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Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?

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ABSTRACT

Codifying, and then implementing, an international right to health, health care, or protection is beset with serious roadblocks—foremost among them being contentious issues of indeterminacy, justiciability, and progressive realization.

Although advanced—and to some degree recognized under the rubric of a social or cultural entitlement within the law of human rights and, more particularly, the U.S. Declaration on Human Rights, together with International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and presently UNESCO's Draft Declaration on Universal Norms on Bioethics—attainment of such a universal right to health remains at best dubious.

The central impediment to the recognition of such a right is determining the extent to which a sustained level of economic stability must be charted before a state can be seen as either recognizing or enforcing a right to health of any kind and at any level of magnitude. Indeed, under the ICESCR, realization of economic social and cultural rights is to be effected only under a standard of progressivity. In other words, so long a states move "progressively" toward the realization of these rights, no actionable violations will be sustained. This, then, results in a flawed enforcement mechanism which allows any state signatory to this foundational covenant to pace enforcement of the rights under the ICESCR according to national standards of political will and

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differing levels of economic development and sustainability. Economic self-interest—not transnational principles and lofty aspirational goals—will determine ultimately, the extent to which health care protections are recognized as a integral part of social, cultural, political, or human rights.

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I. INTRODUCTION AND HISTORICAL OVERVIEW

While the modern law of human rights may have a short, formative period of no more than three centuries, the dignity of man and his common citizenship in society has existed for thousands of years. Indeed, almost from the very beginning of recorded humanity, the quest for a validation of human rights has not been so concerned with reason, but with an instinctive feeling of what is both right and good.[1] Thus, it has been said, "Human rights have always existed with the human being;"[2] such is the concept of human dignity.[3]

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1. Fali S. Nariman, *The Universality of Human Rights*, 50 REV. INT'L COMMISSION JURISTS 8, 11 (1993).

2. *Id.* at 17 (quoting Japanese Judge Tanaka, a member of the International Court of Justice that wrote many famous Judgments about Apartheid).

Under one interpretation, human rights are seen as "non-positivistic, principled, legal limits to what states, state actors, and state agents can do to their citizens."[4] As such, human rights impose no obligations on states themselves; rather, they impose limits on state action.[5] This U.S. view is drawn from the philosophy of the Bill of Rights and rooted in a neo-Lockean conception of the rule of law as a "commitment to a determinate set of legal rules."[6] In the international human rights community, however, a contrary view is taken—a view which holds to the notion that these rights either obligate state action under certain circumstances or, alternatively, obligate restraint by the state.[7]

Although a concrete notion of human rights appears absent from the Greek and Roman legal systems as well as the Chinese and other ancient civilizations,[8] certain claims to parental authorship have, over time, been tied to the Magna Carta of 1215, the Bill of Rights of 1689, the American Declaration of Independence in 1776, and the French Declaration of the Rights of Man and of the Citizen of 1789.[9] Yet, from the standpoint of historical accuracy, the French Declaration is seen correctly as the first document of its character to reference contemporary social, economic, and cultural rights styled originally as the rights to education, work, property ownership, and social protection.[10]

Although viewed as a type of generalized philosophical manifesto for the western world, the French Declaration was not embraced by

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3. Avery Dulles, *Human Rights: Papal Teaching and the United Nations*, 179 AM. 14 (1995); *see generally*, H.C. PAYNE, ETERNAL CRUCIBLE: A NEW COSMOLOGY (1974).

4. Robin West, *Human Rights, the Rule of Law, and American Constitutionalism*, *in* PROTECTING HUMAN RIGHTS, INSTRUMENTS AND INSTITUTIONS 93, 93 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003).

5. *Id.* at 93.

6. *Id.* at 95.

7. *Id.* at 93.

8. *See* Michael D. Kirby, *The Right to Health Fifty Years On: Still Skeptical?*, 4 HEALTH & HUM. RTS. 7, 8 (1999) (citing to Isaiah Berlin for support).

9. *Id.* at 8. *See generally*, Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); R.H. Helmholz, *Magna Carta and the Iuis Commune*, 66 U. CHI. L. REV. 297 (1999).

10. Kirby, *supra* note 8, at 8; *see* PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN (1998); Stephen P. Marks, *From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution*, 20 HUM. RTS. Q. 459, 472 (1998) (supporting the view of the French Declaration as a unique starting point with respect to the notion of human rights). *But see* Hugo Adam Bedau, *"Anarchical Fallacies": Bentham's Attack on Human Rights*, 22 HUM. RTS. Q. 261 (2000) (discussing Bentham's destructive criticism of the French Declaration and his implied criticism of any possible doctrine of human rights).

subsequent European constitutions.[11] Indeed, these new constitutions were seen not only as less pragmatic than the French Declaration, but the new European constitutions also were prone to deemphasize "the philosophy of inalienable rights."[12] Rights were, thus, constitutional in origin. In the United States, however, rights were held not to be societal "gift[s]," but natural or inherent.[13]

The European constitutions of the nineteenth century were the frameworks or mechanisms for declaring rights to be constitutionally protected within legal boundaries.[14] Thus, it was solely within the legislative power where fundamental rights were not only declared but limited.[15] Latin American constitutionalism de-emphasized the "inalienability" of rights and, instead, during the nineteenth and twentieth centuries, chose to reference only those laws established by state authorities.[16]

In attempting to distinguish human rights from fundamental constitutional rights, socialist jurisprudence sought to ignore any inherent or natural rights theories and treated them as but philosophical rights; still, socialist jurisprudence recognized the constitutionally created rights as political in origin.[17] Even though constitutions drafted during the post-socialist period failed to follow the socialist concept of granted rights, there remained a dilemma: how to develop a "middle-ground approach" that would validate the idea that "a consensus reached by the people at the constitution's adoption is the result of their recognition of some commonly accepted values."[18] It was all too apparent to those drafting new constitutions that securing fundamental recognition of a selection of core rights was not guaranteed by a designation of these rights as "natural."[19] Indeed, throughout the subsequent history of human rights, cultural relavitism has been a dominant force with which to reckon, for the values of some people are not always capable of being judged by the norms shared by others.[20]

Even with the vagueness and imprecision that characterizes contemporary human rights, there is a trend toward the

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11. Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 20 (2004).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 20–21. *See generally* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT, HISTORY AND PHILOSOPHY 1 (1999) (discussing how the doctrine of parliamentary sovereignty, long regarded as the most "fundamental element of the British Constitution," has recently been challenged by judges and academic lawyers in the United Kingdom).

16. Ludwikowski, *supra* note 11, at 21.

17. *Id.*

18. *Id.* at 22.

19. *Id.*

20. *Id.* at 23.

"internationalization of human rights movements."[21] Yet, such a trend by no means can be seen as an integration of internationalized human rights with international human rights movements. Rather, it must be accepted as but a "toleration for human rights monitoring by governmental and non-governmental organizations and accession to the most important human rights treaties."[22]

II. SEEKING A CONSENSUS

The need for a modern consensus on the universality of human rights, their international declaration, recognition, and protection, arose as a consequence of the ravages of World War II. The Axis Powers' savage trampling of human rights, the holocausts of the gas chambers of Auschwitz and Dachau, and the use of the atom bomb on Hiroshima galvanized an international response to universalize a legal process for protecting human rights: the United Nations' adoption in 1948 of the Universal Declaration of Human Rights.[23] While the 1945 Charter of the United Nations re-affirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women," it was rather vague in encouraging respect for human rights.[24] This deficiency was corrected on December 10, 1948, when the U.N. General Assembly adopted the Universal Declaration and, at least on paper, established the "universalization of basic human rights."[25]

The Organization of American States' action, also in 1948, in issuing the American Declaration of The Rights and Duties of Man,[26] complemented the Universal Declaration. Together, both documents became the bulwark for recognizing "internationally" human rights and fundamental freedoms. They are also seen as the source for other conventions which further defined and elaborated the rights stated originally within these two instruments—the most significant being the

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21. *Id.* at 40.

