

THE FORGOTTEN RIGHT TO CONTINUOUS IMPROVEMENT OF LIVING CONDITIONS IN ARTICLE 11(1) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SEEKING THE ROOTS OF THE RIGHT IN INTERNATIONAL LAW

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ABSTRACT

This article analyses the forgotten right to continuous improvement of living conditions in ICESCR Art 11(1), drawing on: the *travaux préparatoires*; the broader context of Twentieth Century international law; and the work of the Committee on Economic, Social and Cultural Rights. It argues that we can find nascent interpretations of the right, which provide a starting point for recovering this right into broader international legal discourse. These nascent interpretations, drawn from its roots in international law, prompt a reconsideration of the meaning of Article 11(1). They contribute new ways of thinking about old debates over economic, social and cultural rights as a whole, including different perspectives on the relationship between rights and development; the meaning of continuous improvement beyond economic growth; and human rights' potential contributions to human flourishing and to more sustainable ideas of what it means to be human.

I. INTRODUCTION

Over the last two decades, there has been a flowering of attention to economic and social rights.¹ These rights – particularly those in the International Covenant on Economic, Social and Cultural Rights² (ICESCR) – have been the subject of sustained attention and

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¹ Economic, social and cultural rights, socio-economic, and economic and social rights are used as interchangeable terms in this article.

² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 UNTS 3 [hereinafter ICESCR].

careful interpretation. Scholars, judges, activists, lawyers, policy makers, UN Experts and the staff of International and Regional Organizations have been engaged in work on, about, and through them. But there is a notable exception: the right to the continuous improvement of living conditions, in Article 11(1) of ICESCR. This right has seldom been mentioned, let alone been the subject of sustained interpretation or consideration.

This article aims to make a first step in remedying this lack of attention, arguing that the right prompts us to reconsider the meaning of Article 11(1), and the debates over economic, social and cultural rights as a whole; offers new perspectives on the relationship between rights and development; and helps us reassess human rights' potential contributions to human flourishing. The article draws on the *travaux préparatoires*, the broader context of Twentieth Century international law, and the approach of the Committee on Economic, Social and Cultural Rights to consider the nascent interpretation of the right, and its roots in international law, and suggest how it can be further elaborated to respond to pressing global problems of inequality and unsustainability.

Article 11(1) enshrines a right to an adequate standard of living in the following terms:

The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, *and to the continuous improvement of living conditions*. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.³

Article 11(1) has been interpreted as an umbrella for a number of separate rights. In particular, food and housing have received significant attention,⁴ as has an implied right to

³ *Id.* Art. 11(1) (emphasis added).

⁴ On the right to food, *see, e.g.*, CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, UN Doc. E/C.12/1999/5 (May 12 1999); THE RIGHT TO FOOD IN THEORY AND PRACTICE (Food and Agriculture Organization of the United Nations, ed., 1998); BEN SAUL, DAVID KINLEY & JAQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 867-923 (2004); OHCHR, Special Rapporteur on the Right to food, <https://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> (last visited Aug. 9, 2019). On the right to housing, *see, e.g.*, CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23 (Dec. 13 1991); CESCR, *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, E/1998/22 (1997); OHCHR, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this context, <https://www.ohchr.org/en/issues/housing/pages/housingindex.aspx> (last visited Aug. 9, 2019); JESSIE

water.⁵ The final sentence of the right elaborates state obligations for realizing the right, including the necessity of action taken in concert, beyond national borders. However, the last clause of the first sentence – the right to the continuous improvement of living conditions – has been largely ignored. It is rarely treated as a stand-alone right, and when mentioned, its normative content and its implications have been little discussed.

Explicit academic and scholarly attention to the right has been limited to date (at least in the English language materials on which this study draws). This is the case in the major works, many of which should be otherwise commended for their thoughtful and rigorous interpretation and analysis of Article 11. For example, a leading Commentary on the ICESCR mentions the right only in a few sentences, and does not engage at all with its content, scope or meaning.⁶ Major texts on economic, social and cultural rights also fail to engage in a sustained way with this clause,⁷ and more general texts on human rights have overlooked it.⁸ Even those authors who have focused specifically on the right to an adequate standard of living, who have otherwise done much to advance understanding of Article 11, regularly omit any consideration of it. For example, Asbjørn Eide, who remains a leading expert on the right to an adequate standard of living, has not referred to it as a substantive head of Article

HOHMANN, THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES (2013). Although the right to clothing has received little attention from the CESCR or other UN actors, there has been some engagement with it: *see, e.g.*, Stephen James, *A Forgotten Right? The Right to Clothing in the Universal Declaration of Human Rights*, (2008), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.615.860&rep=rep1&type=pdf#page=14> (last visited Feb. 7, 2020); Arianne Shahvisi, Enguday Meskele & Gail Davey, *A Human Right to Shoes? Establishing Rights and Duties in the Prevention and Treatment of Podoconiosis*, 20 Health & H.R.J 53 (2018). SAUL, ET AL., *supra*, at 924–27.

⁵ *See, e.g.*, CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, E/C.12/2002/11 (Jan. 20 2003); THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS (Malcolm Langford & Anna F.S. Russell, eds., 2017); INGA WINKLER, THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION (2012); THE HUMAN RIGHT TO WATER: FROM CONCEPT TO REALITY (Nandita Singh ed., 2016); TAKELE SOBOKO BULTO, THE EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN AFRICA (2014).

⁶ SAUL, ET AL., *supra* note 4 at 862–63.

⁷ *See, e.g.*, MANISULI SSENIONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (6th ed. 2016) (devoting a chapter to the right to an adequate standard of living, but not discussing the right to continuous improvement of living conditions as a substantive aspect); PAUL O'CONNELL, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES (2012) (considering both international and national standards); JOE WILLS, CONTESTING WORLD ORDER? SOCIOECONOMIC RIGHTS AND GLOBAL JUSTICE MOVEMENTS (2017) (engaging counter-hegemonic potentials of the human right to an adequate standard of living, especially food, access to medicines and water but not invoking the right).

⁸ Neither Steiner and Alston's ground-breaking *International Human Rights in Context* nor its successor, engage with the right. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (1996); PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS (2012). It is also omitted from Olivier De Schutter's exacting texts. *See* OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS AND COMMENTARY (2010); OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS AND COMMENTARY (2nd ed. 2014).

11.⁹ Moreover, a number of important works on the link between human rights and development, a logical area in which to initiate a discussion, particularly given the definition of development as “the right of all peoples and individuals to the constant improvement of their well-being”¹⁰ – do not engage with the right.¹¹

There are important, if limited, exceptions to this neglect. Matthew Craven, an early commentator on the ICESCR, included discussion of the drafting history of the clause in his authoritative text, and Hans Morten Haugen includes a short, but specific, analysis, concluding that continuous improvement of living conditions is only an element of the right to an adequate standard of living, rather than a substantive right like food, clothing or housing.¹² His analysis is based on the grammar of the clause, read in conjunction with the fact that the right “has never appeared in the literature as a substantive human right.”¹³ Margot Solomon engages with the right in critiquing minimalist approaches to economic, social and cultural rights.¹⁴ Finally, the United Nations Independent Expert on Foreign Debt and Human Rights has begun to engage with the right in the context of mass consumption and the failure of exponential economic growth to fulfil human rights.¹⁵

There are a number of reasons why human rights scholars, advocates or researchers may have focused their attention elsewhere. The right to the continuous improvement of living conditions appears almost lewd and certainly provocative in the current moment – an invitation for empowered rights claimants to ask for bigger houses, more pairs of shoes, and

⁹ Asbjørn Eide, *Adequate Standard of Living*, in INTERNATIONAL HUMAN RIGHTS LAW 195, 195 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds., 2nd ed. 2014) (writing “[t]his chapter considers the right to an adequate standard of living and its components, namely, the rights to food, housing and health.”).

¹⁰ UNHRC, *Right to Development: Report of the High-level Task Force on the Implementation of the Right to Development on its Sixth Session*, UN Doc. A/ HRC/15/WG.2/TF/2/Add.2., Annex, Implementation of the Right to Development: Attributes, Criteria, Sub-criteria and Indicators, 8 (Mar. 8 2010).

¹¹ See, e.g., HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson, eds., 2005). Arne Vanderbogaerde argues that all elements of a right to development are already present in international human rights. While invoking the definition of the High-level Task Force, *supra* note 10, he makes no reference to the right to continuous improvement under ICESCR, and only passing reference to the right to an adequate standard of living. All discussion of improvement is seen through the lens of Article 2(1)’s obligation of progressive realisation. See Arne Vanderbogaerde, *The Right to Development in International Human Rights Law: A Call for its Dissolution*, 21 N.Q.H.R 187, 197 (2013).

¹² MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (1995) at 94-5; HANS MORTEN HAUGEN, THE RIGHT TO FOOD AND THE TRIPS AGREEMENT: WITH A PARTICULAR EMPHASIS ON DEVELOPING COUNTRIES’ MEASURES FOR FOOD PRODUCTION AND DISTRIBUTION, 122-23 (2007).

¹³ *Id.* at 122.

¹⁴ Margot Solomon, *Why Should it matter that Others have more? Poverty, Inequality, and the Potential of International Human Rights Law*, 37 REV. INT’L STUD. 2137 (2011).

¹⁵ See UNOHCHR, End of Mission Statement by the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights, Juan Pablo Bohoslavsky, on his Visit to Bolivia (6-15 May 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24607&LangID=E> (last visited Aug. 9 2019).

luxury lifestyles while many live without the bare minimum of shelter, food, or healthcare. Many involved in human rights advocacy and activism see little room for optimism, and the hopeful tone of the mid-twentieth century, captured in the United Nations' Charter, the International Bill of Rights, and other multilateral instruments seems naïve and outdated. Poverty has not been eliminated, and while economic development has occurred, inequality has increased.¹⁶ The unsustainable exploitation, despoliation and degradation of the natural world has left the planet polluted, and on the brink of climate catastrophe.¹⁷ A right that suggests that each person deserves more sounds like an assertion of greed and hubris.

