Accordingly, "there is a risk that freedom in education (religion, language) may not be ensured."[38] For this reason, "the African Commission should see to it that Article 17[3] is interpreted as strictly as possible."[39]

The African Commission on Human and Peoples' Rights is competent to hear complaints that rights in the Charter have been violated. To date, the Commission has decided only three cases on the merits that also addressed Article 17(1). The cases, in each of which violations of a whole series of rights were alleged, barely added normatively to an

34. Banjul Charter, *supra* note 23, art. 17(1). As of June 15, 2017, the Banjul Charter has been ratified by all African states, except Morocco. *See* African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights* (June 15, 2017), https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf.

35. FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 190 (2003). It should be pointed out that the *travaux préparatoires* to the Banjul Charter reveal that the drafters formulated economic, social, and cultural rights in concise and general terms to avoid overburdening young African nations, while simultaneously making it clear that there were definite obligations on states parties in respect of the subject matter concerned. *See* FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 215 (2d ed. 2012) (citing the relevant preparatory documents).

36. OUGUERGOUZ, *supra* note 35, at 190.

37. *Id.* at 189.

38. *Id.* at 190.

39. *Id.*

understanding of Article 17(1), as references to the right to education in all of the stated cases are very brief.[40] The Commission has adopted a number of soft law instruments aimed at—and indeed helpful in—clarifying the normative content of Article 17(1). Paragraph 8 of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa of 2004, for example, considers Article 17(1) to cover, inter alia, the following: compulsory and free basic education; accessible and affordable secondary education, higher education, vocational training, and adult education; addressing the social, economic, and cultural practices and attitudes that hinder access to education by girls; the liberty of parents to choose for their children private schools that conform to minimum educational standards; and the liberty of parents to ensure the religious

40. In Free Legal Assistance Group v. Democratic Republic of Congo, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P. R.] (1995), the Commission, in the wake of a failure by the government to provide basic services, considered the closures of universities and secondary schools for two years a violation of Article 17. *Id.* ¶¶ 4, 48. In Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Communication 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H. P.R.] (2003), the Commission found that "the general disruption of life and state of war that took place while the forces of the Respondent States were occupying and in control of the eastern provinces of the Complainant State are in violation of . . . the right[] to . . . education [in Article 17]." *Id.* ¶ 88. In Association pour la Sauvegarde de la Paix au Burundi v. Kenya [and five other states], Communication 157/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (2003), the Commission held that an embargo that had been imposed on Burundi by the respondent states in reaction to a military coup in Burundi complied, in principle, with international law, as there had existed a threat to and a breach of the peace in Burundi and the region, and as relevant O.A.U. and U.N. procedures had been complied with. It also found "that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and [the] situation was monitored regularly. As a result of these reports adjustments were made accordingly." *Id.* ¶ 76. Consequently, the fact that the embargo had (allegedly) prevented the importation of school materials was held not to have constituted a violation of Article 17(1). A commentator has stated that the latter decision should be treated "with caution," as the current trend on the point is that economic, social, and cultural rights "must be respected and protected as much as possible" in the enforcement of economic sanctions on any state. Mashood A. Baderin, *The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social, and Cultural Rights in Africa*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 139, 158 (Mashood A. Baderin & Robert McCorquodale eds., 2007). It may be added that, in another case—Union Interafricaine des Droits de l'Homme v. Angola, Communication 159/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (1997)—concerning the mass expulsion of aliens from Angola without affording them an opportunity to contest the matter before a court of law, the Commission remarked that "[t]his type of deportations calls into question a whole series of rights recognized and guaranteed in the Charter[,] such as . . . the right to education (Article 17.1)." *Id.* ¶ 17. Although the Commission found the expulsions to have been in violation of the Charter, it did not specifically make a decision with regard to the right to education (a violation of Article 17(1) also not having been alleged).

and moral education of their children in conformity with their own convictions.[41]

It is further instructive to have a look at the Commission's Concluding Observations and Recommendations, which it issues after having considered the report of a state party, in which that state party comments on progress and failures in implementing the Charter. Especially the Commission's more recent statements have increased in quality and assist in deciphering the normative content of rights provisions of the Charter, including Article 17(1). The Commission's remarks on the right to education are sometimes directly made with regard to "Article 17" or "The Right to Education." At other times, they are made under headings such as "Economic, Social and Cultural Rights" or "Protection of the Rights of Women and Children." At yet other times, they are not made under any specific norm-related heading. It is submitted, however, that all the remarks have a bearing on Article 17(1).

The Commission thus emphasizes that a requirement to pay fees in public primary schools is not acceptable,[42] that primary education must be "fully cost-free" because unofficial fees and costs for uniforms and school supplies discourage parents from sending their children to

41. Afr. Comm'n H.P.R., *Pretoria Declaration on Economic, Social and Cultural Rights in Africa*, ¶ 8 (a), (c), (d), (e), (h) (2004), http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf. Attempts to concretize the content of Article 17(1) have also been made in Afr. Comm'n H.P.R., *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, ¶¶ 68-71 (2011), http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf [hereinafter *African Principles and Guidelines*]; Afr. Comm'n H.P.R., *State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines)*, ¶ 7(D) (2011), http://www.achpr.org/files/instruments/economic-social-cultural-guidelines/achpr_instr_tunis_reporting_guidelines_esc_rights_2012_eng.pdf [hereinafter *Tunis Reporting Guidelines*]. The problem with the *African Principles and Guidelines* is that it remains unclear how the Commission will apply them meaningfully. Regarding the *Tunis Reporting Guidelines*, it may be noted that these are to coexist with the Commission's old 1989 reporting guidelines. *See* Frans Viljoen, *From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission's 25 Year Mark*, 17 L. DEMOCRACY & DEV. 298, 312 (2013) [hereinafter Viljoen, *Progress and Challenges*] ("[the] specific reporting guidelines have not been integrated into the general reporting guidelines, and the usefulness of the . . . detailed . . . 'Guidelines and Principles' remains unclear").

42. Afr. Comm'n H.P.R., *Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon*, ¶¶ 82, xxxii, xxxiii (2014), http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf [hereinafter Concluding Observations, Cameroon] (concern expressed and recommendations made).

school,[43] and that legislation must be enacted to ensure primary education is compulsory.[44] Fees also must not constitute a barrier at subsequent levels of education. The Commission lauds "education free up to the tertiary level"[45] and the allocation of adequate funding to schemes providing loans enabling all competent students to complete their tertiary education.[46] Another barrier may be cultural traditions. The Commission points out, for example, that practices such as voodoo worship affecting the educational cycle of children must be eradicated.[47] Discrimination of various groups affecting access must likewise be addressed. Hence, disabled students should be included in ordinary schools with states parties taking "reasonable [measures] … [to] accommodat[e]" them.[48] The education of indigenous children should seek to "maintain[] their culture."[49] States parties should also take measures to prevent girls dropping out from school due to factors such as early marriage, pregnancy, or family responsibilities.[50] Ideally, there should be nationwide sensitization campaigns to promote girls'

43. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights*, ¶¶ 43, 49 (Right to Education – i) (2015), http://www.achpr.org/files/sessions/17th-eo/conc-obs/1-1984-2012/concluding_observations__liberia.pdf (concern expressed and recommendations made).

44. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana*, ¶¶ 46, 67 (2010), http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (concern expressed and recommendations made).

45. *Id.* ¶ 15 (state party commended).

46. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa*, ¶ 11(x) (2016), http://www.achpr.org/files/sessions/20th-eo/conc-obs/2nd-2003-2014/co_combined_2nd_periodic_republic_of_south_africa.pdf (state party commended).

47. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Combined 3rd, 4th and 5th Periodic Report of the Republic of Togo*, ¶¶ 47, 73(xxv) (2012), http://www.achpr.org/files/sessions/51st/conc-obs/3rd-2003-2010/achpr51_conclobs_3_4_5_togo_2012_eng.pdf (concern expressed and recommendations made).

48. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010–2012)*, ¶ 37 (2015), http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding_observations_5th_state_report_uganda.pdf [hereinafter Concluding Observations, Uganda] (state party commended).

49. Concluding Observations, Cameroon, *supra* note 42, ¶ 42 (state party commended).

50. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013)*, ¶¶ 75, 128 (2015), http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding_observations__initial__combined_state_report_malawi.pdf (concern expressed and recommendations made).

education.[51] States parties should take measures to ensure pregnant girls can continue with their education.[52] States parties should, moreover, invest in a system of good-quality public education. Recently commenting on the state report of Uganda, the Commission, therefore, stated:

> The increase in the establishment of private schools, which has been encouraged by the Government, … raises the concern of the Government gradually releasing itself from the obligation to provide quality public education, which could result in discrimination against children from low-income households.[53] … [The government should] [i]ncrease its investment in public education to match the increasing enrolment, and ensure the quality thereof, to avoid forcing parents to resort to private schools, as well as … regulate the quality of education being provided by private schools.[54]

The right to education in Article 17(1) of the Banjul Charter has been elaborated on by Article 11 of the ACRWC of 1990.[55] Article 11 broadly includes the essential elements of Articles 28 and 29 of the United Nations (U.N.) Convention on the Rights of the Child (CRC), the corresponding provisions in the Charter's global counterpart, but adds a distinct African flavor. Regarding the aims of education, apart from common aims mentioned in both instruments (development of the child's personality, preparation for responsible life in a free society, fostering respect for human rights, *etc.*),[56] education under the ACRWC is thus additionally to be directed to "the preservation and

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51. Concluding Observations, Cameroon, *supra* note 42, ¶ 27 (state party commended).

52. Afr. Comm'n H.P.R., *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the African Charter on Human and Peoples' Rights*, ¶¶ 71, 87(xxiv) (2016), http://www.achpr.org/files/sessions/19th-eo/conc-obs/1st-1983-2013/concluding_observations_sierra_leone_eng.pdf (concern expressed and recommendations made).

53. Concluding Observations, Uganda, *supra* note 48, ¶ 80.

54. *Id.* ¶ 116.

55. ACRWC, *supra* note 17, art. 11. As of June 15, 2017, the ACRWC has been ratified by all African states, except the Democratic Republic of Congo, Morocco, São Tomé & Príncipe, Somalia, South Sudan, and Tunisia. *See* African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child* (June 15, 2017), https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf.

56. ACRWC, *supra* note 17, art. 11(2)(a), (d), (b), respectively; CRC, *supra* note 18, art. 29(1)(a), (d), (b), respectively.

strengthening of positive African morals, traditional values and cultures," "the preservation of national independence and territorial integrity," and "the promotion and achievements of African Unity and Solidarity."[57] The ACRWC further requires states parties to "take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community,"[58] and to "take all appropriate measures to ensure that [girls] who become pregnant before completing their education shall have an opportunity to continue their education."[59] Whereas the former provision seeks to address social inequality as a hindrance to equal educational opportunities that should be corrected by state action, the latter acknowledges the African reality of high drop-out rates for female students due to pregnancies—discontinuation often being supported to promote upholding alleged norms of propriety in respect of sexual conduct—it likewise being expected of governments that they take corrective action in this regard. Neither provision is encountered in the CRC.[60]

Hence, the ACRWC constitutes "a necessary duality (not a needless duplication)."[61] It "offers a greater number of progressive provisions tailored to address African realities."[62] Further, like the CRC, the ACRWC defines children as persons below the age of eighteen years.[63] The ACRWC's protective standards are higher, however, as no exceptions to this rule are permitted. Under the CRC, national law is not prohibited from allowing persons under eighteen to attain majority[64] and, for example, to enter into a (child) marriage. Child marriage, a major obstacle to the right to education, is absolutely prohibited under the ACRWC.[65]

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the body of independent experts supervising implementation of the ACRWC, has, moreover, started addressing the right

57. ACRWC, *supra* note 17, art. 11(2)(c), (e), (f), respectively. On the aims of education, compare CRC, *supra* note 18, art. 29(1), with ACRWC, *supra* note 17, art. 11(2).

58. ACRWC, *supra* note 17, art. 11(3)(e).

59. *Id.* art. 11(6).

60. *See* Benyam D. Mezmur, *The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?*, 23 S. AFR. PUB. L. 1, 22-23 (2008) (pointing this out).

61. *Id.* at 29.

62. *Id.* at 28.

63. ACRWC, *supra* note 17, art. 2; CRC, *supra* note 18, art. 1.

64. CRC, *supra* note 18, art. 1 ("[A] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.").

65. ACRWC, *supra* note 17, art. 21(2) ("the minimum age of marriage [shall] be 18 years").

to education in Article 11 in its first two General Comments. It has pointed out the importance of education for the children of incarcerated and imprisoned parents and caregivers[66] and the urgency of realizing the right to birth registration, name, and nationality in Article 6, inter alia, to guarantee access to education.[67] It has also started adjudicating on the right to education under its communication procedure. In its second decision in the case of *Children of Nubian Descent v. Kenya*,[68] the Committee was called upon to assess the human rights situation of children of Nubian descent in Kenya. The Kenyan government, in the light of very special historical reasons linked to the colonial era, had always considered Nubians to be "aliens."[69] The Committee found children of Nubian descent, inter alia, to have suffered "de facto inequality in their access to available educational services and resources" as a result of "their [unjustified] lack of confirmed status as nationals of the Republic of Kenya," in violation of Article 11.[70] In effect, violation of a civil and political right—the right to birth registration, name, and nationality—was held to have adversely affected an economic, social, and cultural right—the right to education. It has been commented that the Committee should be commended for its faithfulness to the indivisibility, interdependence, and interrelatedness of human rights typically guaranteed by the regional African human rights system and that, "[b]y invoking the indivisibility and interrelatedness of rights, the … Committee … would seem to be laying a good foundation towards advancing the human rights of African children in general and socio-economic rights in particular."[71]

The Committee, like the African Commission, is competent to consider state reports, which states parties submit under the ACRWC, and, following such consideration, to issue Concluding Observations and

66. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Gen. Comment No. 1 (ACRWC, Art. 30), Children of Incarcerated and Imprisoned Parents and Primary Caregivers*, ¶¶ 4, 12, 20, 26, 27, ACERWC/GC/01 (Nov. 2013).

67. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Gen. Comment No. 2 (ACRWC, Art. 6), Right to Birth Registration, Name and Nationality*, ¶¶ 17, 31, 44, 54, 71, 85, 86, ACERWC/GC/02 (Apr. 2014). The Committee's General Comments are not legally binding, but do have considerable legal weight.

68. Institute for Human Rights and Development in Africa v. Kenya, No. 002/Com/002/2009 (Mar. 22, 2011), http://www.acerwc.org/download/decision-on-the-communication-against-the-republic-of-kenya/?wpdmdl=9747.

69. *Id.* ¶ 3.

70. *Id.* ¶ 65. *See also* ¶¶ 46, 63-69.

71. Ebenezer Durojaye & Edmund A. Foley, *Making a First Impression: An Assessment of the Decision of the Committee of Experts of the African Children's Charter in the* Nubian Children *Communication*, 12 AFR. HUM. RTS. L.J. 564, 576 (2012).

Recommendations. The Committee also comments on "Article 11," "Education, Leisure and Cultural Activities," or "The Right to Education." Its comments are more elaborate than those of the Commission. They are helpful in understanding the normative implications of ACRWC provisions. They may refer *more generally* to states parties' positive obligations to set up a fully functional education system at all levels. Hence, with regard to South Africa, the Committee

> notes with a concern the inadequate number of schools and infrastructure, high level of school absenteeism, the poor capacity of school regulating bodies, the high cost of education, shortage of materials, and insufficiency of home language teachers as incumbent of children's right to education. Thus the Committee urges the government of South Africa to address the concern areas . . . through allocation of sufficient budget for the education sector, construction of schools and basic infrastructure in the rural areas, training of teachers and regulatory bodies, subsidizing the education system, provision of materials, and incorporation of home language training in teachers education.[72]

However, the Concluding Observations and Recommendations may also identify *more specific* obligations of states parties with regard to a certain entitlement. To mention an example: Article 11(3)(a) and (b) require primary education to be free and secondary education to be made progressively free.[73] The Committee thus lauds "the introduction of free tuition at the kindergarten level."[74] It has stated that arrangements in terms of which primary schools are entitled to levy an additional "School Development Fund," even where the poorest are exempted, must be removed.[75] Hidden charges in primary education,

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72. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Concluding Recommendations by the ACERWC on the Republic of South Africa Initial Report on the Status of Implementation of the ACRWC*, ¶ 51 (2014), http://www.acerwc.org/download/concluding_observations_south_africa/?wpdmdl=8754 (concern expressed and recommendations made).

73. ACRWC, *supra* note 17, art. 11(3)(a), (b).

74. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Recommendations and Observations sent to the Government of the Republic of Uganda by the ACERWC on the Initial Implementation Report of the ACRWC*, at 4 (2010), http://www.acerwc.org/download/concluding_observations_uganda/?wpdmdl=8752 (state party commended).

75. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Concluding Observations and Recommendations by the ACERWC on the Republic of Namibia Report on the Status of Implementation of the ACRWC*, ¶ 36 (2015), http://www.acerwc.org/download/concluding-observations-namibia/?

such as examination fees or levies for extra classes, must be eliminated.[76] Further, to address school drop-outs and low secondary education enrollment, states parties should, among other things, provide free textbooks, sanitary materials, and school feeding programs.[77] Free bus rides for school children, particularly those living in rural areas, are recommended.[78] Free education should be extended to the secondary level.[79] Teachers "who push children out of school because of [inability to pay] extra charges" should "[be] punish[ed]."[80]

The right to education is also protected in Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003,[81] and in Article 13 of the African Youth Charter of 2006.[82] Article 12 of the Maputo Protocol obliges states parties to "take all appropriate measures to . . . eliminate all forms of discrimination against women and guarantee equal

wpdmdl=10072 [hereinafter Concluding Observations, Namibia] (concern expressed and recommendations made).

76. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Concluding Recommendations by the ACERWC on the Republic of Ghana Initial Report on the Status of Implementation of the ACRWC*, ¶¶ 24, 26 (2016), http://www.acerwc.org/download/concluding-observations-ghana/?wpdmdl=9997 [hereinafter Concluding Recommendations, Ghana] (concern expressed and recommendations made).

77. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Concluding Observations and Recommendations by the ACERWC on the Republic of Zimbabwe Report on the Status of Implementation of the ACRWC*, ¶¶ 39, 40 (2015), http://www.acerwc.org/download/concluding-observations-zimbabwe/?wpdmdl=10051 [hereinafter Concluding Observations, Zimbabwe] (concern expressed and recommendations made).

78. Concluding Recommendations, Ghana, *supra* note 76, ¶¶ 25, 26 (concern expressed and recommendations made).

79. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Recommendations and Observations to the Government of Kenya by the ACERWC Concerning the Initial Report on the Implementation of the ACRWC*, at 2 (2009), http://www.acerwc.org/download/concluding_observations_kenya/?wpdmdl=8746 (concern expressed and recommendations made).

80. Afr. Comm. of Experts on the Rights and Welfare of the Child, *Concluding Recommendations by the ACERWC on the Liberia Report on the Status of Implementation of the ACRWC*, at 10-11 (2014), http://www.acerwc.org/download/concluding_observations_liberia/?wpdmdl=8747 (concern expressed and recommendations made).

81. Maputo Protocol, *supra* note 24, art. 12. As of September 7, 2017, the Protocol has been ratified by thirty-nine out of fifty-five African states. *See* African Union, *List of Countries which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Sept. 7, 2017), https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf.

82. African Youth Charter art. 13, July 2, 2006 (entered into force Aug. 8, 2009). As of June 15, 2017, the Charter has been ratified by thirty-eight out of fifty-five African states. *See* African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Youth Charter* (June 15, 2017), https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf.

opportunity and access in the sphere of education and training."[83] In view of the serious problem of violence against girls in African schools, states parties are required to offer girls protection against all forms of abuse in schools.[84] Stereotypes in textbooks and syllabuses are to be eliminated[85] and gender sensitization is to be integrated in education curricula.[86] Education under the Maputo Protocol should further help achieving the elimination of harmful cultural and traditional practices[87] and of culture- or tradition-based violence against women,[88] which are acute issues in many African societies. Article 13 of the African Youth Charter reiterates many of the obligations covered by Article 11 of the ACRWC for the benefit of "person[s] between the ages of 15 and 35 years."[89] An aim of education mentioned in Article 13 that is of significance in the African context is learning about HIV/AIDS, reproductive health, substance abuse, and harmful cultural practices.[90] Neither the Maputo Protocol nor the Youth Charter contains a complaints procedure, however. The Protocol is subject to the system of state reporting provided for under the Banjul Charter.

It should, finally, be added that states parties to the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights may, in appropriate circumstances, submit cases to the Court established under the Protocol.[91] Also the Commission may do so in specific instances in respect of those states party to the Protocol.[92] The Court may also entitle certain NGOs and individuals to institute cases directly before it, provided the state party concerned has made a declaration accepting the competence of the Court to receive

83. Maputo Protocol, *supra* note 24, art. 12(1)(a). The Protocol contemplates "specific positive action" by states parties aimed at promoting girls' and women's right to education. *See id.* art. 12(2).

