



Economic, Social and Cultural Rights in Zimbabwe:

Options for Constitutional Protections

Zimbabwe Lawyers for Human Rights

National Constitutional Assembly

International Human Rights Clinic @ Harvard Law School

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

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ACRONYMS

African Charter on Human and People's Rights (ACHPR)

African Charter on the Rights and Welfare of the Child (ACRWC)

African Union (AU)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Convention on the Rights of the Child (CRC)

International Covenant on Civil and Political Rights (ICCPR)

International Convention on the Elimination of Racial Discrimination (CERD)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Labour Organization (ILO)

National Constitutional Assembly (NCA)

National Human Rights Institution (NHRI)

Universal Declaration of Human Rights (UDHR)

Zimbabwe Lawyers for Human Rights (ZLHR)

EXECUTIVE SUMMARY

Economic, social and cultural rights should be included in a new Zimbabwean Constitution. By enshrining economic, social and cultural rights in a justiciable Bill of Rights, Zimbabwe would take significant steps towards meeting its obligations under international law and satisfying the expressed will of the Zimbabwean people. It would also better ensure that its citizens enjoy lives characterised by dignity and equality. Incorporating economic, social and cultural rights in a new constitution could be an integral part of a new constitutional order that ushers in a broader societal transformation away from Zimbabwe's past of colonial exploitation and authoritarian government.

Problems such as unemployment, hunger, homelessness, lack of education and preventable disease threaten populations across the globe, including in Zimbabwe. Under international law, governments have a responsibility to respond to these conditions, which can violate fundamental human rights.

Constitutional protections for economic, social and cultural rights need not extend the responsibilities of the Zimbabwean state beyond the obligations to which it is already committed. Including economic, social and cultural rights in a justiciable Bill of Rights would merely provide domestic accountability for obligations that Zimbabwe has already undertaken pursuant to its acceptance and ratification of numerous human rights treaties.

In 1948, the Universal Declaration of Human Rights (UDHR) stated that all human beings are entitled to basic human rights. In addition to civil and political rights, such as the rights to freedom of expression and association, the Declaration also recognised economic, social and cultural rights. These rights, which include the rights to work, food, housing, health, education and culture, are guaranteed in numerous international instruments to which Zimbabwe is a party, including the African Charter on Human and People's Rights (ACHPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a result, Zimbabwe is bound to ensure that its citizens enjoy the full complement of economic, social and cultural rights.

The Zimbabwean government has three obligations relating to economic, social and cultural rights. First, it must *respect* people's rights by not undertaking actions that violate these rights. Second, it must *protect* people's rights by ensuring that other people or bodies do not violate such rights. Third, it must *fulfill* people's rights by taking actions to make them a reality in practice.

Governments around the world have widely different resources, and Zimbabwe is a painful example of a country with profoundly limited means. International law therefore recognises that economic, social and cultural rights can only be achieved progressively over time. However, this does not imply that economic, social and cultural rights are mere aspirations. Under international law, Zimbabwe has a number of immediate obligations: the government must take steps aimed at the full realization of rights, immediately satisfy an essential minimum core

of each right, and ensure that rights are guaranteed in a non-discriminatory manner.

Zimbabwe may employ a variety of different measures to satisfy its obligations. These include incorporating international agreements into domestic law, providing judicial remedies for violations, and educating the public on rights protections.

The current commitment of the Zimbabwean government to draft a new constitution, as expressed in the Inter-Party Political Agreement of September 15, 2008, offers an additional, powerful means of satisfying Zimbabwe's obligations to respect, protect and fulfill human rights. Zimbabwe's current constitution is widely recognised as an undemocratic and inadequate document. One frequent criticism of the current constitution is that it does not protect economic, social and cultural rights. Civil society and the Zimbabwean public have therefore called for the inclusion of justiciable¹ economic, social and cultural rights in a new constitution.