But examining the right, and its meaning and potential is important precisely because it can offer us new insights into these pressing global problems. While the right to continuous improvement of living conditions appears on its surface to accord with the promise of a system based on unsustainable and never-ending economic growth, it is precisely the failure of our current economic, political and social arrangements that cast doubt on our capacity to realize it. Considering this right and rehabilitating it into the human rights corpus sheds light on the relationship between economic development and rights, conceived at the time of the ICESCR's drafting, and the descent of that intertwined project into competing paradigms.

Considering the right to continuous improvement of living conditions also has the potential to shed new light on the vexed debate on the role of rights in redistribution and equality, both within and beyond state borders.¹⁸ These are topics of ongoing concern, which have taken on a more pressing cast in a current global climate of protectionist economic policies, retreat from multilateralism, and apparent loss of faith in international institutions.¹⁹ For these reasons, the right provokes us to ask more searchingly what constitutes a better life, and the role of rights in achieving it.

¹⁶ UNDP, HUMAN DEVELOPMENT REPORT 2019: BEYOND INCOME, BEYOND AVERAGES, BEYOND TODAY: INEQUALITIES IN HUMAN DEVELOPMENT IN THE 21ST CENTURY (2019) which notes that 'disparities are widening' despite numbers lifted out of destitution at 30. See also *id.*, Ch 1 more generally.

¹⁷ IPCC, *Summary for Policymakers* in GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY (Masson-Demotte et. al., eds 2018).

¹⁸ See e.g., JOHN LINARELLI, MARGOT E. SOLOMON & MUTHUCUMARASWAMY SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018); Julia Dehm, *Highlighting Inequalities in the Histories of Human Rights: Contestations over Justice, Needs and Rights in the 1970s*, 31 LEIDEN J INTL L. 871 (2018); Philip Alston, *Universal Basic Income as a Social Rights-Based Antidote to Growing Economic Insecurity*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 377 (Katherine G. Young, ed., 2019); ECONOMIC AND SOCIAL RIGHTS IN A NEOLIBERAL WORLD (Gillian MacNaughton & Diana Frey, eds., 2018); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); Andrew Fagan, *The Gentrification of Human Rights*, 41 HRQ 283 (2019).

¹⁹ See, e.g., Jean Galbraith, *Trump Administration Announces Withdrawal from Four International Agreements* 112 AJIL 131, 132-135 (2019) (discussing recent United States practice which evidences this trend).

As the analysis in this article suggests, the right might offer something qualitatively different to, and not merely an aggregate of, rights to housing, water, food and clothing. It might capture something different and irreducible to those separate rights, and illuminate the gaps between them, as well as how they relate to one another. It might help us to value and care for things, concepts or ways of living that are not captured in any of these substantive categories, but are still precious or necessary to a good existence and an adequate standard of living.

This broader discussion about the role of rights in a good or decent life is a longstanding one, but focusing on this question through the right to continuous improvement of living conditions has the capacity to move us beyond a stale debate and to prompt reconsideration of what the improvement of living conditions would – or could – look like in the face of our global challenges. It has the potential to counter the reductionist position that global soft targets – such as the Sustainable Development Goals – have been critiqued for,²⁰ and the reactive and minimalist responses that economic and social rights have been charged with assuming.²¹ As well as providing an analysis of the right itself, this article therefore makes a contribution to a number of ongoing debates about the purposes and power of human rights in the contemporary global order.

The following section of the article (Part II) draws on primary and secondary legal sources in international law, and analyses the nascent interpretation of the right to continuous improvement of living conditions found in them. It begins (Part II A) with an analysis of the *travaux préparatoires* of the ICESCR, through which Article 11(1) was birthed. An analysis of the broader human rights instruments of the Twentieth Century follows (Part II B), which contextualizes and situates the right within a broader international project. The next section (Part II C) examines the work of the Committee on Economic, Social and Cultural Rights (CESCR), which interprets and monitors state compliance with ICESCR. It examines: the CESCR's Concluding Observations on state reports, as well as states reports themselves, as an insight into both state practice and *opinio juris*; the CESCR's General Comments, which

²⁰ See, e.g., Sakiko Fukuda-Parr & Desmond McNeill, *Knowledge and Politics in Setting and Measuring the SDGs: Introduction to Special Issue*, Vol 10 GLOBAL POLICY, SUP 1, 5, 10-13 (2019) (discussing slippage of ambition and vision in the SDG adoption process). See also, Danilo De La Rosa Reyes, *The Sustainable Development Goals and the Dangers of Policy Reductionism*, 9 INT. J POLICY STUD. 23 (2018).

²¹ MOYN, *supra* note 18 (positing that socio-economic rights are concerned with limited safety nets or mere 'sufficiency' rather than human flourishing or equality); Solomon, *supra* note 14 (critiquing the minimal interpretation of ICESCR rights by the CESCR); Aoife Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 4 E.H.R.L.R. 360, 369 (2015) (characterising the CESCR's response to the 2007 Global Financial Crisis as reluctant); see also Ben T.C. Warwick, *A Hierarchy of Comfort? The CESCR's Approach to the 2008 Economic Crisis*, in MacNaughton & Frey, *supra* note 18.

constitute authoritative – if generally soft-law – statements on the meaning, scope and normative content of the ICESCR rights; the CESCR’s Reporting Guidelines; and its Open Letters and Occasional Statements, which further evidence its approach to the rights, and to states’ parties obligations under ICESCR. The final section (Part III) concludes the article with a call for further research and serious engagement with the right to continuous improvement of living conditions, in order to harness the potential of this forgotten right in rethinking what improved living conditions might look like in light of our pressing global challenges.

In drawing out this nascent interpretation of the right, the article begins to flesh out what such a right might mean, and how it might be understood on a theoretical, practical and philosophical level. It also begins to set out a research agenda for a right to continuous improvement of living conditions that responds to growing inequality, our unsustainable impacts on the planet, and our narrow metrics of what constitutes a better life. Considering and seeking to embed this right into human rights in a way that responds meaningfully to these problems offers a potential break from a never-ending economic growth model to more sustainable ideas of what it means to be human. This paper offers a first step in that direction.

II. SOURCES FOR INTERPRETING THE RIGHT IN INTERNATIONAL LAW

A. DRAFTING HISTORY – THE TRAVAUX PRÉPARATOIRES OF ICESCR

The *travaux préparatoires* of the international bill of rights allow us to see the debates that attended the birth of the right to continuous improvement of living conditions into the ICESCR.

On May 2 1951, at the United Nations 222nd meeting of the Seventh Session of the Commission on Human Rights, the United States’ delegate, Mrs. Roosevelt, introduced a proposed article to the International Covenant on Human Rights:

The States Parties to this Covenant recognize the right of everyone to improved standards of living including adequate housing²²

Thus, in its embryonic form, the right that eventually became ICESCR Article 11(1) was a right to improved living conditions, which were expressed as requiring adequate housing. This proposed right is further contextualized by the Australian delegate's proposal for an "adequate standard of living" which had prevailed over the United States' proposal for "improved standards of living."²³ But improvement was still on the agenda. It was Mr. Jevremovic, the Yugoslavian delegate, who introduced the word "continuous" to the debate. He favored a provision which would have two elements: first, the recognition of the "right to a standard of living worthy of man",²⁴ and second, "the need for continuous improvement in that respect."²⁵ He reasoned that including the words "to the continuous improvement of living conditions" would result in a "dynamic" article.²⁶

After some further debate, and a number of further proposals, the chair, Lebanon's Charles Malik, put the issue to a vote, and it was adopted by six votes in favor, five against, and seven abstentions.²⁷ The phrase "and to the continuous improvement of living conditions" was included in the right to an adequate standard of living by only the narrowest of margins, although when the whole text of the provision was voted on only minutes later, fourteen voted in favor, none against, and four abstained on:

The State parties to this Covenant recognize that everyone has the right to an adequate standard of living and the continuous improvement of living conditions.²⁸

This initial draft invites us to see the impetus for Article 11(1) afresh: as concerned *at its core* with improvement of standards of living for everyone as a right. This reverses the current

²² ECOSOC, *Draft International Covenant on Human Rights and Measures for Implementation: Revised Proposal on Provisions Concerning Women and Children*, UN Doc. E/CN.4/582 (Apr. 30 1951), as quoted in ECOSOC, Commission on Human Rights, 7th Session: Summary Record of the 222nd Meeting E/CN.4/SR.222 at 16 (June 8 1951).

²³ See E/CN.4/AC.14/2/Add 3 for the Australian Proposal; E/CN.4/582, *supra* note 22, for the U.S. proposal. The discussion is recorded in E/CN.4/SR.222, *supra* note 22 at 16-17.

²⁴ E/CN.4/SR.222, *supra* note 22 at 20.

²⁵ *Id.*

²⁶ ECOSOC, Commission on Human Rights Seventh Session: Summary Records of the 223rd Meeting, UN Doc. E/CN.4/SR.223, at 2 (June 13 1951).

²⁷ *Id.* at 8.

²⁸ *Id.*

onus on a list of social goods – housing, food, clothing – as of primary concern, suggesting that the right had a more developmental and forward moving impetus than is now generally understood.

However, this does not mean that a right to the continuous improvement of living conditions was uncontroversial during the drafting of ICESCR. In fact, delegates raised a number of important questions for understanding both the right, and the obligations it would raise for states. For instance, who are the relevant right holders? Under what parameters can the right be fulfilled? How can its content or scope be ascertained? These questions remain relevant to our interpretation and understanding of the right today.

i. The base line: from what is improvement measured?

To begin with, delegates queried the base-line from which improvement would be measured. The Guatemalan delegate, Mr. Dupont-Willemin, objected to the inclusion of the word “*meilleur*” (“better”) in the French text of the U.S. proposal because of the comparative implications: he noted that it “would be necessary to specify what was to be used as the basis for comparison.”²⁹ The U.S. delegate responded that “by ‘improved standards of living’ she meant standards better than those obtaining at the present time.”³⁰ The response seems obtuse: the Guatemalan delegate in fact raised a question in which were couched a number of issues that remain unanswered: *whose* living standards, *where*, should be taken as the base from which continuous improvement be calculated? Even if the right is understood as collective, rather than individual – a reading not borne out by the text of the Convention – the question remains a relevant one.