84. *Id.* art. 12(1)(c).

85. *Id.* art. 12(1)(b).

86. *Id.* art. 12(1)(e).

87. *Id.* art. 2(2).

88. *Id.* art. 4(2)(d).

89. African Youth Charter, *supra* note 82, Definitions, "Youth."

90. *Id.* art. 13(3)(f). This is the first provision in a treaty addressing HIV/AIDS in the context of the right to education.

91. Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights art. 5(1)(b)-(d), June 10, 1998, O.A.U. Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997) (entered into force Jan. 1, 2004) [hereinafter Protocol to the African Charter].

92. The Commission may refer cases of serious or massive violations of human rights, as apparent from one or more communications received, of its own accord to the Court. *Id.* art. 5(1)(a); Rules of Procedure of the African Commission on Human and Peoples' Rights (2010), rules 84(2), 118(3).

such cases.[93] The Court can decide on the right to education as protected in the Banjul Charter, but interestingly also as laid down in "any other relevant human rights instruments ratified by the States concerned."[94] So far, however, no case concerning the right to education has been decided by the Court.[95] The right to education may also be adjudicated on by the regional African ECOWAS Community Court of Justice, the adjudicatory body of the Economic Community of West African States (ECOWAS). The Banjul Charter forms part of the legal framework of ECOWAS, and the Court has express competence to decide on human rights cases brought by individuals.[96] In the case of *SERAP v. Nigeria*, the Court confirmed that the right to education is a justiciable right and that "[the] court will . . . hold a state accountable if it denies the right to education to its people."[97] The case concerned allegations of corruption by a state agency responsible for distributing federal education funds to the constituent states of Nigeria. The Court

93. Protocol to the African Charter, *supra* note 91, arts. 5(3), 34(6).

94. *Id.* art. 7; *see also id.* art. 3(1). Whereas the Commission deals with cases confidentially, court proceedings are public. Commission decisions are rather recommendatory, whereas those of the Court are binding.

95. The Court will be replaced by the African Court of Justice and Human and Peoples' Rights, which will exercise the combined jurisdiction of its predecessors, the A.U. Court of Justice and the African Court on Human and Peoples' Rights, and also international criminal jurisdiction once the relevant A.U. Protocols of 2008 and 2014 have entered into force. *See* Protocol on the Statute of the African Court of Justice and Human Rights arts. 1, 2, July 1, 2008, 48 I.L.M. 317 (2009); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 3(1), June 27, 2014, https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [hereinafter Malabo Protocol]. By and large, however, the rules on access to the Court in human rights cases (including those requiring the making of a declaration in the case of NGOs and individuals) and on the wide human rights basis for bringing and deciding cases remain valid. The ACERWC will also be competent to approach the Court. *See* (amended) Statute of the African Court of Justice and Human and Peoples' Rights arts. 28(c), 30, 31(1); Malabo Protocol, *supra*, art. 9(3).

96. Revised Treaty of the Economic Community of West African States (ECOWAS) art. 4(g), July 24, 1993, http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf; Protocol on the Community Court of Justice arts. 9(4), 10(d), July 6, 1991, A/P.I/7/91, as amended by Supplementary Protocol, Jan. 19, 2005, A/SP.1/01/05, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf. On the indirect jurisdiction of the regional East African Court of Justice, the adjudicatory body of the East African Community, to decide cases (including those brought by individuals) alleging human rights violations, see Ally Possi, *Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice*, 15 AFR. HUM. RTS. L.J. 192 (2015). Cases may potentially relate to the sphere of education. *See id.* at 198.

97. Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria, ECW/CCJ/APP/12/02, 2010 AHRLR 145, Judgment, ¶ 21 (ECOWAS 2010).

did not find a violation of the right to education, stating that "[i]n a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though . . . it has a negative impact on education."[98]

C. *The Right Balance Between Universalism and "Africanness"*

The right to education, to the extent that it applies to persons below the age of eighteen years, is a children's right. It has thus been observed that "the success of children's rights implementation strategies in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms," but that the criterion of "general legitimacy" would have to serve as a corrective with regard to "practices or values which enjoy cultural legitimacy but are incompatible with the children's rights."[99] This, *i.e.*, cultural legitimacy compatible with universally accepted human rights norms, reflects the appropriate standard applicable to implementing the right to education in general—that is, the right as also accruing to anyone above eighteen and hence not a child anymore. In this sense then, the right to education, or the particular way it is interpreted and applied, must reflect the specific African context in which it operates. Early marriage or child labor which deny any person an education, however—by way of example—could never be acceptable. Frans Viljoen remarks that the African human rights system has not always succeeded in finding the right balance between universality and "African specificity," referring specifically to the failure of the African system to accord adequate protection to "sexual minorities,"[100] with, at any rate, homosexuality sometimes being described as "un-African."[101] Affording adequate protection in this respect is of significance also in the educational context, as neither teachers nor

98. *Id.* ¶ 19. For a critical discussion of the case, see Adetokunbo Mumuni & Chinyere Nwafor, *The ECOWAS Decision on the Right to Education in* SERAP v. Nigeria, 17 INTERIGHTS BULL. 99 (2013).

99. Thoko Kaime, *The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections*, 5 AFR. HUM. RTS. L.J. 221, 223 (2005).

100. Viljoen, *Progress and Challenges*, *supra* note 41, at 309-10. Within the A.U., "one issue above all else has emerged as an instance of potential normative contradiction and divergence: the rights of sexual minorities, or, differently stated, the issue of equality based on sexual orientation and gender identity." *Id.* at 309.

101. Eusebius McKaiser, *Homosexuality Un-African? The Claim Is a Historical Embarrassment*, GUARDIAN (Oct. 2, 2012), https://www.theguardian.com/world/2012/oct/02/homosexuality-unafrican-claim-historical-embarrassment ("Colonialists are often accused of bringing homosexuality to Africa.").

students should experience any discrimination in education on the ground of their sexual orientation or identity—also not in Africa.

In 2011, the African Commission on Human and Peoples' Rights adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (African Principles and Guidelines). These also comment on the right to education in Article 17(1) of the Banjul Charter. In Paragraph 71(i), they state that "[e]ducation and training must be targeted at development based on African realities."[102] This gives expression, in a very vivid manner, to the notion of the right to education as requiring "domesticization" and being accorded "local ownership." The African Principles and Guidelines, in various provisions, specifically take into account the African context. To mention an interesting example, Paragraph 71(v) obliges states parties "[t]o address the interrelationship between education and child labor by simultaneously providing incentives to keep children in school, expanding educational opportunities for working children and making stronger efforts to remove children from the worst forms of child labor and to ensure their placement in appropriate educational programs."[103]

Whereas the eradication of the worst forms of child labor reflects a global consensus, as notably laid down in the International Labour Organization's (ILO) Worst Forms of Child Labor Convention (No. 182 of 1999), the phrase "expanding educational opportunities for working children" exposes, on the one hand, the reality that children in Africa often must work to help families survive, and, on the other, the fact that African societies usually have a different conception of childhood than Western societies. It may be noted that the ILO's Minimum Age Convention (No. 138 of 1973) implicitly forbids any type of child labor for children below the age of thirteen years. Children aged thirteen to at least fifteen may perform only "light" work.[104] The Convention has been criticized for its Western-centric perspective in terms of which children should, in principle, not work, nor even contribute to family maintenance.[105] In Africa, family unity and community

102. *African Principles and Guidelines*, *supra* note 41, ¶ 71(i).

103. *Id.* ¶ 71(v).

104. Convention Concerning Minimum Age for Admission to Employment arts. 2, 3, 7, June 26, 1973, I.L.O. Convention No. 138, 1015 U.N.T.S. 297 (entered into force June 19, 1976), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138.

105. *See, e.g.*, Matteo Borzaga, *Limiting the Minimum Age: Convention 138 and the Origin of the ILO's Action in the Field of Child Labour*, *in* CHILD LABOUR IN A GLOBALIZED WORLD: A LEGAL

solidarity prevail over any presumed right not to work.[106] Article 31 of the ACRWC mentions responsibilities of the child, among other things, "to work for the cohesion of the family," "to serve his [or her] national community by placing his [or her] physical and intellectual abilities at its service," or "to preserve and strengthen social and national solidarity."[107] It has been held that these duties "represent[] a valuable addition to the international human rights agenda," on the understanding, of course, that "the language of duties should not be used to limit or violate children's rights."[108] In this sense then, forms of child labor or "learn and earn" approaches in Africa that are potentially contentious under the Minimum Age Convention should be considered permissible, if legitimate in terms of African social norms, to the extent that a child's right to education, and other human rights, are not jeopardized.[109] As Paragraph 71(v) of the African Principles and Guidelines suggests, this would require that "educational opportunities for working children ... [be] expand[ed]." The ILO's Minimum Age Convention itself ideally requires modification.

There will be universal minimum criteria that always need to be respected rigorously. Article 11(5) of the ACRWC, for example, requires "State Parties ... [to] take all appropriate measures to ensure that a child who is subjected to school ... discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the ... Charter." Morris Mbondenyi has stated that "[t]here is an emerging trend where schools' ... discipline is being outlawed in some countries. Accordingly, ... school teachers are [not] allowed to chastise children or undertake any other form of disciplinary measure that may be appropriate to the child's upbringing. This is not in line with African cultural values."[110] With all due respect, this statement is at least ambiguous. The U.N. Committee on the Rights of the

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ANALYSIS OF ILO ACTION 39, 53-55 (Giuseppe Nesi et al. eds., 2008) (referring to and confirming such criticism and highlighting the differences in approach).

106. *See id.* at 54.

107. ACRWC, *supra* note 17, art. 31(a), (b), (c), respectively.

108. Julia Sloth-Nielsen & Benyam D. Mezmur, *A Dutiful Child: The Implications of Article 31 of the African Children's Charter*, 52 J. AFR. L. 159, 188 (2008).

109. In other words, "there is nothing wrong for children to work to earn a vocation during their spare time in order that they become responsible citizens. A child who works does so as part of her or his education. Where, on the other hand, the work exceeds the children's rights to education, to play and ... their basic rights then this becomes child labour and as such whoever is responsible should be compelled to stop and if they don't are to be punished." Adoro v. Kihara (2004) 2005 K.L.R. ¶ 5 (H.C.K.) (Kenya).

110. MORRIS K. MBONDENYI, INTERNATIONAL HUMAN RIGHTS AND THEIR ENFORCEMENT IN AFRICA 246 (2011).

Child has stated with regard to the CRC that corporal punishment, no matter how light, "is invariably degrading."[111] It adds: "[T]here are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the [CRC]," such as "punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."[112] The point is that, once a disciplinary measure would impinge on a child's dignity (and physical forms of punishment *always* will), it will not be permissible. The fact that it is "moderate" or "reasonable" then cannot make the encroachment a legitimate limitation of the child's rights.[113] This standard is also applicable with regard to the ACRWC.[114] Below this standard, cultural values are irrelevant. Beyond it, however, cultural values should play a role in the design of an appropriate disciplinary response. As the U.N. Committee notes, there is also a "positive concept of discipline," in that "[t]he healthy development of children depends on [teachers, inter alia] for necessary guidance and direction, in line with children's evolving capacities, to assist their growth towards responsible life in society."[115]

D. *Final Remarks*

The purpose here has not been to describe the protection of the right to education under the African human rights system in all detail, but rather to underline the fact that the right is being accommodated within this system through "own," African legal instruments, implementation mechanisms, and normative interpretations. In this sense then, the right to education is in the process of becoming a genuinely African right with which Africans can identify. It may, however, well be

111. U.N. Comm. on the Rights of the Child, General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19, 28(2), and 37, inter alia), ¶ 11, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter General Comment No. 8].

112. *Id.*

113. *See id.* ¶¶ 26, 31, 33, 39 (to the effect that there is no defense of "moderate" or "reasonable" corporal punishment, violence, chastisement, or correction). Hence, whereas cultural values may often play a role in determining what constitutes a legitimate limitation of rights, there may be quite universal standards from which cultural (or any other) deviation is not possible.

114. In fact, this seems to be confirmed by the ACERWC itself. Commenting on the initial state report of Ghana, the Committee "calls on the State Party . . . [t]o ensure the completion and implementation of the manual on positive forms of discipline for teachers with a view to eventually enacting . . . legislation prohibiting the use of corporal punishment in school." Concluding Recommendations, Ghana, *supra* note 76, ¶ 26.

115. General Comment No. 8, *supra* note 111, ¶ 13.

asked how effectively the various African human rights bodies have been contributing towards this end. It has been stated of the African Commission that "it established itself as a credible if largely ineffectual monitoring body."[116] It has been stated of the ACERWC that, despite an initial "lackluster performance," it "has clearly taken significant strides forward."[117] Although there has been much positive development, major problems with these bodies and the Court remain. It may thus be observed that, where it comes to the provision of effective relief for human rights violations by facilitating recourse to complaints procedures, the African bodies, in comparison with global and other regional human rights bodies, have dealt with only very few cases generally, even fewer on economic, social, and cultural rights, and only a handful on the right to education.[118]

At this point, then, it is tempting to revert to the initial position that human rights are underperforming, that Africans "[do] not perceive the trials and tribulations of their lives as being 'human rights violations,'"[119] and that "[f]aced with overpowering odds, they are unlikely to contemplate going to the further 'trouble' of putting together . . . a legal challenge."[120] However, this is where the role of public interest lawyers and NGOs becomes crucial.[121] Through their active participation, much could be achieved. This presupposes an awareness of the existence of the various procedures on their part.[122] There must further be improvements in the system itself.[123] Regarding the Commission, for example, cost orders need to be made to encourage use of the

116. Viljoen, *Progress and Challenges*, *supra* note 41, at 301.

117. VILJOEN, *supra* note 35, at 408. Generally, on a more coherent and bold approach in the Committee's work recently, see, for example, Lorenzo Wakefield & Usang M. Assim, *Dawn of a New Decade? The 16th and 17th Sessions of the African Committee of Experts on the Rights and Welfare of the Child*, 11 AFR. HUM. RTS. L.J. 699 (2012).

118. *See* Viljoen, *Progress and Challenges*, *supra* note 41, at 307, 312 ("Using any reasonable comparator, the African regional human rights system has only dealt with a handful of cases. . . . [Cases on socio-economic rights] make up a very small proportion.").

119. *Id.* at 308.

120. *Id.*

121. *Id.* at 309 (emphasizing the role of public interest lawyers and NGOs in this context).

122. *Id.* ("[T]hey . . . are in general quite oblivious of the very existence of the system or at least of its potential for redress.").

123. Frans Viljoen mentions the following challenges facing the African human rights system: no genuine movement from intergovernmentalism to supranationalism within the A.U., few submitted cases, a failure sometimes to find the right balance between universality and "African specificity," uneven quality of jurisprudence, insufficient effort to effectively address poverty, a lack of priority in dealing with urgent and massive violations, and prioritization of promotion over protection. *Id.* at 304-14.

complaints procedure, the requirement of exhausting local remedies needs to be relaxed, and decisions need to be taken much faster.[124] Most importantly regarding the Court, African states need to join the Court and make declarations accepting the Court's competence to receive complaints by NGOs and individuals.[125] In sum, it is important that the future sees enhanced domesticization activities concerning the right to education and other human rights not only at the regional, but also at the national level, in Africa as well as in other regions of the world, to strengthen the moral cogency of the right to education and other human rights on the continent and beyond.

III. Debunking Pure "Development Goal" Approaches

A. *Legal Commitments Neglected*

Another reason for the general demise of human rights at the international level is that they have been relegated to play a purely "technical" legal role in U.N. and regional human rights procedures not enjoying prominent publicity and media coverage. The discourse at center-stage, rather than referring to "the realization of human rights," avoids human rights language and speaks of "meeting human needs," "eradicating poverty," and "achieving sustainable development."[126] In the field of education, the right to education has thus been superseded by the lofty goal of "[e]nsur[ing] inclusive and equitable quality education and promot[ing] lifelong learning opportunities for all" by

124. *Id.* at 309 (mentioning, inter alia, these as necessary improvements). Regarding the ACERWC, Viljoen holds that the future emphasis should be on "the improvement of the Committee's procedures, on closer collaboration and experience-sharing with other A.U. and U.N. bodies, on greater visibility, streamlining of its procedures, a strengthened secretariat, and a more secure resource base." Viljoen, *supra* note 35, at 409.

125. As of June 15, 2017, only thirty out of fifty-five African states have joined the Court, with only seven having made a declaration. *See* African Union, *List of Countries which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (June 15, 2017), https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf. On the mixed performance of the Court so far, see generally Manisuli Ssenyonjo, *Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court* 2008–2012, 2 Int'l Hum. Rts. L. Rev. 17 (2013).

126. *See, e.g.*, World Conf. on Educ. for All, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs (1990) [hereinafter Jomtien Declaration and Framework for Action] (the Framework for Action referring to "meeting basic learning needs" already in its title); G.A. Res. 70/1, Transforming Our World: 2030 Agenda for Sustainable Development, at 1 (Oct. 21, 2015) [hereinafter 2030 Agenda for Sustainable Development] (referring to "eradicating poverty . . . for sustainable development" in the preamble).

2030.[127] International human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights of 1966, the CRC, or the ACRWC, create clear legal obligations for states, individually and jointly, to realize the right to education. A second strand of documents, however—notably the Jomtien World Declaration on Education for All (and the accompanying Framework for Action) of 1990, the Dakar Framework for Action of 2000, the U.N. Millennium Declaration of 2000 (from which the Millennium Development Goals, the MDGs, were developed), the 2030 Agenda for Sustainable Development of 2015 (setting out the Sustainable Development Goals, the SDGs, replacing the MDGs), and the Incheon Declaration and Framework for Action of 2015[128]—has shifted into the spotlight now. These documents are markedly different from the human rights treaties long since in place. Political commitments in these documents have come to replace legal commitments laid down in the human rights treaties. The new type of document reflects a pure "development goal" approach, notably proposing that states very incrementally (in the case of the SDGs a remote deadline of 2030 having been set) overcome certain serious socio-economic problems. Under a human rights approach, such problems would require "immediate and top-priority remedial attention" as a matter of obligation.[129]

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127. 2030 Agenda for Sustainable Development, *supra* note 126, Sustainable Development Goal 4.

128. Jomtien Declaration and Framework for Action, *supra* note 126; World Educ. Forum, The Dakar Framework for Action (2000); G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000); 2030 Agenda for Sustainable Development, *supra* note 126; Education 2030, Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4 (2015) [hereinafter Incheon Declaration/Framework for Action].

129. In this vein, see Thomas Pogge & Mitu Sengupta, *Assessing the Sustainable Development Goals from a Human Rights Perspective*, 32 J. INT'L & COMP. SOC. POL'Y 83, 84 (2016). Neither did the MDGs reflect a human rights approach. For a summary of the reasons raised why the MDGs could not be considered to reflect a human rights approach, see Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 764-66 (2005). Some further notable publications addressing the lack of a human rights approach in the MDGs include, for example, THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS: PAST, PRESENT AND FUTURE (Malcolm Langford et al. eds., 2013); Mary Robinson, *The MDG–Human Rights Nexus to 2015 and Beyond*, 41 IDS BULL. 80, 80-82 (2010); Office of the U.N. High Comm'r for Hum. Rts., *Claiming the Millennium Development Goals: A Human Rights Approach*, U.N. Doc. HR/PUB/08/3 (2008); Ashwani Saith, *From Universal Values to Millennium Development Goals: Lost in Translation*, 37 DEV. & CHANGE 1167 (2006). On the importance of a human rights approach to education in the post-2015 development agenda, see U.N. General Assembly, *Report of the Special Rapporteur (Kishore Singh) on the Right to Education*, U.N. Doc. A/68/294 (Aug. 9, 2013) [hereinafter Singh, U.N. Doc. A/68/294] (untitled, but on the very topic).

With regard to the 1990 Jomtien Declaration and Framework for Action,[130] it had been stated by a former U.N. Special Rapporteur on the Right to Education that

> [t]he language of the final document adopted by the Jomtien Conference merged human needs and market forces, moved education from governmental to social responsibility, made no reference to the international legal requirement that primary education be free-of-charge. . . . The language elaborated at Jomtien was different from the language of international human rights law.[131]

How does this compare with the present approach in the SDGs on education? Has anything changed? SDG 4 envisages, inter alia, that, "[b]y 2030, [it should be] ensure[d] that all girls and boys complete free, equitable and quality primary and secondary education."[132] The Incheon Declaration and Framework for Action of 2015[133] concretize and seek to give impetus to the achievement of this and the other SDG 4 education aims. However, all three aspects raised by the Special Rapporteur—the role envisaged for private actors, an absence of accountable duty-bearers, and a paucity of human rights language—remain of concern.