22. *Id.* at 41–42.

23. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. DOC A/810 (Dec. 12, 1948).

24. Nariman, *supra* note 1, at 12.

25. *Id.* *See generally* Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998) (describing the Universal Declaration of Human Rights of 1948 as the "single most important reference point for cross-cultural discussion of human freedom and dignity in the world today").

26. Ninth International Conference of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S.T.S. No. XXX; *see also* HENRY J. STEIMER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAWS, POLITICS, MORALS 642 (1996) (discussing the process of drafting an Inter-American treaty, which resulted in the American Convention on Human Rights of 1969, "which contains 26 rights and freedoms, 21 of which are formulated in similar terms to the provisions of" the ICCPR).

1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[27] and the 1966 International Covenant on Civil and Political Rights (ICCPR).[28]

Article 1 of the 1945 United Nations Charter affirms the dignity and worth of the human person as the cornerstone of human rights. This precept is buttressed by the Universal Declaration in Article 22 where economic, social, and cultural rights are recognized as "indispensable for [a person's] dignity and the free development of his personality."[29] Thus, autonomy—and its exercise—is central to the recognition and implementation of the very goal of maintaining human rights. Indeed, "the free and full development"[30] of personality in the community can never be achieved, as Article 29 of the Universal Declaration sets out, unless one is seen as an autonomous individual.

Interestingly, while the Universal Declaration has no force as a binding treaty, it has nonetheless encouraged "a culture of human rights" and thereby served as a framework for expanding and recreating the very boundaries of human rights by means of a "vast array of nongovernmental organizations and civil-society bodies committed, in very practical ways, to upholding universal rights at home and abroad."[31]

The purpose of this essay is to explore the extent to which a universal right to health, health care, or health protection is being shaped and, to some degree and level, recognized under the rubric of a social or cultural entitlement within the law of human rights. The conclusion to be reached is that current issues of indeterminancy, justiciability, and progressive realization present serious roadblocks to the goal of codifying and implementing an international right to health.

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27. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3 (the United States is not a party).

28. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (the United States is a party, subject to several reservations, understandings and declarations); *see also* Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. Doc. A/RES/44/25/Annex (Dec. 12, 1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1989); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) U.N. Doc. A/6014 (Dec. 21, 1965). *See generally* DAVID P. FORSYTHE, THE POLITICS OF INTERNATIONAL LAW, U.S. FOREIGN POLICY RECONSIDERED (1990) (espousing the view that the whole international law of human rights is viewed as having developed essentially by the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man); Dinah Shelton, *Challenges to the Future of Civil & Political Rights*, 55 WASH. & LEE L. REV. 669 (1998).

29. Universal Declaration of Human Rights, *supra* note 23, art. 22.

30. *Id.* art. 29.

31. Kirby, *supra* note 8, at 16; *see also* STEINER & ALSTON, *supra* note 26, at 563–9 (exploring the regional approach to the promotion and protection of human rights). *See generally* 1 MILTON I. ROEMER, NATIONAL HEALTH SYSTEMS OF THE WORLD (1991).

While measured progress in meeting these first two challenges is occurring, the most contentious impediment remains: determining the extent to which a sustained level of economic stability must be attained before a state can seek to recognize and enforce a right to health at any minimum or maximum level. Stated otherwise, economic self-interest must be recognized as the primary vector of force gauging the extent to which a state will honor the enforcement of a human right to health, healthcare, or health protection.

III. APPLYING INTERNATIONAL LAW

A. *Issues of Justiciability and Indeterminancy*

The international law of human rights is shaped initially by states assuming obligations in various international instruments. While these documents reference individual rights in every instance, a state's obligation and the rights of individuals neither correlate nor necessarily exist in the same legal order. Because of this reality of international lawmaking, three perspectives have developed—and are used alternatively as dictated by the particular circumstances—to evaluate the integrity of international human rights agreements.

Under the first perspective, human rights are viewed essentially, if not exclusively, as interstate matters. Accordingly, international human rights create two sets of duties: the duty of every state-party to act as it promised and the corresponding right of the other state-party to have the original promise kept. An individual has no international legal rights nor remedies in the international legal order and is but an "incidental beneficiary" of rights and duties between the state-parties.[32]

Some interpret justiciability as a principle that allows a judicial body to address complaints alleging violations of a legal right while others expand the meaning to include the "possibility" to be heard before a tribunal. One such tribunal is, for example, what was formerly the European Commission on Human Rights,[33] but has been replaced by a newly constituted European Court of Human Rights.[34] Defined broadly

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32. Louis Henkin, *The Philosophy of Human Rights*, *in* THE PHILOSOPHY OF HUMAN RIGHTS 137–38 (Milton E. Winston ed., 1989). *See generally*, ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD (1994).

33. BRIDGET C.A. TOEBES, THE RIGHT IN INTERNATIONAL LAW 168 (1999).

34. *See* Europ. T.S. No. 155 (Protocol 11 amended the European Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 005, and came into effect November 1, 1998). *Id.* It directs all state parties to accept a complete overhaul of the Convention control mechanisms with the creation of a single Court of Human Rights replacing, as such, The European Commission and Court. *Id.* It is hoped

as "the susceptability of a right to third-party adjudication,"[35] justiciability varies in scope and application from one decision-making body to another—all because of the heretofore lack of uniformity or consistency in global judicial decision-making.[36]

A move toward consistency was taken in 1998 when the Eleventh Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force.[37] Prior to this Protocol, under the European Commission on Human Rights, the only mandatory procedure required of states was adherence to the interstate complaints procedure of the European Commission of Human Rights and the Committee of Ministers—at the time, the highest political body in the Council of Europe.[38] Since individual complaints procedure and jurisdiction before the European Court of Human Rights were wholly optional, the parties thus had the option of recognizing them through voluntary declarations and usually only for a limited period.[39]

Under the newly established permanent European Court of Human Rights, optional claims were eliminated.[40] This change had the direct effect of requiring individual complaints and interstate complaint procedures by all state parties to be brought before an independent court.[41] In turn, the Commission of Ministers is now eliminated from the decision-making processes and charged with the responsibility of supervising the execution of the Court's judgments at the national level.[42]

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that with time and implementation this Protocol will go far in clarifying issues of justiciability.

35. TOEBES, *supra* note 33, at 168.

36. *See id.* at 169; 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 AM. J. INT'L L. 462, 473–74 (2004). Others view justiciability as a concept referring primarily to what is permissible in a state's domestic law or as tied to the issue of what rights (or disputes about them) are recognized, and thus justiciable in a mechanism capable of adjudicating them. *Id.* When mechanisms or procedures are found lacking, disputes are seen as nonjusticiable. *Id.* And, interestingly, no provision is made by the majority of states for domestic adjudiciation of economic, social and cultural rights. *Id.*; *see also* HUMAN RIGHTS: NEW DIMENSIONS AND CHALLENGES 135–39 (Janusz Symonides ed., 1998) (discussing the issue of justiciability with respect to the right to a healthy environment); Brigit Toebes, *Towards an Improved Understanding of The International Human Right to Health*, 21 HUM. RTS. Q. 661, 671 (1999) (stating that the lack of judicial review of the right to health has resulted on a number of attempts to introduce health issues through other international procedures, both at the regional and national levels).