The Uruguayan delegate, Mr. Ciasullo, also expressed some discomfort with pegging the right to existing living standards, and preferred an “entirely neutral” assertion such as only to the right to an adequate standard of living.³¹ This, however, ignores the subjectivity, and the contextual and evolutionary nature, of the concept of adequacy, as the Greek delegate, Mr. Eustathiades, noted.³² Chile’s delegate, Mr. Valenzuela, thought there were “so many widely differing standards in the world that it was difficult to say which of them everyone should have the right to enjoy,” and that the aim “should be to improve living

²⁹ E/CN.4/SR.222, *supra* note 22 at 17.

³⁰ *Id.*

³¹ *Id.*

³² E/CN.4/SR.223, *supra* note 26 at 8.

conditions in accordance with the economic capabilities of each state.”³³ These questions still motivate pressing debates over the role of socio-economic rights in responding to relational aspects of injustice and inequality both within and beyond state borders.³⁴ The ongoing nature of these debates give us further impetus to understand what the right means, and how it can be meaningfully interpreted.

ii. *Who is the subject of the right?*

A second question concerns who the rights holder is. The UK delegate, Miss Bowie, pointed out that “everyone” would not necessarily be an appropriate category given that a minority of people in the world already enjoyed an adequate “if not an excessively high” standard of living.³⁵ For this reason, she suggested the Covenant should follow the wording in Art 25(1) of the Universal Declaration of Human Rights (UDHR), which lacks a clause on improvement or forward progress.³⁶ A number of years later, at the General Assembly’s 1957 discussions of the Third Committee, the Belgian Representative Mr. Delhye raised a similar objection, arguing that “the primary aim should be to improve the living conditions of the most under-privileged; persons outside that category could hardly claim, at the current stage, to have a right to continuous improvement of their living conditions.”³⁷ However, he continued, he could accept the article as framed, since the Covenant looked to the “very long-term”,³⁸ signifying that he could envisage a future world in which the right would be universally applicable.

Accordingly, it is clear that a more limited reading – of a right to continuous improvement of living conditions only for the most deprived – was not endorsed in either forum, but that does not exhaust the issue of whether the right should apply only to those falling below a certain minimum standard of living, particularly in the short term, and in light

³³ E/CN.4/SR.222, *supra* note 22 at 19.

³⁴ See e.g., Susan Marks, *Human Rights and the Bottom Billion* 1 E.H.R.L.R. 37 (2009); Solomon, *supra* note 14; THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2nd ed., 2008); Dehm, *supra* note 18; LINARELLI ET AL., *supra* note 18.

³⁵ E/CN.4/SR.222, *supra* note 22 at 17.

³⁶ *Id.* UDHR Art. 25(1) states:

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

G.A. Res. 217 (III) A. (Dec. 10 1948).

³⁷ G.A. 11th Session Third Committee, A/C.3/SR.743 (Jan. 28 1957) at 309 § 8.

³⁸ *Id.*

of the obligations set out in Article 2(1) of the ICESCR. A minimal approach would have the advantage of providing a social protection floor.³⁹ This is the understanding argued to underpin the CESCR's current "minimum core" approach to violations.⁴⁰ It also has the potential to concentrate resources where they are needed the most in the short term, and to redress the worst deprivations in a profoundly unequal and unfair world. But such a minimal understanding also introduces limitations, as pointed out by Margot Solomon. Is it sufficient, she asks, that a minimum standards approach be the basis for compliance with human rights, such that "a marginally tolerable life nonetheless passes the human rights test"?⁴¹

It is also clear that on a plain text reading the right applies to *everyone*. This of course introduces issues of its own, which are also related to questions of the base line, raised above. How could it be just that people who already enjoy safe and adequate housing, sufficient healthy food, decent work, and good health care are entitled to *more*, when millions are living in hunger, are homeless, suffer from disease, or are exploited in dangerous and unhealthy livelihoods? As Dennis and Stewart note, "a strict reading" of Article 11(1) suggests that "the rich are entitled to the continuous improvement of living conditions as much as anyone else."⁴² These are pressing questions, but rather than being insurmountable problems, they instead open up opportunities for rethinking what count as "better living conditions." For example, considering living conditions that move beyond rampantly unsustainable market practices of accumulation and consumerism, thinking about the ecological parameters for a good life, engaging Indigenous world views that have been side-lined,⁴³ and harnessing ideas of how neighborly, inclusive or conducive to happiness our modes of living are.⁴⁴ These

³⁹ ILO, World Social Protection Report 2017-19: Universal Social Protection to Achieve the Sustainable Development Goals (2017) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_604882.pdf (last visited Aug. 12 2019). See also, ILO, Social Protection Floor for a Fair and Inclusive Globalization: Report of the Advisory Group chaired by Michelle Bachelet, (Oct. 2011) http://www.oit.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/article/wcms_166486.pdf (last visited Aug. 12 2019); SPECIFYING AND SECURING A SOCIAL MINIMUM IN THE BATTLE AGAINST POVERTY (Toomas Kotkas, Ingrid Leijten & Frans Pennings, eds., 2019).

⁴⁰ See e.g., Solomon, *supra* note 14.

⁴¹ *Id.* at 2143.

⁴² Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?*, 98 AJIL 462 at note 221 (2004).

⁴³ See, e.g., JERRY MANDER & VICTORIA TAULI-CORPUZ, PARADIGM WARS: INDIGENOUS PEOPLES' RESISTANCE TO GLOBALIZATION (2006); INTERNATIONAL FORUM ON GLOBALIZATION, ALTERNATIVES TO ECONOMIC GLOBALIZATION: A BETTER WORLD IS POSSIBLE (2002); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (2nd ed., 2011) vii – viii and more generally; RAJ PATEL & JASON MOORE, A HISTORY OF THE WORLD IN SEVEN CHEAP THINGS: A GUIDE TO CAPITALISM, NATURE AND THE FUTURE OF THE PLANET, at 202–12; UN Expert on Foreign Debt, *supra* note 15;

⁴⁴ See e.g., UNGA Resolution adopted by the General Assembly on 28 June 2012 International Day of Happiness A/Res/66/281 (recognising "the need for a more inclusive, equitable and balanced approach to economic growth that promotes sustainable development, poverty eradication, happiness and the well-being of

alternative ways of thinking can guide us in reimagining not only the right, but the broader global order within which it sits.

iii. *Right versus obligation*

While a *right* might apply to each individual, state obligations may be different for differently situated people. So, while the right to continuous improvement of living conditions may be held by every person, it may be the case, as Haugen notes, that obligations for it “must be observed particularly with regard to the most vulnerable.”⁴⁵ This raises questions of the relationship between a right to continuous improvement of living conditions and the obligation of progressive realization under ICESCR Article 2(1). The *travaux* clearly demonstrate that the right to continuous improvement in Article 11(1) is distinct from the question of obligations in Article 2(1). For example, when the Human Rights Commission met in 1951–52 to consider the inclusion of provisions relating to the implementation of and limitations to economic and social rights, it was clear that debate on the concepts of the obligations to take steps; to use all available resources; and to progressively realize, were considered as separate to the issue of the continuous improvement of living conditions as a substantive right.⁴⁶ In discussions over the “umbrella” clause on obligations, the right was discussed as a preambular matter, not a qualifier of obligations as were these later issues.⁴⁷

Nevertheless, the drafting history does demonstrate their closely intertwined nature. An early proposal for an obligations clause, discussed in 1951, included three preambular paragraphs to frame the fourth, substantive obligation in the following terms:

States parties ...

all peoples”) JENNIFER NEDELSKY & TOM MALLESON, *A CARE MANIFESTO: PART-TIME FOR ALL*, Introduction (forthcoming 2021) [introduction on file with author] (arguing in favour of mandatory balance between paid and unpaid (care or volunteer) work for all; ANN STEWART, *GENDER, LAW AND JUSTICE IN A GLOBAL MARKET* (2012); John Helliwell, Richard Layard & Jeffrey Sachs, *WORLD HAPPINESS REPORT* (2018) (questioning the relationship between material wealth and happiness, and provoking engagement with happiness as a value for economic, social and political organization).

⁴⁵ HAUGEN, *supra* note 12 at 123.

⁴⁶ ECOSOC, Commission on Human Rights, 7th Session: Summary Record of the 236th Meeting UN Doc. E/CN.4/SR.236 (May 10 1951). See also 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, 229 (1987) generally, and in particular Annex 1, on the drafting history of Art 2(1), at 223-29.

⁴⁷ ECOSOC, Commission on Human Rights, 7th Session: Summary Record of the 612th Meeting UN Doc. E/CN.4/612 (May 5 1951), as amended by ECOSOC, Commission on Human Rights, 7th Session: Summary Record of the 615th Meeting UN Doc. E/CN.4/615 (May 8 1951); see also the discussion of this point in Alston & Quinn, *Id.*

[3]. resolved to strive to ensure that every human being shall obtain the food, clothing and shelter essential for his livelihood and well-being, and shall achieve an adequate standard of living and a continuous improvement of his living conditions;

[4]. Undertake, in accordance with their organisation and resources, to take steps, individually or through international co-operation, by legislative measures or other methods with a view to achieving progressively the full realisation of the rights recognised in this part of the Covenant.⁴⁸

This construction was not accepted as part of the proposal adopted by the Committee on Human Rights,⁴⁹ and was not rehabilitated during debates before the Third Committee. During those later debates before the Third Committee, it appeared generally accepted, as voiced by the Saudi delegate, Mr. Baroody, that “the idea of a continuous improvement of living conditions was entirely consistent with the principle of progressive realization of economic and social rights.”⁵⁰ This has generally been accepted as the case,⁵¹ but the relationship between a *right* to continuous improvement of living conditions, and an *obligation* of progressive realization, including: the concepts of taking steps; use of maximum available resources; retrogression (or backward steps); and economic and technical cooperation, are deserving of further attention and should prompt further research in this area.

iv. *Continuous improvement: what are the end points of the right?*

A further complicating factor in understanding the right concerns the nature of *continuous* improvement. The Chilean delegate to the Commission on Human Rights Seventh Session, Mr. Valenzuela, noted that long-term economic plans in some states might necessitate a drop in living conditions in the short term, and harm progress towards the

⁴⁸ E/CN.4/612, *supra* as amended by UN Doc E/CN.4/615, *supra*.