B. *A Role for the Private Sector?*

The Incheon Framework for Action recognizes that "[t]he private sector, philanthropic organizations and foundations can play an important role, using their experience, innovative approaches, business

130. The Jomtien Declaration and Framework for Action were adopted at the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990. Representatives of governments, intergovernmental organizations, and NGOs participated in the conference. Jomtien Declaration and Framework for Action, *supra* note 126.

131. KATARINA TOMAŠEVSKI, REMOVING OBSTACLES IN THE WAY OF THE RIGHT TO EDUCATION 10 (2001), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%201.pdf. Generally, for an evaluation of the Education for All (EFA) process, commencing with the Jomtien Declaration and Framework for Action, up to 2005, see BEITER, *supra* note 15, at 328-33.

132. 2030 Agenda for Sustainable Development, *supra* note 126, Sustainable Development Goal 4.1.

133. The Incheon Declaration and Framework for Action were adopted at the World Education Forum 2015, held at Incheon, Republic of Korea from 19 to 22 May 2015. Representatives of governments, intergovernmental organizations, civil society, and the private sector participated in the event. *See* Incheon Declaration/Framework for Action, *supra* note 128.

expertise and financial resources to strengthen public education."[134] It is important "[to] uphold" their "right to participation."[135] Although the Framework for Action refers to the "primary responsibility" of governments for education and the fact that private actors should "respect education as a human right,"[136] the Incheon documents fail to address the essential reality that many private actors are driven by self-interested motivations, prefer their activities to run parallel to the mainstream and beyond ordinary accountability, and focus on lucrative, rather than priority areas in education investment.[137] Evidence does not bear out schools operated by non-public providers achieving better learning outcomes,[138] and it reveals that such schools expend less money per pupil on instructional costs because they keep teacher salaries low by relying on

134. Incheon Framework for Action, *supra* note 128, ¶ 82.

135. Incheon Declaration, *supra* note 128, ¶ 12.

136. Incheon Framework for Action, *supra* note 128, ¶¶ 78, 82.

137. *See, e.g.*, Steven J. Klees, *Will We Achieve Education for All and the Education Sustainable Development Goal?*, 61 COMP. EDUC. REV. 425, 434 (2017) ("[W]hat they do offer will be self-interested, short-sighted, uncoordinated, and contribute little to education investment priorities."). Regarding corporations, see Justin van Fleet, *A Disconnect between Motivations and Education Needs: Why American Corporate Philanthropy Alone Will Not Educate the Most Marginalized*, *in* PUBLIC PRIVATE PARTNERSHIPS IN EDUCATION: NEW ACTORS AND MODES OF GOVERNANCE IN A GLOBALIZING WORLD 158, 178-79 (Susan L. Robertson et al. eds., 2012) ("[C]orporate philanthropy is driven by self-interest . . . poses moral, accountability and democratic conflicts . . . [and] can . . . purposefully or incidentally perpetuate dependency, inequality and marginalization."). Regarding "pure" philanthropy, see Prachi Srivastava & Su-Ann Oh, *Private Foundations, Philanthropy and Partnership in Education and Development: Mapping the Terrain*, *in* PUBLIC PRIVATE PARTNERSHIPS IN EDUCATION: NEW ACTORS AND MODES OF GOVERNANCE IN A GLOBALIZING WORLD, *supra*, at 128, 128 (noting that philanthropy in education reflects "highly complex and often self-interested motivations and colonial, neocolonial and imperialist paradigms"). Drawing attention to the dangers of the privatization of education and stressing the need for strengthening public education, see also Fons Coomans & Antenor Hallo de Wolf, *Privatisation of Education and the Right to Education*, *in* PRIVATISATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION 229 (Koen de Feyter & Felipe Gómez Isa eds., 2005); Sylvain Aubry & Delphine Dorsi, *Towards a Human Rights Framework to Advance the Debate on the Role of Private Actors in Education*, 42 OXFORD REV. EDUC. 612 (2016); MANFRED NOWAK, HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION 57-66 (2017); *Privatisation of Education*, RIGHT TO EDUCATION, http://www.right-to-education.org/issue-page/privatisation-education (last visited Jan. 3, 2018) (Right to Education is a global human rights organization focusing on the right to education, making available many resources on the topic on its website.).

138. Furnishing evidence in support of the advantage of public education (though just focusing on the U.S.), see, for example, CHRISTOPHER A. LUBIENSKI & SARAH T. LUBIENSKI, THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS (2013).

younger, less experienced staff.[139] Many of these schools further levy fees in some form or another, thus undermining the basic postulate of international human rights law that education up to the age of fifteen years should be free.[140] Public-private partnerships (PPPs) in education have become a noticeable phenomenon.[141] Generally with regard to PPPs in Africa, a 2005 report notes that "the record of PPPs in Africa over the last 15 years is mixed, the process is complex, and governments should not expect PPPs to be a 'magic bullet.'"[142] With regard to plans to expand PPP schooling in South Africa, it has been stated that "[h]ealthy skepticism is a good idea," as "there's a real risk of such models laying the country's public education coffers vulnerable to capture by private interests."[143] A former U.N. Special Rapporteur on the Right to Education emphasizes that "[u]nder no circumstances should a State provide financial support to a private provider of education."[144]

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139. For a clear demonstration of this point (also in the U.S. context), see Mark Weber & Bruce Baker, *Do For-Profit Managers Spend Less on Schools and Instruction? A National Analysis of Charter School Staffing Expenditures*, EDUC. POL'Y (2017), https://doi.org/10.1177/0895904816681525.

140. On this requirement of international human rights law, see BEITER, *supra* note 15, at 510, 512-14, 516, 518. Whereas primary education must be made free virtually immediately, free lower secondary education needs to be introduced with a fairly high measure of urgency. *See id.* at 390, 514-16 (read with 303, 519). Although there is strictly only a right to free *public* education, increased private provision and a resultant reduction in good-quality public alternatives naturally tend to undermine the principle of free education. Primary education usually refers to the first six years of schooling, lower secondary education to the subsequent three years of schooling, fifteen being the most common age for the completion of lower secondary education. *See* UNESCO, INTERNATIONAL STANDARD CLASSIFICATION OF EDUCATION: ISCED 2011 ¶¶ 122, 141, 146 (2012), http://unesdoc.unesco.org/images/0021/002191/219109e.pdf.

141. For a critical assessment of PPPs in education in the light of the right to education, see, for example, Maria Ron-Balsera & Akanksha A. Marphatia, *Do Public Private Partnerships Fulfil the Right to Education? An Examination of the Role of Non-State Actors in Advancing Equity, Equality and Justice*, *in* PUBLIC PRIVATE PARTNERSHIPS IN EDUCATION: NEW ACTORS AND MODES OF GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 137, at 217, 218 (the endeavor must be "to strengthen state systems and increase resources for public education rather than seek a substitute in private provision"); U.N. General Assembly, *Report of the Special Rapporteur (Kishore Singh) on the Right to Education*, ¶ 123, U.N. Doc. A/70/342 (Aug. 26, 2015) [hereinafter Singh, U.N. Doc. A/70/342] (untitled, but on the very topic) (stating that it is important that "Governments take a critical view of the euphoria around [these] partnerships").

142. PETER FARLAM, WORKING TOGETHER: ASSESSING PUBLIC–PRIVATE PARTNERSHIPS IN AFRICA i (2005).

143. Sara Muller, *SA's Public-Private School Plans Require Healthy Skepticism*, MAIL & GUARDIAN (May 17, 2017), https://mg.co.za/article/2017-05-17-sas-public-private-school-plans-require-healthy-scepticism.

144. U.N. General Assembly, *Report of the Special Rapporteur (Kishore Singh) on the Right to Education*, ¶ 112, U.N. Doc. A/69/402 (Sept. 24, 2014) [hereinafter Singh, U.N. Doc. A/69/402] (untitled, on the topic of private providers of education).

Private actors should play a role in education—in Africa as elsewhere—only by offering alternative or supplementary educational opportunities.[145] It is crucial for states to retain comprehensive control over the education sector. As the Special Rapporteur states, "[t]he commercialization of education should have no place in a country's education system. . . . It breeds exclusion and marginalization. . . . It also entails disinvestment in public education."[146] Where private actors are involved, state responsibility is engaged by virtue of the duty to protect human rights.[147] Moreover, the recent U.N. Guiding Principles on Business and Human Rights of 2011 propose a conceptual framework in terms of which business enterprises are to be considered directly obliged to respect human rights.[148]

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145. There are, therefore, good reasons for states to provide funding to non-profit-making private schools adopting "alternative" educational approaches—states in this way promoting freedom in education—or catering, for example, to language or culture minorities, discriminated religious groups, or gifted or disadvantaged students. *See* BEITER, *supra* note 15, at 39-41, 537 (promoting freedom in education), 146-47, 259-60, 445, 559-60, 563-67 (state duty to fund private education in certain cases).

146. Hum. Rts. Council, *Report of the Special Rapporteur (Kishore Singh) on the Right to Education, Protecting the Right to Education against Commercialization*, ¶¶ 111-12, U.N. Doc. A/HRC/29/30 (June 10, 2015); *see also* Singh, U.N. Doc. A/70/342, *supra* note 141, ¶¶ 121, 141 ("[T]he State is responsible for providing the right to education as the apex of its public service functions. . . . [Privately-driven initiatives] may provide stopgap measures.").

147. *See* John Ruggie (Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises), Guiding Principles on Business and Human Rights, Guiding Principles 1-10, 25-27, 31, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (annexed to final report) [hereinafter U.N. Guiding Principles on Business and Human Rights] (on the state duty to protect human rights against business enterprises). The Guiding Principles were endorsed by Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011). *See also* U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 22, U.N. Doc. E/C.12/GC/24 (June 23, 2017) [hereinafter General Comment No. 24] ("[I]ncreased role and impact of private actors in traditionally public sectors, such as in the . . . education sector[], pose new challenges."); General Comment No. 24, *supra*, ¶ 19 (state duty to "regulat[e] . . . business activities concerning the Covenant right[] to education"); General Comment No. 24, *supra*, ¶ 21 ("The privatization of education [constitutes] a risk, where private educational institutions lead to making high-quality education a privilege affordable only to the wealthiest segments of society, or where they are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States Parties not to discharge their own duties towards the fulfilment of the right to education.").

148. *See* U.N. Guiding Principles on Business and Human Rights, *supra* note 147, Guiding Principles 11-24, 28-31 (on the corporate responsibility to respect human rights).

C. *Duty-Bearers and a "Violations" Approach: The World Bank and Other Intergovernmental Organizations*

The Incheon Declaration and Framework for Action repeat the notion that achieving education for all depends on "shared responsibility and accountability,"[149] rather than clearly identifying specific duty-bearers in relation to specific tasks. A human rights approach would have to state "who is to do what." Pogge and Sengupta thus lament that under the 2030 Agenda "[t]he world's most powerful agents—affluent states, international organizations, multinational enterprises—are once again shielded from any concrete responsibilities for achieving the SDGs";[150] they therefore describe the SDGs as "Sustainable Development Wishes."[151]

The United Nations Educational, Scientific and Cultural Organization's (UNESCO) Global Education Monitoring Report of 2016 finds that, at current trends, Northern Africa (Algeria, Egypt, Libya, Morocco, Sudan, Tunisia) will achieve universal completion of primary education by 2048, while Sub-Saharan Africa (all other African countries) will achieve this by 2080 only.[152] Universal secondary education will be achieved in Northern Africa by 2082, but in Sub-Saharan Africa only after 2100![153] In 2030, Northern Africa will have a completion rate of ninety-two percent in primary and seventy-seven percent in secondary education.[154] The figures are a meager seventy-seven and forty-two percent, respectively, for Sub-Saharan Africa.[155] In Africa, therefore, SDG 4.1 will be missed by far.

A major stumbling block is funding. If states secured maximum domestic funding for education (widening the tax base, preventing tax evasion, increasing budgetary allocations to education, *etc.*),[156] this would still leave, on average, a global external funding gap of

149. Incheon Declaration, *supra* note 128, ¶ 5.

150. Pogge & Sengupta, *supra* note 129, at 89.

151. *Id.* at 90.

152. UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016: EDUCATION FOR PEOPLE AND PLANET: CREATING SUSTAINABLE FUTURES FOR ALL 153 (2016), http://unesdoc.unesco.org/images/0024/002457/245752e.pdf [hereinafter UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016].

153. *Id.*

154. *Id.*

155. *Id.*

156. These are required under the Incheon Framework for Action. Incheon Framework for Action, *supra* note 128, ¶ 106.

$39 billion per year between 2015 and 2030 to reach the SDG 4 targets.[157] It should further be remembered that in low-income countries, to which twenty-six out of fifty-four African countries belong,[158] forty-two percent of total costs would have to come from external sources.[159] $39 billion seems an astronomical sum, but is relativized if it is considered that total U.S. military expenditures in 2016 amounted to $611 billion,[160] or if it is considered that a global financial transactions tax could raise revenue between $60 billion and $360 billion annually.[161] However, bilateral aid for education in 2014 stood at $9.3 billion and multilateral aid at $3.7 billion—thus totaling only $13 billion.[162]

But, who then should be considered liable for which amounts? This is not stated anywhere. It has been noted with regard to the drafting of the various development approach documents:

> One important feature of th[e] process [is] the key role of international agencies rather than governmental delegations in negotiations. . . . [I]nternational agencies remain largely beyond the reach of international human rights law. An explicit acknowledgment that these agencies are committed to the right to education would have triggered a search for making them accountable for promoting rather than hindering it.[163]

Something will be said on the obligations of donor states in the next section.[164] Nevertheless, intergovernmental organizations as such should clearly be recognized to be the bearers of human rights obligations under international human rights law. The U.N. and its programs thus have a clear human rights mandate in terms of the U.N.

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157. *See* UNESCO, *Pricing the Right to Education: The Cost of Reaching New Targets by 2030*, at 6, UNESCO Doc. ED/EFA/MRT/2015/PP/18/REV3 (July 2015) [hereinafter UNESCO, *Pricing the Right to Education*].

158. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 399 (listing all low-income countries).

159. *See* UNESCO, *Pricing the Right to Education*, *supra* note 157, at 6.

160. *See* NAN TIAN ET AL., TRENDS IN WORLD MILITARY EXPENDITURE, 2016, 2 (Stockholm International Peace Research Institute, Apr. 2017), https://www.sipri.org/sites/default/files/Trends-world-military-expenditure-2016.pdf.

161. *See* ALEX COBHAM & STEVEN J. KLEES, GLOBAL TAXATION: FINANCING EDUCATION AND THE OTHER SUSTAINABLE DEVELOPMENT GOALS 32 (Nov. 2016). The authors further argue in favor of a global wealth tax. *See id.*

162. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 482.

163. TOMAŠEVSKI, *supra* note 131, at 11, 13.

164. *See infra* Subsections IV-A and IV-B.

Charter.[165] Some U.N. specialized agencies, such as UNESCO or the ILO, possess clear human rights mandates in terms of their own foundational documents. However, even those U.N. specialized agencies that do not possess such a mandate, such as the International Monetary Fund (IMF) or the World Bank, still are usually said—by virtue of their relationship agreements with the U.N. under Article 63 of the U.N. Charter—to be bound to *respect* and sometimes to *protect*, though usually not to *fulfill*,[166] human rights under the U.N. Charter.[167] Intergovernmental organizations are further required to obey human rights obligations that are binding on them under customary international law or that form part of the general principles of law recognized by civilized nations. This is of importance with regard to, for example, the World Trade Organization (WTO), which is not a U.N. specialized agency.[168] It has been held that "at least some elements" of the right to

165. *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 37 (Dec. 20) [hereinafter WHO Agreement Case] (intergovernmental organizations bound by obligations under their constitutions). Human rights protection constitutes an aim of the U.N., entailing corresponding obligations for the organization and its members. *See* U.N. Charter art. 1(3), ch. IX. "Human rights" should be interpreted widely to refer to the various human rights standards formulated under the auspices of the U.N. over the years.

166. Obligations to *respect* require refraining from interfering with the enjoyment of human rights, obligations to *protect* require preventing violations of such rights by third parties, and obligations to *fulfill* require taking appropriate legal standard-setting, administrative, financial, adjudicatory, and other measures directed towards the full realization of such rights. The definitions are based on Paragraph 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997). *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 693-94 (1998).

167. Specifically as regards the International Monetary Fund (IMF) and the World Bank, see SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 147-74, 193 (2001) (the first commentator addressing the issue in detail and making an argument to this effect). *See also id.* at 154-57 (remarks on the right to education). The Tilburg Guiding Principles on World Bank, IMF and Human Rights, a document prepared by a group of experts in international law in 2001 and 2002, state, in Paragraph 5, that, "[a]s international legal persons, the World Bank and the IMF have international legal obligations to take full responsibility for human rights respect in situations where the institutions' own projects, policies or programs negatively impact or undermine the enjoyment of human rights." *See* Willem van Genugten et al., *Tilburg Guiding Principles on World Bank, IMF and Human Rights*, *in* WORLD BANK, IMF AND HUMAN RIGHTS 249-57, ¶ 5 (Willem van Genugten et al. eds., 2003) (reproducing the Tilburg Guiding Principles).

168. *See* WHO Agreement Case, 1980 I.C.J. 73, ¶ 37 (intergovernmental organizations bound by obligations under "general rules of international law"); Olivier de Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1121 (2012) (human rights obligations of intergovernmental organizations in terms of customary law and general principles).

education constitute customary law[169]—the right to compulsory and free primary education being one such element.[170]

A few words should be said specifically with regard to the World Bank. It has become the most powerful agency in the field of education for development,[171] with the Bank describing itself as "one of the largest external education financiers for developing countries."[172] Does the World Bank really just have a negative duty to respect human rights? Are there not also specifically some elements of a positive duty to fulfill—*i.e.*, to *facilitate* and/or to *provide*[173]—that are binding on the World Bank too?

Providing development aid is the task of the International Development Association (IDA), which gives concessional loans and grants to low-income countries[174] so as—in terms of its constitution—"to promote economic development, increase productivity and thus raise standards of living."[175] Can development really be seen as divorced from the positive realization of human rights? The U.N. Charter similarly mentions as U.N. goals "higher standards of living, full employment, . . . conditions of economic and social progress and development . . . and international cultural and educational co-operation,"[176] but immediately links these aims to "respect for" and "promoti[on] [of]" human rights.[177] As the discussion of the Bank's "human capital" approach to education

169. ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 40-41 (2010).

170. *See* BEITER, *supra* note 15, at 45 (arguing that the right to compulsory and free primary education forms part of customary law).

171. Attesting to and commenting on this phenomenon, see Karen Mundy & Antonio Verger, *The World Bank and the Global Governance of Education in a Changing World Order*, 40 INT'L J. EDUC. DEV. 9 (2015).

172. *See Projects & Programs*, WORLD BANK, http://www.worldbank.org/en/topic/education/projects (last visited June 23, 2017).

173. At the level of the obligations of intergovernmental organizations under international human rights law, the duty to fulfill may be stated to comprise two layers of obligations. Obligations to *facilitate* require creating an international enabling environment that allows for the realization of human rights in states. Obligations to *provide* require providing assistance, according to ability, where human rights in one state or another can otherwise not be guaranteed. The definitions are broadly based on Jean Ziegler (Special Rapporteur), *The Right to Food*, ¶¶ 57, 58, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005).

174. The Bank's other branch, the International Bank for Reconstruction and Development (IBRD), provides commercial loans to middle-income countries.

175. Articles of Agreement of the IDA art. 1, Jan. 26, 1960, 439 U.N.T.S. 249 (entered into force Sept. 24, 1960). "Development" also constitutes an objective of the IBRD. *See* Articles of Agreement of the IBRD art. 1, Dec. 27, 1945, 2 U.N.T.S. 134 (entered into force Dec. 27, 1945) ("reconstruction and development").

176. U.N. Charter art. 55(a), (b).

177. U.N. Charter arts. 1(3), 55(c).

below will show,[178] development activities—in any field, including that of education—not simultaneously tending to advance the fulfillment of human rights will not, in fact, yield progress for any nation. The non-realization of human rights is a major reason why development fails in many states.[179] The Bank is not comprehensively obliged to fulfill human rights. However, one should, first of all, consider it to be the bearer of an obligation to *facilitate* the realization of the right to education, in that it must, at all times, design its education operations in a way tending to advance realization of the right to education in beneficiary states. It must further devise policies, standards, procedures, and mechanisms that help ensure that its education operations respect, protect, and, as suggested, tend to advance realization of the right to education.

Moreover, if one—as is done below[180]—considers international aid to be a legal obligation of states and appreciates further that education lending by the IDA (being almost 60 percent of the Bank's overall education lending)[181] derives primarily from donor states' official development assistance (ODA),[182] then it appears artificial to argue that the Bank as an institution does not also have any obligation to *provide* resources directed at realizing the right to education.[183] This conclusion would seem to be reinforced by the fact that the IDA "has a huge unleveraged asset in the form of $135 billion"[184] but spends on average

178. On the World Bank and the right to education, see also *infra* Subsection IV-C, where the perspective is from the human rights obligations of states themselves as members of the World Bank.

