Social and Economic Rights and the ILO

Too often it is forgotten that social and economic rights are a century old in international law, at least with respect to some labor rights. The International Labour Organisation (ILO) was created in 1919, but the practice of states enacting conventions concerning labor and work conditions began in 1905. The context in which the ILO was created is important to analyzing and defining women’s social and economic rights. The ILO was established in response to the objective living conditions of new industrial workers and to the political pressures of the socialist movement and pioneering sociologists. The creation of a level playing field with regard to standards designed to improve workers’ living conditions was one of the key objectives of the ILO. The concern with improving the quality of life for workers was linked to the issue of fair trade practices by some industrialists who argued that competing industrial states must protect themselves from unfair production costs based on low or nonexistent labor standards.

In the early 1900s, the definition of both work and workers was then specific to the newly industrialized European context. The worker was a male industrial laborer responsible for supporting his wife and children. The ILO, reflecting the traditional values of the larger culture, saw its role as one of shielding women from the workplace, thereby allowing women to assume their primary role as stay-at-home mothers. In the view of the ILO, women were drawn into the labor market because of the inadequate wage structure for men. The appropriate place for women, however, still was considered to be in the home. The first social security standards established in the relevant ILO conventions reflected a traditional gender bias in workers’ rights norms.
The first generation of labor rights, reflecting new developments in domestic labor law, institutionalized a three-party labor contract involving the state, the employer and the worker. From the start, the state was seen as an active and responsible player with regard to social and economic rights. The first generation of international labor rights established state protection for workers in four areas: the conditions of work (which included reasonable limits on working hours and a day off each week), social security, protection of income and prohibition of forced labor. This last category was a response to the strained North-South relations that were a legacy of the colonial era.

The states, through the introduction of social and economic human rights into international law, subjected themselves to some form of international control. First, according to the ILO Constitution, it is the obligation of a state member to report on the reasons why a convention adopted by the International Labor Conference has not been ratified. Second, it is the obligation of a ratifying state to report on the means of implementation of a convention. Only ILO Conventions (98) and (87), which guarantee the freedom of association and the right to bargain collectively, use a distinct form of international control. This modest form of international control where states are governed through reporting obligations is today still the prevalent mode of control of the ILO conventions.

For the most part, these first generation norms were to be implemented through the adoption of domestic legislation. The legislation was to be designed to prohibit certain categories of persons (such as children) from entering the work place or to regulate the conditions of the work setting on behalf of workers.

The group of states that created the ILO made it relatively easy for its first conventions to be ratified and implemented (with the exception of social security conventions that were never extensively ratified). Until the post-World War II period, ILO conventions concerned mainly one type of work (industrial) and one type of worker (the male industrial worker) as a framework for normative action.

The Post-War East-West Compromise and the Welfare State

In 1944, the ILO adopted the Philadelphia Declaration and restructured itself as a specialized institution in the new framework of the United Nations. Although the Declaration is not an instrument of normative content, it changed the ILO mission in a significant way.
The Philadelphia Declaration broadened the mission of the ILO to include the protection of all workers, not just industrial workers. Also, while the ILO Constitution never addressed the right to work, the Philadelphia Declaration did. It declared that ILO member states shall adopt policies dedicated (1) to work that respects labor standards; and (2) to the promotion of full employment. Politically speaking, the Declaration created a new balance between every person's obligation to work and every person's right to work which relied heavily on state commitment. Legally speaking, the Declaration opened the way for what we now call programmatic entitlements or claim rights. In other words, the Declaration created rights to something, such as the right to work, to health or to education.

In 1962, the Convention (122) on employment policy was adopted. This Convention originally was designed for underdeveloped countries, but it evolved until the final draft had universal application. The Convention (122) clearly defines every person's right to work. This right includes the positive obligation of a state to take active measures dedicated to the attainment of full employment. Many scholars and states took issue with the programmatic right to work because it had been adopted primarily as a result of pressure from Eastern bloc states. Western critics of Convention (122) argued that its provision for a right to work reflected and adopted socialist political and economic structures. Some critics argued that there could not be a legal right to work because it would be too contextual and flexible to be universally implemented.

The debate over an international and universal right to work has further significance. A few years after the adoption of the Philadelphia Declaration, the Universal Declaration on Human Rights was adopted in 1948. It is a typical East-West compromise. The Universal Declaration is legally considered a body of customary, universal human rights to be respected by every country. The idea that it is universal means that every country, whether or not it has ratified the international treaty, must respect and defend the rights contained in the Declaration. The Declaration contains many programmatic rights including the right to education, to health and to work. However, because the level of precision granted to the entitlements found in the Universal Declaration is not exhaustive, the entire debate on programmatic rights is left open.

In 1966, the Universal Declaration was split into two covenants or treaties: the International Covenant on Civil and Political Rights
(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although these two covenants are considered still to constitute an "International Bill of Rights," many states have only ratified and agreed to abide by the obligations of the ICCPR while the ICESCR has remained under-ratified and its legal mandates considered optional. Generally, states in the West believed that programmatic rights such as the right to work, which were codified in the ICESCR, referred only to rights of people in Eastern bloc states.5

In fact, it was on political, rather than legal grounds, that the states split the original Universal Declaration of Human Rights into two covenants. Neither the Western nor the Eastern bloc was willing to put the domestic implementation of social and economic human rights under international surveillance. The Western bloc contended that social and economic rights were not universal rights but could be granted only through ratification as well as moral commitment by the states. The eastern bloc deeply resisted a breach of the principle of national sovereignty and opposed any international control of rights.