Constitutional Protections for Economic, Social and Cultural Rights

A Bill of Rights is an essential component of any constitution, protecting the fundamental values of a nation and ensuring the interests of politically vulnerable groups. In addition to entrenching specific economic, social and cultural rights in a justiciable Bill of Rights, however, a new constitution should also create a framework for governance that ensures that such rights become a reality for ordinary Zimbabweans. Constitution-makers in Zimbabwe should therefore consider including provisions in a new constitution that establish the following:

- A role for international law in the interpretation of constitutional rights;
- Broad remedial powers for courts considering violations of rights;
- Liberal standing rules that allow third parties to bring cases under the Bill of Rights;
- Judicial remedies for individuals whose rights have been violated by non-state actors;
- Effective measures to better ensure the constitutionality of legislation before a parliamentary vote;
- Self-executing status for international treaties;
- Protections against constitutional amendments that manipulate the Bill of Rights;
- Judicial appointment and removal procedures that ensure the independence of the judiciary; and
- An independent Human Rights Commission, Public Protector or similar body empowered to investigate rights violations at all levels of government.

Economic, Social and Cultural Rights for a New Constitution

A new constitution should include, at a minimum the following economic, social and cultural rights:

¹ The word "justiciable" refers to the competence of courts to review a subject and enforce rights. Justiciable constitutional rights are usually contained in a Bill of Rights or similar document which the nation's courts are empowered to enforce. Non-justiciable rights are sometimes contained in an "Objectives" or "Principles" section of the Constitution, which courts are explicitly prohibited from enforcing.

The Right to Work

The right to work is not an unconditional right to obtain employment, but rather encompasses the right of everyone to the opportunity to earn his living by work which he freely chooses or accepts. A provision safeguarding the right to work should explicitly address each of the distinct elements of this right, including:

- The right to freely seek employment;
- The right to safe, just and favorable working conditions;
- Non-discriminatory access to training, employment and promotions, and equal pay for equal work;
- The right to be free from forced labour or servitude;
- Prohibitions on child labour;
- The right to form and participate in trade unions; and
- The right of such trade unions to operate with minimal governmental interference.

In addition to these elements, the provision should commit the government to making efforts to ensure the right to work is protected for vulnerable groups, including women, disabled persons and children.

The Right to Food

The right to food recognises the fundamental right of all persons to be free from hunger, and to have access to food sufficient to promote healthy development and survival. The right to food is fundamental to the achievement of other human rights. Therefore, it merits either its own constitutional provision, in conjunction with the related right to water, or incorporation as an independent subsection within a provision discussing the right to other basic necessities, including water, clothing and shelter. The provision should take into account:

- The need to ensure an adequate quantity and quality of food to provide nutrients for physical and mental growth and wellbeing; and
- The need to ensure that food is safe, uncontaminated, available and accessible, and that the cost of food is kept at a level attainable at modest income levels.

A provision on the right to food should account for the particular needs of special groups including pregnant and breastfeeding women, children, the ill and the elderly.

The Right to Housing

Housing provides physical protection from the weather, offers personal security, and satisfies psychological demands for individual space and privacy. Housing also serves integral social functions by providing a gathering space for families and communities, and can serve as an economic centre for commercial production. A provision safeguarding the right to housing should explicitly address each of the distinct elements of this right by:

- Protecting legal security of tenure and barring forced evictions;
- Stressing the affirmative right of inhabitants to adequate, affordable and accessible housing in a location that is proximate to goods and services; and
- Ensuring that housing is culturally adequate.

Special protection should be afforded to vulnerable groups, such as women, children and migrant workers.

The Right to the Highest Attainable Standard of Health

Good health is critical to ensure that people of all ages can participate in the social, economic and political processes of their communities. The right to health extends beyond the right to medical care to encompass a range of socio-economic factors that influence healthy lives. A robust provision for the right to health should protect the underlying determinants of health alongside the necessary access to medical care and freedom from physical interference, and ensure at a minimum:

- The availability of health care facilities, goods and services that are functioning and of a sufficient quantity, that respect medical ethics, and that are gender and culturally-sensitive;
- An equal opportunity to attain the highest standard of health for all people, without discrimination; and
- The physical and financial accessibility of health care facilities, goods and services, as well as accessibility of health-related information and education.