⁴⁹ See UN Doc. E/CN.4/SR.618 (1951) and 13 UN ESCOR Sup (no 9), UN Doc E/1992 (1951).

⁵⁰ GA, 11th Session, Third Committee, 739th Meeting UN Doc. A/C.3/SR.739, at 293 § 6 (Jan. 23 1957).

⁵¹ See e.g., CRAVEN, *supra* note 12 at 294; Peter Bailey, *The Right to an Adequate Standard of Living: New Issues for Australian Law*, 4 A.J.H.R 14, 16 (1997); but see Olivier De Schutter, *Economic, Social and Cultural Rights: An Introduction*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS (Olivier De Schutter, ed., 2013) for a careful analysis of the intersections between different obligations to progress under ICESCR, and the right to an adequate standard of living (although without explicit reference to the a right to continuous improvement of living conditions).

overall improvement of living conditions “if not of contemporary workers, at least of their children.”⁵² Interestingly, the Iranian delegate, Mr. Massoud-Ansari, speaking before the General Assembly Third Committee in 1957, also noted barriers to continuous improvement in the policies of various states, for instance restrictions on the right to property, and the progressive taxation of income.⁵³ Would these be in accordance with the provision on the continuous improvement of living conditions? These issues raise the question of what policies states can permissibly take to fulfil a right to the continuous improvement of living conditions. A number of these questions also pertain to the obligation of progressive realization, and motivate ongoing debates over economic and social rights more broadly,⁵⁴ though they cannot be reduced to them, as they pertain to the content and scope of the right, rather than only to a state’s obligation to “take steps”.

More fundamentally, the question directs us to inquire into the end-points of human rights. When, if ever, is a human right to continuous improvement of living conditions fulfilled? And what are the consequences of the answer in a finite world? These problems shrink, at least, though may not disappear, if we understand improvement of living conditions not as solely or primarily economic, or even material, in nature. A fuller understanding of what an adequate standard of living entails might rest not on increased income or goods for all, though these might be necessary for the fulfilment of the right for many, but the measurement of a standard of living might actually mean less – less work, or lucrative and dignified work shared more equally, increased time for care, more leisure time or family time.⁵⁵ It might rest on a fuller understanding of social reproduction and its role in the

⁵² E/CN.4/SR.222, *supra* note 22 at 19.

⁵³ GA 11th Session, Third Committee, 741st Meeting, UN Doc. A/C.3/SR.741 § 1 (Jan. 24 1957).

⁵⁴ *See*, on the obligation of progressive realization, CESCR, *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ Under an Optional Protocol to the Covenant*, UN Doc. E/C.12/2007/1 (Sept. 21 2007); CESCR, *Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, Reference CESCR/48th/SP/MAB/SW (May 16 2012); A. Nolan, N.J. Lusiani & C. Courtis ‘Two Steps Forward, No Steps Back? Evolving Criteria on The Prohibition of Retrogression in Economic and Social Rights’ in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* (A. Nolan ed., 2014); *See also* the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13 (Oct. 2 2000). On immediate obligations *see* E/C.12/2007/1, *supra* at § 7; UN CESCR *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para 1, of the Covenant)*, UN Doc. E/1991/23 § 10 (Dec. 14 1990); *See also* MAGDALENA SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2003) De Schutter, *supra* note 51. On conceptualising a minimum core *see* Katharine Young, *The Minimum Core of Economic and Social Rights: a Concept in Search of Content*, 33 YALE J. INT’L L. 113 (2008); David Landau, *The Promise of a Minimum Core Approach: The Colombian model for judicial Review of Austerity Measures*, in Nolan, *supra*.

⁵⁵ *See*, on part time work and the value of unpaid contributions to the community NEDELSKY & MALLESON *supra* note 44; on ideas of basic income as a response to precarious and poorly regulated work and growing inequality *see* Philip Alston’s, *Report of the Special Rapporteur on extreme poverty and human rights, Report to*

adequate standard of living, and fuller acknowledgement of it, for example.⁵⁶ Again, these questions point both to practical problems, and to the power of the right to engage our thinking in creative and productive ways in the face of global challenges.

B. BROADER CONTEXT OF TWENTIETH CENTURY INTERNATIONAL LAW

While the right to continuous improvement of living conditions has become a marginal right, continuous improvement of living conditions is not a marginal concern in twentieth century international law. In this section, I show that the presumption that a main goal for states was to continuously improve living conditions through, or by the realization, of rights was a familiar one for international organizations and institutions during the Twentieth Century.

In fact, the right to continuous improvement of living conditions was axiomatic in a broader, social justice-regarding, international framework, as a close reading of a number of international and regional instruments shows. Analyzing these international legal sources, we can see that some frame better standards of living as necessary underpinnings for the realization of rights. On the converse, some express the purpose of a human right as enabling a better life. Some see human rights and improved standards of living as *inherently* intertwined. Continuous improvement of living conditions and the equitable distribution of the world's resources are, therefore, "part of a much larger post-1945 international effort to situate the eradication of material deprivation within a process of human-centred development."⁵⁷ A right to continuous improvement is certainly the most explicit link between human rights and improvement of living conditions, making this a right itself, but it is a small – if important – further step when viewed within this broader context, as this section now turns to discuss.

i. Rights and/or Development?

the Human Rights Council Thirty-Fifth Session, UN Doc. A/HRC/35/26, 5-6 (Mar. 22 2017); on valuing care and social reproduction within the law see Beth Goldblatt & Shirin M. Rai, *Recognizing the Full Costs of Care? Compensation for Families in South Africa's Silicosis Class Action*, 26 SOC. & LEG'L STUD. 671 (2018).

⁵⁶ See, e.g., STEWART, *supra* note 44; WOMEN'S RIGHTS TO SOCIAL SECURITY AND SOCIAL PROTECTION (Beth Goldblatt & Lucie Lamarche, eds., 2014); BEYOND STATES AND MARKETS: THE CHALLENGES OF SOCIAL REPRODUCTION (Isabella Bakker & Rachel Silvey, eds., 2008).

⁵⁷ Solomon, *supra* note 14 at 2152.

As an initial point, however, we need to tackle the assumption that human rights and improvement of living conditions came together only in the 1980s, in a shift in development thinking (though as is clear from the examination and analysis of the *travaux préparatoires*, in the section above, the concept of development does not exhaust the concept of improvement of living conditions). Mainstream approaches to the relationship between rights and development tend to posit that they are two distinct spheres, based on different principles, and often operating in tension with each other; as a consequence, a dominant characteristic of this debate has been to situate the concept of rights *versus* development.⁵⁸ Much scholarship on the relationship between improvement of living conditions through development, and human rights, suggests that the link was first forged in the 1980s. This, it is argued, occurred with the “new” interest of international development organizations and international financial institutions in poverty; the shift from overall economic development to human development or development economics; the United Nations General Assembly 1986 Declaration on the Right to Development; and the publication of the first Human Development Report in 1990.⁵⁹ At this point, the orthodoxy suggests, while tensions remained, development was forced to become human rights regarding.⁶⁰ That is not to say that development agencies, the international financial institutions, states, or multinational enterprises actually embraced their human rights obligations, rather than paying them mere lip-service.⁶¹ It is also a move open to critique as the co-optation and neutralization of resistance – particularly of Third World states’ – demands for a just global order.⁶² In addition, and of particular relevance to the analysis here, this orthodoxy neglects a number of rich engagements between improved living conditions and the role of human rights that existed from the conception of the United

⁵⁸ See, e.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2nd ed., (2003) at 196–203.

⁵⁹ See e.g., Jeremy Perelman, *Human Rights, Investment and the Rights-ification of Development*, in YOUNG, *supra* note 18 at 438; Ulrike Davy, *The Rise of the “Global Social”: Origins and Transformations of Social Rights under UN Human Rights Law*, 3 Int. J. Soc. Qual. 41, 53–55 (2013); RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL AND PITFALLS (Sam Hickey & Diana Mitlin, eds., 2009); Peter Uvin, *From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development*, 17 DEV. IN PRAC. 597 (2007); Alston & Robinson, *supra* note 11; UNDP, *HUMAN DEVELOPMENT REPORT* (1990). The influential AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) is also notable in this shift.

⁶⁰ Davy, *supra* note 59 at 54–55; see generally Alston & Robinson, *supra* note 11.

⁶¹ See, e.g., the stinging critique in UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (3rd ed., 2012 Oxford University Press) Chapters 7 and 9.

⁶² See, e.g., SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); 108–09; Joseph R. Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World*, 40 HRQ 735 (2018); Dehm, *supra* note 18; David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, at 109–8 (2002).

Nations, if not before. I turn to analyze these sources in international legal instruments, followed by a number of important regional sources.

ii. *International Instruments*

To begin with, the link between human rights and better standards of living is explicit in both the Universal Declaration of Human Rights and in the United Nations Charter.⁶³

According to its Charter, a main aim of the United Nations is set out in the first preambular paragraph which opens: “we the peoples of the United Nations, determined... to promote social progress and better standards of life in larger freedom.”⁶⁴ Article 55, on International Economic and Social Cooperation, is phrased:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁶⁵

The UDHR’s 5th preambular paragraph, referring back to the United Nations Charter, states that:

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.⁶⁶

⁶³ UN Charter, Oct. 24 1945, 1 UNTS XVI.

⁶⁴ *Id.* preamble.

⁶⁵ *Id.* Art. 55.

⁶⁶ UDHR, *supra* note 36 preamble.

These foundational documents of the post-World War II international order are clearly premised on a mutually reinforcing relationship between better standards of living and human rights.

A number of other international legal instruments also reflect this. For example, the Declaration of Philadelphia, concerning the aims and purposes of the International Labour Organization⁶⁷ (ILO) is similarly based on an underpinning assumption of continuous improvement of living conditions twinned with rights. One such framing is in Article III(e), which reads:

III The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:

(e) the effective recognition of the right to collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures⁶⁸

This theme remains current in the work of the ILO. The 2008 ILO Declaration on Social Justice for a Fair Globalization, for example, makes similar links between improvement of living conditions, social justice, and fundamental rights,⁶⁹ though neither the Declaration of Philadelphia nor the 2008 Declaration on Social Justice use the term “human rights”.