Therefore, whereas a consensus rapidly developed around the idea of an Optional Protocol for the enforcement of civil and political rights, this was not the case for the ICESCR. States limited their commitment to a procedure of reporting on progress of implementation. A review of the preparatory work during the last drafting period of the covenants demonstrates that neither the fundamental state commitment provided for in Section 2 of the ICESCR nor the control of its implementation generated serious debate.

In sum, the status of social and economic rights at the end of the 1960s was such that neither their internationalization nor their universalization through the ICESCR opened the way to serious and effective mechanisms of accountability. Implementation was not foreseeable and therefore was not the major concern of either the Experts Commission of the ILO or the Economic and Social Council

5 Western critics argued that programmatic rights only applied to states that were set up to establish a universal right to work and that an international right to work was designed to accomplish standards of a growing welfare state. Many western states with substantial influence in the international political arena, such as the United States, stated that programmatic rights did not legally apply to them. Therefore, the international right to work was relegated to a lower status than civil and political rights and its meaning became vague and practically unenforceable.
(ECOSOC) of the United Nations. The major concern was to create and maintain what was called a constructive dialogue with the ratifying states. The intimate and historical relationship between the ILO and the United Nations as to social and economic rights makes it clear that the adoption of the ICESCR was much more a project for the universalization of those rights than one dedicated to create a superior level of state accountability. Again, among international labor rights, only rights of freedom of association and collective bargaining were enacted with a strong mechanism for enforcement and state accountability. The great majority of international social and economic rights only require that states take measures towards their progressive implementation.

The model of implementation reserved for most of the social and economic rights is a model where the state’s role is to advocate for its people. By contrast, the model adopted by the United Nations for implementing civil and political rights positions the people against the state. This overall philosophy of rights distinguished social and economic programmatic rights (such as the right to work) as positive rights in contrast to civil and political rights (such as the right to freedom from arbitrary imprisonment) which were negative rights. However, developments in the 1970s demonstrated that the positive/negative distinction was a false distinction.

The 70s and the Emergence of the Right to Development

From its adoption in the 1960s, implementation of the ICESCR took a back seat to other issues. The crucial importance legitimately given to the right of peoples to self determination and to the construction of a person’s right to development overshadowed the implementation and international control of social and economic rights. Furthermore, mainly southern states argued that other rights, including the right to development and peace, were prerequisites to an effective implementation of the first (civil and political) and second (social and economic) generations of rights. On the international political agenda, the quest for a right to development lay somewhere between the march for peoples’ self-determination and the recognition of third generation rights that had yet to be codified and recognized including indigenous people’s rights and other collective, “group” rights.
This is exactly where, chronologically, an important shift took place from a rights perspective to a needs perspective. At the time, the accepted international legal reasoning described above resulted in the conclusion that the implementation of the majority of rights in the ICESCR could only be enforced by "progressive implementation" standards.\(^1\) Thus it is understandable that the immediate aspects of the recognition of a person's right to development and to the satisfaction of one's basic needs superseded interest in utilizing international legal mechanisms to advance social and economic rights.

The tension between a rights and a needs perspective produced theoretical confusion in assessing functions and international legal obligations of states. For example, the commitments by states to peace and equity are undertaken through Article 55 of the United Nations Charter, which takes a needs perspective. Their commitments to advance social and economic rights are codified in the ICESCR which takes a rights perspective.

Several questions added to the uncertainties concerning the legal standing of programmatic social and economic rights. For instance, is the right to development a person's individual right or a people's group right? What are the elements that constitute a person's right to development? How are third generation, so-called collective rights, which are interdependent with the right to development, defined? Is enforcement of these rights limited by the lower status, "progressive implementation" mechanisms of justiciability that are already in place? Unfortunately, there were not enough powerful voices to help resolve these issues on the side of the ICESCR.

It was not until 1976 that ECOSOC created a sessional working group to control the implementation of the ICESCR. The working group was bombarded with so many complaints that no serious progress was made toward implementing the ICESCR before 1985 when the Covenant Committee of Independent Experts was finally created.

At the same time, the preoccupation with development inundated the work of the ILO and created an important shift away from

\(^1\) That is, the language of the ICESCR requiring that states "take all measures necessary" to implement social and economic rights was interpreted to mean that states should try their best, without much international oversight, to someday achieve the goals of the Convention. Under the interpretation that was then dominant, if states believed they did not have the resources to implement the Convention's rights, the fact that they asserted an inability to comply generally excused their inaction.
the promotion of and respect for codified labor and economic rights towards the satisfaction of basic human needs as a political target. The 1976 Declaration and Action Plan for social progress, actualized in 1979, is a clear illustration of this. Labor rights are not mentioned in the Declaration, which focuses instead on the satisfaction of basic human needs. No mechanisms of state accountability are present in the Declaration, even in nascent form. The satisfaction of human needs cannot be evaluated by reference to legal standards unless the methodology for such an evaluation is framed in terms of rights.