The constitution should also take special note of the need for maternal, childhood and reproductive health care, and include a provision on the importance of popular participation in national and community health decision-making.

The Right to Education

The right to education recognises the crucial role that education plays in the enhancement of human dignity and the attainment of other human rights. A provision protecting the right to education should ensure that:

- Primary education is free and compulsory;
- Educational institutions are available in sufficient quantity, and contain adequate and appropriate infrastructure to operate effectively;
- Educational institutions and programmes are geographically and financially accessible to everyone, without discrimination;
- The form and substance of education, including curricula and teaching methods, are relevant, culturally appropriate and of high quality; and
- Education is adaptable to the needs of changing societies and communities and responds to the needs of diverse students.

The provision should also ensure that the right to education is implemented in a non-

discriminatory manner and account for the special needs of girls, disabled children and cultural and linguistic minorities, among others.

The Right to Culture

International human rights law recognises the right of all individuals to express and enjoy their culture, which can be understood as the practices, knowledge, language and skills, as well as the instruments, artifacts and cultural spaces, which communities recognise as part of their cultural heritage. A provision should be incorporated that:

- Guarantees the ability to engage in cultural and religious practices of one's choosing or form groups affiliated for cultural or religious purposes;
- Protects the right to language, which is an important aspect of the right to culture; and
- Contains a "clawback" provision limiting the protection of the right to culture—the right to culture may sometimes be subject to limitation, particularly in circumstances where traditional practices have potentially harmful consequences and conflict with other fundamental human rights.

Benefits of Including Economic, Social and Cultural Rights in a Constitution

Placing economic, social and cultural rights in a justiciable Bill of Rights will provide a number of benefits beyond bringing Zimbabwe into compliance with its international legal obligations. First, a Bill of Rights is designed to protect fundamental aspects of human life from incursions by the state, or other persons or bodies, and is especially important for those who cannot grasp political power, such as electoral minorities and marginalised sectors of society.

Second, the government will demonstrate that it is responsive to the will of the people, who have consistently demanded the inclusion of such rights in public forums and in documents such as the Zimbabwe People's Charter. A constitution is the foundational document of a nation, which gives voice to the aspirations and concerns of the people. A populace that feels its collective interests are reflected in a constitution will embrace the document with a sense of pride and ownership, and will understand that rights will be respected and protected by government. Placing economic, social and cultural rights in a justiciable Bill of Rights will give expression to societal values and affirm the government's commitment to the interests of the people.

Third, including economic, social and cultural rights will promote participation in public life by building networks committed to fighting societal ills and by giving individuals and groups a platform for challenging unjust practices by the state. Rights inspire people to become active citizens who identify ways to improve their lives and who build collaborative social movements that work towards realization of such rights.

Finally, protecting economic, social and cultural rights in the constitution can guide legislation and help develop an environment of accountability and transparency in governmental decision-making. Providing individuals with the ability to demand rights protections, including through court cases, will motivate political leaders to justify policy decisions that affect vulnerable groups and will provide citizens with grounds for demanding responsive action by government.

Past and present realities in Zimbabwe demand that economic, social and cultural rights be granted the same status as civil and political rights in a new constitution. Zimbabwe's new constitution could potentially be the centrepiece of a broader societal transformation from an authoritarian past characterised by injustice and deprivation to a future of freedom, equality, prosperity and respect for human dignity. The inclusion of economic, social and cultural rights in a justiciable Bill of Rights is an essential component of such a transformative document and something that the people of Zimbabwe deserve.