37. *See* Europ. T.S. No. 155, *supra* note 34.

38. *See* MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 161 (2003).

39. *See id.*

40. *Id.* at 164–65.

41. *Id.*

42. *Id.*

Largely divested of political influence, the streamlined and accelerated system has seen an increase in individual complaints.[43] Indeed, in the five years since 1998 and Protocol 11's entering into force, roughly 135,000 applications have been lodged.[44] This figure is higher than the total of all such applications submitted in the previous forty years.[45]

Although mandatory since the establishment of European Commission on Human Rights, interstate complaint procedures against other states for human rights violations have rarely been pursued.[46] Interestingly, only twelve interstate complaints were filed in the fifty-year history of the European Commission on Human Rights.[47]

Under a second view of human rights, international human rights agreements not only create rights and duties for party-states, but they confer upon the individual rights against the state under international law, in addition to rights ensuring the individual's benefit under national constitutional legal systems. Even though enforceable only by interstate remedies or by governments or international bodies acting in the individual's behalf, the individual does have international legal rights under this view.[48] A good example of this perspective in action may be seen in the British 1998 Human Rights Act, which implements the 1950 European Convention on Human Rights in English domestic law.[49] While failing to incorporate the European Convention on Human Rights into domestic law, the Act allows the Convention to be relied upon directly in British domestic courts. Indeed, under so-called "Convention rights," certain provisions of the Convention and some of its protocols are given a defined status in English law.[50] The European

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43. *Id.* at 164.

44. *Id.* . *See generally* HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT (Janusz Symonides ed., 2003).

45. Nowak, *supra* note 38, at 164.

46. *Id.* at 165.

47. *Id.* at 166. *See generally* ANNE F. BAYEFSKY, HOW TO COMPLAIN TO THE U.N. HUMAN RIGHTS TREATY SYSTEM (2003).

48. *See generally* Henkin, *supra* note 32.

49. Human Rights Act, 1998, c. 42 (Eng.); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force on Sept. 3, 1953).

50. K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 82 (1999); *see* Richard A. Edwards, *Deference under the Human Rights Act*, 65 MOD. L. REV. 859, 860 (2002) (observing that while the extent of judicial deference to the other branches of government is under current debate, it nonetheless is a firmly established feature of judicial review in cases involving the British Human Rights Act); *see also* Paul Craig, *The Courts, the Human Rights Act and Judicial Review*, 117 LAW Q. REV. 589 (2000) (discussing how recent case law in England has clarified important issues of principle concerning the interpretation of the Human Rights Act 1998). *See generally* K. D. Ewing, *The Case for Social Rights*, *in* PROTECTING HUMAN RIGHTS, INSTRUMENTS AND INSTITUTIONS, *supra* note 4, at 323 (noting how the recent enactment of the convention in the HRA has effected the role of the judiciary in

Convention on Human Rights guarantees a number of rights without limit or restriction.[51] Thus, when a citizen's rights and freedoms are violated under Article 13 of the Convention, the citizen is given an effective remedy before a national authority.[52]

Finally, a third perspective on human rights advocates privatization theory and argues that party-states have legislated "human rights" into international law, thus conferring upon those rights the status of affirmative independent values.[53] This view is advanced as a basis for acknowledging a right to health to be incorporated fully, both in principle and in operation, as part of a domestic national legal system. Such an incorporation would thereby create a public obligation on national governments to implement that right and to structure a private legal remedy for its enforcement in their domestic courts, administrative tribunals, and other public authorities.[54]

Multiple international investigative or settlement bodies complicate the issue of justiciability. For example, the ICESCR designates the

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England). *See generally* Alasdour Maclean, *The Human Rights Act of 1998 and the Individual's Right to Treatment*, 4 MED. L. INT'L 245 (2000).

51. Ewing, *supra* note 50, at 82.

> the right to life (article 2), the right not to suffer torture or inhuman degrading treatment (article 3), the right not to be held in servitude (article 4), the right to liberty (article 5), the right to a fair trial (article 6), protection against the retrospective application of the criminal law (article 7), the right to protection of private life (article 8), rights to freedom of conscience and religion (article 9), expression (article 10), and association and peaceful assembly (article 11), and the right to marry and found a family (article 12).

Some of these rights are, to be sure, qualified: among them being those relating to privacy, conscience and religion, expression, and association and assembly. *Id.*

52. *Id. See generally*, Mark Elliott, *The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review*, 11 LAW Q. REV. 119 *passim* (1998).

53. *See* Preliminary Draft Declaration on Universal Norms on Bioethics, Feb. 9, 2005, art. 14 (ii–iv), 22(b), SHS/EST/CIB-EXTR/05/CONF. 202/2. *See generally* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993) (challenging the presumption that the fundamental rights and freedoms of the European Convention on Human Rights are irrelevant in the private sphere).

54. Philip W. Bates, *Health Law, Ethics and Policy: Challenges and New Avenues for the 21st Century and New Millenium*, 18 MED. L. 13, 21 (1999); *see* FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS, USING INTERNATIONAL LAW IN U.S. COURTS at xvi (2001) (illustrating "how and in what areas international human rights law can enhance U.S. civil rights and liberties protections"); BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996) (examining the development of human rights litigation in the U.S. against foreign officials and governments who have committed torture against private citizens, thereby violating international law); Richard B. Lillich, *Damages for Gross Violations of International Human Rights, Awarded by U.S. Courts*, 15 HUM. RTS. Q. 207 (1993) (discussing the issue of choice of law with respect to the determination of a defendant's liability and the amount of damages to be awarded to the plaintiff in a human rights violation case); *see also* TIMOTHY S. JOST, DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 24–30 (2003) (discussing the extent to which, in America, there is a constitutional right to health).

Economic and Social Council (ECOSOC), the Commission on Human Rights, and particular specialized agencies—International Labor Organization; United Nations Educational, Scientific and Cultural Organization (UNESCO); Food and Agricultural Agency; and the World Health Organization (WHO)—as oversight bodies for individual human rights complaints.[55] When the jurisdiction of the Committee on Economic, Social and Cultural Rights is brought into play on the issue of individual complaints,[56] the determination of issues of justiciability becomes even more clouded. Additionally, to some extent, economic, social, and cultural rights claims are also subject to review under their respective treaties by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of Discrimination against Women.[57]

Current efforts by a newly structured working group of the U.N. Commission on Human Rights are tackling this very contentious issue of whether a new complaints mechanism can codify all those economic, social, and cultural human rights—together with civil and political rights—under one individual complaints procedure.[58] It is argued that since all human rights are universal and interdependent, they should be enforced uniformly under one mechanism.[59]

Critics have expressed skepticism as to whether such a mechanism is practical and Utopian since the ICESCR never intended the rights and obligations contained in it "to be susceptible to judicial or quasi-judicial determination."[60] Indeed, the drafters of the Universal Declaration of Human Rights, the ICCPR, and the ICESCR "well understood the differences between economic, social and cultural rights, on the one hand, and civil and political rights, on the other."[61]