The absence of mechanisms of state accountability is understandable in a context where millions of people were not in a position to capture the sense and merits of the universality of human rights. But it is a fact that the North was delighted to not hear about social and economic rights for a while. As was shown above, the North profited from the opportunity to rhetorically lower social and economic human rights standards. Social and economic "rights" were then reduced to "human needs" or the even more vague and minimal "basic human needs." Some Northern countries also felt that they were above any requirement to enact, defend or comply with the normative content of international social and economic rights. However, their declining economies showed the need for globally addressing social and economic conditions. New forms of Northern poverty and exclusion from the international economy emerged around 1972. In response to global changes, Northern economic conditions continued to worsen throughout the decade.

Prior to the era of globalization, programmatic social and economic rights, and even more objective labor rights, never developed to the point that they seriously demanded state accountability. A major reason for this was their lack of justiciability, or the lack of an enforcement mechanism, but that certainly could have been developed later.

About the rights themselves, two other factors slowed progress. First, the presence of the right to development became a competing value and tensions between the rights/needs approaches hindered enforcement. Second, the institutions in this specific field of human rights collaborated with financial institutions in the field of international trade without protesting the hegemonist attitudes present in those institutions. NGOs also bear a measure of blame. NGOs kept the international human rights focus exclusively on civil and political rights for too long. As a result, the states were left alone to
fundamentally restructure and transform the welfare state, which is intimately linked to social and economic rights, into the trade state as a facilitator for international business. Many states had little choice but to follow the dramatic changes in the global, essentially North-South economy. However, some of the damage of the 1970s was arguably avoidable. Generally speaking, the international community had not seriously considered a defensive strategy of social and economic rights.

The Economic, Social and Cultural Rights Committee

It was not until 1985 that the ICESCR Independent Experts' Committee got a mandate from ECOSOC to assume the monitoring of the Covenant. The committee was created in the context of the globalization of the market. This was a period marked by the emergence of international trade agreements and new policies of structural adjustments. These developments were to transform notions regarding a person's obligation to work and his or her right to decent living conditions.

The recent work of the ICESCR Experts' Committee has given a legal meaning to social and economic rights, especially to those that can be described as programmatic. The Committee's work basically resolves definitional problems of the past and demonstrates that social and economic rights are new universal rights. Because the Committee's official observations regarding the ICESCR state that its rights apply to "persons," the rights are shown to be much more than general goals to be progressively implemented by willing states. The use of the word "person" shows that social and economic rights are human rights. If they are universal human rights, then surely they must apply to women.

Trade and Social And Economic Rights

Under the modern international legal regime, women's social and economic rights will be affected by international trade issues. Human rights have always been trade-related. Examination of either the creation of the ILO or the relevant factors that led to the creation of the Bretton Woods institutions demonstrates that human rights have always been linked to trade.

In April 1994, in Marrakech, Morocco, the General Agreement on Tariffs and Trade (GATT) General Secretary Sutherland declared
that the Uruguay Round (the most recent in a series of general agreements on tariffs and trade) was to be the GATT of employment. The Uruguay Round of GATT was adopted by international agreement among the world’s prominent trading partners but is still in the process of national ratification, debate and implementation. The Marrakech announcement meant that employment policies could from then on be considered as trade-related and not human rights-related. Commodification of human rights in the international commercial sphere would be a profound but questionable transformation of human rights.

Under the rules of the 1994 GATT, labor rights, in order to be submitted to international control, must affect trade in a detrimental way. The consequences of this new management of human rights means (1) a redefinition of labor rights, often referred to as labor standards within commercial agreements; (2) a lowering of labor rights content and a reduction of the labor and economic rights, which from then on are recognized as the aforementioned labor standards of commercial agreements; and (3) the creation of competing spheres, one being trade-oriented and the other person-oriented.

Competing means bargaining and this is exactly the strategy adopted by the ILO at its 81st session of 1994. The director of the ILO, in discussing the role of the ILO in a new global economy, did not reject the idea that the normative mission of the ILO might move toward a soft and supportive mission in world trade. Perhaps another arm of the ILO, to be created by member states, could control the human rights dimensions of international trade or at least address the core of the existing legal standards such as freedom of association or the ban on child labor. It is not yet clear whether the ILO would then be addressing human rights or trade-related human standards.

This discourse of cooperation is alarming because it is obvious that human rights “management” or social clauses in commercial agreements implies the commodification of social and economic rights. How can we fight this move toward commodification given that the stage has already been set? It seems that human rights have now been redefined as a matter of development through a needs-based approach. The question remains whether human rights activists and southern states have inadvertently created the problem by emphasizing a needs-based theory of social and economic rights.

We should underscore the fact that the ICESCR is doing much more than affirming every person’s right to the satisfaction of his or
her essential needs. The ICESCR is committed to the progressive development of all social and economic rights, which, although not limited to basic rights, at least includes them. Even if we are used to living with trade-related human rights, it does not mean that those rights should no longer be related to persons and controlled as such in their own sphere. This assumes, however, that we are talking about normative contents and not mere human aspirations.

**Gender Equality Perspective in Social And Economic Rights**

"A woman should not be discriminated against because she is a woman ..."