CHAPTER ONE: INTRODUCTION

This report is intended to inform the constitution-making process in Zimbabwe, with a particular emphasis on economic, social and cultural rights. It is a product of the consistent demands of the Zimbabwean people for a new constitution that includes such rights. For example, the Zimbabwe People's Charter, signed in February 2008 by a broad cross-section of Zimbabwean society, embodies the views of the nation's citizenry and the perennial requests by civil society for constitutional entrenchment of economic, social and cultural rights. The People's Charter called for a constitution that would include "a justiciable Bill of Rights that recognises civil, political, social, economic, cultural and environmental rights."²

Chapter One begins with an overview of the relevant historical background and current context in Zimbabwe, as well as a brief introduction to economic, social and cultural rights. Chapter Two outlines Zimbabwe's existing obligations under international law to respect, protect and fulfill economic, social and cultural rights. Chapter Three discusses different options for including economic, social and cultural rights in a new constitution, including through a justiciable Bill of Rights, and examines some of the national institutions that might play a role in giving effect to such rights. Chapter Four contains a detailed discussion of six specific rights recommended for inclusion in a new Zimbabwean Constitution: the rights work, food, housing, health, education and culture. Finally, Chapter Five concludes the report with a look at the many benefits of enshrining economic, social and cultural rights in a constitution.

I. Historical Background

Since independence in 1980, Zimbabwe has been governed by the Lancaster House Constitution, a document that was part of a negotiated settlement between the white Rhodesian government of Ian Smith, the British government and a coalition of liberation movements prominently featuring now-President Robert Mugabe. There is widespread recognition of the inadequacy of the Lancaster House Constitution, and for the past decade constitutional reform has been at the forefront of the political agenda in Zimbabwe. One shortcoming of the Lancaster House Constitution is that it only protects civil and political rights and does not include economic, social and cultural rights.³ The Zimbabwean Constitution is thus "fundamentally weak on matters of social and economic rights."⁴

² The Zimbabwe People's Charter, adopted at the People's Convention, Harare, Zimbabwe, February 9, 2008 available at <http://www.kubatana.net/html/archive/cact/080209pc.asp> [hereinafter People's Charter].

³ Constitution of Zimbabwe, chapter III, 1979.

⁴ Amy S. Tsanga, "A Critical Analysis of Women's Constitutional and Legal Rights in Zimbabwe in Relation to the Convention on the Elimination of All Forms of Discrimination Against Women," *Maine Law Review*, Vol. 54 (2002) p. 233.

Over the years, Zimbabweans have intensely debated both the appropriate process for creating a new constitution and what the content of that document should encompass. Calls for the inclusion of economic, social and cultural rights have featured prominently in this discussion. Although the current constitution does not protect economic, social and cultural rights, subsequent constitutional proposals have made gestures towards incorporating these rights.

In 1999, a government-sponsored Constitutional Commission presented a draft constitution that addressed food security, protection of the environment, cultural issues, education, shelter, health care and various other matters touching on social and economic wellbeing in a non-justiciable “National Objectives” section.⁵ Civil society and opposition political parties organised a campaign that led to the defeat of this proposal in a referendum, alleging, among other things, that the public’s calls for the inclusion of economic, social and cultural rights in a justiciable declaration of rights had been ignored. Indeed, in nationwide consultation before drafting its proposal, the Constitutional Commission recorded almost unanimous support for constitutional protections relating to education, shelter, health services and equitable distribution of natural resources.⁶

During the same time period, the National Constitutional Assembly (NCA) was conducting a grassroots education and consultation campaign. Based on evidence collected, the NCA found that the people of Zimbabwe desire a constitution that includes justiciable economic, social and cultural rights.⁷ For this reason, the rights to housing, education, language, culture, health care, food and water were included in the Bill of Rights of the NCA Draft Constitution, which was released in 2001.⁸

Over the past decade, Zimbabweans have continued to call for the inclusion of economic, social and cultural rights in a new constitution. On February 9, 2008, local organisations convened a People’s Convention, attended by representatives from diverse sectors of Zimbabwean society. The Convention culminated in the drafting of the Zimbabwe People’s Charter, which called for a “people-driven” constitution which includes justiciable economic, social and cultural rights.⁹ The People’s Charter elaborates on the obligations of the state in relation to health care, education, job creation, social security, transportation, food security, housing and the distribution of national resources.¹⁰ The Zimbabwe People’s Charter is arguably the most authoritative document expressing the opinion of the people regarding democratic reform.