Prevailing authority holds that violations of both social and cultural rights generally, and violations of the right to health in particular, are not justiciable and thus unsuitable as bases for judicial review because of their very indeterminancy.[62] Put simply, since the United Nations provides no specific procedures for complaints for violations of health rights, as well as other economic, social and cultural rights, violations of these rights are not justiciable.[63]

To shape access to health care resources and advance the ultimate aspirational goal of a legal claim to a right to health, a "right to health"

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55. Dennis & Stewart, *supra* note 36, at 506.
56. *Id.*
57. *Id.* at 504.
58. *Id.* at 462.
59. *Id.* at 463.
60. *Id.* at 515.
61. *Id.*
62. TOEBES, *supra* note 33, at 169.
63. *Id.* at 181.

must be precisely defined. Article 3 of the European Convention of Human Rights mandates only equitable access to health care of appropriate quality.[64] Of course, this does not mandate what form of health care is accessible or appropriate. Indeterminancy, thus, is a serious central weakness to stabilizing the right to access to health care and is coupled with the realization that there is neither a moral nor legal standard that gives universal meaning to a "right to health."[65]

B. *Non-Treaty Bases for Implementing Human Rights*

Traditional support for formulating a general, non-treaty based international law of human rights is found in customary law, authentic interpretation, and general principles.[66] Customary international law is seen as supplying a comprehensive set of norms held applicable to all states. Indeed, it has been maintained that the range of rights enumerated in the 1948 Declaration of Human Rights should now be seen as accommodating all of the desired human rights principles.[67] Others contend that the ICESCR and ICCPR,[68] have shaped the customary acceptance of some sixteen groups of human rights found in the covenants themselves.[69] In the past, customary law was developed through the emergence of practice joined by a sense of legal obligation or *opinio iuris*. Today, however, there is a movement from empirical or inductive verification to interpretative verification. Accordingly, the text of a U.N. declaration or treaty provision is tested to determine whether the normative claims set forth in it are being upheld by conduct.[70]

Inasmuch as the rules and principles built upon the Universal Declaration of Human Rights are recognized as authoritative interpretations of the U.N. Charter obligations of Articles 55 and 56, all member states are bound to conform their treaty obligations and

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64. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, art. 3, Eur. T.S. No. 164, 36 I.L.M. 817 (1997) [hereinafter Convention on Human Rights and Biomedicine].

65. David P. Fidler, *"Geographical Morality" Revisited: International Relations, International Law and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries*, 42 HARV. INT'L L.J. 299, 348 (2001); *see also* Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL'Y & ETHICS 137, 156 (2005) (arguing that health care is a necessary component of a right to health).

66. R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 48–51 (Cambridge Univ. Press 1986).

67. *Id.* at 38.

68. *See generally*, FORSYTHE, *supra* note 28.

69. Rolf Künnemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 324–25 (1995).

70. VINCENT, *supra* note 66, at 37–39.

practice with relevant organizations of the U.N. in ways that promote of human rights.[71]

Using the general principles of domestic law recognized and developed by civilized nations which are then transferred to the international plane and applied to relations between states provides yet another anchor for human rights obligations through rules of *jus cogens*.[72]

A final source for validation of international human rights, regarded by some as the most important part of contemporary lawmaking, is referred to as the "soft law" of human rights.[73] This term includes policies and mechanisms for standard-setting designed as either a final or intermediate consensus; it is through the process of standard-setting and monitoring where most political action occurs.[74]

C. *Limits of Practical Applicability*

The general rules of international law may be seen as failing to establish an individual right of action before a domestic court, unless domestic law provides specifically for such a right.[75] Although this lack of standing is a debilitating weakness in enforcing human rights and setting penalties for their breach, perhaps the central roadblock to effective action is the U.N. Security Council's enforcement lethargy. Thus, in addition to recognizing a right of protection for human rights, an "obligation to intervene" for humanitarian purposes must be imposed as well.[76]

Presently, the voluntary system of compliance and self-policing efforts by individual states, coupled with the Security Council's lack of decisiveness, guarantees that the self-interests of each state will shape and control its ultimate response to a human rights violation. Coupled with the passivity of the Security Council is the lack of jurisdictional authority by the International Court of Justice to deal with serious human rights infractions.

Another inherent weakness is the absence of a general system of ethics under the very concept of human rights. To achieve a system of this nature, structures would have to be designed in such a way as to impose far-reaching obligations on the individual to other individuals.

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71. *Id.* at 44.
72. *Id.* at 46–47.
73. *Id.* at 45–46.
74. *Id.*
75. Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, *in* IV-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW: THE PROTECTION OF HUMAN RIGHTS IN EUROPE 153, 231 (Academy of European Law ed., 1995).
76. *Id.* at 232.

Such structures would be alien to the classical nature of international law. State obligations are established under the concept of human rights, with no inclusion of individual duties to other human beings. The demand made in Article 1 of the Universal Declaration on Human Rights that all beings "should act towards one another in a spirit of brotherhood"[77] is far too broad to be seen as a visible mechanism for imposing concrete duties. "The fact that human rights create individual rights but not individual duties"[78] is quite rational because "the function of human rights is to create State obligations, and not to create general ethics. They are minimum standards for acceptable governance and a means of empowerment against oppression by States."[79]

In the final analysis, it appears as though contentious debate will nonetheless continue to focus on whether economic, social, and cultural rights are as pressing as civil and political rights.[80] Some would seek to prioritize rights, arguing that there are varying moral weights attached to them. Others contend that no ranking can be made of fundamental rights and, indeed, none should be honored before others.[81] Seeking universality in application of human rights requires all states to respect a defined set or core of minimum standards of behavior. So long as they meet these standards, adjustments might allow for differing legal, moral, and cultural value systems within each state.[82]

IV. SPECIFIC PROTECTIONS FOR HUMAN RIGHTS IN THE AGE OF BIOTECHNOLOGY

In November 1996, the Council of Europe adopted the Convention for The Protection of Human Rights and the Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Bioethics.[83] Patterned after the human rights approach of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,[84] the Bioethics Convention seeks to establish a direct relationship between bioethics and human rights. While the European Convention uses a holistic personality-identity framework for focusing on the value of the human being and the dignity and value of humanhood, the Bioethics Convention endeavors to

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77. Künneman, *supra* note 69, at 339.
78. *Id.*
79. *Id.*
80. Helena M. Cook, *International Human Rights Mechanisms*, 50 REV. INT'L COMMISSION JURISTS 31, 38 (1993).
81. *Id.* at 38.
82. *Id.* at 40; *see also* LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 29 (Oxford Univ. Press 1997).
83. Convention on Human Rights and Biomedicine, *supra* note 65.
84. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

enlarge and build upon this concept of respect, dignity, and protection and seeks to apply it to human substances as well, thereby safeguarding genetic heritage.[85]

The Convention on Human Rights and Biomedicine is similar to the Universal Declaration of Human Rights in its aspirational goal to recognize "the importance of insuring the dignity of the human being"; in its Preamble and Declaration in Article 1, the Convention states that that the parties "shall protect the dignity and identity of all human beings."[86] Yet in the Convention's Explanatory, emphasis is placed on the conclusion that the essential value to be upheld and used to interpret the Convention is the protection of human rights and dignity "with the principle of respect for human dignity being central to Articles 15 (regarding scientific research), 17 (safeguarding the protection of those unable to consent to research upon them), and 21 (prohibiting the commercialization of human genes and human reproductive cloning).[87] On the issue of human cloning, the draft Protocol to the Convention clearly identifies the need to be guided by the understanding that "the instrumentalisation of human beings" is contrary to human dignity.[88] Also, Article 1 suggests that the concept of human dignity may be used to protect those nascent human life forms which are not yet eligible for protection under a human rights analysis.[89]

Although this Convention is primarily for European Community members, countries who have observer status in the Council of Europe and acted as participants in the Convention's preparation, such as the United States, are invited to become signatories. In research involving human subjects, the level of similarity between Convention and U.S. federal precepts (e.g., principles of autonomy, beneficence, and justice) is

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85. Eibe Riedel, *Global Responsibilities and Bioethics: Reflections on the Council of Europe's Bioethics Convention*, 5 IND. J. GLOBAL LEGAL STUDS. 179, 182 (1997).