The principle is so easy to state. As we review the first generation of gender-based anti-discrimination standards offered by the international law of human rights, we discover the premises on which they were based. Quite simply, it was presumed that women were in a similar social position to men and that it was sufficient to correct the gender variable to attain equality. Of course, it was accepted that some affirmative action measures were required, specifically in the fields of employment and education. The assumption was that women, with a bit of help and protection from affirmative action measures, would gain an equal footing with industrial male workers in developed countries. Put another way, all women's problems were going to be solved if we created a normative framework dedicated to bringing women into the formal work sector. Entering the sphere of formal work would, in itself, guarantee women social security by assuring decent living conditions.

This working model of equality has been misleading although it has some utility. Let us take as examples the *Zwaan-de Vries* (1987) and *Danning* (1987) decisions of the ICCPR Human Rights Committee. In those cases, the Committee concluded that it was against the equality guarantees provided by the ICCPR to deny or lower the benefits of a social security scheme to married women either because they were women or married women. How much progress can we accomplish with this classical approach to equality? To tell the truth, very little.

**Women's Exclusion in the Global Economy**

To understand this situation, one has to take into account what women's social and economic exclusion is all about. For sure, it is
about being kept powerless at all levels: in the family, through violence, through invisible domestic work, in the informal work sector and in the formal work sector but without protection, through the absence of fertility control, and through exclusion from public processes of decision making, whether de facto or de iure. All these elements taken together preclude women from attaining equality with men. The particular configuration of oppressive circumstances varies, of course, from one group of women to another. But the basis of the oppression is the same everywhere: it is the simple fact of having been born female.

Substantive equality is about taking into account the causes and consequences of women’s social exclusion. It is about naming, stopping and correcting the mechanisms of exclusion. It is not about simply integrating women into society without attention to social structures. Equality concerns structural adjustment as well as domestic production. It concerns the so-called reorganization of work in the North and a push for microenterprises as a means for women’s survival in Latin America.

Some states, including Canada, have taken a principled, “substantive equality” approach in their constitution. However, in the field of social and economic rights, the Canadian norm of equality is having trouble guaranteeing more than the right to be equally poor. What occurs is that once litigation gets to the heart of public policy in social and economic matters, Canadian courts refuse to put substantive equality into practice. In socio-economic rights cases affecting Canadians, the courts have refused to apply constitutional equality principles and instead deferred to the legislature. Therefore, in the case of women, socio-economic rights are a “wall” that prevents their practical enforcement.

One major conceptual problem with the welfare state approach to equality is its incapacity to integrate the interdependence of all human rights. Equality is a norm of equity to the benefit of persons who, aside from being women, are similarly situated in the social and economic world. This highly individualistic approach to equality is certainly in accordance with the logic of civil and political rights. But it does not take into account that social and economic rights were framed by the principle of mutuality and solidarity. Unfair class differences and economic tensions were recognized and resolutions sought through social and economic rights.
Women are at the heart of new economic tensions. Twentieth-century international trade is counting on women to manage poverty and the essential needs of family and community in countless ways (in the North as well as in the South). Commonly, international trade also relies upon the devaluation of women's work (in the formal and informal sectors) as a means to lower direct and indirect production costs. The structuring of a two-tiered civil society (rich and poor) is, in fact, the structuring of a many-tiered society (and differentiated by the socio-economic situation of rich and poor, male and female). Among the poor, women are adversely affected by structural changes and expected to assume new responsibilities to respond to the so-called need for structural adjustment. Cultural, religious and sexual forms of discrimination and exclusion are factors in this new restructuring of women's exclusion. The singular claim for the integrity and respect of women's civil and political rights won't do it. The principle of mutuality needs to be redefined in legal terms to ensure women's equality. We must then contribute to the process of legally shaping women's equality in a global economy.

**Interdependence of Rights: a Model for Substantive Equality**

The adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was certainly a move in the right direction. It is imperfect, however. It can even be argued that its Preamble is not clear in its objectives. But it remains a valid example and standard of substantive equality for women. Basically, CEDAW integrates the principle of the interdependence of women's rights as human rights. It gives logic to the numerous affirmations of this principle taken by the UN General Assembly. CEDAW affirms that women count and that their legal claims have valid foundations. It proposes a principled approach to equality that suggests a new reading of women's social and economic rights in the actual context. It can be summarized, from an economic perspective, by the following three affirmations: (1) women must not be adversely affected by economic change because they are women (i.e., economic decisions must not rely for social peace on women's invisible or devalued work either in the market or at home); (2) women should be protected from any manifestation of physical commodification (i.e., women are not goods that can be sold in the market through institutions of
prostitution and networks which traffic in women); and (3) states have the burden of proof to demonstrate that they are effectively taking into account women’s right to substantive equality in any decision affecting the enjoyment of their social and economic programmatic rights (i.e., the right to health, education and work).

CEDAW is a proper legal standard for such an interpretation. First, it recognizes that the sources of exclusion are public (the state is gendered) and private (society is gendered). Second, because CEDAW, like most of the human rights normative instruments, relies heavily on state commitment, it forces an analysis of the adverse effects that the privatization of the social sphere have on women. CEDAW requires more from the state than the attitude of a good government. It requires the government to be responsible for the achievement of women’s equality.