179. In this vein, see also MCBETH, *supra* note 169, at 241 ("[T]he emphasis in recent times [in the World Bank] on poverty reduction as a driving force has perhaps readied the path for the consideration of not just the reduction of poverty, but the realization of those human rights that, when lacking, contribute to poverty.").

180. *See infra* Subsection IV-A.

181. *See Annual Report 2017, Fiscal Year 2017 Data, Lending by Sector, Fiscal 2013–17*, WORLD BANK, http://www.worldbank.org/en/about/annual-report/fiscal-year-data (last visited Dec. 23, 2017) (Bank education lending here referring to overall IBRD and IDA education lending).

182. *See* IDA, INTERNATIONAL DEVELOPMENT ASSOCIATION: THE WORLD BANK'S FUND FOR THE POOREST 9 (2016), http://ida.worldbank.org/sites/default/files/pdfs/1-ida_brochure_2017.pdf ("[O]fficial development assistance will remain a key source of financing for IDA clients.").

183. *See* MCBETH, *supra* note 169, at 71 ("[T]he concurrent duties of member States to respect, protect and promote human rights, including in the course of their participation in [international economic] organizations, may have some impact on directing the operations of [these] organizations towards a course that promotes human rights.").

184. This is reported by the INT'L COMM'N ON FIN. GLOB. EDUC. OPPORTUNITY, THE LEARNING GENERATION: INVESTING IN EDUCATION FOR A CHANGING WORLD 119 (2016), http://report.educationcommission.org/wp-content/uploads/2016/09/Learning_Generation_Full_Report.pdf.

less than $2 billion per year on education.[185] It has been stated:

> The World Bank, as the premier financier of education, can play an important role in the human rights field *if they so choose*. The understanding that education is a basic human right combined with the purchasing and funding power of the World Bank to ensure that primary education is truly free can achieve amazing outcomes for both the right to education and human rights in general.[186]

To the extent that countries' education policies are well designed, the Bank should provide much more funding than it does at present to support national (especially primary) education budgets, not linking this to repressive macro-economic conditionalities. Hence, the Incheon Declaration and Framework for Action should have laid down concrete obligations of the Bank to help fix the identified "external funding gap."

SDG documents fail to clearly identify specific duty-bearers in relation to specific tasks, who, if targets are not met, are responsible for having committed a violation of the right to education. In the words of a former U.N. Special Rapporteur on the Right to Education, "[t]he difference which human rights bring can be expressed in one single word—violation. The mobilizing power of calling a betrayed pledge a human rights violation is immense."[187] This is true also with regard to the right to education and other economic, social, and cultural rights, whose realization, as is well known, depends on resources, which, more often than not, are scarce. However, not describing the failure to satisfy, at the very least, minimum essential levels of these rights—such as, for instance, compulsory and free education up to the age of fifteen years[188]—as a *prima facie* human rights

185. *See Annual Report 2017, Fiscal Year 2017 Data, Lending by Sector, Fiscal 2013–17*, *supra* note 181.

186. Melissa Bellitto, *The World Bank, Capabilities, and Human Rights: A New Vision for Girls' Education Beyond 2015*, 27 FLA. J. INT'L L. 91, 101 (2015) (emphasis added).

187. TOMAŠEVSKI, *supra* note 131, at 10.

188. On compulsory and free education up to the age of fifteen years as a minimum core obligation, see U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 13, The Right to Education (Art. 13 of the ICESCR), ¶ 57, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter General Comment No. 13]; *African Principles and Guidelines*, *supra* note 41, ¶ 71(a), (b); BEITER, *supra* note 15, at 643-47.

violation, renders these rights legally and morally irrelevant.[189] Where a state has insufficient resources, this violation must be deemed to have been committed by those legally obliged to assume substitute roles. The Incheon Declaration and Framework for Action, for example, do not once use the word "infringement" or "violation."[190] In a situation where clear human rights obligations become pledges whose fulfillment is vaguely assigned to a multitude of actors—states, intergovernmental agencies, NGOs, the private sector, teachers and educators, the research community, youth[191]—and whose realization, in the absence of the language of "violations," is more discretionary than mandatory, these pledges will be betrayed time and time again. It is no wonder that the Incheon Declaration and Framework for Action need to provide for "a single, *renewed* education agenda that is holistic, ambitious and aspirational, leaving no one behind,"[192] as previous ones necessarily had to fail.

D. *A Paucity of Human Rights Language*

Even if improvements compared to prior development goal documents may be noted, the paucity of human rights language remains a

189. *See* U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the ICESCR), ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3]; *African Principles and Guidelines*, *supra* note 41, ¶ 17. Both documents—even if the latter more indirectly—indicate that the failure to satisfy, at the very least, minimum essential levels of economic, social, and cultural rights constitutes a *prima facie* human rights violation.

190. This does not accord with a "violations" approach to economic, social, and cultural rights, which has clearly been accepted, at any rate, at the level of state responsibility. Such an approach has first been suggested in the literature. *See* Audrey R. Chapman, *A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996). It has subsequently been elaborated on in a document prepared by international law experts, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, *supra* note 166. The fact that individuals and groups may now bring claims of the infringement of economic, social, and cultural rights before the U.N. Committee on Economic, Social and Cultural Rights or the U.N. Committee on the Rights of the Child, and before the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, or the African Court on Human and Peoples' Rights, confirms that the "violations" approach to economic, social, and cultural rights must now be considered firmly entrenched in global and African international human rights law. Any encroachment upon economic, social, and cultural rights that cannot be justified within the context of limited resources or as a "reasonable" measure in the circumstances will therefore constitute a human rights violation.

191. *See* Incheon Framework for Action, *supra* note 128, ¶¶ 78, 80-84, 86, 88 (mentioning all these actors).

192. *See* Incheon Declaration, *supra* note 128, ¶ 5 (emphasis added).

feature of SDG documents. SDG 4.1 envisages the attainment of "free, equitable and quality primary and secondary education" by 2030.[193] It does not refer to the requirement of compulsoriness of international human rights law. Primary or lower secondary education that is not compulsory opens the door to children venturing into child labor or early marriage.[194] The obligation of international human rights law to implement compulsory and free primary education for all without delay[195] becomes an obligation subject to "very" progressive realization, to be achieved over a period of fifteen years.[196] Education as a human right includes higher education. Whereas previous efforts largely ignored higher education, SDG documents now address it in more detail. Former U.N. Secretary-General Kofi Annan had correctly pointed out that "[t]he university must become a primary tool for Africa's development in the new century."[197] There is evidence suggesting higher education would significantly contribute to promoting economic growth and alleviating poverty in Africa.[198] However, whereas international human rights law deals with higher education as a right and requires such education to be made progressively free,[199] SDG

193. 2030 Agenda for Sustainable Development, *supra* note 126, Sustainable Development Goal 4.1.

194. *See* Katarina Tomaševski (Special Rapporteur), *Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25*, ¶ 46, U.N. Doc. E/CN.4/2000/6 (Feb. 1, 2000) (pointing this out). On the requirement of compulsory primary and lower secondary education in international human rights law, see BEITER, *supra* note 15, at 30-32, 510-12, 516, 519 (read with 303).

195. On the immediacy of this obligation, see General Comment No. 13, *supra* note 188, ¶¶ 51, 57; *African Principles and Guidelines*, *supra* note 41, ¶¶ 16, 71(a), (b); *see also supra* note 140.

196. This problem already existed under the MDGs. To this effect, see Malcolm Langford, *A Poverty of Rights: Six Ways to Fix the MDGs*, 41 IDS BULL. 83, 86 (2010). The criticism expressed here may actually also be raised regarding the 2030 deadline for the implementation of free lower secondary education in the SDGs. International human rights law requires compulsory and free lower secondary education to be introduced with a fairly high measure of urgency. *See supra* note 140.

197. U.N. Secretary-General, Kofi Annan, Address at the University of Ghana (Aug. 2, 2000), http://www.unis.unvienna.org/unis/en/pressrels/2000/sg2625.html.

198. *See* David E. Bloom et al., *Higher Education and Economic Growth in Africa*, 1 INT'L J. AFR. HIGH. EDUC. 23 (2014). Based on factual evidence, the article "challenges the belief that tertiary education plays little part in promoting economic growth. . . . [T]ertiary education may improve technological catch-up and, in doing so, help to maximize Africa's potential to achieve its greatest possible economic growth." *Id.* at 48. *See also* PEDRO UETELA, HIGHER EDUCATION AND DEVELOPMENT IN AFRICA vi (2017) (arguing that the linkage between higher education and economic development has so far been neglected for Africa).

199. *See, e.g.*, ICESCR, *supra* note 18, art. 13(2)(c); *African Principles and Guidelines*, *supra* note 41, ¶ 71(e).

documents merely speak of "access to higher education," which must be "affordable."[200] The enhanced use of references to education as a human right in SDG documents does not detract from the fact, though, that the right to education does not really permeate the spirit of SDG documents. The twenty-two-fold incantation of the phrase "right to education" in the Incheon Declaration and Framework for Action does not by itself make the latter human rights instruments.

E. *Final Remarks*

The problem, of course, is not the existence of the Education for All, MDG, or SDG initiatives to help achieving certain important development goals as such. These initiatives could potentially constitute important instruments in reaching higher levels of educational attainment, promoting economic growth, and alleviating poverty. The problem is rather that the stated initiatives do not—although they often profess to—follow a human rights-based approach.[201] Moreover, the global attention focuses essentially on these initiatives. Little attention is being paid to the important human rights work done by competent human rights bodies and courts under various human rights treaties. Obviously, in these circumstances, where global development endeavors in a populist, almost messianic fashion promise prosperity but properly remain beyond the realm of human rights, and where genuine human rights work performed by expert bodies and tribunals is accorded a subordinate significance without enjoying any public attention, human rights will not only not be fulfilled, but also will lose their luster.

IV. Recognizing Extraterritorial State Obligations

A. *International Assistance and Cooperation and the Concept of Extraterritorial State Obligations Under International Human Rights Law*

A third and crucial observation relates to the need for adding a perspective that so far has been lacking in international human rights law. As is borne out by recent publications, education policy has become an internationalized field with multilateral actors or global initiatives providing a major impetus for the substantial recasting of national

200. *See, e.g.*, 2030 Agenda for Sustainable Development, *supra* note 126, Sustainable Development Goal 4.3.

201. Philip Alston considers that the development and human rights communities, rather than embracing linkages, follow separate paths, and are like "ships passing in the night." *See* Alston, *supra* note 129, at 755.

education policy,[202] often with far-reaching consequences for the right to education. A commentator has noted that "international organizations *are not simply* agents who fulfill the aims of domestic actors. They also pursue their own interests and develop their own norms."[203] This is certainly correct, and for that reason—as has been argued above—intergovernmental organizations should be considered the bearers of human rights obligations under international human rights law.[204]

It is important, however, to also adopt another approach. On the one hand, as has been intimated, despite the moral cogency of the case, doctrinally "[i]t is not [really] clear [yet] how international organizations incur legal obligations (other than by their own consent), and as a result it remains unclear how they can be found to be acting in breach of an international legal obligation."[205] On the other hand, international organizations *are also* the agents of their (at times influential) members, fulfilling the aims of member states. In the World Bank, for example, the group of eight (G8) industrialized nations (Canada, France, Germany, Italy, Japan, Russian Federation, U.K., U.S.) hold somewhat more than forty percent of the voting power, with that of all the forty-eight Sub-Saharan African states together being just around

202. *See, e.g.*, NEW ARENAS OF EDUCATION GOVERNANCE: THE IMPACT OF INTERNATIONAL ORGANIZATIONS AND MARKETS ON EDUCATIONAL POLICY MAKING (Kerstin Martens et al. eds., 2007); THE HANDBOOK OF GLOBAL EDUCATION POLICY (Karen Mundy et al. eds., 2016).

203. Timm Fulge et al., *Rational Intentions and Unintended Consequences: On the Interplay between International and National Actors in Education Policy*, *in* THE HANDBOOK OF GLOBAL EDUCATION POLICY, *supra* note 202, at 453, 453 (emphasis added).

204. *See supra* Subsection III-C. Good arguments may and have been advanced in the literature to strengthen the case for obligations of intergovernmental organizations under international human rights law. *See, e.g.*, Ige F. Dekker, *Accountability of International Organisations: An Evolving Legal Concept?*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS 21 (Jan Wouters et al. eds., 2010); Niels M. Blokker, *International Organisations as Independent Actors: Sweet Memory or Functionally Necessary?*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS, *supra*, at 37; Olivier de Schutter, *Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS, *supra*, at 51. UNESCO's most recent Global Education Monitoring Report, devoted to the topic of accountability in education, confirms "the accountability" of intergovernmental organizations towards international standards in education being met, but stops short of discussing the question as one of obligations under international human rights law. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2017/8: ACCOUNTABILITY IN EDUCATION: MEETING OUR COMMITMENTS 93-103 (2017), http://unesdoc.unesco.org/images/0025/002593/259338e.pdf.

205. JAN KLABBERS, ADVANCED INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS 96 (2015).

eight percent.[206] There should thus also be an approach based on the uncontentious truth that states hold obligations under international human rights law and the recognition further that these obligations may have to be accorded extraterritorial effect—for states not only as autonomous actors, but also as members of intergovernmental organizations, thereby preventing them from hiding behind these organizations' institutional veil.

In a globalized world, many states factually wield the power through their conduct to affect the human rights of those beyond their own borders—be it through the way they vote in intergovernmental organizations, their failure to proactively engage in multilateral initiatives directed at formulating human rights safeguard policies, resisting institutional reforms in intergovernmental organizations, the amount of ODA they provide, or their specific design of bilateral development assistance and cooperation. A neglect to add the missing dimension of extraterritorial state obligations—specifically as it relates to the way developed states are obliged to demonstrate solidarity towards developing states—facilitating accountability of the former for human rights violations they produce in the latter, is one of the major reasons why human rights are perceived to be failing in the present world. As has been stated correctly, using a catchy slogan, "[h]uman rights have been locked up behind domestic bars to prevent their universal application to globalization and its much needed regulation. Extraterritorial obligations . . . unlock human rights."[207]

With the right to education being prominently protected in Article 13 of the International Covenant on Economic, Social and Cultural Rights,[208] note should be taken of Article 2(1) of the Covenant, which could be seen as embodying the notion of extraterritorial state obligations to fulfill the right to education and other Covenant rights. It lays down the obligation of states parties to progressively realize Covenant rights "individually and through international assistance and co-

206. These figures are based on information of individual states' voting powers in the World Bank's International Bank for Reconstruction and Development and its International Development Association provided by the World Bank on its website, with data as of June 7, 2017. Whereas the voting powers lie around forty percent for the G8 in both branches, they lie around six and ten percent for Sub-Saharan African states, respectively. *See Voting Powers*, WORLD BANK, http://www.worldbank.org/en/about/leadership/votingpowers (last visited June 23, 2017).

207. *See* ETO CONSORTIUM, http://www.etoconsortium.org (last visited Dec. 23, 2017) (The ETO Consortium is a network of human rights-related civil society organizations and academics advancing the cause of extraterritorial state obligations under international human rights law.).

208. ICESCR, *supra* note 18, art. 13.

operation."[209] While the Covenant's *travaux préparatoires* seem not to provide a basis for *legal* obligations of state parties to render international assistance and cooperation,[210] Philip Alston and Gerard Quinn, in a seminal 1987 article on the nature and scope of state obligations under the Covenant, assert that "[i]n the context of a given right it may, according to the circumstances, be possible to identify obligations to co-operate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant,"[211] and, moreover, that trends in the arena of international development cooperation could subsequently require a reinterpretation in support of legal obligations.[212]

In 1990, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts supervising implementation of the Covenant and authoritatively interpreting its provisions, has, in its General Comment No. 3, held that "international co-operation for development ... is an obligation ... particularly incumbent upon those States which are in a position to assist others."[213] In arriving at this conclusion, the Committee relied, inter alia, on Articles 55 and 56 of the U.N. Charter.[214] As this author himself has indicated when commenting on the right to education in Article 13, unless such a purposive interpretation of the Covenant's assistance and cooperation obligations is adopted, the full realization of economic, social, and cultural rights in developing states might well never be achieved.[215]

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209. *Id.* art. 2(1).

210. *See* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 188-91 (1987) (analyzing the Covenant's *travaux préparatoires* on the point).

211. *Id.* at 191.

212. *Id.* at 191-92.

213. General Comment No. 3, *supra* note 189, ¶ 14.

214. Whereas Article 55 of the U.N. Charter mentions various U.N. goals in the sphere of socio-economic development, referring also to the promotion of "universal respect for, and observance of, human rights," U.N. Charter art. 55(c), Article 56 states that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55," U.N. Charter art. 56.

215. BEITER, *supra* note 15, at 380 n.35. A very strong argument in support of legal obligations of developed states may be based on the following considerations mentioned by Thomas Pogge: Inequalities between the North and the South are the product of past slavery, colonialism, and genocide perpetrated by the North, with those living in developed states today having "inherited" the "fruits" of such exploitation. Moreover, even if Africa, since the 1960s, had consistently achieved growth in per capita income of one percentage point higher than Europe, the ratio of inequality would still be 20:1 today, implying that also *persisting* inequality is not (solely) African states' "own fault." Thomas Pogge, *The First United Nations Millennium Development Goal: A Cause for Celebration?*, 5 J. HUM. DEV. 377, 389 (2004). In support of legal obligations, see also Felipe Gómez Isa, *Transnational Obligations in the Field of Economic, Social and Cultural Rights*, 18 REVISTA

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, a document prepared by a group of experts in international law, addresses all three dimensions of human rights obligations, recognizing that states have obligations to respect, protect, and fulfill civil, political, economic, social, and cultural rights within their territories and extraterritorially.[216] Extraterritorial obligations encompass:

> (a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
>
> (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international co-operation, to realize human rights universally.[217]

ELECTRONICA DE ESTUDIOS INTERNACIONALES 1, 30 (2009), http://www.reei.org/index.php/revista/num18/archivos/Articulo_GOMEZ_Felipe.pdf (arguing that "developed States are [at least] obliged not to reduce the level of ODA"); Magdalena Sepúlveda Carmona, *The Obligations of "International Assistance and Co-operation" under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8*, 13 INT'L J. HUM. RTS. 86, 93-94 (2009) (pointing out that developed states are obliged "to take concrete steps towards the target of 0.7% of GNP as assistance to developing countries" and "to co-operate in providing disaster relief and humanitarian assistance in times of emergency"); Wouter Vandenhole, *Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Co-operate Internationally for Development?*, 17 INT'L J. CHILD. RTS. 23, 46, 54 (2009) (showing that the CESCR "has identified a number of fulfilment obligations [facilitate, promote, provide] for States parties," and that the CRC Committee "has . . . identified *specific* obligations [notably to fulfill (provide)] for donor countries in relation to development co-operation"); Michael Wabile, *Re-examining States' External Obligations to Implement Economic and Social Rights of Children*, 22 CAN. J. L. & JURIS. 407, 447 (2009) ("[A]ll members of the United Nations have both domestic and diagonal obligations to respect, protect and fulfil economic and social rights.").

216. MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Principle 3 (2011) [hereinafter MAASTRICHT PRINCIPLES]. See de Schutter et al., *supra* note 168, at 1084, for a reproduction of and commentary to the Maastricht Principles. For commentary on Principle 3, see *id.* at 1090-96. Meanwhile there exists a corpus of literature on extraterritorial state obligations in the field of economic, social, and cultural rights. Apart from that cited in this article, see also that referred to in Klaus D. Beiter, *Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations under the International Covenant on Economic, Social and Cultural Rights*, *in* TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES 445, 487-98, 488 n.174 (Hanns Ullrich et al. eds., 2016).

217. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 8 (Definition of extraterritorial obligations). For commentary on Principle 8, see de Schutter et al., *supra* note 168, at 1101-04.