On September 15, 2008, Zimbabwe’s three main political parties signed an Inter-Party Political Agreement that led to the formation of a unity government in February 2009. Article 6 of that

⁵ Constitutional Commission, Proposed Constitution of Zimbabwe, November 29, 1999, sections 17-32, available at <http://web.archive.org/web/20000824120354/http://www.gta.gov.zw/constitutional/Draft+Constitution/Contents.Draft.Const.htm> [hereinafter Constitutional Commission Proposal].

⁶ Constitutional Commission of Zimbabwe, “What the People Said,” October 22, 1999. Editions for all ten provinces of Zimbabwe.

⁷ NCA Draft Constitution, 2001, Prologue: Summary of the Main Features of this Draft Constitution, available at http://www.ncazimbabwe.org/images/stories/publications/NCA_constitution.pdf?phpMyAdmin=gaAQ2DAAHKY15UnFvPbTHy7Bd7, [hereinafter NCA Draft].

⁸ *Ibid.*, sections 26, 34-37.

⁹ People’s Charter, section 3, Constitutional Reform.

¹⁰ *Ibid.*, section 4, National Economy and Social Welfare.

document laid out an eighteen-month process for drafting and enacting a new constitution for Zimbabwe.¹¹ The same article referenced a previously unknown draft constitution created by representatives of the political parties in 2007,¹² which has come to be known as the Kariba Draft after the location where it was written. Despite demands by the public for entrenchment of economic, social and cultural rights in a justiciable Bill of Rights, the Kariba Draft replicated the structure of the 1999 proposal by the Constitutional Commission, making such rights non-justiciable “National Objectives.”¹³ The Kariba Draft is viewed by many as reflecting the current thinking of Zimbabwe’s political leaders on the ideal content of a new constitution.

On April 12, 2009, the Speaker of Parliament commenced the Article 6 constitution-making process outlined in the Inter-Party Political Agreement by naming a Select Committee of Parliament to oversee public consultation and the writing of a new constitution.¹⁴

II. An Introduction to Economic, Social and Cultural Rights

People around the world, including in Zimbabwe, face levels of deprivation that undermine their ability to live with dignity. Hunger, homelessness, lack of education and preventable disease are not simply social problems caused by inadequate resources but can also be violations of international legal obligations to respect, protect and fulfill fundamental human rights. Governments have a responsibility to respond and ameliorate these violations, which threaten principles of human dignity.

Profound economic and social inequality is a persistent reality in countries of all political persuasions and levels of development. Providing access to food, water, education, housing, health and work requires significant human and economic resources. Limited resources, however, are only one part of the analysis; widespread abuses are often fueled by a combination of lack of capacity and knowledge, poor governance, intentional neglect, discrimination and other forms of injustice.

Over sixty years ago, the Universal Declaration of Human Rights (UDHR)¹⁵ recognised the human rights to which all persons are entitled. The UDHR includes civil and political rights, such as the rights to freedom of expression and association. These rights have since been enshrined in various binding treaties, including the International Covenant on Civil and Political Rights (ICCPR).¹⁶ The UDHR also includes economic, social and cultural rights that

¹¹ Agreement Between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations On Resolving the Challenges Facing Zimbabwe, adopted Harare, Zimbabwe, September 15, 2008, art. 6, available at <http://www.kubatana.net/html/archive/demgg/080915agreement.asp?sector=DEMGG> [hereinafter September 15 Agreement].

¹² *Ibid*, art. 6.

¹³ Kariba Draft Constitution, September 30, 2007, section 13-32 available at <http://www.kubatana.net/html/archive/demgg/070930kariba.asp?sector=DEMGG> [hereinafter Kariba Draft].

¹⁴ Raymond Maingire, “Constitutional committee established,” *Zimbabwe Times*, April 12, 2009, available at <http://www.thezimbabwetimes.com/?p=15037>.

¹⁵ Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/180 at 71 (1948) [hereinafter UDHR].