One major dimension of CEDAW’s philosophy is the need for the interdependence of all human rights including social and economic programmatic rights. Perhaps the best example of this is the recent work of the ICESCR Experts’ Committee, which did not hesitate to take into account the prejudicial effects on women of some manifestations of social exclusion. In matters such as rights that can be guaranteed through not only legislation but also policy, this interdependence between CEDAW and the ICESCR is of fundamental importance. It is no coincidence that in both cases serious discussions are going on as to the need for an Optional Protocol that would guarantee a right of petition to individuals or groups of individuals.

**States Parties Obligations According to the ICESCR**

Let’s face it. Few people want to hear nowadays about the ICESCR Experts’ Committee. Furthermore, there are few voices in favor of serious efforts to frame the debate surrounding social development in terms of rights. Since the eighth session of the Committee (1993), the World Bank, for example, has declined invitations from the Committee to discuss the effects of structural adjustment policies on social rights. The UN General Secretary also seems to have forgotten about the existence of the ICESCR and its Experts’ Committee when organizing the Vienna and Copenhagen Conferences. Even the Vienna Declaration is a weak model with regard to the principle of the interdependence of all human rights and social and economic rights themselves.
At its 10th session (1994), the ICESCR Experts' Committee, partly to disprove an emerging consensus that the Committee was defunct, decided to organize a General Debate. The Committee chose the theme of social security concerns as a means of protecting economic rights confronted in the context of major structural adjustments policies. Interestingly, the debate, which included the ILO, the United Nations Development Programme (UNDP) and the United Nations Research Institute on Social Development (UNRISD), focused on the question of finding the appropriate place for social and economic rights in the process of shaping human development. This question is of crucial importance because, as underlined by Committee member Bruno Simma of Germany, it is unclear whether social and economic rights are a condition or a presumed consequence of human development.

The position of the Committee is quite clear. Human rights are not negotiable. Henceforth, respect for human rights should be a fundamental condition of any structural adjustment policy or economic model. This implies that (1) state obligations are primary and states should not be forced to deal (directly or indirectly) with international agencies which neglect human rights and (2) a state cannot rely on globalization arguments to ignore the level of development of the national social and economic rights. In the same manner, and even if they are not bound by the Covenant, NGOs involved in the field of international cooperation or assistance should develop a principled approach based on preliminary guarantees with regard to social and economic rights and not one based on assumptions that the accomplishment of such rights would occur as a consequence of the NGOs' presence or assistance. This proposed approach is based on the interpretation of Section 2(1) of the ICESCR that is provided by General Observation No. 3 of the ICESCR Experts' Committee.

The General Observation No. 3 contains five pages of rich interpretation demonstrating that the language of the ICESCR mandating "progressive implementation" of social and economic rights has some teeth to it. The major directives include: (1) means for implementation of the ICESCR shall be taken immediately following the ratification of the Covenant; the lack of resources is never a good excuse for inaction, although the action will be proportionate to the available resources; (2) means include adopting appropriate legislation, including legislation to prohibit or correct discrimination; legislative intervention is often not only conceivable but highly expected; (3) means
should be appropriate. The Experts' Committee, when proceeding to the implementation report submitted by a state, may not only look for the existence of means for implementation but may also examine whether the means are appropriate; often, the Committee will be in a position to conclude that adopting laws is an appropriate means but, also, that such a law will be appropriate only if a recourse is made available; and (4) the ICESCR may be implemented through means other than legislation or through legislation that sets principles that cannot so easily provide openings for individual recourses.

The state cannot deliberately cut back resources for implementing economic, social and cultural rights including, for example, the right to health or to work unless those cutbacks are justified by the need to use those resources for the implementation of other rights guaranteed by the Covenant. Progressive implementation of these rights never means that the implementation of basic or core social and economic rights can be denied. Or, in other words, the satisfaction of basic rights must be immediately implemented. A state that alleges that it cannot even implement basic rights must demonstrate to the Committee that every effort has been made to use the full resources available in order to respect that minimal and immediate obligation.

The international community, according to the general principles of the UN Charter, is bound by the ICESCR. Accordingly, it should not make, directly or indirectly, any support to the weaker states conditional to adjustment standards that are not compatible with such an interpretation. Therefore, foreign aid programs, foreign development and foreign investment must not be made either directly or indirectly conditional to any standards less than ICESCR standards.

**How Women's Rights Can Transform Socio-Economic Rights**

As we can see, the Committee developed, through its General Observation No. 3, a principled approach to evaluate state parties' compliance with the general obligation of the Covenant. That methodology should be enriched by the right to equality. This is the first application of the interdependence principle. Accordingly, women's social and economic rights can be said to force the state to assess the impact of laws and social policies (or the absence of needed laws and policies on women's equality). This principled methodology of social
and economic rights applies to basic rights, as well as to cases in
developed countries involving the dismantling of economic programs
and social rights that adversely affect women. It is not only principled
but universal as well.