Extraterritorial obligations to *fulfill* entail positive duties and may be stated to encompass, on the one hand, obligations to *facilitate*, requiring states to create an international enabling environment that allows for the realization of human rights in other states, and, on the other, obligations to *provide*, requiring states to provide financial, technical, cooperative, and other assistance, according to ability, where human rights in another state can otherwise not be guaranteed.[218] Less contentious than extraterritorial obligations to fulfill are negative duties to respect and positive duties to protect human rights extraterritorially. Extraterritorial obligations to *respect* oblige states to refrain from conduct that nullifies or impairs the enjoyment of human rights (*e.g.*, by reversing their levels of realization) of persons outside their territories, or which impairs the ability of other states to respect, protect, and fulfill human rights.[219] Extraterritorial obligations to *protect* oblige states to protect individuals outside their territories by preventing infringements of their rights by private actors. In cases where a sufficient nexus exists between those states and the private actors concerned, their anticipated conduct, or the harm they might cause, this is done by regulating the conduct of private actors through legal standard-setting, administrative, investigative, adjudicatory, or other measures. Where, due to the absence of a sufficient nexus, regulation is not possible, states should, to the extent possible, influence the conduct of private actors.[220]

Extraterritorial jurisdiction arises by virtue of the fact either that a state exercises authority or effective control over foreign territory, that

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218. The definitions are broadly based on Ziegler, *supra* note 173, ¶¶ 57-58. In the context of states' compliance with international human rights obligations *within their territories*, obligations to fulfill are usually identified as positive obligations to facilitate (installing frameworks or systems, enabling individuals to exercise rights), to provide (making available actual "hand-outs," money, and social assistance to individuals in case of need), and to promote (raising public awareness concerning rights, preparing the ground for subsequent realization). *See, e.g.*, MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 25-26 (2009) (broadly providing these definitions). These categories cannot be transposed one-to-one to *the extraterritorial level*. At the extraterritorial level, there does not exist a full-fledged duty to fulfill. Obligations are often supplementary at this level, arising only when assistance and cooperation is needed and others are able to provide this. Moreover, the state in need—positioned between the extraterritorial actor and individuals in the state in need—always remains, or should remain, in control of organizing the realization of human rights in that state.

219. This definition is broadly based on Maastricht Principle 20 (Direct interference) and Principle 21 (Indirect interference). MAASTRICHT PRINCIPLES, *supra* note 216.

220. This definition is broadly based on Maastricht Principle 24 (Obligation to regulate), Principle 25 (Bases for protection), and Principle 26 (Position to influence). MAASTRICHT PRINCIPLES, *supra* note 216.

its conduct produces "foreseeable" human rights effects in other territory, or that, regarding international assistance and cooperation, it "is in a position" to assist and cooperate[221] (and the other state is in need of such assistance and cooperation).[222] The latter accords with the CESCR's view, expressed in its General Comment No. 3, that "international co-operation for development . . . is an obligation . . . particularly incumbent upon those States which are in a position to assist others."[223] The Committee's General Comments, not legally binding in themselves, could be seen as "subsequent practice" in the application of a treaty to be considered in establishing the meaning of treaty provisions in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. This would confirm the existence of a legally binding obligation to render international assistance and cooperation for those states parties that are able to do so. The Maastricht Principles may be regarded as reflective of "the teachings" of "the most highly qualified publicists" as a subsidiary means in determining rules of international law in the sense of Article 38(1)(d) of the Statute of the International Court of Justice—and could, therefore, be relied on to confirm the existence of the stated obligation.

In General Comment No. 13, the CESCR reaffirms "the obligation of States parties in relation to the provision of international assistance and co-operation for the full realization of the right to education."[224] Taking the right to education seriously means recognizing the extraterritorial state obligations it imposes.[225] Specifically addressing the African context, comments will now be made in respect of each of three areas where this is highly pertinent: bilateral development assistance and cooperation, the lending operations of the IMF and the World

221. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 9 (Scope of jurisdiction) (mentioning these three bases for jurisdiction). For commentary on Principle 9, see de Schutter et al., *supra* note 168, at 1104-09.

222. Where a state "is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory . . . it has the obligation to seek international assistance and cooperation." MAASTRICHT PRINCIPLES, *supra* note 216, Principle 34.

223. General Comment No. 3, *supra* note 189, ¶ 14.

224. General Comment No. 13, *supra* note 188, ¶ 56.

225. For a discussion of extraterritorial state obligations imposed by the right to education, particularly as flowing from the fact that a state exercises effective control over foreign territory, see Diana E. Balanescu, *Safeguarding Education Beyond Borders*, 8 VIENNA J. INT'L CONST. L. 34 (2014). For an analysis of extraterritorial state obligations in the context of overseas public education activities (operating branch campuses in other countries), see Gearóid Ó. Cuinn & Sigrun Skogly, *Understanding Human Rights Obligations of States Engaged in Public Activity Overseas: The Case of Transnational Education*, 20 INT'L J. HUM. RTS. 761 (2016).

Bank, and free trade within and beyond the WTO (here GATS and TRIPS).

B. *Bilateral Development Assistance and Cooperation in the Field of Education*

The full realization of the right to education in developing states—all African states qualifying as such[226]—crucially depends on bilateral development assistance and cooperation. States are to render such assistance and cooperation in the field of education in discharging extraterritorial state obligations to *fulfill* the right to education. This covers both obligations to *facilitate* the realization of the right to education by contributing to creating an international enabling environment conducive to achieving its realization and to *provide* financial, technical, cooperative, and other assistance, according to ability, directed at realizing the right. Obligations to facilitate require donor states to, inter alia, elaborate, interpret, apply, and regularly review bilateral and multilateral agreements and international standards so that they respect, protect, and, as appropriate, can help advance realization of the right to education.[227] Each donor state should further adopt domestic and foreign relations policies and measures that can contribute to realization of the right to education in other states (*e.g.*, unilaterally easing visa requirements for foreign students).[228] Bilateral education assistance granted in the endeavor of discharging obligations to provide must itself respect, protect, and be conducive to achieving realization of the right to education.[229] In detail, extraterritorial state obligations in respect of bilateral education development assistance and cooperation may be stated to include the following duties:[230]

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226. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 398 (listing all states as "in transition," "developed," or "developing").

227. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 29(a). Principle 29 is fully cited *infra* at note 290. In the present context, see also the discussion of GATS-plus and TRIPS-plus arrangements *infra* Subsections IV-D and IV-E, respectively.

228. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 29(b). Principle 29 is fully cited *infra* at note 290.

229. "In fulfiling economic, social and cultural rights extraterritorially, States must . . . observe international human rights standards." MAASTRICHT PRINCIPLES, *supra* note 216, Principle 32(c).

230. These duties apply to donor states bilaterally, but where they can be applied to multilateral donors, they apply *mutatis mutandis* to such donors as well. For a thorough and excellent recent discussion, even if in German, of extraterritorial state obligations in the field of development assistance and cooperation, see LÉONIE J. WAGNER, MENSCHENRECHTE IN DER ENTWICKLUNGSPOLITIK: EXTRATERRITORIALE PFLICHTEN, DER MENSCHENRECHTSANSATZ UND SEINE UMSETZUNG (2017).

– Developing states have the right—and also duty—to formulate credible education policies and to set priorities as to their implementation. It is said that the "ownership" of development policies should "vest" in developing states themselves.[231] Donor states need to respect and not interfere with this right.
– Donor states are obliged to align their assistance and cooperation with developing states' policies and priorities. In the African context, it has thus been held that there is a need for "the channeling of more resources through the budget process."[232] Hence, there should be a sector-wide approach to education aid "aim[ing] to abandon previous donor projects in favor of long-term budgetary support to the education sector as a whole, and to strengthen governmental structures rather than continuing parallel donors' set-ups."[233]
– Among themselves, donor states are required to harmonize approaches to assistance and cooperation to minimize costs and to enhance the efficiency of support.
– Donor states should allocate 0.7 percent of their gross national income (GNI) to official development assistance (ODA), a target recognized since 1970.[234] In 2014, donor states allocated on average only 0.31 percent of their GNI to ODA.[235]
– Donor states should allocate fifteen to twenty percent of ODA to education.[236] In a way, this matches with the goal of states spending that percentage of their national budgets on education.[237] In 2014, donor states allocated on average only eight percent of bilateral ODA to education.[238]

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231. *See* UNESCO, EFA GLOBAL MONITORING REPORT 2005: EDUCATION FOR ALL: THE QUALITY IMPERATIVE 196-97 (2004) (mentioning this and the following two aspects enumerated as the "[t]hree core principles of international good practice" of effective aid).

232. Charles Mutasa (African Forum & Network on Debt & Development), *The Politics of the Millennium Development Goals in Africa: Is Global Partnership Really Working?*, 6 SUST. DEV. L. & POL'Y 21, 24 (2005).

233. Tomaševski, *supra* note 194, ¶ 18.

234. *See* DEVELOPMENT ASSISTANCE COMMITTEE (DAC), HISTORY OF THE 0.7% ODA TARGET (Mar. 2016) (original text from 3 DAC J. III-9–III-11 (2002)), https://www.oecd.org/dac/stats/ODA-history-of-the-0-7-target.pdf (last visited Dec. 23, 2017). ODA includes concessional loans, grants, debt relief, and technical assistance and covers assistance channeled through multilateral actors.

235. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 481.

236. *See* GLOBAL CAMPAIGN FOR EDUCATION (GCE), EDUCATION AID WATCH 2015, 11 (2015).

237. For this goal, see Incheon Framework for Action, *supra* note 128, ¶ 105.

238. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 483. Multilateral donors spent on average nine percent of ODA on education. The IDA spent sixteen percent. *Id.*

– Half of this amount, *i.e.*, ideally ten percent of ODA, should be allocated to basic education.[239] This reflects the priority accorded the realization of compulsory and free primary education for all in international human rights treaties.[240] In 2014, on average, only slightly less than three percent of bilateral ODA was allocated to basic education.[241]
– Support for scholarships for post-secondary education in donor states, though important, should not count towards education ODA.[242] This is because such support is not utilized to develop local education infrastructure and resources. It may even promote brain drain with students remaining in donor states and contributing to the economy there. In 2013, a quarter of direct aid for education (*i.e.*, aid exclusive of general budget support) was thus actually spent in donor states themselves.[243]
– Donor states should spend at least fifty percent of all education aid in low-income countries.[244] In 2014, on average, only 21.5 percent of all education aid was spent in such countries.[245] It is of interest to note that 24.7 percent of all education aid was spent in Sub-Saharan Africa.[246]
– The African Forum & Network on Debt & Development emphasizes that "[a]id should be untied and donor countries should provide technical assistance for capacity building."[247]

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239. *See* GCE, EDUCATION AID WATCH 2015, *supra* note 236, at 11. "Basic education" here refers to pre-primary, primary, and basic adult education. *See id.* at 7.

240. "In fulfiling economic, social and cultural rights extraterritorially, States must . . . prioritize core obligations to realize minimum essential levels of economic, social and cultural rights." MAASTRICHT PRINCIPLES, *supra* note 216, Principle 32(b). See *supra* note 188 on compulsory and free education up to the age of fifteen years as a minimum core obligation.

241. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 481-83. Multilateral donors spent on average 4.3 percent of ODA on basic education. The IDA spent somewhat more than seven percent. *Id.*

242. *See* GCE, EDUCATION AID WATCH 2015, *supra* note 236, at 11.

243. *See id.* at 9.

244. *See id.* at 12. *See also supra* note 158 (on low-income countries).

245. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 488. This percentage relates to both bilateral and multilateral aid.

246. *See id.* This percentage relates to both bilateral and multilateral aid.

247. Mutasa, *supra* note 232, at 24. Aid is "untied" if its granting is not dependent on the developing state agreeing to restrictions as to from where products, services, or personnel may be sourced.

- The Forum & Network also stresses that "ODA should be more predictable to allow for better planning."[248] It has been suggested that commitments to developing states should be predictable over a period of "5 years plus."[249]
- Development assistance and cooperation needs to safeguard education as a public good that is available for free, or made progressively free, and of good quality. The CESCR has thus recently stated that it "is particularly concerned about the financial support provided by the [U.K.] to private actors for low-cost and private education projects in developing countries, which may have contributed to undermine the quality of free public education and created segregation and discrimination among pupils and students."[250] To the extent that private providers of education are legitimately supported,[251] donor states incur extraterritorial state obligations to *protect* learners, parents, and teachers against infringements of their rights by such providers (if feasible, by regulating, otherwise, as far as possible, by influencing the conduct of such providers).[252]
- It needs to be fully appreciated that "[u]sing ... local ('indigenous') language[s] [not only in primary, but also in secondary education and beyond][253] satisfies the rights criteria of availability, accessibility, acceptability

248. *Id.*

249. *See* GLOBAL CAMPAIGN FOR EDUCATION, FUND THE FUTURE: EDUCATION RIGHTS NOW: A TEN POINT PLAN FOR TRANSFORMING AID TO EDUCATION 3 (2011).

250. U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, ¶ 14, U.N. Doc. E/C.12/GBR/CO/6 (June 24, 2016). *See also* GCE, EDUCATION AID WATCH 2015, *supra* note 236, at 12 (duty to "ensur[e] aid supports free and public education, not fee-paying and private education . . . donor assistance should never subsidize profit-making education"); LAURA DAY ASHLEY ET AL., THE ROLE AND IMPACT OF PRIVATE SCHOOLS IN DEVELOPING COUNTRIES: A RIGOROUS REVIEW OF THE EVIDENCE 45 (University of Birmingham et al., Apr. 2014) ("the evidence . . . revealed that private school teachers have fewer formal qualifications, lower salaries and weak job security"); ASHLEY ET AL., *supra*, at 46 ("private schools tend to be more expensive to users in terms of costs of school fees and other more hidden costs such as books and uniforms").

251. See *supra* note 145 for when this will be the case.

252. For a definition of extraterritorial obligations to protect, see *supra* at note 220.

253. On linguistic human rights in education, see BEITER, *supra* note 15, at 420-27, 479, 493, 581-82, 627, 646 (language of choice), 130-31, 147, 175, 178-79, 420 (migrant workers and members of their families and language rights), 147, 180-84, 186-87, 202, 260, 428-30, 432-36, 439-42, 445, 447-50, 457, 581-84, 646 (minorities and language rights), 150-53, 211-12, 312-13, 585-86 (indigenous peoples and language rights).

and adaptability,"[254] and donor states should structure their development assistance and cooperation accordingly.[255] "A wrong educational language policy [*i.e.*, one not based on multilingualism, with mastery of the mother tongue at its heart][256] in underdeveloped countries, ... promoted, advocated, and partially financed by the West with its experts, is the most important pedagogical reason for 'illiteracy' in the world."[257]

– In respect of all education development policies and projects, donor states (as part of their obligations to *facilitate*) need to make prior human rights impact assessment, subsequent monitoring, and ascertaining that access to complaint procedures exists in the developing states concerned a part of their development assistance and cooperation strategy.[258]

C. *The Lending Operations of the IMF and the World Bank: Effects on Education*

Next, the relevance of extraterritorial state obligations under international human rights law in the context of the lending operations (the

254. ZEHLIA BABACI-WILHITE, LOCAL LANGUAGES AS A HUMAN RIGHT IN EDUCATION: COMPARATIVE CASES FROM AFRICA 108 (2015). Using the mother tongue in education facilitates students' self-appreciation, better learning, and increased understanding, and further has cultural, emotional, cognitive, and socio-psychological benefits. *See id.* at 110-11. The ACERWC also supports mother tongue education. Commenting on the initial state report of Namibia, the Committee, "not[ing], with great concern, the existence of high rates of drop-outs and non-completion of secondary education . . . recommends [to] the State Party to take . . . necessary actions such as . . . making the mother tongue the medium of instruction." Concluding Observations, Namibia, *supra* note 75, ¶ 37.

255. Zehlia Babaci-Wilhite has noted that "wealthy donor nations such as the USA and UK spend large amounts of 'foreign aid' on the promotion of English in developing countries instead of using it for funding basic literacy acquisition in local dialects and generating quality educational materials in native languages." BABACI-WILHITE, *supra* note 254, at 113. She further observes that "[r]eforms in Africa are being undertaken on the basis of an unrealistic agenda that is incorporating Western curriculum and using Western languages. . . . [E]mulation of Western development and Western educational systems are regarded as the way forward for Africa. Scientifically speaking, this does not form a basis for capability-based educational development, nor does it bring social justice and quality in education." *Id.* at 107.

256. *See* TOVE SKUTNABB-KANGAS, LINGUISTIC GENOCIDE IN EDUCATION: OR WORLDWIDE DIVERSITY AND HUMAN RIGHTS? 567-649 (2000) (essentially proposing this as the most appropriate model of linguistic human rights in education).

257. *Id.* at 665.

258. *See* U.N. Comm. on Econ., Soc. and Cultural Rts., *supra* note 250, ¶ 15 (mentioning these three aspects).

awarding of loans and grants) of the IMF and the World Bank will be dealt with. As will be shown, states have obligations under international human rights law "to ensure that their actions as members of . . . international financial institutions[] take due account of the right to education."[259] This must accordingly affect these institutions' lending operations.

The IMF, in terms of its Articles of Agreement, grants finance to members where needed, which affords them "[w]ith opportunity to correct maladjustments in their balance of payments."[260] In the first four decades of its existence, such finance was made available subject to conditionalities relating to, for example, reductions of budgetary deficits, the adoption of restrictive monetary policies, or the devaluation of exchange rates. With the rise of "pure" market liberalism in the 1980s, however, the IMF started extending the reach of its conditionalities, requiring countries to enhance competition by privatizing the public sector, liberalizing markets, and deregulating the economy. Countries were urged to ensure "good governance" (meaning "minimal" government), to reform labor laws (to lower employee protection), and to "adjust" social policies (to provide for reductions in social spending).[261] The firm, but erroneous belief underlying this "mission creep," as it has been called,[262] was that macro-economic adjustment of the nature contemplated was necessary to "program" those countries experiencing economic set-backs for long-term economic success.[263] The IMF has been criticized for the social consequences of the conditionalities attached to its provision of finance to poor countries. The conditionalities, notably those requiring a reduction in social spending, had devastating effects on health, education, and general social conditions in those countries.[264]

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259. General Comment No. 13, *supra* note 188, ¶ 56. For a very recent discussion of the role of international human rights law in relation to the activities of the World Bank and the IMF, addressing both the human rights obligations of these institutions themselves and those of their respective members, see WILLEM VAN GENUGTEN, THE WORLD BANK GROUP, THE IMF AND HUMAN RIGHTS: A CONTEXTUALISED WAY FORWARD (2015).

260. Articles of Agreement of the IMF art. I(v), July 22, 1944, 2 U.N.T.S. 39 (entered into force Dec. 27, 1945).

261. *See* Alexander E. Kentikelenis et al., *IMF Conditionality and Development Policy Space, 1985–2014*, 23 REV. INT'L POL. ECON. 543, 549 (2016) ("The era of so-called structural adjustment saw the involvement of the IMF in sensitive policy areas.").

262. Sarah Babb & Ariel Buira, *Mission Creep, Mission Push and Discretion: The Case of IMF Conditionality*, *in* THE IMF AND THE WORLD BANK AT SIXTY 59 (Ariel Buira ed., 2005).

263. *See* Kentikelenis et al., *supra* note 261, at 548-50 (broadly describing the development of IMF conditionality along these lines).

264. *See id.* at 550-52 (referring to these social consequences of IMF conditionality).

Reacting to such criticism, the Fund subsequently introduced "floors on social … spending"[265] to safeguard basic social service provision. The Fund claims its lending programs now exhibit "responsive design and streamlined conditionality" to create "policy space" for countries.[266] A recent study, however, finds that there has actually been an increase in the total number of conditions, making it impossible for borrowers to secure social spending targets.[267] The authors report that "[d]ata from social expenditure targets in Sub-Saharan Africa show that they remain unmet half of the time, even while fiscal deficit targets are achieved. Such findings suggest that the IMF's pro-poor concerns are accorded, at best, secondary importance compared to macroeconomic targets."[268] The authors conclude that their findings constitute evidence of "paradigm maintenance" and also "organized hypocrisy" in the IMF, as there is "the rebranding of existing practices and the addition of token gestures to placate critics, without altering the underlying premises of reform design."[269]

The World Bank's lending approach is problematic, too. The Bank's education lending is premised on a "human capital" approach to education. This holds that education should provide learners with such capabilities as will make them "assets" in the grander plan of providing technological skills to the labor market, increasing productivity, enhancing competitiveness, and boosting economic growth. As the "human capital" approach is not rooted in human rights, it is almost certain to fail in reducing poverty. It is reductive and depletes education of much of its purpose and substance.[270]

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265. IMF, *What Happens to Social Spending in IMF-Supported Programs?*, SDN/11/15, at 5 (Aug. 31, 2011) ("More recently, minimum indicative floors on social and other priority spending have been incorporated into programs for low-income countries where appropriate."); IMF, *A New Architecture of Facilities for Low-Income Countries*, at 3 (June 26, 2009) ("[A]ll facilities should support policies that safeguard social and other priority spending.").

266. IMF, *Creating Policy Space: Responsive Design and Streamlined Conditionality in Recent Low-Income Country Programs*, at 4 (Sept. 10, 2009) ("[T]he design of recent LIC programs has shown considerable flexibility, providing expanded policy space.").

267. *See* Kentikelenis et al., *supra* note 261, at 545 ("The most recent data from 2014 show a sharp increase both in the total number of conditions and in the array of policy areas under reform."). The study analyzed IMF loan agreements between 1985 and 2014, extracting 55,465 individual conditions across 131 countries. *Id.* at 552.

268. *Id.* at 566.

269. *Id.* at 546.