The United Nations General Assembly has also generated a number of important declarations which interlace improved living conditions and rights. For example, the Declaration on the Right to Social Progress and Development of 1969⁷⁰ had as its objectives:

Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect

⁶⁷ International Labour Organization, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia), May 10 1944.

⁶⁸ *Id.* Art. III(e).

⁶⁹ ILO Declaration on Social Justice for a Fair Globalization, June 10 2008.

⁷⁰ GA RES 2542 (XXIV) (Dec. 11 1969).

for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals:

Art 10 ...(c) The elimination of poverty; the assurance of a steady improvement in levels of living and of a just and equitable distribution of income.⁷¹

The 1986 Declaration on the Right to Development is also an important expression of the link between human rights and better standards of living, articulated strongly in a number of the preambular paragraphs, as well as infusing the text as a whole, where development – in the sense of better living conditions – is sutured to human rights enjoyment and fulfilment in numerous Articles.⁷² And it is arguable that, if not a central objective, then at least one intended consequence of the Declaration was, as Saul, Mowbray and Kinley write, to “enhance the means, methods and magnitude of international development assistance and cooperation in the realization of economic, social and cultural rights.”⁷³

United Nations’ led efforts to implement a right to development continue, and in 2010 the High Level Task Force on the Implementation of the Right to Development expressed the “core norm” of the right to development as “the right of all peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.”⁷⁴ The definition of development contained in this document is “the right of all peoples and individuals to the constant improvement of their well-being.”⁷⁵

There are also links in international trade regimes. For example, The Marrakesh Agreement preamble lists “raising standards of living” as an objective of economic activity under the WTO,⁷⁶ and one commentator has noted, in discussing the right to food and the WTO rules on agriculture, that a right to continuous improvement of

⁷¹ *Id.*

⁷² GA Res 41/128 (Dec. 4 1986) *see, e.g.*, Arts. 1, 2, 3, 6, 8, 10.

⁷³ SAUL ET. AL, *supra* note 4 at 140.

⁷⁴ GA Right to Development, report of the high-level task force on the implementation of the right to development on its sixth session, Addendum, Right to development criteria and operational sub-criteria. UN Doc. A/HRC/15/WG.2/TF/2/Add.2. (Mar. 8 2010), Annex at 8.

⁷⁵ *Id.*

⁷⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15 1994, 1867 UNTS 154, preamble.

living conditions “could contribute to the harmonious interpretation of the trade and international human rights regimes”.⁷⁷

Focusing specifically on the ICESCR, it is important to point out that the right to continuous improvement of living conditions in Art 11(1) is not the only place in the Covenant where material improvement is explicitly contemplated as the foundation for realizing a right. Art 11(2) on the right to be free from hunger is premised on state obligations to:

11(2)(a) improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.⁷⁸

The right to the highest attainable standard of health also requires “[t]he improvement of all aspects of environmental and industrial hygiene,”⁷⁹ while the right to education must be underpinned by an adequate standard of living for teachers: “the material conditions of teaching staff shall be continuously improved.”⁸⁰

iii Regional Legal Instruments

At the regional level, in the American Declaration on the Rights and Duties of Man⁸¹ there is an explicit link between improvement of living conditions and rights within the right to education, which aims to “prepare [a person] to attain a decent life, and to raise his standard of living, and to be a useful member of society.”⁸² In addition, the right to “betterment” of whole peoples was a common right in Latin American constitutions, informing the inclusion of social and economic rights in the UDHR.⁸³

⁷⁷ RHONDA FERGUSON, THE RIGHT TO FOOD AND THE WORLD TRADE ORGANIZATION’S RULES ON AGRICULTURE 118 (2018).

⁷⁸ ICESCR, *supra* note, 2 Art. 11(2)(a).

⁷⁹ *Id.* Art. 12(2)(b).

⁸⁰ *Id.* Art. 13(2)(e).

⁸¹ Inter-American Commission on Human Rights, American Declaration on the Rights and Duties of Man, May 2 1948.

⁸² *Id.* Art. XII.

⁸³ See e.g., Ulrike Davy, *How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights*, 13 WASH. U. GLOBAL STUD. L. REV. 201, 221 (2014).

This is also true of the European Social Charter of 1961.⁸⁴ The preamble notes one the aims of the Council of Europe:

is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms⁸⁵

Here, economic and social progress will be secured by the realization of human rights. The preamble also notes that states parties are “resolved to make every effort in common to improve the standard of living”⁸⁶ These preambular paragraphs are repeated in the 1996 Revision to the Treaty.⁸⁷ The Preamble to the African Charter on Human and Peoples Rights reaffirms a pledge “to achieve a better life for the peoples of Africa,”⁸⁸ and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration acknowledges the role of the ASEAN Intergovernmental Commission on Human Rights “as a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples.”⁸⁹ The ASEAN Human Rights Declaration, however, does not include a right that explicitly requires improvement, though it includes a right to development and a progressive obligations clause.⁹⁰ Finally, the Arab Charter on Human Rights,⁹¹ adopted in 2004, while self-consciously distinguishing its rights-protecting regime from the United Nations Covenants and other regional sources, also opens in Article 1(1):

Article 1 The present Charter seeks, within the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following aims:

⁸⁴ Council of Europe, European Social Charter preamble, Oct. 18 1961 ETS No. 035.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Council of Europe, European Social Charter (Revised) preamble Mar. 5 1996, ETS No. 163.

⁸⁸ Organization of African Unity, African Charter on Human and Peoples’ Right (Banjul Charter) preamble June 27 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

⁸⁹ Association of Southeast Asian Nations, ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (Feb. 2013) at 13, https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last visited 14 August 2019).

⁹⁰ Association of Southeast Asian Nations, ASEAN Human Rights Declaration, Nov. 18 2012. Arts. 35- 37 (right to development); Art. 33 (obligations for economic, social and cultural rights).

⁹¹ League of Arab States, Arab Charter on Human Rights, Sept. 15 1994.

1. To place human rights at the centre of the key national concerns of Arab States, making them lofty and fundamental ideals that shape the will of the individual in Arab States and enable him to improve his life in accordance with noble human values.

This survey of international instruments shows that the founding documents of a broad range of international institutions, including the major human rights covenants of the twentieth century, make an explicit link between the realization of human rights, and improved living standards or conditions. Thus, continuous improvement of living conditions, rather than emerging in the ICESCR as an isolated and unusual phrase, is in fact a central project of international law, and “[i]nternational law provides a rich framework through which human dignity can be upheld based on improvements in education, health and standards of living.”⁹²

iv. *Conclusion – Improvement of Living Conditions as Axiomatic to International Law*

The precise relationship between human rights and improved living conditions varies across these documents. In some instruments, rights and improved standards of living are better seen as supporting tools for realizing another aim, for instance in the UN Charter, the goal of peaceful and friendly relations among states. Some suggest better standards of living as necessary underpinnings for the realization of rights, as is the case in the UDHR’s preamble, and ICESCRs Articles 11(2), 12, and 13. On the converse, some express the purpose of a human right as enabling a better life, of which the framing of the right to education in the American Declaration is an example, as is the preamble to the European Social Charter, and the Arab Charter. Some see human rights and improved standards of living as *inherently* entwined, clearly expressed in the Declaration on the Right to Development, and in the definition of development as “the right of all peoples and individuals to the constant improvement of their well-being”. A *right* to continuous improvement is certainly the most explicit link between human rights and improvement of living conditions, making this a normative right itself, but it is a small – if important – further step when viewed within this

⁹² Eibe Riedel, Gilles Giacca, & Christophe Golay, *The Development of Economic, Social, and Cultural Rights in International Law*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES* 3, 5 (Eibe Riedel, Gilles Giacca & Christophe Golay, eds., 2014).

broader context. Considering this broader perspective, a right to the continuous improvement of living conditions does not appear as anomalous or marginal, but instead as reflecting a central concern of international institutions of the Twentieth Century onward.

The next part turns to consider how the right has been interpreted by the main body overseeing the ICESCR, the Committee on Economic, Social and Cultural Rights and what its work adds to the picture of the right.

C. RIGHT TO CONTINUOUS IMPROVEMENT OF LIVING CONDITIONS IN THE WORK OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The CESCR's work on fleshing out the scope and content of a right to the continuous improvement of living conditions can only be characterized as underdeveloped, particularly in contrast to other aspects of its work. There are, however, materials which give us an insight into the CESCR's approach to, and interpretation of, continuous improvement of living conditions. We can find these in the Committee's reporting guidelines; the Committee's concluding observations on state's reports (which also point towards states parties' interpretation of the right and gesture to state practice and *opinio juris*); in the General Comments crafted by the Committee; and in further interpretive statements and open letters issued by it from time to time. As yet, the Committee has not considered the right in any of its individual complaints, either in adoption of views or inadmissibility decisions.⁹³

i. Reporting Guidelines

The core reporting guidelines for ICESCR are contained in Part IV of the Covenant itself. In addition to outlining the process of reporting, Part IV makes some references to the progressive realization of rights, and to measuring or assessing progress in fulfilling them,⁹⁴ but there is no explicit attention to any of the substantive rights. General Comment No. 1, produced by the CESCR in 1989, concerned Reporting by States Parties and further fleshed out the bare bones of Part IV.⁹⁵ There are a number of references to the obligation of progressive realization in the Covenant, but no explicit attention to a right to continuous

⁹³ As at Feb. 6, 2020.

⁹⁴ See, ICESCR Art. 16(1), Art. 17(2), Art. 21, Art. 22.