Such an approach sets aside the old debate about the justiciability
of programmatic social and economic rights. The implementation of
those rights is not about defining their objective and immutable con-
tent. The sanction of denying such rights is not about damages. The
maturity of social and economic rights should provide any group of
persons with the ability to denounce, in a formal international forum,
the adversarial effects of any related national policy. Social and eco-
nomic rights also should civilize the international law of human
rights. The principle of interdependence requires that a treaty body
or judicial committee take into account the entire body of law rele-
vant to the dignity of the person. It should not confine itself to the in-
strument that created it. Ultimately, the justiciability of programmatic social and economic rights is about forcing the state
not to implement any law or policy that constitutes a reduction or a
denial of any person’s rights. It is about stopping the state from ad-
justing to globalization while forcing it to adopt or comply with the
law of international social and economic rights, which includes the
more positive labor rights.

This general principle is of great significance for women’s right
to equality. In the arena of social development, women are seen as an
economic variable that international financial institutions must factor
into their proposals. Any economic model of adjustment must take
into account the adverse effects on women and must adjust the
model to ensure protection of women’s social and economic rights.
This approach is not the legal standard of either CEDAW or the
ICESCR. Criticisms of structural adjustments or economic strategies
for change are to be addressed by an accountable state before their
implementation. Structural adjustments or economic strategies are
one thing. Respecting human rights and their implementation is an-
other. Human rights should not be sacrificed to structural adjust-
ment. The justiciability of social and economic rights is then
necessary to shape the process of adjustment (in the North and the
South) with respect to women’s rights and, more specifically, to
women’s right to equality, which is a requirement for any generation
of rights. We should stop considering social indicators and social de-
development as legal standards. Methodologically, this approach to
development contradicts states' commitment to economic rights. Basic rights as well as social and economic rights may vary from one country to another not only because of the available resources but also because of states failure to implement these rights, which in turn has adverse consequences for women. The ICESCR makes clear that development should occur in the context of rights. The most we can probably expect from managers of international financial institutions and others concerned with social development is a statistical calculation of the price for social peace in a world comprised of trade states. We need the multiple functions of human rights, especially the protective ones, but also the political ones, against that trade state.

**The Implementation of Economic Rights: A Matter of State or of Trade Accountability?**

As the generation of economic rights has emerged, the state has been assigned the role of promoting and protecting the social and economic dimensions of human dignity. Yet it is the states themselves that are opposed to any mature form of accountability in the field of economic human rights. The states want to restrict the emergence of mature economic rights that would be expressed through a right of petition at the international level. Instead the states want to meet a narrower requirement to report on their progress with regard to the implementation of social and economic rights. The legal definition of a right and the maturity of that right are not the same thing. Indeed, accountability has much more to do with its maturity than with new mechanisms dedicated to the recognition and implementation of new economic rights. Trying not to be bound by existing rights, states, within the tiny scope of their remaining sovereignty that has not been decimated already by new market rules, are actually looking for new limits and new core definitions of economic rights. States want to introduce new and limited definitions of economic rights into the commercial field to protect themselves from the consequences of the human rights field as it matures.

We believe that the implementation of economic human rights is, above all, a matter of states accountability in the socially oriented perspective of the Universal Declaration on Human Rights. Accountability mechanisms must be person oriented and not trade oriented. Consequently, we consider that the persons' struggle for state accountability in the field of economic human rights has, as a prerequisite, struggle for the rehabilitation of state sovereignty. As we are
fighting for this goal, political pressure and lobbying also should be exerted on the United Nations and the ILO to define an operative means to respect the interdependence of all existing human rights. In addition, pressure should continue for the adoption of additional protocols granting persons and groups of persons a right of petition at the international level in the field of economic human rights.

Social Clauses in Trade Agreements

The idea of social clauses in commercial international agreements is not new. For example, in 1948 at the conclusion of the Bretton Woods Agreements, Cuba insisted on a trade agreement that contained language protecting social and economic rights. However, the Bretton Woods agreement failed. And similar efforts will fail in the future because social clauses are not an effective means to ensure economic human rights.

To put it simply, social clauses can be nothing other than a commodification of human rights. An accountable state is a protectionist state. And to be accountable a state must protect human and labor rights, tasks which are contrary to market rules. Controlling social dumping would not be a compatible approach in a market system. If we accept this globalization argument, we must then look for another operating principle designed for social peace.

The concept of fundamental rights has surfaced recently as a means of protecting rights in an age of globalization. But fundamental rights is a puzzling expression. Although fundamental rights have some specific consequences with regard to international law principles, the problem is that the reference to some rights as more fundamental than others creates a hierarchical organization of human rights. Furthermore, according to the general principles of international law, few rights would be really fundamental.

In addition, there is more than one perspective on fundamental human rights. The ILO itself, through its numerous working groups on labor standards, always maintained its own hierarchy that recognizes some fundamental rights, which include the interdiction of forced labor, protection against discrimination and the right to associate and bargain collectively. Establishing a hierarchy has some logic for the ILO. The ILO has to set priorities to make it clear to member states that some rights are not negotiable. Other rights are not ranked as fundamental rights. For example, the right to benefit from a national employment policy, as expressed in Convention
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(122) on employment policy, never attained the importance of a fundamental right.