270. For critical assessments of the "human capital" approach, see, for example, Steven J. Klees, *Human Capital and Rates of Return: Brilliant Ideas or Ideological Dead Ends?*, 60 COMP. EDUC. REV. 644, 647-53, 658-60 (2016) (arguing, inter alia, that the human capital approach is flawed because it assumes the existence of a perfect market, which does not exist; because it erroneously

Specifically in the African context, it ignores that education should also prepare young adults for political participation with the aim of strengthening democracy; enable them to take part in a business sector traditionally more informal than formal; teach responsible sexuality and parenthood; foster social cohesion and tolerance; offer strategies for overcoming socio-economic exclusion, notably of girls and the poor; and facilitate a flourishing of cultural and linguistic diversity. In the words of international human rights law, education must be aimed at "the full development of the human personality."[271] A former U.N. Special Rapporteur on the Right to Education says that "[t]he system of education should be inspired by a humanistic rather than by a mere utilitarian version of education."[272] The "human capital" approach to education is blind to the root causes of poverty and will, therefore, not be helpful in reducing poverty and promoting development.

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measures productivity in terms of income; because it ignores benefits other than income benefits of education; because there is no real proof that more education is actually the reason for higher income; and because it is based on capitalist thinking but does not see that "full employment, decent jobs, and greater equality are neither features nor goals of capitalism"); Salim Vally & Carol A. Spreen, *Human Rights in the World Bank 2020 Education Strategy*, *in* THE WORLD BANK AND EDUCATION: CRITIQUES AND ALTERNATIVES 173, 179-80, 183-84 (Steven J. Klees et al. eds., 2012) (arguing that the human capital approach "impl[ies] that lack of employment is a reflection of a person's skills level . . . instead of an intrinsic weakness of the economic structure," supposes that competition and deregulation in the education sector lead to desired results and that investing resources in the education system is of secondary importance, overlooks that economic growth often disguises the reality of inequality and poverty, and focuses solely on the symptoms of poverty rather than its causes). The "human capital" approach likewise underlies the Organization for Economic Co-operation and Development's education surveys, whose outcomes massively influence national education policy. *See* Clara Morgan & Louis Volante, *A Review of the Organisation for Economic Co-operation and Development's International Education Surveys: Governance, Human Capital Discourses, and Policy Debates*, 14 POL'Y FUT. EDUC. 775, 787-88 (2016) ("Although human capital rationales seem to dominate the overarching purposes of the OECD international education surveys, it is clear that schools are responsible for other important functions that fall outside of economic growth and prosperity. Indeed, the dominant neoliberal paradigm is oriented towards market-oriented economic growth and the erosion of the public sphere. Such a paradigm does not value the significant role that public schools play in building socially cohesive and equitable societies."). On the World Bank's and OECD's "economic" education model, see also JOEL SPRING, GLOBALIZATION OF EDUCATION: AN INTRODUCTION 32-92 (2d ed. 2015). Spring explains that the World Bank—which emphasizes the economization of education and supports the idea of the audit state—borrows many of its ideas from the OECD, which, as a "World Ministry of Education," through its common assessments for OECD countries and partners, with such assessments ignoring national curricula and solely focusing on "the basic skills needed to function in a global knowledge economy," dictates a one-sided world education culture. *Id.* at 58, 64, 74-75, 88.

271. *See, e.g.*, ICESCR, *supra* note 18, art. 13(1).

272. Singh, U.N. Doc. A/68/294, *supra* note 129, ¶ 103.

Moreover, as in the case of the IMF, the Bank's lending is conditioned by market-liberal criteria, entailing a reduction in public spending on social issues, deregulation, privatization, free trade, and unimpeded competition.[273] It has been pointed out that "[t]he results of these conditions are lower salaries, impoverishment for Africans, and cheaper raw materials for multinational companies."[274] Consequently, while formal education attainment has increased in Africa, students subsequently find no or only poorly paid jobs.[275] There is no genuine reduction in poverty levels.

The World Bank contributes to one of the greatest threats to the right to education, particularly in Sub-Saharan Africa: the unprecedented expansion of private primary and secondary education.[276] On the one hand, the World Bank supports the operations of a multinational chain of low-fee, profit-making, private primary schools targeting poor families in Kenya and Uganda. These schools use highly standardized teaching methods, untrained and low-paid teachers, and aggressive marketing strategies to target poor households. On the other hand, the Bank has not invested in free public primary education in these countries.[277] Previously, the World Bank still would back public primary education, though it also advocated the charging of user fees

273. *See* PHILLIP W. JONES, EDUCATION, POVERTY AND THE WORLD BANK 16-22, 39 (2006) (stating that World Bank education lending is based on two factors, the human capital approach and neoliberal reform demands, and providing a historical account of how Keynesianism succumbed to neoliberal thinking in the World Bank).

274. Mark J. Wolff, *Failure of the International Monetary Fund & World Bank to Achieve Integral Development: A Critical Historical Assessment of Bretton Woods Institutions Policies, Structures & Governance*, 41 SYRACUSE J. INT'L L. & COM. 71, 113 (2013).

275. *See* Vally & Spreen, *supra* note 270, at 177 (noting "massive (and increasing) youth unemployment . . . not commensurate with the high levels of skills many of these young people possess").

276. *See, e.g.*, BAILEY GREY, USING HUMAN RIGHTS STANDARDS TO ASSESS PRIVATISATION OF EDUCATION IN AFRICA 1, 4 (2012), http://www.right-to-education.org/resource/using-human-rights-standards-assess-privatisation-education-africa ("The role of private education has grown in Africa," with private education taking essentially five forms: for-profit schools, PPPs, low-fee schools (for-profit or not-for-profit), private tutoring, and philanthropy schools.).

277. *See World Bank Must Support Quality Public Education, Not Private Schools!*, EDUC. INT'L (May 13, 2015), https://www.ei-ie.org/en/detail/3191/world-bank-must-support-quality-public-education-not-private-schools. In Uganda, the High Court has now ordered the closure of more than sixty Bridge International Academies found to have operated in contravention of the law. *See Uganda: For-Profit Education Chain Suffers Major Blow*, EDUC. INT'L (Nov. 4, 2016), https://ei-ie.org/en/detail/3821/uganda-for-profit-education-chain-suffers-major-blow. In Kenya, the High Court has now ordered ten out of twelve Bridge International Academies to close because of low educational standards. *See Kenya: Blow to Bridge International Academies*, EDUC. INT'L (Feb. 22, 2017), https://ei-ie.org/en/detail/3945/kenya-blow-to-bridge-international-academies.

in contravention of international human rights law.[278] As Susan Robertson observes, despite the worst global financial crisis since the 1930s as a result of the failure to regulate financial markets, neoliberalism is alive and well in the Bank's Education Strategy 2020, and the Bank now, in fact, envisages a collapsing of the boundaries between public and private education, with the state being regarded as just one provider among many.[279] There appears to be truth to the remark that "the poor are increasingly viewed as the last unconquered market, and . . . poverty reduction [is to be] profitable."[280] However, a former U.N. Special Rapporteur on the Right to Education has made it very clear that

> [States] . . . should not allow or promote low-cost private schools and the provision of school vouchers, nor should they allow for-profit institutions in education.[281] . . . Governments should exercise caution as to any advice offered by international organizations, such as the World Bank . . . to the effect that they should relinquish their responsibility for education to private actors. If such advice were sound, it would have been adopted by the wealthiest nations. Instead, the top-performing education systems in the world, in Asia, Europe and North America, are predominantly public systems.[282]

Up to now, the World Bank has sought to comply with certain environmental or social standards by seeking to respect its own safeguard policies. However, there never were any such policies specifically addressing the right to education or human rights generally.[283] In 2016, the Bank adopted a new Environmental and Social

278. For an account of the World Bank's approach to education lending up to 2005, see BEITER, *supra* note 15, at 614-20.

279. Susan L. Robertson, *The Strange Non-Death of Neoliberal Privatization in the World Bank's* Education Strategy 2020, *in* THE WORLD BANK AND EDUCATION: CRITIQUES AND ALTERNATIVES, *supra* note 270, at 189, 200-01.

280. Saith, *supra* note 129, at 1196.

281. Singh, U.N. Doc. A/69/402, *supra* note 144, ¶ 106.

282. Singh, U.N. Doc. A/70/342, *supra* note 141, ¶ 140.

283. *See* Suzanne Zhou, *Reassessing Prospects of a Human Rights Safeguard Policy at the World Bank*, 15 J. INT'L ECON. L. 823, 824 (2012) ("[E]ngagement with human rights at the Bank remains largely *ad hoc*, informal, and independent of international human rights law."); U.N. General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, Extreme Poverty and Human Rights*, ¶¶ 32, 68, U.N. Doc. A/70/274 (Aug. 4, 2015) (untitled, on the topic of the World Bank and human rights) ("[T]he current safeguards contain no explicit human rights policy. . . . For most purposes, the World Bank is a human rights-free zone. In its operational

Framework.[284] Whereas the previous system placed clear obligations of due diligence, risk assessment, and progress monitoring on the Bank to ensure its safeguards were being met, the new system places the onus on borrower countries to satisfy the Bank that standards are being safeguarded, allowing such countries to follow their own policies, laws, and regulations.[285] Again, there is no mention of human rights.[286] It has been opined that the new system stands for a demise of accountability in the World Bank, that it entails "a nebulous system in which rules and remedies are negotiated with clients on a case-by-case basis . . . allow[ing] for the avoidance of compliance with policy requirements and the attendant respect for the entitlements of people adversely affected by World Bank projects."[287] Of the IMF, it has been stated that the reason for its inability to reform itself "is that the Fund is a [market] fundamentalist organization . . . believ[ing] that an improved macroeconomic profile would mean more to the poor . . . than healthcare or education for their kids."[288]

However, it is important to remember that—apart from any human rights obligations binding on the IMF or the World Bank as such—their various member states do not relinquish their respective obligations under international human rights law on becoming and when acting as members of these institutions. The Maastricht Principles make this point clear by stating as follows:

> As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable

policies, in particular, it treats human rights more like an infectious disease than universal values and obligations.").

284. WORLD BANK, WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK (2017), http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-REVISED-Environmental-and-Social-Framework-Web.pdf.

285. *See* Natalie Bugalski, *The Demise of Accountability at the World Bank?*, 31 AM. U. INT'L L. REV. 1, 32 (2016) ("The flexible due diligence, monitoring, and supervision requirements of the Bank mean that there are fewer sharp hooks against which the Inspection Panel can assess compliance."); Sasha Chavkin, *Debate Surrounds World Bank's Proposed New Safeguards Rules*, GLOBAL MUCKRAKER (Aug. 2, 2016), https://www.icij.org/blog/2016/08/debate-surrounds-world-banks-proposed-new-safeguards-rules (shifting responsibility to borrowers).

286. *See* Chavkin, *supra* note 285 (stating that "[h]uman rights . . . [have been] left out").

287. Bugalski, *supra* note 285, at 56.

288. Ross P. Buckley, *Improve Living Standards in Poor Countries: Reform the International Monetary Fund*, 24 EMORY INT'L L. REV. 119, 144 (2010).

> steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.[289]

This should be read in conjunction with what the Maastricht Principles expect of states regarding their extraterritorial conduct. States have extraterritorial obligations to *respect*, *protect*, and *fulfill* human rights. The latter comprise obligations to *provide* financial, technical, cooperative, and other assistance, according to ability, but also to *facilitate*. The Maastricht Principles describe obligations to facilitate as obligations "to create an international enabling environment":

> States must take deliberate, concrete and targeted steps, separately, and jointly through international co-operation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development co-operation.
>
> The compliance with this obligation is to be achieved through, *inter alia*:
>
> a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
>
> b) measures and policies by each State in respect of its foreign relations, including actions within international organizations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.[290]

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289. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 15 (Obligations of States as members of international organizations). For commentary on Principle 15, see de Schutter et al., *supra* note 168, at 1118-20.

290. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 29 (Obligation to create an international enabling environment). For commentary on Principle 29, see de Schutter et al., *supra* note 168, at 1146-49. The gist of both Principles 15 and 29 of the Maastricht Principles is likewise encapsulated in a single Paragraph 7 of the expert Tilburg Guiding Principles on World Bank, IMF and Human Rights, Van Genugten et al., *supra* note 167, ¶ 7, thus specifically focusing on the international financial institutions:

> The World Bank and the IMF are governed by their member States. When representatives of member States determine the policies of the two IFIs, they are bound by their States' international obligations, including those arising from international human rights law. This includes an obligation on those States in a position to assist, to provide international assistance and co-operation. The obligation of international assistance

Therefore, member states of the IMF and the World Bank should comply with the following extraterritorial state obligations flowing from the right to education:

- They should not engage in any conduct in these institutions, notably not vote in favor of institutional policies or loans/grants, nullifying or impairing the enjoyment of the right to education (*e.g.*, by reversing its level of realization) in any beneficiary state, or impairing that state's ability to respect, protect, and fulfill the right to education *(respect)*.[291]
- Member states of the World Bank must, to the extent possible (by regulating and influencing conduct), offer protection to learners, parents, and teachers against infringements of their rights by private providers of education involved in World Bank-supported projects *(protect)*.
- Each IMF and World Bank member state should adopt policies in respect of its actions—and, as a matter of practice, actively engage in and promote conduct—in these institutions helping to ensure that institutional operations respect—and, in the case of the World Bank's education operations, also protect and tend to advance realization of—the right to education in beneficiary states *(facilitate)*.[292]
- In the light of the stated dimensions of institutional human rights obligations, member states should initiate, promote, and help adopt and implement institutional safeguard policies that recognize education as a public good and contain an express commitment to observe the right to education *(facilitate)*.

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and co-operation includes the duty to work actively towards an equitable financial investment and multilateral trading system that is condusive to the reduction and eradication of poverty and the full realization of all human rights.

291. The CESCR has, at least, this obligation to respect, but probably also some of the obligations to facilitate mentioned subsequently, in mind when it says that, "[s]tates parties have *an obligation to ensure* that their actions as members of international organizations, including international financial institutions, take due account of the right to education." General Comment No. 13, *supra* note 188, ¶ 56 (emphasis added). The obligation becomes stronger, or more extensive, by describing it as one "to ensure that . . . actions . . . take due account of" the right to education.

292. Although neither the World Bank itself nor its member states as such are comprehensively obliged to fulfill human rights in beneficiary states, they are obliged not to support Bank projects frustrating the fulfillment of human rights but to support Bank projects tending to advance fulfillment. It has been stated above that World Bank development activities not simultaneously tending to advance the fulfillment of human rights will prove largely futile. *See supra* Subsection III-C.

– World Bank member states should ensure that safeguard and other relevant policies detail institutional due diligence, risk assessment, and progress monitoring obligations in relation to the right to education *(facilitate)*.
– They should, to the extent that they are in a position to do so, ensure that, prior to the conclusion and during the lifespan of loan/grant agreements, institutional due diligence, risk assessment, and progress monitoring obligations in relation to the right to education are complied with ("watchdog function") *(facilitate)*.
– World Bank member states should initiate, promote, and help realize reforms that envisage granting full human rights-review competences to the World Bank's Inspection Panel, alternatively granting any such competences to an existing or new independent expert body within the U.N. system *(facilitate)*.
– They should initiate, promote, and help realize reforms that envisage making the IMF and the World Bank "less technicist" and "more democratic" institutions *(facilitate)*.[293]

D. *Free Trade in Education Services, GATS, and GATS-Plus*

Free trade within the World Trade Organization (WTO)—and beyond it—poses a real threat to the right to education. A former U.N. Special Rapporteur on the Right to Education has expressed the fear that "education will be moved from international human rights law to international trade law."[294] There are essentially two features of the current WTO system that may severely obstruct the realization of the right to education. First, education constitutes a tradable service under the General Agreement on Trade in Services (GATS);[295] second, copyright protection is a strict requirement under the Agreement on Trade-Related Aspects of Intellectual

293. Klees, *supra* note 137, at 438. In fact, Klees has stated that "the World Bank is too one-sided and one-dimensional to be improved. . . . It probably should be replaced entirely." Steven J. Klees, *World Bank and Education: Ideological Premises and Ideological Conclusions*, *in* THE WORLD BANK AND EDUCATION: CRITIQUES AND ALTERNATIVES, *supra* note 270, at 49, 62.

294. TOMAŠEVSKI, *supra* note 131, at 22.

295. *See* WTO, Services Sectoral Classification List, MTN.GNS/W/120 (July 10, 1991) (covering as subsectors of "education services": "primary education," "secondary education," "higher education," "adult education," and "other education services"); General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (entered into force Jan. 1, 1995) [hereinafter GATS].

Property Rights (TRIPS)[296] (with GATS and TRIPS forming part of the WTO architecture).[297] Bilateral and plurilateral agreements concluded outside the WTO framework may exacerbate the problem. This subsection focuses on free trade in education services, GATS, and GATS-plus agreements, while the next focuses on textbooks, copyright, TRIPS, and TRIPS-plus agreements.[298]

The GATS Agreement envisages WTO members pursuing the liberalization of trade through negotiations yielding commitments in terms of which such members open up their markets to foreign services[299] and grant such services the same treatment as domestic services.[300] The crucial question is whether education services include public education. Although GATS excludes "services supplied in the exercise of governmental authority,"[301] it may yet include public education, seeing that the stated services cover solely those "supplied neither on a commercial basis, nor in competition with one or more service suppliers."[302] In many cases, often contrary to international human rights law,[303] public education is offered against a fee.[304] Furthermore, the private provision

296. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II, Section 1 (Copyright and Related Rights), arts. 9-14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995) [hereinafter TRIPS].

297. On the effects of GATS and TRIPS on education, see SPRING, *supra* note 270, at 93-123. Spring argues, specifically with higher education in mind, that "free trade rules . . . ensure[] the global dominance of schools in English-speaking countries and the global use of English[,] . . . contribut[e] to a uniformity of . . . education institutions based on models in the richest countries[,] [and] . . . contribute to the influences of the richest countries." *Id.* at 118.

298. *See infra* Subsection IV-E.

299. GATS, *supra* note 295, art. XVI (Market Access).

300. *Id.* art. XVII (National Treatment).

301. *Id.* art. I(3)(b).

302. *Id.* art. I(3)(c).

303. International human rights law requires education up to the age of fifteen years to be free. *See* BEITER, *supra* note 15, at 390, 510, 512-16, 518 (read with 303, 519). Upper secondary and higher education are to be made progressively free. *See id.* at 390, 516, 518, 521-23 (read with 303, 519). Introducing, reintroducing, or increasing study fees at these levels of education is highly suspect in terms of international human rights law. *See id.* at 387-88, 400-01, 458, 521, 526, 572-73, 592, 594, 651. *See also supra* notes 140, 188, 195, 196.

304. An exhaustive study on the prevalence of fees in primary education, albeit already more than ten years old, compiled by a former U.N. Special Rapporteur on the Right to Education, showed how widespread fees in primary education were at the time. *See* KATARINA TOMAŠEVSKI, THE STATE OF THE RIGHT TO EDUCATION WORLDWIDE: FREE OR FEE: 2006 GLOBAL REPORT (Aug. 2006). Of the 170 countries surveyed, 113 levied some kind of charge in primary education. *Id.* at 237-38. Sub-Saharan Africa was the most severely affected region. *Id.* at 1-90, 239-41. A recent analysis for the Education for All Global Monitoring Report shows that, among fifty low-, middle-, and high-income countries in all regions, including nineteen African countries (with data for 2005–2012), household

of education has become a very common phenomenon in some countries. These factors could lead some to say that public education is offered on a commercial basis and in competition with other service providers.[305] Considering public education covered under the GATS holds potential dangers. The funding of public education could be seen as an unfair subsidy[306] or amounting to discriminatory treatment of foreign service providers. As a consequence, public money might have to be spread across various domestic and foreign providers of education, leaving the state unable to adequately fund free or progressively free public education of a high quality.[307]

The GATS further requires WTO members to eliminate "unnecessary" barriers to the trade in services (such as qualification requirements, technical standards, and licensing) generally, *i.e.*, also beyond the discrimination context.[308] If education is to be understood as a human right, it needs to be highly regulated to guarantee quality, protect students, and ensure that national economic, social, and cultural priorities are met. Such regulations could be seen as "unnecessary" barriers that need to be removed for domestic and foreign providers of education of all kinds, including the state itself.[309]

Commentators rightly have warned against "[the] risk of 'trade creep,' where education policy issues are being increasingly framed in terms of trade and economic benefit . . . at the expense of other key objectives and rationales for . . . education—such as social, cultural, and scientific development and the role of education in promoting democracy and

education spending constituted on average thirty-one percent of those countries' total education expenditure. Household financing thus "often makes up for the fact . . . that despite fee-free public primary schooling being enshrined in law . . . [countries] still continue to charge some sort of fee." *See* UNESCO, EFA GLOBAL MONITORING REPORT 2015: EDUCATION FOR ALL 2000–2015: ACHIEVEMENTS AND CHALLENGES 260 (2015), http://unesdoc.unesco.org/images/0023/002322/232205e.pdf. In low-income countries, households' share of total education expenditure in the study was forty-nine percent. *See* UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 356.