⁹⁵ CESCR, *General Comment No. 1: Reporting by States Parties*, UN Doc. E/1989/22 (July 27 1981).

improvement of living conditions. However, in 1991, the CESCR clarified its reporting guidelines.⁹⁶ The 1991 guidelines take the form of a list of questions that states parties should answer in their reports, with the Committee seeking a full picture of the legislative and other measures taken to ensure the Covenant rights. There is attention to the issue of better rights protection in the form of questions asking for a comparative picture over time,⁹⁷ and here the Committee explicitly addresses continuous improvement of living conditions, asking states parties to:

1(a) Please supply information on the current standard of living in your population, in respect of both the aggregate and different socio-economic, cultural, and other groups within the society. How has the standard of living changed over time (e.g., compared with 10 years ago and 5 years ago) with regard to these different groups? Has there been a continuous improvement of living conditions for the entire population or for what groups?⁹⁸

The Committee also asks for information on the per capita GNP of the poorest 40 percent of the population; the existence of a poverty line, and the basis for it; and the country's Physical Quality of Life index.⁹⁹ While paragraph 1(a) suggests an approach to the right to continuous improvement for all groups, the following questions suggest that rights of the poorest members of society are of particular concern, reflecting an earlier Commission on Human Rights Recommendation of 1987 to that effect.¹⁰⁰

Perhaps remarkably, the right to continuous improvement of living conditions was not explicitly further clarified by the CESCR until the adoption of harmonised revised guidelines on state reporting in 2009,¹⁰¹ which replaced the earlier 1991 guidelines. Under the revised

⁹⁶ CESCR, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/1991/1 (June 17 1991).

⁹⁷ See, e.g., on Art. 6, para 3(b) pg 6; on Art. 9, para 4; on Art. 9 para 6(a) and (b) (asking for 'calendar and time-related bench-marks for measuring your achievements in this regard'). Measurement within a specific window of time may not give a full picture of rising (or falling) living standards beyond that frame, and hence much insight into continuous improvement of living conditions as materially experienced, or as a normative statement of right.

⁹⁸ E/C.12/1991/1, *supra* note 96 at 11.

⁹⁹ *Id.* at 12.

¹⁰⁰ Commission on Human Rights Res 1987/20, 12th preambular paragraph, see also Philip Alston & Bruno Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 A.J.I.L. 747, 753 (1987).

¹⁰¹ *International Human Rights Instruments, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc. HRI/GEN/2/Rev.6 (June 3 2009).

guidelines, states are asked to report on the right to continuous improvement of living conditions as follows:

42. Indicate whether the State party has defined a national poverty line and on what basis it is calculated. In the absence of a poverty line, what mechanisms are used for measuring and monitoring the incidence and depth of poverty?

43. Indicate:

- (a) Whether the State party has adopted a national action plan or strategy to combat poverty that fully integrates economic, social and cultural rights and whether specific mechanisms and procedures are in place to monitor the implementation of the plan or strategy and evaluate the progress achieved in effectively combating poverty; and
- (b) Targeted policies and programmes to combat poverty, including among women and children, and the economic and social exclusion of individuals and families belonging to the disadvantaged and marginalized groups, in particular ethnic minorities, indigenous peoples and those living in rural and deprived urban areas.¹⁰²

These revised guidelines appears to reflect a change – identified by a number of commentators – from overall development policy as a driver of improved living conditions as a right, to a right that is a response to poverty, and a greater focus on minimal standards, rather than on overall human development or flourishing.¹⁰³ However, we must turn to states parties’ reports, and the CESCRs concluding observations on those reports, to seek additional clarity on the normative content or state’s obligations for the right.

ii. *Concluding Observations and the Reporting Process*

States parties to ICESCR are required to report on their efforts to realize the rights under the Covenant, and thus states’ periodic reports are a rich source of information on their approach to the fulfilment of the rights and their obligations under the Covenant. A consideration of these reports can give us an indication of international law through state practice and *opinio juris*, though whether state reports reflect with any accuracy the situation on the ground is questionable: the CESCR recognizes that these reports should be read in

¹⁰² *Id.* at para 42-3.

¹⁰³ See the discussion accompanying notes 118 – 123 below. See also e.g., Solomon, *supra* note 14; Davy, *supra* note 58; MOYN, *supra* note 18.

conjunction with parallel or “shadow” reports submitted to the Committee by civil society actors or organizations, and NGOs.¹⁰⁴ These parallel reports have the capacity to give both a fuller picture of rights on the ground, as well as richer texture to our understanding of *opinio juris*. The Committee’s concluding observations, meanwhile, demonstrate its concerns with state parties’ compliance as well as its position on what the Covenant requires of states with respect to their obligations under it.

Prior to the establishment of the CESCR in 1985,¹⁰⁵ states’ reports were considered by the ECOSOC.¹⁰⁶ These early concluding observations point to states’ understanding that they should demonstrate continued improvement in living standards, not only with respect to the enumerated heads of Article 11, but more generally. For example, in 1980, the observer for the Byelorussian Soviet Socialist Republic stated that, due to the state’s economic and cultural programs “the material well-being, education, culture and intellectual and moral life of the working people were improving every year.”¹⁰⁷ In the same record, the observer for Romania noted that “systematic creation of new jobs, particularly for young people and women, was a basic component of Romania’s economic and social policy and of the policy of continually raising the standard of living of the entire population.”¹⁰⁸ The records of the 1982 session of the Working Group on the Implementation of the ICESCR¹⁰⁹ reveal similar assumptions on the part of states reporting. The representative of Barbados, for example, stated that the state’s policy for the previous twenty years had been “to make economic, social and cultural development a continuous process” and aim towards “removing the welfare aspect of development and to providing guarantees that its citizens would enjoy the

¹⁰⁴ ECOSOC, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1, UN Doc. E/C. 12/2000/6 (July 7 2000) (stressing the importance of cooperation with NGOs); ECOSOC, *NGO Participation in Activities of the Committee on Economic, Social and Cultural Rights*, UN Doc. E.C./12/1993/WP.14, (May 12 1993) (reiterating the Committee’s ‘longstanding invitation to NGOs to submit to it in writing, at any time, information regarding any aspect of its work’). See also Eric Tars, *Who Knows What Lurks in the Hearts of Human Rights Violators - The Shadow (Reporter) Knows - Human Rights Shadow Reporting: A Strategic Tool for Domestic Justice*, 42 CLEARINGHOUSE REV. 475 at 476-7 (2009) (discussing the ‘very rosy picture’ presented by a number of U.S. reports).

¹⁰⁵ OHCHR, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/Res.1985/17 (May 28 1985).

¹⁰⁶ Specifically, the Sessional Working Group (1979-1982), and the Sessional Working Group of Governmental Experts (1983-86).

¹⁰⁷ ECOSOC, *Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Summary Record of the 16th Meeting*, UN Doc. E/1980/WG.1/SR.16 (Apr. 28 1980) at § 1.

¹⁰⁸ *Id.* at para 20, see also *Id.* at § 24.

¹⁰⁹ ECOSOC, *Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Summary Record of the 3rd Meeting*, UN Doc. E/1982/WG.1/SR.3 (Apr. 12 1982).

right to a better quality of life.”¹¹⁰ The Italian delegation, while stressing that Italy was “in full compliance”¹¹¹ with the Covenant “within the limits of its available resources”¹¹² also noted that in coming to compliance “the process had been continuous and progressive.”¹¹³ Interestingly, despite the delegation’s statement of full compliance, it also admitted the need for further action to improve the situation of economic rights.¹¹⁴

It is not clear whether the states reporting considered that they were answering the Covenant’s progressive realization obligations (though this is implicit at least in the Italian example), or were explicitly engaging with a right to continuous improvement of living conditions, or how they might have understood these facets of the Covenant to interrelate.

States’ reports in the 1980s provided a baseline. In subsequent reports – that is, those after the first reporting cycle – the overall focus is on whether or not the state has demonstrated improved protection of rights. Thus, the concluding observations generally follow a pattern, showing concern where living conditions have fallen, praising states for demonstrating improvements, and, in either case, urging states to improve the situation (further), with a particular focus on those who are vulnerable or marginalized.¹¹⁵

Similarly, trends in the way that states have reported can be identified. Ulrike Davy, engaging empirically with the CESCRs work on the right to an adequate standard of living using a comprehensive database of state reports up to the year 2011, provides a useful

¹¹⁰ *Id.* at § 2, *see also* § 14.

¹¹¹ *Id.* at § 37.

¹¹² *Id.* at § 45, *see also* § 37.

¹¹³ *Id.* at § 41.

¹¹⁴ *Id.* at § 42.

¹¹⁵ *See, e.g., Report of the Committee on Economic, Social and Cultural Rights on its Tenth and Eleventh Sessions*, UN Doc. 82 E/1995/22 E/C.12/1994/20 and Corr.1 § 82 (Uruguay); *id.* § 94 (Romania); *id.* § 194-5 (Gambia); *id.* § 274 and 280 (UK); *id.* § 104 (Morocco); *Report of the Committee on Economic, Social and Cultural Rights on its Twelfth and Thirteenth Sessions* UN Doc. E/1996/22 E/C.12/1995/18 § 99 (Portugal); *id.* § 108 (Philippines); *Report of the Committee on Economic, Social and Cultural Rights on its Eighteenth and Nineteenth Sessions*, UN Doc. E/1999/22 E/C.12/1998/26 § 146 (Poland); *id.* § 86 (Sri Lanka); Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Zambia* UN Doc. E/C12/1/Add.106 (June 23 2005); Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant*, UN Doc. E/C.12/NZL/CO/3 (May 31 2012) (New Zealand); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Iraq*, UN Doc. E/C.12/IRQ/CO/4 (Oct. 27 2015); Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/C.12/GBR/CO/6 (July 14 2016); Committee on Economic, Social and Cultural Rights, *Concluding Observations on the sixth periodic report of the Netherlands*, UN Doc. E/C.12/NLD/CO/6 (Jul. 6 2017); Committee on Economic, Social and Cultural Rights, *Concluding Observations on the third periodic report of Estonia*, UN Doc. E/C.12/EST/CO/3 (Mar. 27 2019); *See also* the analysis of Concluding Observations by Audrey R. Chapman & Benjamin Carbonetti, *Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, 33 HUM. RTS. Q. 682, 732 (2011) (noting this pattern).