Currently, the recourse to fundamental rights in international commercial institutions and agreements is determined by trade customs, which historically have been oriented much more to economics than to social or human concerns. The United States and the European Community rely on the use of fundamental rights to attach some conditions to their bilateral and multilateral aid programs. The conditions, broadly defined, require a good government, which means a democratic state, albeit one designed around commerce. Matters such as wages, social security, health, education and citizenship (not solely designed through the industrial model of unionized participation or participation in free elections) are not included in the list of fundamental rights.

The wording of the North American Agreement on Labor Cooperation, otherwise full of mysteries with regard to labor cooperation, speaks for itself. In a state-to-state complaint procedure, an Arbitral Panel is rationae materiae limited to the following matters: occupational safety and health, child labor, minimum wage and technical labor standards in trade-related matters which have shown a persistent pattern of failure. Several caveats weaken the operative aspects of that short list. It is worth identifying two of them. First, a party can defend against complaints by demonstrating that the failure to enforce a requirement of labor law results from a bona fide decision to allocate resources to enforce other labor matters considered higher priorities. But this contradicts Article 2(1) of the ICESCR which requires states to use "the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." Second, the definition of technical labor standards, as provided in Section 49 of the North American Agreement on Labor Cooperation, states that the setting of all standards and levels with respect to minimum wages and labor protection for children and young persons are not subject to obligations under the Agreement. Each party to the Agreement sets its own standards on the general minimum wage and age limitations on child labor. There is, in effect, a large gap between the obligations set forth in some major ILO conventions and the level of commitment required by the terminology of the Agreement.

With regard to the North American Free Trade Agreement (NAFTA) side agreement on labor it can be said that (1) clauses
referred to as social in NAFTA are having a negative impact on the construction and definition of economic human rights and (2) the NAFTA Labor Side Agreement is a perfect example of the commodification of economic human rights in the sense that any dispute has to be based on the allegation that a persistent pattern of failure is trade related. Although state parties seem to be satisfied with such an agreement, it is worth asking whether these new trade-related labor rights should be submitted to a more operative form of control or accountability that would provide state parties (and not persons) with guarantees of compliance.

The ILO has an answer for that. Why not create some form of secular arm of the ILO that could control the implementation of such agreements? Again, we can take the NAFTA side agreement on labor as an example of commercial trade agreements potentially weakening international labor rights. Some of the most fundamental ILO rights are not construed in the Agreement for the purpose of arbitration as technical labor standards. On one hand, it has been said many times that the NAFTA social clause is nothing more that an exploratory model for the United States in the field of international trade. On the other hand, it is also reasonable to assume that the general idea of social clauses in commercial agreements, as announced recently in the context of creating the World Trade Organization, also represents a serious departure from human rights objectives and standards. In addition, we can safely presume no international commercial institution will ever feel forced to comply with more than the new core rights guaranteed in NAFTA or any other trade agreement. The problem is much more complex as we consider women's economic rights. Social clauses in commercial agreements are commodifying economic human rights while women's economic rights are being decommodified in many circumstances. Women's input in productivity is increasingly either invisible or discounted.

Operative Aspects of Social Clauses and the Maturity of Economic Human Rights

To reiterate, we are facing a serious problem in the field of labor and economic human rights. That is, most of those rights are immature because of the states' collective wish to preclude any serious mechanisms of accountability. However, this problem must not be confused with the rhetorical one regarding the legal meaning of such rights. After all, what is the difference, in terms of certainty,
between the right to freedom of speech and the right to work? Both are flexible, submitted to limits and variable according to different constitutional contexts. Both are submitted to a principled approach regarding means of implementation which are binding on states. While good governments admit that approach with regard to the right of freedom of speech, that is not the case for economic rights. The Experts' Committee of the ICESCR established a principled approach to the implementation of social and economic rights, but it has been rejected by state members. What we are currently offered is a trade-oriented approach to economic rights, a framework which offers a soft approach to rights and that is supportive of trading states. It is as though no other possibility exists.

We need now more than ever to discover means to take advantage of the principled approach developed by the ICESCR Experts' Committee. The task is not to submit trade and cooperation agencies to a principled human rights approach designed for commercial purposes but rather to force states to respect, in a principled way, economic rights. What we need is a right to petition at the international level. We must then fight attempts by the United Nations and the ILO to transform economic human rights into trade-related economic rights, even if there is a strong temptation to focus on the operative aspects of social clauses in commercial agreements. This strategy inevitably takes for granted the need for new trade-related rights instead of reaffirming existing economic human rights.

This simple affirmation requires much more discipline from human rights activists than it would seem at first glance. So much energy has been invested recently in work dedicated to social development instead of human rights. So much work has been directed at forcing international financial institutions to take into account the prejudicial effects of structural adjustment policies and free-trade agreements on people's rights rather than directing attention to developing mechanisms that would make economic rights mature rights. We must ask ourselves if we believe in economic rights? Or are we ourselves trapped in the utopian discourse on economic rights?

**Preconditions for Implementing State Accountability Mechanisms**

The first precondition is rehabilitation of the state. A sovereign state is the operative concept in human rights and it must regain its stature. The globalization of the market is operating against the
human rights of individuals in two major ways. First, globalization of
the market tends to assume the existence of a good faith state and the
state is allowed to ignore acting on the best interests of individuals.
Second, globalization provides a rationalization for the state to avoid
allocating resources in the people’s best interests.