305. It has been noted that "[t]he considerable amount of ambiguity around the status of the education sector in relation to Article 1.3 has made those concerned with protecting education services very nervous." Susan L. Robertson, *Globalisation, GATS and Trading in Education Services*, *in* SUPRANATIONAL REGIMES AND NATIONAL EDUCATION POLICIES: ENCOUNTERING CHALLENGE 139, 152 (Johanna Kallo & Risto Rinne eds., 2006).

306. *See* GATS, *supra* note 295, art. XV (Subsidies).

307. *See* Jane Knight, *Trade Creep: The Implication of GATS for Higher Education Policy*, 28 INT'L HIGH. EDUC. 5, 6 (2002) (drawing attention to this danger).

308. *See* GATS, *supra* note 295, art. VI(4).

309. *See* David Robinson, *GATS and Education Services: The Fallout from Hong Kong*, 43 INT'L HIGH. EDUC. 14, 14-15 (2006) (drawing attention to this danger).

citizenship."[310] In the case of African countries, commitments regarding primary education have been entered for five states up to now; six states have made commitments regarding secondary education and six states have made them regarding higher education.[311] As has been pointed out:

> [F]ree trade in education services is generally not desirable concerning compulsory education, particularly in as far as developing countries are concerned. Increasing the number of private schools at the compulsory education level will present complex problems for these countries, in which public compulsory education is often neither available for all nor free of charge yet.[312]

States have extraterritorial obligations to *respect*, *protect*, and *fulfill* (covering obligations to *facilitate* and *provide*) human rights under international human rights law, also as members of intergovernmental organizations. This is also true in the context of free trade in education services under the GATS. WTO members' extraterritorial state obligations flowing from the right to education include the following:

> – WTO members should not engage in any conduct in the WTO, notably not vote in favor of institutional WTO-GATS policies or measures, nullifying or impairing the enjoyment of the right to education (*e.g.*, by reversing its level of realization) in any member, or impairing that member's ability to respect, protect, and fulfill the right to education *(respect)*.[313]

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310. Knight, *supra* note 307, at 7.

311. For primary education: The Gambia, Lesotho, Liberia, Seychelles, Sierra Leone; for secondary education: Cabo Verde, Ghana, Lesotho, Liberia, Seychelles, Sierra Leone; for higher education: Cabo Verde, Democratic Republic of the Congo, Lesotho, Liberia, Seychelles, Sierra Leone. *Summary Reports*, WTO, http://i-tip.wto.org/services/ReportsPortal.aspx (search for "Africa" and "Educational Services").

312. BEITER, *supra* note 15, at 610. Focusing on education provision in Southern African countries, it has thus been noted with regard to the GATS that "[t]he risks relate primarily to being swamped by poor quality and inappropriate products, a lack of requisite capacity to monitor such quality, doubts about whether liberalization will actually lead to increased access, the possibility of a two-tier (rich-poor) system developing, and the substitution of country-specific cultural, social and other values by those from foreign countries." Pundy Pillay, *GATS: Implications and Possible Ways Forward for the SADC*, *in* GENERAL AGREEMENT ON TRADE IN SERVICES AND HIGHER EDUCATION IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY 22 (Pundy Pillay et al. eds., 2003).

313. *See supra* note 291 (CESCR's comments).

– *Demandeur* states should not ask developing states to make any commitments in the field of compulsory (primary and lower secondary) education *(respect)*.[314] This is specifically relevant in the light of the impetus the Hong Kong Ministerial Declaration gives to the conduct of plurilateral (as opposed to the traditional one-on-one bilateral) request-offer negotiations, entailing that various powerful states jointly develop model schedules and negotiate with developing states,[315] placing the latter in a largely defensiveposition.[316]
– WTO members must, to the extent possible, ensure that providers of education sufficiently linked to their sphere of control, or whose conduct they can influence, do not violate the rights of learners, parents, and teachers in other members, for example, by offering education of a low standard *(protect)*.
– Each WTO member should adopt policies in respect of its actions relating to the GATS—and, as a matter of practice, actively engage in and promote conduct relating thereto—in the WTO helping to ensure that WTO-GATS policies and measures respect the right to education in the various members *(facilitate)*.[317]
– WTO members should interpret the GATS in a way that respects the right to education. To reinforce such an interpretation, they should initiate, promote, and help adopt and implement GATS safeguard policies or a soft law

314. Other commentators do not go that far. *See, e.g.*, Ana C. Paulo Pereira, *The Liberalization of Education under the WTO Services Agreement (GATS): A Threat to Public Educational Policy?*, 2 MANCHESTER J. INT'L ECON. L. 2, 36 (2005) ("[T]he problem is not the provision of education by private entities, but rather whether governments can guarantee that such providers will contribute to improving national education systems and social welfare for all."). Others are stricter to include all levels of education. *See, e.g.*, Pierrick Devidal, *Trading Away Human Rights? The GATS and the Right to Education: A Legal Perspective*, 2 J. CRITICAL EDUC. POL'Y STUD. 29, 54 (2004) ("[E]ducation must be kept out of the GATS' scope of regulations. The current negotiations on trade in educational services must be stopped.").

315. World Trade Organization, Ministerial Declaration of 18 December 2005, Annex C: Services, ¶ 7, WT/MIN(05)/DEC (2005).

316. *See* Robinson, *supra* note 309, at 14 (referring to the pressure this type of negotiations places on developing states).

317. As Adam McBeth points out, "[i]n the case of the WTO, which remains essentially a legal forum rather than a proactive actor, th[e] basic obligation . . . not to frustrate the realization of human rights . . . is sufficient to address the bulk of the human rights concerns." MCBETH, *supra* note 169, at 70. This may be compared to the more extensive obligation of the World Bank and its member states to ensure the Bank's education operations also tend to advance realization of the right to education. *See supra* at note 292.

instrument laying down, inter alia, the following: No commitments in respect of compulsory education should be entered for developing states. Education services should not include public education. Where education services are rendered by foreign providers from a certain member in another member in an effort to allow the latter to meet its human rights obligations in case of a shortage of supply, in the absence of, or beyond existing, liberalization commitments under the GATS, this should not trigger application of the most-favored-nation treatment provision.[318] States should further retain full capacity to regulate "service provision" by public and private providers of education to guarantee standards in education *(facilitate)*.[319]

– Developed states as WTO members should, to the extent possible, ensure the entering of commitments regarding education services, and subsequent trade in terms thereof, observe the right to education in developing states as committing members. Prior and subsequent human rights impact assessments need to assess extraterritorial effects on human rights, including the right to education, to trigger, if need be, the adoption of specific measures to ensure compliance with notably extraterritorial obligations to respect and protect *(facilitate)*.[320]
– WTO members should initiate, promote, and help adopt and implement a WTO strategy, in terms of which specifically developing states as committing members are called upon to undertake human rights impact assessments prior

318. GATS, *supra* note 295, art. II (Most-Favoured-Nation Treatment).

319. *See* U.N. High Comm'r for Human Rights, *Liberalization of Trade in Services and Human Rights: Rep. of the High Commissioner*, Sub-Comm'n on the Promotion and Protection of Human Rights, ¶¶ 52-58, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002) [hereinafter High Comm'r, *Liberalization of Trade in Services*]. The scope of GATS should be interpreted to ensure that governments are not constrained in taking action to protect human rights. *Id.* ¶¶ 52-54. Governments must be allowed to impose regulations that might have an impact on trade, if necessary, to protect human rights. *Id.* ¶¶ 55-58. See also GATS, *supra* note 295, art. XIV(a), entitling members to adopt or enforce measures "necessary to protect public morals or to maintain public order." The public order exception allows members to safeguard education as a "fundamental interest[] of society" in case of a "genuine and sufficiently serious threat" thereto. GATS, *supra* note 295, art. XIV(a) n.5.

320. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 14 (Impact assessment and prevention) (obligation of states to assess the potential extraterritorial impacts of their conduct on the enjoyment of human rights). For commentary on Principle 14, see de Schutter et al., *supra* note 168, at 1115-18.

and subsequent to commitments regarding education services being entered, ensuring they will remain able to respect, protect, and fulfill the right to education domestically. The strategy should envisage allowing members some flexibility to modify or withdraw commitments, if necessary to uphold the right to education, without compensatory adjustment being required *(facilitate)*.[321]

– WTO members should initiate, promote, and help realize reforms that envisage conformity between the WTO/GATS and international human rights law being enhanced, if need be through amendment of the GATS itself *(facilitate)*.
– WTO members should initiate, promote, and help adopt and implement GATS safeguard policies that call upon WTO dispute settlement panels and the Appellate Body to interpret GATS law in accordance with WTO members' obligations under international human rights law *(facilitate)*.

Bilateral or plurilateral free trade agreements can produce "GATS-plus" arrangements by providing for commitments that extend market access and national treatment to areas where a WTO member has not made such commitments under the GATS. The Maastricht Principles emphasize that "[s]tates must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations."[322] Free trade agreements should, prior and subsequent to their conclusion, be subjected to human rights impact assessments, also in respect of their extraterritorial effects, to ensure the right to education is observed.[323] These will indicate

321. *See* High Comm'r, *Liberalization of Trade in Services*, *supra* note 319, ¶¶ 50, 64-67. WTO members must undertake assessments of the impact of the implementation of GATS on the enjoyment of human rights. *Id.* ¶¶ 65-67. In consequence of such assessments, there must be some flexibility to modify and withdraw commitments, if necessary to protect human rights, without requiring compensatory adjustment. *Id.* ¶ 64. Developed states should assist developing states in undertaking such assessments. *Id.* ¶ 50. Human rights impact assessments should ensure that, in their totality, commitments under GATS can improve the enjoyment of human rights in the developing state concerned.

322. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 17 (International agreements). For commentary on Principle 17, see de Schutter et al., *supra* note 168, at 1122-24. In the context of discussing states parties' assistance and cooperation obligations under the ICESCR, the CESCR states that, "[i]n relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education." General Comment No. 13, *supra* note 188, ¶ 56.

323. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 14. On Principle 14, see *supra* note 320. *Domestically*, states should ensure they remain able to respect, protect, and fulfill human

whether provisions need to be modified or deleted. Appropriate safeguard clauses may have to be included. An agreement concluded may even (have to) be terminated.[324] This also applies to bilateral or plurilateral free trade agreements seeking to liberalize trade in education services beyond the GATS. Hence, by way of example, such agreements should not entail the liberalization of compulsory education for developing states. They should provide for protection to learners, parents, and teachers against foreign providers of education. They should not make liberalization applicable to public education. They should not restrain the power of states to maintain standards in public and private education. They must further oblige dispute settlement tribunals to take into account contracting states' international human rights obligations. Apart from clear obligations to *respect* and *protect* the right to education implicated, there are, therefore, also obligations to *facilitate* its observance (*e.g.*, regular human rights impact assessments, inclusion of safeguard clauses, human rights-conform drafting and interpretation of agreements).

E. *Textbooks, Copyright, TRIPS, and TRIPS-Plus*

Textbooks are crucial for education, particularly in developing countries.[325] However, "[t]extbooks are a rare commodity in most

rights. The effect of any free trade agreement should further be that it can improve the overall enjoyment of human rights. Olivier de Schutter (Special Rapporteur), *Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, Addendum, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, ¶ 6, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011) [hereinafter de Schutter, *Guiding Principles*] ("States should use human rights impact assessments . . . to ensure that the agreement contributes to the overall protection of human rights."). *Extraterritorially*, human rights impact assessments of free trade agreements are to secure state compliance with notably extraterritorial obligations to respect and protect.

324. *See* de Schutter, *Guiding Principles*, *supra* note 323, ¶ 3.3. ("[A] right of denunciation or withdrawal may be implied in any trade . . . agreement to the extent necessary for a State to comply with its human rights obligations, even in the absence of . . . an explicit clause," as "human rights obligations prevail over other treaty obligations."). The Vienna Convention on the Law of Treaties provides that "a right of denunciation or withdrawal may be implied by the nature of the treaty." Vienna Convention on the Law of Treaties art. 56(1)(b), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

325. *See* SUSAN ISIKO ŠTRBA, INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES: EXPLORING MULTILATERAL LEGAL AND QUASI-LEGAL SOLUTIONS 202 (2012) ("[D]eveloping countries depend primarily on printed copies of copyrighted works, as opposed to electronic works, for educational purposes. Therefore, the textbook represents the most important source of information."). Digital content proves not a wondrous solution. Information and communication technology is either not available, or even where it is, information may not readily be accessible. Open access is not a common feature, peer-to-peer platforms not quite legal, access protected by technological protection measures (TPMs)

developing countries. One book per student (in any subject) is the exception, not the rule, and the rule in most classrooms is, unfortunately, severe scarcity or the total absence of textbooks."[326] Cheaply (translating and) reproducing textbooks would be a solution.[327] However, "[r]eprography, which, from a developmental perspective, could facilitate access is often seen from the perspective of 'piracy' and is highly regulated."[328] The TRIPS Agreement requires WTO members to put in place a system of copyright protection in accordance with most of the provisions of the Berne Convention for the Protection of Literary and Artistic Works of 1971.[329] Copying and translating thus require the copyright holder's consent and occur against the payment of a fee. Where textbooks *are* available in developing countries, they would accordingly be expensive—both when produced locally and especially when imported—and would often have to be paid for by parents, even though education under international human rights law must be free or progressively free.[330] The requirement of "free education" also covers textbooks.[331]

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summarily negating permissible copyright limitations and exclusions, and their circumvention often a crime.

326. PERNILLE ASKERUD, A GUIDE TO SUSTAINABLE BOOK PROVISION 16 (1997). This remains true today. As for Sub-Saharan Africa, see UNESCO, GLOBAL EDUCATION MONITORING REPORT 2016, *supra* note 152, at 190 ("In some sub-Saharan African countries, few primary school students have personal copies of textbooks."); INT'L COMM'N ON FIN. GLOB. EDUC. OPPORTUNITY, *supra* note 184, at 66 ("[I]n many [Sub-Saharan African] countries, textbooks are underfunded, priced too high, unavailable to many students, or poorly used.").

327. According to the CESCR, the right to education entails that education at all levels must be "available," availability extending to "teaching materials." General Comment No. 13, *supra* note 188, ¶ 6(a). Education must also be "economically accessible," *i.e.*, "affordable to all." *Id.* ¶ 6 (b). Immediate compliance with state obligations in this regard is required for primary education, progressive compliance at subsequent levels. *Id.* ¶ 6(a), (b).

328. ROBIN RAMCHARAN, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND HUMAN SECURITY 65 (2013); *see id.* at 65-71 (discussing copyright and education). On the right to education and copyright in learning materials, see also LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 316-63 (2011). Similarly, on copyright and access to education, not adopting an explicit human rights approach, see SARA BANNERMAN, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 53-79 (2016).

329. *See* TRIPS, *supra* note 296, Part II, Section 1 (Copyright and Related Rights), arts. 9-14.

330. See *supra* note 303 on the requirement of international human rights law that education be free or progressively free.

331. The CESCR, for example, has never unequivocally stated that textbooks must be free (in primary and lower secondary education) or progressively free (in upper secondary and higher education). A contextual reading of all its interpretative materials reveals, however, that the Committee considers the costs of textbooks "indirect" costs that, especially for developing states, should largely be eliminated by states heavily subsidizing textbooks. *See* BEITER, *supra* note 15, at 512-14, 589-90. The African Commission on Human and Peoples' Rights has held that education

The Berne Convention of 1971 contains an Appendix (also made a part of TRIPS), allowing developing states to adopt a compulsory licensing scheme that limits the rights of copyright holders to control reproduction and translation of their works. However, as Margaret Chon points out, the Appendix has not been a success.[332] This is a result of the complex and onerous requirements associated with its use (*e.g.*, waiting periods of up to seven years[333] or notification to the copyright holder prior to issuing a license[334]). For all practical objectives, the Appendix further envisages compulsory licenses only for domestic publication, forbidding the publication of books in other countries for purposes of importing them,[335] which would, however, be of vital importance in a development context. Generally, limitations and exceptions to copyright protection permitted under Berne and TRIPS have so far not been used to facilitate access to copyrighted educational materials in developing states. This is largely a consequence of the notoriously restrictive interpretation of the so-called three-step test—initially laid down in Article 9(2) of the Berne Convention (as revised in 1967) with regard to possible exceptions to the right of reproduction and now more comprehensively applicable in terms of Article 13 of TRIPS—that governs such limitations and exceptions.[336] Margaret Chon contends:

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must be (made) "economically accessible," accessibility covering "the provision of educational materials." *African Principles and Guidelines*, *supra* note 41, ¶ 71(c). The right to free primary education entails the (immediate) "provision of free textbooks." *Id.* ¶¶ 16, 71(a), (b). The ACERWC "highly urges" states parties to the ACRWC to "provid[e] free text books . . . in order to address . . . school dropouts and low secondary education enrolment." Concluding Observations, Zimbabwe, *supra* note 77, ¶ 40.

332. Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 826-31 (2007). *See also* RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES 15-16, 19, 29 (Mar. 2006) ("By all accounts, . . . the Berne Appendix . . . has been a failure.").

333. Berne Convention for the Protection of Literary and Artistic Works app. art. III(3), Sept. 9, 1886, revised at Paris July 24, 1971, 1161 U.N.T.S. 3 (entered into force Dec. 15, 1972) [hereinafter Berne Convention].

334. *Id.* app. art. IV(1).

335. *Id.* app. art. IV(4).

336. Under Article 9(2) of the Berne Convention, *supra* note 333, and Article 13 of TRIPS, *supra* note 296, limitations and exceptions may be applied in "special cases," that "do not conflict with a normal exploitation of the work," and "do not unreasonably prejudice the legitimate interests of the author/the right holder." A group of copyright law experts has fairly recently held that "certain interpretations of the Three-Step Test at international level [are] undesirable," and that "national courts and legislatures have been wrongly influenced by restrictive interpretations of that Test." *Declaration: A Balanced Interpretation of the Three-Step Test in Copyright Law*, 39 INT'L

> As a distributive justice matter, enhancing capability for education within a human development framework should take priority over guarding excess rent to creators generated from the regulatory intervention of the state in the form of a . . . copyright.[337] . . . [A]rguably a right to education is embodied in various human rights documents, which form the legal basis for a human capability approach to the question of copyright on educational materials.[338]

Extraterritorial state obligations to *respect*, *protect*, and *fulfill* (covering obligations to *facilitate* and *provide*) the right to education under international human rights law of states as members of the WTO in the context of TRIPS, copyright, and educational materials include the following:[339]

- WTO members should not engage in any conduct in the WTO, notably not vote in favor of institutional WTO-TRIPS policies or measures, nullifying or impairing the enjoyment of the right to education (*e.g.*, by reversing its level of realization) in any member, or impairing that member's ability to respect, protect, and fulfill the right to education *(respect)*.[340]
- Powerful WTO members must not compel developing WTO members to subordinate to conceptions of copyright protection that jeopardize access to educational materials *(respect)*.[341] Developing states must be held entitled to fully utilize the potential of open-ended provisions (*e.g.*, those restating the three-step test) and specific flexibilities provided for (*e.g.*, compulsory licenses, parallel imports) in TRIPS to protect the public interest in education. Such an interpretation accords with the public interest principles in Articles 7 and 8 of TRIPS and the right to education.[342]

REV. INTELLEC. PROP. & COMP. L. 707, 711 (2008) [hereinafter *Declaration: A Balanced Interpretation of the Three-Step Test in Copyright Law*].

337. Chon, *supra* note 332, at 846.

338. *Id.* at 818.

339. For an analysis of TRIPS generally in the light of extraterritorial state obligations under international human rights law, see Beiter, *supra* note 216, at 467-70, 487-98.

340. *See supra* note 291 (CESCR's comments).