86. Convention on Human Rights and Biomedicine, *supra* note 65, pmbl., art. 1.

87. Secretary General of the Council of Europe, *Explanatory Report on the Convention for Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, ¶ 9, Eur. T.S. No. 164, 36 I.L.M. 817 (Dec. 17, 1996).

88. Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights and Human Genetics*, 61 MOD. L. REV. 661, 663–64 (1998). Inasmuch as the original Biomedicine Convention contained no direct ban on human cloning, a protocol to this effect was drafted prohibiting "any intervention seeking to create a human being genetically identical to another human being, whether living or dead." *Additional Protocol to the Convention for Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, art. 1, Eur. T.S. No. 168 (Jan. 12, 1998).

89. Beyleveld & Brownsword, *supra* note 88, at 664; *see also* Maurice A.M. de Wachter, *The European Convention on Bioethics*, 27 HASTINGS CENTER REP. 13, 19 (1997).

truly fascinating.[90] This fact, in turn, supports the point that contemporary norms for global, bioethical decision-making are beginning to take shape and achieve recognition under the very dynamic concept of transnational human rights.

A. *The UNESCO Declaration*

When evaluating UNESCO's Universal Declaration on the Human Genome and Human Rights,[91] the concept of human dignity is seen as the lynchpin of the Declaration itself. Indeed, of the twenty-five articles compromising the document, the first four are set under the heading, "Human Dignity and the Human Genome."[92] Article 2 affirms: "(a) Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics. (b) That dignity makes it imperative not to reduce individuals to their genetic characteristics . . . ."[93]

Following through with the need to maintain the human genome in its natural state and prevent its commercialization (Article 4), dignity is referred to subsequently in seven other articles.[94] Article 6 prohibits "discrimination based on genetic characteristics" which infringe human dignity[95]; Article 10 forbids research on the human genome which fails to respect human dignity, and other practices (*e.g.*, human cloning) "contrary to human dignity" (Article 11)[96]; "advances in biology, genetics and medicine" are to be made available to all "with due regard for the dignity . . . of each individual" (Article 12)[97]; a framework for free genomic research is to be provided in a way which safeguards "respect . . . for human dignity" (Article 15) and thereby raises awareness of "responsibilities regarding the fundamental issues relating to the defense of human dignity" that arises from human genetic research (Article 21).[98] In Article 24, the International Bioethics Committee is mandated to provide oversight "regarding the identification of practices that could be contrary to human dignity" (*e.g.*,

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90. F. William Dommel & Duane Alexander, *The Convention on Human Rights and Biomedicine of the Council of Europe*, 7 KENNEDY INST. ETHICS J. 259 *passim* (1997).

91. U.N. Educ. Scientific & Cultural Org. [UNESCO], Comm. of Governmental Experts for the Finalization of a Declaration of the Human Genome, *Final Report*, ¶ 13, BIO-97/CONF.201/9 (July 22–25, 1997).

92. Beyleveld & Brownsword, *supra* note 88, at 664–65.

93. Universal Declaration on the Human Genome and Human Rights, UNESCO, 29th Sess., 29C/Resolution 19, arts. 2(a)–(b) (Nov. 11, 1997).

94. Beyleveld & Brownsword, *supra* note 88, at 664–65.

95. *Id.* at 665.

96. *Id.*

97. *Id.*

98. *Id.*

germline interventions).[99] Essentially, then, the Declaration seeks to but establish a legal framework for international research.[100]

B. *A New Bioethics Instrument*

UNESCO's continuing effort to give both substantive and practical value to the basic principles of bioethics as lynchpins for safeguarding advances in genetic science is seen in its present study of the need for and development of a Universal Instrument in Bioethics.[101] The Instrument, when completed, will encourage all member states of the United Nations "to set up national and regional bodies designed to encourage the population to take part in an informed debate" on genomic and other scientific fields. It will, furthermore, allow all citizens to receive clear and precise information on the impact of the procedures available to them; this will, in turn, enable citizens to give truly full and informed consent to either accept or to decline such procedures.[102]

C. *The Draft Declaration*

On January 28, 2005, UNESCO's International Bioethics Committee finalized its Preliminary Draft Declaration on Universal Norms on Bioethics.[103] In declaring its aim to provide a framework for setting forth universal principles and procedures to assist states in developing legislation and policies in bioethics,[104] the Draft Declaration seeks, specifically, to "promote equitable access to medical, scientific and

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99. *Id.*

100. BARUCH A. BRODY, THE ETHICS OF BIOMEDICAL RESEARCH 89 (Oxford Univ. Press 1998); *see also* Michael D. Kirby, *Challenges of the Genome*, 20 U. NEW SO. WALES L. J. 537, 548–49 (1997).

101. U.N. Educ. Scientific & Cultural Org. [UNESCO], Working Group of the IBC on the Possibility of Elaborating a Universal Instrument on Bioethics, *Preliminary Report on the Possibility of Elaborating a Universal Instrument on Bioethics*, ¶¶ 6–10, SHS/EST/02/CIB-9/5 (Nov. 15, 2002).

102. *Id.* at ¶ 33; *see also* Steering Committee on Bioethics, *Draft Additional Protocol to the Convention on Human Rights and Biomedicine, on Biomedical Research*, pmbl., CDBI/INF (2001) 5 (July 18, 2001) (explaining goal of providing protections on human experimentations). *See generally*, Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J. LAW & MED. 479, 507–08 (1999).

103. Preliminary Draft Declaration on Universal Norms on Bioethics, SHS/EST/CIB-EXTR/05/CONF.202/2, (Feb. 9, 2005). Interestingly, the Committee—differing with the style of the U.N. charge to it—has recommended the document be entitled, "Universal Declaration on Bioethics and Human Rights." *Id.* On October 19, 2005, UNESCO's member states adopted the Universal Declaration on Bioethics and Human Rights by acclamation. Press Release, UNESCO, UNESCO's General Conference adopts Universal Declaration on Bioethics and Human Rights (Oct. 19, 2005), *available at* http://tinyurl.com/do886.