Women’s interests are doubly neglected in the process because
(1) states’ limitations affect women more seriously and (2) in the
process of allocating or reallocating resources, a state relies on
women’s invisible contribution to the family, to the cohesion of soci-
ey and to social needs. The principled and flexible approach to
equality for women with regard to economic rights is determined by
women’s capacity to blame the state for not taking their rights seri-
ously, in the North as well as in the South.

The second precondition is acceptance of the interdependence of
all human rights. It is time for the human rights community and
NGOs to provide the world of human rights institutions with prac-
tical models of human rights interdependence. We are talking about a
simultaneous reading of both CEDAW and ICESCR. Both CEDAW’s
and ICESCR’s Committees have started such work. It is time now for
NGOs and women’s groups to adopt this dual approach in their dia-
logues in international events. Any infringement of women’s right to
physical and psychological dignity has an economic meaning in the ac-
tual context of restructuring a new global economic order. Any in-
fringement of women’s economic rights has a gendered explanation.

Gender-based discrimination and oppression as well as
economic-based exclusion of women are interrelated. We should
fight against the pattern of generations of rights. The most practical
approach to interdependence is for women to ground their claims on
the combined meaning of CEDAW and the ICESCR and to use those
instruments to argue against any commercial institution or human
rights institutions which fail to read CEDAW and the ICESCR
jointly. Our best strategy is to depart from the Copenhagen approach
to social development and to work instead for the adoption of an Op-
tional Protocol to the ICESCR, not as a secondary target but as an
immediate objective. This strategy supports a short-term commit-
ment for a legal playing ground in the field of human rights.

**Optional Protocols to CEDAW and the ICESCR**

Both the Parliamentary Assembly of the European Council and
the ICESCR Experts’ Committee have produced recent work on the
issue of a right to petition with regard to social and economic rights. It is not necessary to reiterate the legal grounds for a right to petition. Our objective is simply to draw attention to some interesting aspects of a right to petition. First, a right to petition allows the petitioner to exhaust internal remedies. The requirement that the petitioner exhaust remedies has been viewed, in certain circumstances, as an obstacle in matters related to civil and political rights. However, in the case of social and economic rights, the requirement is no obstacle with regard to rights that can be nationally implemented through policies or programs. The petitioner will need to and should engage domestic remedies. Most of the standards for creating legislation that determine such policies and programs no longer even affirm a person's right to health, education, employment, social security or social services. Accordingly, the modern state is more vulnerable than ever to such an international right of petition.

Second, neither the ICESCR Experts' Committee nor the European Council have excluded the idea that such a petition right could be available to groups of persons affected in a patterned way by national policies and programs or social and economic legislation. Thus, women as a group could take advantage of such a legal space, all the more because their claim to social and economic equality is often based on the identification of some exclusion or prejudicial effect of a government policy, program or legislation. Contrary to a constitutional right of action, which is often conditioned by the existence of legislation, this international recourse privileges the examination of programs and policies. Such an examination is governed by all human rights principles and conditioned by state obligation to take into account the exclusionary effects on groups of persons of any of its decisions or its failure to protect economic human rights.

Such a forum could provide women a means to conceptually construct, at the universal and international level, their right to social and economic equality. In the specific field of labor rights, this right of petition also would force the ILO to contribute, according to its own existing legal standards, to the meaning of women's labor rights in the actual context of decommmodifying women's work. This contribution then could be used as a counterweight to the ILO's institutional strategy in the sphere of international trade. Without creating undesirable distinctions between the interests of unions and those of people, it is worth noting that a community group would have access to this right to petition. This is not the case in the ILO perspective
due to a historical tripartism that reserves the persons’ representation for unions.

Of course, the final issue concerns the output or result of a right to petition. Considering the weak operative guarantees offered by the social clauses approach in the field of trade and its excluding effect on persons, it seems that the primary objective should be the creation of a legal forum to define state liability with regard to social and economic rights. Ultimately, what we can expect as a result of a right to petition is a recommendation from the international community to invalidate states’ decisions, programs, legislation or policies that would negatively affect people’s social and economic rights.

The political impact of a human rights forum that could conclude, for example, that the allocation of resources to the military, the nuclear industry or even tax exemptions for companies denies the right to equality of women and other groups that are victims of exclusion is not negligible. Suppose that the investigation of a complaint shows that structural adjustment policies constitute an obstacle to the education or health care systems. The committee responsible for such a protocol could conclude that structural adjustment policies are affecting people’s right to education or health. The finding of the international economic rights forum would, in turn, put pressure on the commercial international community. We need such a legal forum simply because not too much can be expected from domestic tribunals in this regard. Furthermore, an international right to petition in regard to social and economic rights provides a remedy that is needed to defend against international trade interests.

Conclusion

This paper is about strategizing in the actual context of women’s social and economic rights. We have tried to demonstrate the need for a new focus and argumentation around the notion of social and economic human rights. For some of us, economic rights are still new rights or not yet even developed rights. The distinctions and similarities between labor rights and economic rights may still have to be noted in some cases. But surely what we are actually accepting against our will is a trade-oriented redefinition of those rights. If we can come to a common understanding of the factors influencing this development, then we can begin to draw on social and economic
human rights to constitute a real and operative obstacle to the commodification of these important rights.