mapping.¹¹⁶ In the early decades, she finds, Latin American states paid the most attention to overall development trends, and to the need for improvement, readily admitting the need for better standards of living among their populations; while Eastern European states also interpreted Article 11 as requiring a persistent policy of economic development based on state planning and agrarian reform.¹¹⁷ However, as Davy further points out, Eastern European governments tended to deny there were people not already enjoying an adequate standard of living in their states.¹¹⁸ OECD states, in Davy's analysis, "never mentioned 'development' as a policy goal. As a last resort, the adequate standard of living ... was to be secured through state-financed cash benefits."¹¹⁹ There was little attention, with the exception of Latin American states, to the unevenness in living standards, and those left behind by economic development.¹²⁰ Davy's analysis demonstrates that the focus in state reports on overall development or improvement waned,¹²¹ in favor of a focus on poverty, socio-economic inequalities, and cash transfers as a policy to mitigate vulnerability.¹²² This shift occurred around the time of the CESCR's new reporting guidelines, themselves occurring at a time of increased focus on 'development with a human face' and world poverty, as discussed above.¹²³

One way to read this shift is to see it as reflecting a new focus on the part of states on the individual nature of the right to an adequate standard of living.¹²⁴ A second is to read it as a watered-down approach to continuous improvement of living conditions, focusing not on flourishing, but on minimums for the most vulnerable – an approach that the Committee has been criticized for.¹²⁵ These may be relevant factors, but the change also reflects the updated reporting guidelines of 1999, which explicitly altered what the Committee expected states to report on, moving from a wider developmental emphasis to focus attention on the poor or disadvantaged.¹²⁶ It may also represent similar concerns expressed through different human rights tools: recent empirical work by Ben T.C. Warwick demonstrates an *increase* in the

¹¹⁶ Ulrike Davy, *Social Citizenship Going International: Changes in the Reading of UN-Sponsored Economic and Social Rights*, 22 INT'L J. OF SOC. WELFARE s15 (2013).

¹¹⁷ *Id.* s25.

¹¹⁸ *Id.*

¹¹⁹ *Id.* s26.

¹²⁰ *Id.*

¹²¹ *Id.* s27 (Davy notes that there were only 4 references to economic development or socialist planning in the 175 reports submitted between 2000 and 2009).

¹²² *Id.* s26-s27.

¹²³ See text accompanying notes 58 to 62.

¹²⁴ This is Davy's thesis; see Davy, *supra* note 116 at s28.

¹²⁵ See e.g., Solomon *supra* note 14; MOYN, *supra* note 18.

¹²⁶ See discussion at notes 102 to 104.

Committee's attention to *obligations* of progressive realization, and overall use of "progress based language" from the 2007 financial crisis onwards,¹²⁷ though the phrase "continuous improvement" rarely appears after the end of the 1990s. But if improvement and progress remain the ethos that infuses the concluding observations, a right to continuous improvement of living conditions still remains ambiguous in these sources.

iii. General Comments

There is no General Comment on the right to continuous improvement of living conditions, but the Committee has addressed the right, and related issues of progress and improvement, in a number of its General Comments, and these do help to shed some light on its normative content and the Committee's approach to it.

After its first General Comment in 1989, which addressed Reporting under the Covenant,¹²⁸ in 1990, the Committee's General Comment No. 2 on International Technical Assistance Measures¹²⁹ tackled the problem of the adverse impact of debt and structural adjustment measures on the enjoyment of the rights under the Covenant.¹³⁰ In what appears to be an early capitulation to a minimal approach, the Committee notes that "adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent."¹³¹ This General Comment would have been a welcome place for the Committee to engage with continuous improvement of living conditions as a right, and while the Committee noted the need for "adjustment with a human face", or "the human dimension of development,"¹³² it did not engage with the right per se. Similarly, in its General Comment No. 3 of the same year, on the Nature of States Parties Obligations,¹³³ it makes note of the Declaration on the right to Development,¹³⁴ but there is no engagement with a right to continuous improvement under the ICESCR itself. This, again, appears a missed opportunity, particularly given the rich

¹²⁷ See, Warwick, *supra* note 21 at 134-5 (tracking, through empirical work, the Committee's approach to progressive realization from the years 1999-2015).

¹²⁸ *Supra* note 96.

¹²⁹ CESCR, *General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant)*, UN Doc. E/1990/23 (Feb. 2 1990).

¹³⁰ *Id.* at § 9.

¹³¹ *Id.*

¹³² *Id.*

¹³³ General Comment No. 3, *supra* note 54.

¹³⁴ *Id.* at § 14.

potential overlap and normative relationship between the right to continuous improvement of living conditions, the obligations of progressive realization in Article 2(1), and international cooperation and assistance in Article 11.

However, in the 1991 General Comment No. 4 on the Right to Housing,¹³⁵ the Committee does explicitly mention the right, as follows:

Policies and legislation should ... not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However as noted by the Committee in its general comment No 2 ... despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.¹³⁶

This statement in General Comment No. 4 clearly indicates that the Committee treats the continuous improvement of living conditions as a *right*. In addition, it goes some distance to repair the lack of attention to the right in the two earlier General Comments on international technical assistance, and on states parties' obligations. As welcome as this statement in General Comment No. 4 is, the Committee did not further flesh out the right here, and in fact it was not until 1999 that the Committee directly engaged with the right again in a General Comment.

In that year, General Comment No. 12, on the right to adequate food – another of the enumerated rights in Article 11(1) – lists the right to continuous improvement of living conditions as one of the heads of Article 11(1), though does not further engage with it.¹³⁷ A number of other General Comments, however, when making reference to the rights under Article 11, do not make reference to a right to continuous improvement of living conditions. This is true for General Comment No. 15 on Water.¹³⁸ While the right to water is implied from Article 11, there is no reference in discussion of Article 11 to continuous improvement

¹³⁵ *Supra* note 4.

¹³⁶ *Id.* at § 11.

¹³⁷ *Supra* note 4 at § 1.

¹³⁸ *Supra* note 5.

of living conditions. It is also the case in General Comment No. 6, on the rights of older persons:¹³⁹ this General Comment makes reference to Article 11 and to the 1991 United Nations Principles for Older persons, which references the rights of older persons to an adequate standard of living¹⁴⁰ but in discussing the heads of Article 11, there is no reference to continuous improvement.¹⁴¹

General Comment No. 14, on the Right to Health, is interesting in its approach to improvement. Although Article 12(2)(b) of ICESCR is one of the areas of the Covenant where improvement is explicitly part of the right as drafted, the Committee's interpretation in General Comment No. 14 is couched in negative terms – those of prevention, reduction, and minimization.¹⁴² While these measures should, as a corollary, lead to improvement, the overall tone suggests a minimal improvement is all that is practical: for example, “industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.”¹⁴³ Yet in the General Comment, the Committee also states that “acceptability” of health includes that “all health facilities, goods and services must be ... designed to respect confidentiality and improve the health status of those concerned.”¹⁴⁴ And Article 12(2)(a) requires “measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as resources necessary to act on that information.”¹⁴⁵

Interestingly, in General Comment No. 16 – on the equal right of men and women to enjoy economic, social and cultural rights – in discussion of Article 11, continuous improvement of living conditions is not mentioned, or listed as a head.¹⁴⁶ In fact, in listing the rights that Article 11(1) is composed of, the Committee often does not list continuous improvement of living conditions.¹⁴⁷ Indeed, General Comments No. 17 to No. 22 (produced by the Committee between 2006 and 2016) do not include any mention of the right to

¹³⁹ CESCR, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, UN Doc. E/1996/22 (Dec. 8 1995).

¹⁴⁰ G.A. Res 46/91 (Dec. 16 1991).

¹⁴¹ See General Comment No. 6, *supra* note 139 at § 5, 32.

¹⁴² CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN Doc. E/C.12/2000/4 (Aug. 11 2000) at § 15.

¹⁴³ *Id.* at § 15.

¹⁴⁴ *Id.* at § 12(c).

¹⁴⁵ *Id.* at § 14.

¹⁴⁶ CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, UN Doc. E/C.12/2005/4 (Aug. 11 2005).

¹⁴⁷ The most recent example is the Committee's Statement, *The Pledge to “Leave no-one Behind”: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development*, UN Doc. E/N.12/2019/1 (Mar. 8 2019) at § 5.

continuous improvement of living conditions. In fact, these General Comments make no reference to improvement of any kind.

However 2016's General Comment No. 23, on just and favorable conditions of work, marked a return to attention to the improvement of living conditions.¹⁴⁸ Here, the Committee makes reference to the interrelationship between a decent living and a fair wage¹⁴⁹ and explicitly mentions improvement under the heading of “international assistance and cooperation” where the Comment notes that:

States parties should take measures, including legislative measures, to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right to just and favourable conditions of work throughout their operations extraterritorially. This responsibility is particularly important in States with advanced labour law systems, as home-country enterprises can help to improve standards for working conditions in host countries.¹⁵⁰

This is the most recent General Comment to add to the Committee's approach to improvement, explicitly invoking standards of decent living, and the relevance of international cooperation and assistance in respect of it. It does not, however, add to our understanding of the Committee's approach to the right to continuous improvement of living conditions, beyond pointing to the intersections between international action, decent work, and an adequate standard of living.

iv Statements and Open Letters

In addition to the General Comments discussed above, the Committee has issued a number of statements and open letters, often in reaction to particular events, global challenges, or specific rights-impacting situations. None of these deal with the right to continuous improvement of living conditions specifically, but many do demonstrate the Committee's engagement with broadly related issues. Most prominently, this includes the

¹⁴⁸ CESCR, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/23 (Apr. 27 2016).

¹⁴⁹ *Id.* at § 9.

¹⁵⁰ *Id.* at § 50, 51.

Committee's efforts to ensure that the rights under ICESCR are not violated through backward steps, especially in the context of economic crisis, globalization, debt or structural adjustment.