104. *Id.* art. 3 (i).

technological developments"[105] consistent with safeguarding respect for human dignity and protecting human rights and fundamental freedoms.[106]

Enunciating a Principle of Social Responsibility codified in Article 13, the Declaration directs decisions and practice in science and technology to advance "the common good" by providing "access to quality of health care and essential medicines,"[107] providing "access to adequate nutrition and water,"[108] improving living conditions,[109] eliminating the marginalization of persons,[110] and reducing poverty and illiteracy.[111] Building on this delineation of social responsibility, Article 14 directs the benefits of scientific research to advance, among other interests, "access to quality health care,"[112] "facilities for new treatments or medical products,"[113] and "support for health services."[114]

Finally, again underscoring the responsibility of the state to promote and safeguard public health standards, Article 22 of the Draft Declaration urges that proportionate measures designed to accord respect for "human dignity, human rights and fundamental freedoms" be undertaken when there are "threats of serious or irreversible damage to public health or human welfare."[115] In this regard, the Declaration is to be seen as a bold effort to recognize—and thereby validate—the inextricable relationship between human dignity and human rights with "access to health care."[116] Once adopted by the U.N. General Assembly, the Declaration will serve as an important guide for the global development of health care policy which, in turn, will advance a claim to a universal right to health.

D. *The Scope of Human Dignity*

Human dignity, as a concept, is open to abuse and misinterpretation. It can not only oversimplify complex issues, but can also encourage a form of paternalism totally incompatible with the very spirit of self-determination.[117] Often it is seen as the primary source of human rights. While, at other times, it is viewed as but a species of it or a framework for defining the subject of human rights. Still, in other

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105. *Id.* art. 3 (v).
106. *Id.* art. 3 (iii).
107. *Id.* art. 13 (i).
108. *Id.* art. 13 (ii).
109. *Id.* art. 13 (iii).
110. *Id.* art. (iv).
111. *Id.* art. 13 (v).
112. *Id.* art. 14 (ii).
113. *Id.* art. 14 (iii).
114. *Id.* art. 14 (iv).
115. *Id.* art. (b).
116. *Id.* art. (ii).
117. Beyleveld & Brownsword, *supra* note 88, at 662.

applications, human dignity defines objects to be protected; thus, in some situations it may limit individual rights of autonomy and self-respect.[118] It has been asserted that "any violation of human rights *implicitly* violates human dignity."[119]

Dignity may also be thought of as a claim for a basic degree of respect as individual human beings, and is accordingly a driving or defining force in shaping well-being.[120] As such a mechanism for action, it may be understood further "as that which protects self-respect, which in turn permits self-consciousness and self-identity, which, in turn, requires the promulgation of rights."[121] Always at the crux of defining and advancing human well-being, however, are health and human rights.[122]

V. THE RIGHT TO HEALTH, HEALTH CARE, OR HEALTH PROTECTION

As early as the fourth century B.C., Aristotle reportedly wrote of a citizen's absolute right to the measure of good health that society is able to give.[123] Over the course of time, the notion of a right to health, or health care as a human right, has gained some level of credence; the right to health is sometimes considered as a corollary to the general duty and responsibility of states to advance the enjoyment of freedoms and entitlements considered as the rights of each human.[124] Yet the battle for *universal* recognition and enforcement of human rights has been largely aspirational and unenforceable.[125] That said, an interesting perspective in law reform, led by a prominent Australian jurist, is nonetheless beginning to take hold.

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118. *Id.* at 665. For an extended analysis of human dignity as a duty-led or rights-led concept, *see id.* at 667–73.

119. *Id.* at 665.

120. MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 10, 146 (Yale Univ. Press 1980).

121. Alice Ely Yamin, *Defining Questions: Situating Issues of Power in the Formulation of a Right to Health Under International Law,* 18 HUM. RTS. Q. 398, 401 (1996).

122. Jonathan M. Mann et al., *Health and Human Rights,* 1 HEALTH & HUM. RTS. 7, 19 (1994). Individual conscience is seen, interestingly, as an emerging norm in the international law of human rights. ROBERT F. DRINAN, CAN GOD AND CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 24 (Yale Univ. Press 2004).

123. EUGENE B. BRODY, BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS 13 (1993). *See generally* Steven D. Jamar, *The International Right to Health,* 22 S.U.L. REV. 1 (1994) (stating that "even before the time of Aristotle the centrality of health has been recognized").

124. BRODY, *supra* note 123, at 13.

125. GEORGE J. ANNAS, SOME CHOICE: LAW, MEDICINE AND THE MARKET 256 (1998).

In the Fifty-fifth Hamlyn Lecture, Justice Michael D. Kirby of the High Court of Australia, observed that the trend toward globalism dictates that human rights law, as a part of the larger body of international legal principle, be used to fill gaps in the common law decisionmaking process or when ambiguities in written law need to be resolved.[126] Indeed, "as national and international determinations come to influence courts in many lands, global sources will supplement purely local ones in judicial reasoning, especially when the judge is faced by a novel problem."[127] Contemporary constitutional interpretation requires more reference to international law and normative values in order to avoid intellectual isolation by the judiciary.[128] The extent to which there is an active or passive interaction between international law and national law remains an issue of great importance.[129]

A. *Definitional Uncertainties*

Defining and enforcing civil and political rights in the world community has required, and continues to require, tenacity and great patience. The record of achievement has, at best, been quite irregular. An even greater challenge lies in shaping a meaningful, identifiable, operational, and enforceable right to health within the ambit of economic and social rights.

To make a right to health more than merely aspirational, a first step is to develop a workable definition of what precisely such a right includes. What, for example, does "enjoyment of the highest attainable standard of health"[130] mean, as used in the preamble of the WHO's 1946 Constitution? Article 55 of the U.N. Charter dedicated the United Nations to promoting solutions for international health problems.[131] What is the nature and scope of these problems? The Universal Declaration of Human Rights structures a right to enjoy "a standard of living adequate for the health and well-being of himself and of his family."[132] What are the requisites of health necessary for a state of

126. MICHAEL KIRBY, JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD 74 (2004).

127. *Id.* at 75.

128. Justice Michael Kirby, The Seventh Annual Grotius Lecture: The Growing Use of International Human Rights Law in the Elaboration of Municipal Constitutions, The American Society of International Law, 99th Annual Meeting, Washington, D.C. (March 30, 2005).

129. NOWAK, *supra* note 38, at 52–53.

130. World Health Organization, pmbl., para. 3, July 22, 1946.

131. U.N. Charter art. 55(b).

132. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. at 71, U.N. doc. A/810 (Dec. 10, 1948).

well-being?[133] Interestingly, the ICESCR does not define the right to health and treats it in general, rather than in specific, terms.[134]

Some rights within the ICESCR are "recognized,"[135] while others need only be "respected,"[136] "ensured,"[137] or "guaranteed."[138] The highest ordering of state responsibility under the ICESCR, then, is found under the terms, "to ensure" and "to guarantee"; for they are not subject to the standard of "progressive realisation."[139] While the right to the highest standard of health is only "recognized," this was done in the drafting of the ICESCR to assure wider acceptability to states initially unwilling to assume specific responsibilities—it is, however, given a stronger ordering by the enumeration of various, non-exhaustive steps for its realization.[140]

In actuality, a fundamental right to health suggests something that usually cannot be guaranteed at all—namely, perfect health. Not only does this state or condition vary from person to person, but from country to country, and is thus truly an indeterminate variable.[141] In the relevant international human rights instruments pertinent to shaping a right to health,[142] the right is viewed as corresponding to a shorthand term for "the right to the highest attainable standard of health,"[143] with the right to health care viewed as an inherent part of the right to

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133. *See* GOSTIN & LAZZARINI, *supra* note 82, at 27–31 (noting that although several documents promote the right to public health, few, if any, have a working definition or standard).