341. They may exert pressure on the diplomatic level or by threatening recourse to the WTO dispute settlement system.

342. Article 7 of TRIPS, *supra* note 296, provides that the protection of intellectual property rights should be "to the mutual advantage of producers and users . . . [and] . . . conducive to social and

– WTO members must, to the extent possible, ensure that publishers sufficiently linked to their sphere of control, or whose conduct they can influence, do not exploit their copyright to the detriment of learners, parents, and teachers in other members, for example, by charging excessive prices for educational content *(protect)*.
– Each WTO member should adopt policies in respect of its actions relating to TRIPS—and, as a matter of practice, actively engage in and promote conduct relating thereto—in the WTO helping to ensure that WTO-TRIPS policies and measures respect the right to education in the various members *(facilitate)*.[343]
– TRIPS incorporates the provisions of the Berne Convention. The latter operates under the auspices of the World Intellectual Property Organization (WIPO), a U.N. specialized agency and the actual "maker" of global intellectual property law. WIPO members (many of whom are also WTO members) will have to accept responsibility for reforming the Berne Appendix to make it work for developing states *(facilitate)*.
– WTO (and WIPO) members should interpret TRIPS (and Berne) in a way that respects the right to education. To reinforce such an interpretation, they should initiate, promote, and help adopt and implement a soft law or legally binding instrument calling for moderation in copyright law, including a balanced interpretation of the three-step test, allowing for far-reaching limitations and exceptions to copyright protection *(facilitate)*.[344] Hence, there could be

economic welfare, and to a balance of rights and obligations." Article 8 of TRIPS, *supra* note 296, states that members "may . . . adopt measures necessary . . . to promote the public interest in sectors of vital importance to their socio-economic . . . development," *id.* ¶ 1, or "to prevent the abuse of intellectual property rights by right holders," *id.* ¶ 2. The proviso in both paragraphs that measures be "consistent with" the provisions of TRIPS (which are aimed at promoting free trade) must be interpreted restrictively, otherwise the insertion of the protection of the public interest is rendered futile. It may be noted that the U.N. High Commissioner for Human Rights has urged that "[i]n the event of a renegotiation of the Agreement . . . [there should be] . . . an express reference to human rights in article 7." U.N. High Comm'r for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Rep. of the High Commissioner*, Sub-Comm'n on the Promotion and Protection of Human Rights, ¶ 68, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001).

343. See *supra* note 317 on the nature of this obligation of WTO members.

344. As regards the three-step test, the *Declaration: A Balanced Interpretation of the Three-Step Test in Copyright Law*, *supra* note 336, at 707-13, formulated by a group of copyright law experts, may serve as an example for such a document. Indeed, Christophe Geiger proposes that "this initiative should now be taken one step further and that a legal instrument should be integrated into international law."

provisions aiding the easy compilation of textbooks without fearing multiple copyright infringements, allowing students, teachers, and libraries to copy whole textbooks, or permitting minority language speakers to prepare their own translations of textbooks.[345] Likewise, it could be made

Christophe Geiger, *Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions*, 6 INT'L REV. INTELLEC. PROP. & COMP. L. 627, 628 (2009). *See also* Farida Shaheed (Special Rapporteur), *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Copyright Policy and the Right to Science and Culture*, ¶¶ 104, 109, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) [hereinafter Shaheed, *Copyright Policy*]. Shaheed stresses that the three-step test should be interpreted to encourage the establishment of a robust and flexible system of exceptions and limitations. Shaheed, *Copyright Policy*, *supra*, ¶ 104. Further, "WIPO members should support the adoption of international instruments on copyright exceptions and limitations for libraries and education. The possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognized by most States, and/or an international fair use provision, should also be explored." *Id.* ¶ 109. It may be noted that the "45 Adopted Recommendations under the WIPO Development Agenda" emphasize the importance of a robust public domain (Recommendations 16, 20), access to knowledge for developing states (Recommendation 19), and, in promoting development goals, norm-setting activities related to exceptions and limitations (Recommendation 22(d)). World Intellec. Prop. Org., *The 45 Adopted Recommendations under the WIPO Development Agenda* (2007), http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf. The WIPO Development Agenda was formally established by WIPO in 2007, and may potentially become a suitable basis for strengthening the public interest in international intellectual property law. In this vein, see CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA (2007) (broadly arguing that the Development Agenda will help WIPO socializing international intellectual property law). It may be noted, however, that the 45 Recommendations do not refer to human rights. It has been stated that the Agenda document should be interpreted "so as to insert human rights norms into the conversation." Amanda Barratt, *The Curious Absence of Human Rights: Can the WIPO Development Agenda Transform Intellectual Property Negotiation?*, 14 LAW DEMOCRACY & DEV. 14, 45 (2010). Specifically highlighting WIPO's potential role under the Development Agenda with regard to norm-setting activities related to limitations and exceptions to facilitate access to textbooks in developing states, see ISIKO ŠTRBA, *supra* note 325, at 179-200. WIPO's Standing Committee on Copyright and Related Rights is at the moment examining questions regarding two possible international legal instruments on limitations and exceptions for educational activities and libraries. *See* BANNERMAN, *supra* note 328, at 76-77; Daniel Seng, *Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, SCCR/35/5 Rev. (Nov. 10, 2017); Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, SCCR/35/6 (Nov. 2, 2017). For now, Isiko Štrba recommends the adoption of a soft law instrument. ISIKO ŠTRBA, *supra* note 325, at 198-200. For an overview of limitations and exceptions to copyright protection in Africa as these effect education, see Joseph Fometeu, *Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa*, World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights, SCCR/19/5 (Oct. 26, 2009).

345. *See* Andrew Rens et al., *Education and Access to Knowledge in Southern Africa*, *in* INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 303,

possible for developing states, for example, to fully utilize the potential of Article 10(2) of the Berne Convention "to create access to works for educational purposes that may counterbalance [a] lack of bulk access to textbooks."[346] In terms of Article 10(2), states parties may "permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."[347]

– Similarly, WTO (and WIPO) members should initiate, promote, and help adopt and implement a soft law instrument on TRIPS (and Berne) and educational materials (akin to the Doha Declaration on the TRIPS Agreement and Public Health, adopted at the WTO Ministerial Conference in 2001) that encourages developing states to fully utilize the flexibilities provided for under TRIPS (and Berne), notably compulsory licenses and parallel imports *(facilitate)*.[348] Though the use of compulsory licenses beyond the Berne Appendix is not expressly dealt with in TRIPS (or Berne), developing states are not prohibited from using compulsory licenses beyond the Berne Appendix.[349] As for parallel

308-09 (Ricardo Meléndez-Ortiz & Pedro Roffe eds., 2009) ("provisions that make it easily and legally possible to adapt copyright material for non-profit markets[] would help serve to meet the needs of students").

346. Chon, *supra* note 332, at 838.

347. Berne Convention, *supra* note 333, art. 10(2); *see* Chon, *supra* note 332, at 837-39 (recommending that developing states adopt such a wide reading of Article 10(2) of the Berne Convention). *See also* ISIKO ŠTRBA, *supra* note 325, at 111-57, 163-64 (suggesting that elements of fair use should be combined with those of fair dealing to facilitate access to copyrighted materials for the purpose of education). The former U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, pointed out that "[i]nternational copyright instruments should be subject to human rights impact assessments," and that "[s]uch instruments should never impede the ability of States to adopt exceptions and limitations that reconcile copyright protection with . . . human rights, based on domestic circumstances." Shaheed, *Copyright Policy*, *supra* note 344, ¶¶ 94, 95.

348. *See, e.g.*, Melissa Staudinger, *A Textbook Version of the Doha Declaration: Editing the TRIPS Agreement to Establish Worldwide Education and Global Competition*, 55 INTELLEC. PROP. L. REV. 319, 358 (2015) ("[A] lack of education in a country constitutes a circumstance of extreme urgency . . . [justifying] . . . compulsory licenses for the distribution and reproduction of educational textbooks."). Again, note should be taken of *The 45 Adopted Recommendations under the WIPO Development Agenda*, *supra* note 344, emphasizing that "[i]n its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries" (Recommendation 17, also 22(d)).

349. *See* ISIKO ŠTRBA, *supra* note 325, at 157-64. Isiko Štrba proposes that "use of compulsory . . . licensing outside the provisions of the Berne Appendix is something developing countries could explore." *Id.* at 164.

imports, developing states should enact international exhaustion rules that would facilitate parallel imports of cheaper educational materials that pass muster under the provisions on fair use in other states.[350]

– WTO members should initiate, promote, and help realize reforms that enhance conformity between the WTO/TRIPS and international human rights law if need be through amendment of TRIPS itself *(facilitate)*.
– WTO members should initiate, promote, and help adopt and implement TRIPS safeguard policies that call upon WTO adjudicatory bodies to interpret TRIPS law in conformity with WTO members' obligations under international human rights law *(facilitate)*.

While TRIPS poses a threat to the right to education already, the situation becomes even more acute in practice as particularly developed states interpret TRIPS standards as minimum requirements allowing for enhanced levels of intellectual property protection. Bilateral or plurilateral free trade agreements concluded between developed and developing states on this premise may thus envisage even stricter copyright protection. Developing states are prepared to make sacrifices in fields such as copyright protection because they are eager to get access to markets abroad.[351] Morocco, for example, has concluded a free trade agreement with the United States containing various TRIPS-plus provisions.[352] The term of copyright protection is seventy rather than fifty years, parallel imports are not allowed, and more precise standards forbidding the circumvention of technological protection measures (TPMs) (digital works) are stipulated.[353] Free trade negotiations between the United States and the Southern

350. *See* Chon, *supra* note 332, at 839 (making this suggestion).

351. *See* Antoni Verger & Barbara van Paassen, *Human Development vis-à-vis Free Trade: Understanding Developing Countries' Positions in Trade Negotiations on Education and Intellectual Property Rights*, 20 REV. INT'L POL. ECON. 712, 735 (2013) ("[T]hey are willing to make 'concessions' in services and IPR issues if, in exchange, they get access to markets abroad.").

352. U.S.-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544 (2005) (entered into force Jan. 1, 2006).

353. *Id.* arts. 15.5.5, 15.5.2, 15.5.8. For critical comment on the Agreement, see Saïd Aghrib et al., *Morocco*, *in* ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT 126, 144-45 (Chris Armstrong et al. eds., 2010). Aghrib et al. observe: "The challenges connected to the US-Morocco FTA are numerous. In the field of knowledge/learning materials, Morocco's public education system is already fragile and sensitive to the price of foreign publications. The strengthening of copyright included in the agreement may, among other things, restrict access to these publications." *Id.* at 145.

African Customs Union stalled in 2006 because of the United States' extreme demands regarding intellectual property rights.[354] It also has been noted that "[t]he EU's charitable episode ended . . . which sets the scene for a new trend of agreements putting African countries on [a] similar footing [with] the rest of the world."[355] One may observe that "the ever increasing standards of protection on the regional and bilateral level erode the optional policy space on the multilateral level."[356] Moreover, as Peter Yu points out, these agreements also "force[] countries to divert scarce time, resources, energy, and attention from other international intergovernmental initiatives, including the development of the international human rights system."[357] They further lead to a fragmentation of the international regulatory system (the "famous" "spaghetti bowl"), with powerful states promoting such fragmentation to create "strategic inconsistencies" and putting pressure on what they consider unfavorable norms in the international human rights system.[358]

Annette Kur and Henning Grosse Ruse-Khan have harshly criticized endeavors to achieve ever-increasing levels of intellectual property protection through TRIPS-plus arrangements. They point out that, as a result of obligations within and outside international intellectual property law, "TRIPS . . . does not only create a 'floor' of minimum protection, but opens the door to ceilings which place a binding maximum level [on] the protection of IP."[359] As stated above,[360] "[s]tates must elaborate, interpret and apply relevant international agreements and standards in a manner

354. *See* Tobias Schonwetter et al., *South Africa*, *in* ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT, *supra* note 353, at 231, 249 ("[N]egotiations . . . have stalled, partly because of demands made by the United States in relation to broader intellectual property rights protection."). SACU members are Botswana, Lesotho, Namibia, South Africa, and Swaziland. *Id.* at 249 n.44.

355. Souheir Nadde-Phlix, *IP Protection in EU Free Trade Agreements vis-à-vis IP Negotiations in the WTO*, *in* EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? 133, 140 n.34 (Josef Drexl et al. eds., 2014).

356. Henning Grosse Ruse-Khan, *The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELLEC. PROP. L. 325, 364 (2011).

357. Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1089 (2012).

358. *Id.* at 1090-91.

359. Annette Kur & Henning Grosse Ruse-Khan, *Enough Is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection* 68 (Max Planck Inst. for Intellec. Prop., Comp. & Tax L., Research Paper Series No. 09-01, 2008) (footnote omitted).

360. See the discussion of GATS-plus arrangements *supra* Subsection IV-D.

consistent with their human rights obligations."[361] Prior and subsequent to their conclusion, therefore, free trade agreements should be subjected to human rights impact assessments, also in respect of their extraterritorial effects.[362] Bilateral or plurilateral free trade agreements seeking to regulate copyright protection must, therefore, be elaborated, interpreted, and applied so as to observe the right to education. Hence, by way of example, limitations must not be imposed on utilizing flexibilities available under TRIPS that could be relied on to safeguard access to educational materials. It should be assured that a broad construction of limitations and exceptions to copyright protection, a balanced interpretation of the three-step test, will be adopted. Individuals should enjoy protection against monopolistic prices for educational content being charged by foreign publishers operating locally. Infringements of copyright not occurring on a commercial scale should not be criminalized.[363] There must further be an obligation on dispute settlement tribunals to take into account contracting states' international human rights obligations. Apart from clear obligations to *respect* and *protect* the right to education discernible here, there are, accordingly, also obligations to *facilitate* its observance (*e.g.*, regular human rights impact assessments, inclusion of safeguard clauses, human rights-conform drafting and interpretation of agreements).

F. *Final Remarks*

The failure, in a globalized world, to add the missing dimension of extraterritorial state obligations under international human rights law will render human rights largely impotent. Whereas many states, on a

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361. MAASTRICHT PRINCIPLES, *supra* note 216, Principle 17 (International agreements). *See also supra* note 322 (CESCR's comments).

362. The CESCR has thus recommended to Switzerland that it "comply with its Covenant obligations and take into account its partner countries' obligations when negotiating and concluding trade and investment agreements. . . . The Committee also recommends that the State party undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party's partner countries of their economic, social and cultural rights. For example, the imposition by the State party of strict intellectual property protection that goes beyond the standards agreed upon in the World Trade Organization can adversely affect [human rights]." U.N. Comm. on Econ., Soc. and Cultural Rts. [CESCR], Concluding Observations on the Second and Third Periodic Reports of Switzerland, ¶ 24, U.N. Doc. E/C.12/CHE/CO/2-3 (Nov. 26, 2010). *See also supra* note 323 (what has been stated there applies *mutatis mutandis* here).

363. *See, e.g.*, RAMCHARAN, *supra* note 328, at 69 ("[Such criminalization] in particular heralds dramatically a loss of balance in the copyright regime as there is no moral consensus on the same.").

political level, reject the idea that human rights could apply extraterritorially,[364] they must be held to accept it indirectly. It has already been pointed out that the normative pronouncements of the U.N. human rights treaty bodies, notably their General Comments, must be seen to reflect a form of "state practice."[365] The latest General Comment issued by the CESCR in June 2017 on "State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" contains a whole section on "Extraterritorial Obligations."[366] It naturally may be asked why extraterritorial state obligations under international human rights law should enjoy precedence over potentially conflicting extraterritorial state obligations under, for example, the World Bank's constitution (*e.g.*, hypothetically, pure development versus human rights). Human rights must be held to enjoy such precedence both on a "constitutional" as well as on a more "classical" reading of public international law. In the former case, it is accepted that, quite beyond the concept of *ius cogens*, relations of superiority and inferiority exist between different norms of public international law, with human rights often viewed as superior.[367] In the latter case, the norms of international human rights law (as *lex specialis*) are principally considered to rank on a par with those of any other self-contained regime in international law (whether international finance, trade, or intellectual property law). However, even though special international law (*lex specialis*) may derogate from general international law (*lex generalis*), special international law still derives its general validity

364. *See* Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION, *supra* note 40, at 71, 77 (describing how the United States, Canada, and Western European states in the U.N. context have rejected the idea of extraterritorial human rights obligations).

365. *See supra* Subsection IV-A.

366. General Comment No. 24, *supra* note 147, ¶¶ 25-37.

367. It has thus been stated that "[a]lthough there is no single, fixed set of hierarchical relationships between the rules, principles and obligations of international law, this does not mean that relations of superiority and inferiority would be non-existent, only that what they are, cannot be determined in an abstract way, irrespective of the contexts in which some norms (rules, principles) are invoked against countervailing considerations. Although it is customary to deal with hierarchy in international law in terms of *jus cogens* norms and *erga omnes* obligations, it is not clear that those are the only – or indeed the practically most relevant – cases. . . . [T]here are other important rules." Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, ¶ 407, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006). Specifically regarding obligations *erga omnes*, it has been stated that "it seems best to consider human rights obligations generally as a class of *erga omnes* obligations." IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 145 (2001).

from general international law and may not contradict fundamental principles of legitimacy forming part of the latter. Many aspects of human rights constitute not only special law, but also have become legitimacy components in the structural edifice of general international law.[368]

However, once the concept of extraterritorial state obligations is accepted, it needs to be defined with sufficient clarity what these obligations entail for each human right, including the right to education, so as to be able to say whether a specific form of state conduct constitutes non-compliance with an extraterritorial state obligation and whether that would amount to a prima facie violation of human rights. The importance of a "violations" approach has been explained above.[369] Non-compliance with an extraterritorial state obligation that cannot be justified within the context of limited resources or as a "reasonable" measure in the circumstances must be held to constitute a human rights violation. Violations implicate a state's accountability.[370] They require access to an effective remedy,[371] which must be able to lead to reparation.[372] The question of remedies may seem complicated for extraterritorial state obligations. The Maastricht Principles require the state of conduct and the state of harm to cooperate in the provision of remedies.[373] The "innocent" state of harm may, in fact, under its own international human rights obligations, be obliged to seek redress on behalf of victims in appropriate cases.[374] The Maastricht Principles thus

368. *See, e.g.*, Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L. L. 483 (2006). "In strong regimes [such as WTO law], general international law . . . serve[s] as a source of legitimacy, while the rules of the regime provide the kind of operational effectiveness that advances the goals of the regime." *Id.* at 510. "[G]iven the centrality of human rights in 21st-century international relations, it is not surprising that the spirit of human rights has transcended these specific instruments, entering the formerly state-oriented area of 'general' international law." *Id.* at 524.

369. *See supra* note 190 ("violations" approach to economic, social, and cultural rights).

370. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 36 (Accountability). For commentary on Principle 36, see de Schutter et al., *supra* note 168, at 1159-60.

371. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 37 (General obligation to provide effective remedy). For commentary on Principle 37, see de Schutter et al., *supra* note 168, at 1160-64.

372. *See* MAASTRICHT PRINCIPLES, *supra* note 216, Principle 38 (Effective remedies and reparation). For commentary on Principle 38, see de Schutter et al., *supra* note 168, at 1164-65.

373. Principle 37(a) of the Maastricht Principles states that states should "seek co-operation and assistance from other concerned States where necessary to ensure a remedy." MAASTRICHT PRINCIPLES, *supra* note 216, Principle 37(a).

374. *See* de Schutter et al., *supra* note 168, at 1165-66.

underline the importance of states availing themselves of existing interstate complaints mechanisms.[375]

V. A Vision for the Future

In my view, the three courses of action outlined in this Article will go some way towards restoring faith in human rights, including the right to education, and reinstating such rights as a compelling moral category, globally and also in Africa. Accordingly, human rights need to be domesticized in the specific context in which they are to operate. The notion of "soft" relativism allows for global human rights norms to be adapted at the local level to gain acceptance there, but requires that such adaptation does not undermine the universal essence of human rights. Furthermore, the approach in terms of which "all we (whoever that is) need to do is try our best, over the next fifteen years or so, to satisfy certain human needs, without fearing any consequences in case we fail to achieve success" needs to be debunked in favor of a clear human rights or "violations" approach. Margot Solomon correctly holds:

> The MDGs [or now the SDGs] are not being achieved because they exist as a discrete humanitarian project rooted in the idea of collective good and shared responsibility, appended to the far grander economic project resting on a belief in individualized gain and minimal regulation. As a result, the MDGs [SDGs] were not set up to challenge structural inequality, nor to present economic alternatives, nor were they given any teeth with which to confront the demands of poverty reduction.[376]

Finally, it needs to be appreciated that, taking human rights seriously will have to entail the recognition of obligations of states under international human rights law to respect, protect, and fulfill human rights also beyond national borders. It is true that many questions regarding extraterritorial state obligations still need to be finally resolved: How far exactly does jurisdiction extend, and when consequently will a state be held accountable? When is there a *legal* obligation to provide assistance? How is responsibility to be apportioned in circumstances where

375. *See* Maastricht Principles, *supra* note 216, Principle 39 (Inter-State complaints mechanisms). For commentary on Principle 39, see de Schutter et al., *supra* note 168, at 1165-66.

376. Margot E. Salomon, *Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*, 51 German Y.B. Int'l L. 39, 72 (2008).

there is, as often is the case, more than one culprit?[377] Difficulties in finding answers to these questions should not thwart the essential acceptance of the notion of extraterritorial state obligations, however. The A.U.'s aspiration in its Agenda 2063 towards "[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law" perhaps may constitute the appropriate context for making human rights relevant on the African continent again and for adopting a perspective that incorporates a wider and more robust understanding of human rights, as advocated here. The battle for the right to education and other human rights is not lost. The age of human rights is not over yet. A renewed effort to fight for these rights is necessary. It is about time that Africans and others embark on the journey into a new human rights era.

377. *See* Malcolm Langford et al., *Introduction: An Emerging Field*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 3, 24-28 (Malcolm Langford et al. eds., 2013) (identifying these three "continuing puzzles").