Beginning in 1998, the CESCR dealt explicitly, through a number of open letters and statements, with the negative impact of globalization, international trade and the work of the international financial institutions on the enjoyment of economic, social and cultural rights. The Committee's Statement following its Day of Discussion on Globalization and its Impacts on the Enjoyment of Economic, Social and Cultural Rights in 1998¹⁵¹ strongly conveys that "globalization risks downgrading the central place accorded to human rights by the Charter of the United Nations in general and the International Bill of Human Rights in particular. This is especially the case in relation to economic, social and cultural rights."¹⁵² The records of the Day of Discussion capture both the Chair of the Committee's disappointment that "the international trade and financial institutions had never referred in their work to the Covenant, or the obligations thereunder assumed by the Governments with which they were dealing"¹⁵³ and his strong opinion that "the monitoring and enjoyment of [Covenant] rights could not be left exclusively to a committee of 18 experts with no mandate for monitoring the development of international financial markets, with no capacity for technical analysis and with diminishing secretariat support."¹⁵⁴ Interestingly, the records show that the representative for the International Service for Human Rights mentioned that the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities had proposed that the social forum be established within the Sub-Commission "and that it should, inter alia, propose legal standards on income distribution, poverty and human rights."¹⁵⁵

The CESCR's Statement on Human Rights and Development of 15 May 1998 is similarly strongly worded in relation to the need to include the realization of economic, social and cultural rights within development activities. The statement opens:

The Committee considers that development activities which do not contribute to respect for human rights, either directly or indirectly, are not worthy of the name.

It therefore welcomes the commitment of the Secretary-General to ensure that

¹⁵¹ E/1999/22 E/C.12/1998/26, *supra* note 115 at Ch V.

¹⁵² *Id.* at Ch VI § 3.

¹⁵³ *Id.* at § 441.

¹⁵⁴ *Id.* at § 442.

¹⁵⁵ *Id.* at § 456.

human rights, including economic, social and cultural rights, are part of the mainstream of all United Nations activities.¹⁵⁶

In the same statement, the Committee recommends that the guidelines for the United Nations Development Assistance Fund should be reformed to include specific reference to the ICESCR as part of the essential framework; and to require states to establish specific benchmarks against which to measure their own performance in promoting realization of these rights.¹⁵⁷ These statements show that the Committee was, in the early years, at pains to contest the marginalization of economic and social rights within the United Nations system, and the impact of that marginalization on the realization of better standards of living and human rights enjoyment.

The emphasis on economic, social, and cultural rights and their importance for development then appears to have dropped away, but from the time of the Global Financial Crisis in the latter 2000s, the Committee turned its attention again to the impacts of austerity and financial adjustment on rights realization. A number of statements, especially in 2007¹⁵⁸ and 2012,¹⁵⁹ exhorted states to take economic, social and cultural rights into account in their response to financial crises or other economic downturns, but – perhaps understandably – these statements focused on preventing retrogressive measures or backwards steps, with little hope expressed for actual improvement.

In 2016, the Committee issued a statement on public debt, austerity measures and the Covenant.¹⁶⁰ This statement revives the Committee’s concern with global structural inequality, and the detrimental impacts it often has on economic and social rights. While offering detailed guidance to borrowers and lenders on their human rights obligations, it also re-articulates the link between the realization of human rights, and the broader purposes of the United Nations organs. Urging the international financial institutions to take their obligations seriously, the Committee states:

¹⁵⁶ *Id.* page 94 ‘A: Human Rights and Development’ at § 1.

¹⁵⁷ *Id.* ‘B: United Nations reform and the UNDAF process’ p 95 § 3-4. For an assessment of the UNDAF reform as an opportunity to mainstream human rights in the late 1990s, see Anne F. Bayefsky, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (2001) at 79-82.

¹⁵⁸ E/C.12/2007/1, *supra* note 54.

¹⁵⁹ CESCR, Letter Dated 16 May 2012, *supra* note 54.

¹⁶⁰ CESCR, *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2016/1 (July 22 2016).

as specialized agencies of the United Nations, IMF and IBRD are obligated to act in accordance with the principles of the Charter of the United Nations, which sets the realization of human rights and fundamental freedoms as one of the purposes of the Organization, to be achieved in particular through international economic and social cooperation.¹⁶¹

This links back with the earlier focus on human rights as part of a broader UN purpose, twinned with development: a focus that was sidelined as the Committee appeared to be consumed with reacting to the general failure of state's policies to actually lead to better economic and social rights realization for many.

v. *Conclusion on the Approach of the CESCER to the Right to Continuous Improvement of Living Conditions*

It is natural and desirable that the CESCER's approach to the ICESCER will change over time. Its approach will reflect not only changing factors in the global political, economic and legal landscape, but also the expertise and concerns of the Committee's altered membership, as well as its funding and support.¹⁶² And human rights themselves are not static. What, then, can we draw from the Committee's changing approach to what can only be described as an underdeveloped conception of the right to continuous improvement of living conditions?

First, the Committee appears, at least at times, to have treated the right to continuous improvement of living conditions as a substantive right. This is clear particularly in General Comment No. 4, of 1991,¹⁶³ which states that the Committee "is aware that external factors can affect the right to a continuous improvement of living conditions".¹⁶⁴ The reporting Guidelines of 1991 and 1999 also indicate that the Committee expects states to report on it, even though states' reports themselves do not make a distinction between, and may even conflate, the right with obligations under Article 2. There is no direct evidence of conflation by the Committee in this manner, though certainly the relationship between right and obligation remains underexplored.

¹⁶¹ *Id.* at § 8. (citations omitted).

¹⁶² See, e.g., Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AJIL 604 (1988) (discussing changing membership); see also Warwick, *supra* note 21 (discussing the Committee's apparent differing 'comfort' with certain concepts of obligation over time); See also Davy, *supra* note 116.

¹⁶³ *Supra* note 4.

¹⁶⁴ *Id.* para 11.

However, the Committee has been inconsistent in its approach to the right to continuous improvement of living conditions as distinct to, rather than an internal or descriptive aspect of, the right to an adequate standard of living more broadly. Only in a few General Comments does the Committee enumerate the right when it lists the rights that make up Article 11. And it fails to engage with it even in those General Comments that address another Covenant right that requires material improvement such as the right to health or to food. Between 2006 and 2016, the Committee's General Comments make no mention of improvement of any kind, even though empirical work suggests an increased incidence of "progress based" language in the Committee's Concluding Observations, General Statements and Open Letters between 2007 and 2015.¹⁶⁵ This progressive language has not occurred in tandem with an explanation or consideration of the right to continuous improvement of living conditions in Article 11.

Third, that a right to continuous improvement of living conditions has undergone a long period of hibernation, from which it may now be stirring, can tell us something about the CESCR's work and its priorities. The CESCR has, as its early chair Philip Alston lamented, been hampered by lack of support and funding to tackle serious, complex and pressing global challenges which often require technical expertise in areas well beyond human rights *per se*.¹⁶⁶ Perhaps for this reason, the Committee has tended to react to events beyond it, rather than setting pro-active and ambitious agendas for human rights and equality, human flourishing through improved standards of living, or radical approaches to structural global justice. That inequality has seriously increased, living standards have decreased for many, and life remains materially precarious for so many can seem to justify the Committee's focus on preventing retrogressive steps or backsliding. Nevertheless, there is little to suggest in the Committee's work the potential that a right to continuous improvement of living conditions may hold in moving beyond human rights minimalism and reactivity.

The CESCR could mobilize the right to shift the terrain on which economic, social and cultural rights debates are being held, for example following the lead of the United Nations independent expert on the effects of foreign debt and human rights, Juan Pablo Bohoslavsky, who has discussed the right to continuous improvement of living conditions in the context of mass consumption and economic growth, noting at the conclusion to his visit to Bolivia in May 2019:

¹⁶⁵ See, Warwick, *supra* note 21.

¹⁶⁶ E/1999/22 E/C.12/1998/26, *supra* note 115 at § 442.

While economic growth has brought many benefits to the population, I do see the need for deep reflection on rising tensions among different values and goals—mass consumption and the concept of living well; property and collective rights, solidarity and individualism propelled by the market economy; and extractivism and the protection of Pachamama.¹⁶⁷

Resuscitating the right to continuous improvement of living conditions might offer new avenues for the CESCR to move forward in addressing these questions.

III. CONCLUSION: TOWARD A RIGHT TO THE CONTINUOUS IMPROVEMENT OF LIVING CONDITIONS

The right to the continuous improvement of living conditions has not yet received extensive or substantive scholarly engagement, or been fleshed out by the relevant human rights bodies: it appears largely forgotten. This sits at odds with the otherwise exponential growth in the scholarship and practice on economic and social rights. At the same time, within many social, protest, and human rights movements lies a demand to take seriously a right to something more, or something better for everyone. At a time when the global economic, social and political order appears increasingly unstable many are questioning the continuing relevance of the post-World War II settlement, including the commitment to human rights and multilateral institutions. In this context, we need radical new ways of thinking about old problems, institutions, and arrangements. Might the right to the continuous improvement of living conditions offer new avenues, or help us to see these difficult problems in new ways? This paper has argued that it does so, and has sought to begin a broader conversation on this right. Specifically, it has sought to uncover and provide a close reading of the drafting history of the right; analyzed the interpretation of it by the CESCR; and set it in the context of the broader human rights instruments of the 20th Century.

¹⁶⁷ End of Mission Statement by the Independent Expert on the Effects of Foreign Debt *supra* note 15. Based on a search of the UN Human Rights Index under ‘continuous improvement of living conditions’ with respect to all organs and bodies, and with the focus ‘Economic Social and Cultural Rights’ on 5 January 2020, Bohoslavsky appears to be the only UN expert currently engaging with the right to continuous improvement of living conditions.

The analysis demonstrates that there is a strong basis for considering the right to continuous improvement of living conditions as a central project of Twentieth Century international law; that there is at least a nascent understanding of the right to continuous improvement of living conditions; and that the idea of improvement infuses the work of the CESCR.

However, much remains to be done in order to flesh out fully what such a right might mean and how it might be understood on a theoretical, as well as a practical, level.

Undertaking this work will be crucial to translating the right into actual social change. In a world where inequality is growing, and we are confronted by our unsustainable impacts on the planet, the right to the continuous improvement of living conditions can seem both naively and dangerously rapacious. At the same time, considering and seeking to embed this right into human rights in a way that responds meaningfully to these problems offers a potential break from a never-ending economic growth model to more sustainable ideas of what it means to be human. This paper offers a modest first step in that direction.