134. *Id.*; *see* PAUL SIEGHART, THE LAWFUL RIGHTS OF MANKIND 130 (1985) (acknowledging the European Social Charter (Art. 11), and the African Charter, (Art. 16), also recognize the rights of everyone to the enjoyment of the highest or best attainable standard of health—both physical and mental). *See also* Organization of African Unity: Banjul Charter on Human and Peoples' Rights, Jan. 7, 1981, 21 I.L.M. 58 (recognizing the right to public health without providing a definition or explanation of what such a right entails); *see generally* M.C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 24 (1995) (discussing international agreement on human rights without explicitly defining the right to health).

135. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), at 49, 21 U.N. GAOR, U.N. Doc. A/6316 (Jan. 3, 1976).

136. *See e.g.*, *id.* art. 13(3), 15(3) (requiring respect for parental liberty regarding certain aspects of their children's education and freedom of scientific research).

137. *See e.g.*, *id.* art. 3, 8 ("ensuring" the equal rights of men and women as well as trade union rights).

138. *See e.g.*, *id.* art. 2(2), 7(a)(1) ("guaranteeing" nondiscrimination and the prohibition of gender discrimination in employment).

139. TOEBES, *supra* note 33, at 293.

140. *Id.* at 293–332.

141. *Id.* at 16; *see also* Symonides, *supra* note 36, at 132–35.

142. *See* TOEBES, *supra* note 33, at 28 (listing the WHO Constitution, the Universal Declaration of Human Rights, the Covenant on Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child as international instruments pertaining to a right to health).

143. *Id.* at 17–18.

health.[144] Care must always be taken to avoid broadening the scope of this right to include "almost everything."[145]

There is agreement, however, that there are basic underlying preconditions which influence health and indeed become part of this right to health. They include: adequate nutrition, safe drinking water, sanitation, safe working conditions or occupational health, and a healthy environment.[146] Without doubt, many of these preconditions overlap with the Covenant for Economic and Cultural Rights.[147] They complement and strengthen what has been termed "core health care elements" such as safeguarding maternal and child health care (including family planning), immunizing against major infectious diseases, and the appropriate treatment of common diseases and injuries.[148]

Article 3 of the European Convention on Human Rights mandates equitable access to health care of appropriate quality.[149] This, of course, does not resolve in any manner the defining issue of what form of health care is accessible and appropriate.[150] Nor does this mandate allow for any recognition of the fact that the strength and availability of health care services depend not only upon the resource bases available to those within domestic health care systems,[151] but the social settings in which health demands arise.[152] Consequently, individual claims to appropriate health care are often seen as incompatible with communitarian obligations to preserve the general good.[153]

Thus, the Universal Declaration, together with the ICESCR and the ICCPR, can be understood as, at best, referencing the *right* to health as an "imperfect obligation."[154] And under the principle of cultural relativism, serious doubts remain as to whether all of the rights in the Declaration are encoded culturally in one context or are subject to

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144. *Id.* at 19.

145. *Id.* at 259; *see* DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL JURISPRUDENCE 302–09 (2005) (explaining that the right to health is essentially seen as the right of access to health services).

146. TOEBES, *supra* note 33, at 122, 272; NOVAK, *supra* note 37, at 143 (arguing that the right to health, as a social human right to health, is linked, perhaps inextricably, to the right to an adequate standard of living and right to food).

147. TOEBES, *supra* note 33, at 122, 272.

148. *Id.* at 284.

149. Convention on Human Rights and Biomedicine, *supra* note 65, art. 3; *See* JAMES E. CHILDRESS, PRACTICAL REASONING IN BIOETHICS 249–50 (Indiana Univ. Press 1997) (arguing for equitable access to health care).

150. Dieter Giesen, *Health Care as a Right: Some Practical Implications*, 13 INT. L J. MED. & L. 285, 290 (1994); *see generally* ROBERT M. VEATCH ET AL, MEDICAL ETHICS 57–73 (Robert M. Veatch ed., 2d ed. 1994) (discussing the concepts of health, illness, and disease).

151. RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH? 417 (1997).

152. ANNAS, *supra* note 125, at 254.

153. BRODY, *supra* note 123, at 29.

154. Kirby, *supra* note 8, at 20.

differing applications within the varying world cultures, especially since notions of right and wrong vary across transnational boundaries.[155]

B. *Shaping A Right To Health Care*

Because of these profound uncertainties, it has been suggested that it is misleading to refer to a governmental obligation to guarantee a person's good health.[156] Rather, it is better and more accurate to refer to a right to health protection[157] which would include a right to health care and a right to live under healthy conditions.[158] Yet a strong conceptual framework for both identifying and analyzing those essential societal factors representing the conditions under which people can be healthy is lacking.[159] Others suggest that a right to health does exist in the abstract but disagree as to the practical consequences of its recognition.[160] Consistent with all of these concerns, the WHO recently concluded that it made poor economic sense to provide comprehensive medical services for everyone. Accordingly, poorer countries should be helped to carry out low cost programs to tackle illnesses such as malaria, while wealthier countries should learn how to prioritize the care they offer. Again, the components of qualitative health care availability are seen as being shaped by a clear understanding of resource availability within each state.[161]

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155. *Id.* at 8; STEINER & ALSTON, *supra* note 31, at 192–94; VINCENT, *supra* note 66, at 37–38.

156. *But see* CHILDRESS, *supra* note 149, at 241 (arguing for a political-legal right to health care).

157. Virginia Leary, *Health, Human Rights and International Law*, 82 AM. SOCY. INT'L. L. PROC. 122 (1988).

158. Virginia Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 25, 31 (1994). *See generally* Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L. J. 285, 291, 305–59 (2004) (suggesting 67.5% of the world constitutions have provisions covering health or health care and then surveying them).

159. Jonathan M. Mann, *Medicine and Public Health, Ethics and Human Rights*, 37 HASTINGS CENTER RPT. 6, 8 (1997); NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL REGIONAL AND INTERNATIONAL JURISPRUDENCE 883 (2002) (asserting that the right to health is seen as embodying both freedoms and entitlements: freedom to the control of one's health and body together with the right to be free from interference with medical treatment and an entitlement to participation in a system of health protection which affords all individuals under it a right to attain the highest levels of health).

160. ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT 201 (Ralph Beddard & Dilys M. Hill eds., 1992).

161. Ian Murray, *World Body Calls for Healthcare to be Rationed*, THE TIMES (London), May 12, 1999, at 2.

C. *The ESCR Comment*

The United Nations Committee on Economic, Social and Cultural Rights (ESCR), which is charged with monitoring the implementation of ICESCR, issued in 2000 General Comment No. 14: "The Right to the Highest Attainable Standard of Health."[162] While proclaiming health as "a fundamental human right indispensable for the exercise of other human rights," the ESCR structures the right within broad norms, state obligations, violations, and implementations.[163]

There are four core state obligations, among others, designed to guarantee a minimal level of health: nondiscriminatory access to health services, especially for vulnerable or marginalized groups; adequate food sources that are nutritionally enriched; basic shelter which accommodates sanitation and potable water; and use of essential drugs.[164] The development of national public health strategies that address health concerns regarding reproduction and maternal health, immunization, infectious disease control, and ready access to health information is centrally important.[165]

While impressive, the General Comment must surely have been seen as more aspirational than determinative, for the indisputable fact remains: violatons of these lofty (albeit noble) pronouncements of state obligations remain nonjusticiable. Also, the bottom line may be that the members of the transnational community—by and large—simply refuse to invest the necessary economic capital sufficient to guarantee the components of the right to health as seen by the ESCR. Enforcement of such broadly defined and indeterminate rights is not viewed as practical.

Since the United States has not ratified the ICESCR, as observed above, the General Comment has neither force nor effect on its international responsibilities. In point of fact, the United States may be seen as violating the right to health, not because it spends too little on health care and public health, but rather because its resources are distributed inequitably.[166]

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162. Committee on Economic, Social, and Cultural Rights, 22 Sess., Agenda Item 3, U.N. Doc. E/C.12/2000/4, 4 (2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?Opendocument.

163. *Id.*; DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 188 (1989) (noting that Art. 12 (2) of the International Covenant is far too general to provide clear insight into concrete actions states parties need to take in order to be in compliance); *see also* Meier, *supra* note 65, at 156 (observing that little guidance is provided to the states regarding the scope of their obligations under the right to health under the ESCR).

164. JAYAWICKRAMA, *supra* note 159, at 96–97.

165. *Id.*

166. Lawrence O. Gostin, *The Human Right to Health: A Right to the Highest Attainable Health*, 31 HASTINGS CENTER RPT. 29, 30 (2001); *See* Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457 (2001) (noting that the WHO ranked performance of the U.S. health care system 37th among all nations due to disparities by race and income);

VI. INSURMOUNTABLE DIFFICULTIES?

For any working definition of a right to health, health care, or health protection to have contemporary relevance, it must first include recognition of an obligation of the state "to ensure the conditions necessary for the health of individuals."[167] As observed previously, there is no consensus on what minimal conditions are necessary for health[168] because of the almost inextricable relation its recognition as a perfect or imperfect right has with the level of cultural and economic development of each state within the world community.[169] Inevitably, individual claims to health right protections must be balanced within a utilitarian construct against societal or communal needs.[170] The result often means that equity is forsaken for economic stability.

Organizationally, at the supranational level of administration, the internal weaknesses of the U.N. Security Council and the International Court of Justice for enforcing violations of human rights are compounded "in specific health policies" by the WHO's inability to assume a decisive leadership role. Indeed, the WHO has been reluctant to utilize its legal powers—or to adopt legal principles—which implement directly health care strategies. It has chosen instead to adopt a functional or technical approach to health care matters, thereby developing a well-regarded and limited reputation for the collection of data and for technical standardization of international health regulations.[171]

Consequently, recommendations, resolutions, codes of conduct, and technical standards comprise the arsenal used by the WHO to impact health issues transnationally.[172] Whether this is viewed as an effective, systematic, and assertive approach to problem-solving is questionable. Absent use of the treaty-making process, however, it is feared the leadership ability of the WHO and other international organizations will

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see generally Ronald Dworkin, *Justice in The Distribution of Health Care*, 38 MCGILL L. J. 883 (1993) (arguing that the right to health requires equitable distribution of health care).

167. GOSTIN & LAZZARINI, *supra* note 82, at 29.

168. Mann, *supra* note 159 at 6, 8.

169. Kirby, *supra* note 8, at 8.

170. GOSTIN & LAZZARINI, *supra* note 82, at 4, 33–34; BRODY, *supra* note 123, at 202; HEALTH AND HUMAN RIGHTS 54–55 (Jonathan M. Mann et al., eds. 1999).

171. Alison Lakin, *The Legal Powers of the World Health Organization*, 3 MED. L. INT'L. 23, 24 (1997); *see* Jamar, *supra* note 123, at 43–48; *See also* Yutaka Arai-Takahashi, *The Role of International Health and the WHO in the Regulation of Public Health, in* LAW AND THE PUBLIC DIMENSION OF HEALTH 139–41 (Robyn Martin & Linda Johnson eds., 2001) (discussing ways to induce compliance with WHO directives); *see generally* Elsa Stamatopoulou, *The Development of United Nation's Mechanisms for the Protection and Promotion of Human Rights*, 55 WASH. & LEE L. REV. 687 (1998) (discussing the development of U.N. human rights protection mechanisms and outlining some of the main challenges in effectuating human rights).

172. Lakin, note 169, at 24, 33–4.

remain limited, due inherently to the continuing domination of independent states.[173]

Regardless of which approach is taken to resolving the complex definitional issues of human rights and their scope, there is an overriding need for more explicit implementation standards to be articulated and developed in order to reflect the dynamic quality of a contemporary human rights doctrine.[174] The very imprecision in problems of definition as well as measurement, monitoring, and enforcement have been roadblocks to applying useful economic, social, and cultural rights. Indeed, some consider them insuperable obstacles.[175] Until all countries ratify the ICESCR, establish the domestic capability to monitor the successful enjoyment of these covenant rights and create a complaint and investigative process when allegations of human rights violations occur, no resounding progress or success will be recorded.[176]

Concrete steps have been taken to address many of these concerns. Central to this agenda for change has been the Eleventh Additional Protocol to The European Convention for the Protection of Human Rights and Fundamental Freedoms which has streamlined a new complaint procedure for individual human rights complaints and interstate complaint procedures for all state parties.[177] Also, the Commission on Human Rights and other specialized agencies[178] provide a venue for individual human rights complaints. The current efforts of a Working Group of the U.N. Human Rights Commission to study and hopefully resolve the issue of whether human rights are universal and should be enforced under one mechanism can have nothing but a salutary effect on clarifying the issues of justiciability.[179]

Whether justiciability of economic, social, cultural and health rights is achieved (as it has been for civil and political rights[180]) in the future, depends in very large measure upon the willingness of the courts to recognize and apply them. Perhaps equally as important is whether states achieve a demonstrable level of economic prosperity that accommodates a recognition and a guarantee of these rights.[181] Even though there is a discernible trend toward such a recognition,[182] the fact remains that without a sustained level of economic stability, justiciability will not be validated for claims to either a right to health,

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173. *Id.*
174. GOSTIN & LAZZARINI, *supra* note 82, at 35.
175. *Id.*
176. *Id.*
177. *See* NOWAK, *supra* note 38, at 164 (discussing the streamlined procedures to facilitate international human rights adjudication).
178. *See* Dennis & Stewart, *supra* note 55, at 502–03.
179. *Id.* at 504.
180. TOEBES, *supra* note 33, at 231–32, 345.
181. *Id.* at 349; *see also* Symonides, *supra* note 36, at ch. 3.
182. TOEBES, *supra* note 33, at 349.

health care, or health protection. It should be remembered that Article 2(1) of the ICESCR allows the realization of rights set out within it by the state signatories "progressively" *and* "to the maximum of a State's available resources." Thus, this principle of progressive realization has the very real effect of emasculating any concerted and sustained attempt to structure a universal right to health; the justifiable differences among states (timely or otherwise) in this area of concern are based upon their varying respective degrees of political will and levels of economic resources.[183] So long as their compliance efforts move "progressively" toward the goal of realizing the Article 12 right to health, no violations are registered.[184]

Perhaps the self-defeating weakness of the whole enforcement structure is its reliance upon a voluntary system of compliance and self-policing efforts by individual states. Inevitably, self-interest shapes and controls the ultimate response to a violation of human rights as well as health care protections which are an inherent part of those basic rights.[185]

183. Meier, *supra* note 65, at 159.

184. *Id.*

185. GOSTIN & LAZZARINI, *supra* note 82, at 8–9; *see* TIMOTHY S. JOST, READINGS IN COMPARATIVE HEALTH LAW AND BIOETHICS 5 (2001) (noting that the WHO has no authority to enforce compliance); *see generally* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999) (discussing the problems of compliance in international law).

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