¹⁶ International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, acceded to by Zimbabwe August 13, 1991 [hereinafter ICCPR].

are guaranteed in numerous instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷ and the African Charter on Human and People's Rights (ACHPR).¹⁸ Zimbabwe, along with nearly every country in the world, is party to at least one treaty that recognises economic, social and cultural rights.¹⁹ Such rights include:

- **the right to work**, including fair conditions of employment and compensation, protection against forced or compulsory labour, and the right to form and join trade unions;
- **the right to adequate food**, including the right to freedom from hunger and access to adequate nutrition to promote healthy development and survival;
- **the right to adequate housing**, including security of tenure, protection from forced eviction and access to affordable, habitable, well located and culturally adequate housing;
- **the right to the highest attainable standard of health**, including the right to healthy living conditions and available, accessible, acceptable and quality health services;
- **the right to education**, including ensuring that primary education is free and compulsory, and that education is sufficiently available, accessible and adapted to the individual; and
- **the right to culture**, including protection of the practices, knowledge and skills that communities or individuals recognise as part of their cultural heritage, especially for minority populations and indigenous peoples.

As discussed in Chapter Two, national governments bear the primary responsibility for ensuring the human rights of their people. Governments have three related obligations in this regard:

- (1) government itself must **respect** peoples' rights,
- (2) government must **protect** peoples' rights against infringement by others, and
- (3) government must **fulfill** peoples' rights by taking steps that make rights a reality in practice.²⁰

Although international law recognises that some states are confronted with significant resource constraints, governments nevertheless have an immediate obligation to establish a "minimum core" of each right, and must take steps towards their full realisation.²¹

¹⁷ International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, acceded to by Zimbabwe August 13, 1991 [hereinafter ICESCR].

¹⁸ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, ratified by Zimbabwe May 30, 1986 [hereinafter ACHPR].

¹⁹ Zimbabwe itself is a party to the ICESCR, ICCPR and ACHPR, as well as the Convention on the Elimination of All Forms of Discrimination against Women (acceded to June 12, 1991), Convention on the Rights of the Child (acceded to October 11, 1990), International Convention on the Elimination of Racial Discrimination (acceded to June 12, 1991), African Charter on the Rights and Welfare of the Child (ratified January 19, 1995), and Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (ratified September 5, 2008).

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties Obligations*, 5th Sess., 1990, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?OpenDocument) [hereinafter General Comment No. 3].

²¹ *Ibid.*, paras. 1, 10.

III. The Relationship Between Economic, Social and Cultural Rights and Civil and Political Rights: Indivisible, Interdependent and Interrelated

Economic, social and cultural rights are part of a larger network of rights—including civil and political rights—that support and reinforce each other. “Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.”²² Rights, therefore, should not be divided and pursued independently. The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights by 171 nations, including Zimbabwe, affirms this longstanding concept:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.²³

This interdependence reflects the fact that economic, social and cultural rights cannot be neatly disentangled, either logically or practically, from civil and political rights. Rather, pursuing rights simultaneously will “create synergies that contribute to poor people’s securing their rights, enhancing their human capabilities and escaping poverty.”²⁴ Civil and political rights may constitute the condition for, and thus be implicit in, economic and social rights, and vice versa. The right to freedom of speech, for example, means little unless it is accompanied by a basic education, while the right to life requires taking steps to reduce infant mortality, disease and malnutrition.

IV. The Importance of Economic, Social and Cultural Rights in Zimbabwe

The protection of economic, social and cultural rights is especially urgent for the people of Zimbabwe. Zimbabwe is currently recovering from a period of record-setting inflation and many Zimbabweans live in deplorable conditions.²⁵ By the end of 2008, only six percent of the population was formally employed.²⁶ Chronic malnutrition has been prevalent, and starvation has been spreading. By early 2009, seven million Zimbabweans—over half the population—

²² Annotations on the Text of the Draft International Covenant on Human Rights, Prepared by the UN Secretary-General, UN Doc. A/2929, 1955, p. 7.

²³ Vienna Declaration and Programme of Action, Report of the World Conference on Human Rights: Report of the Secretary-General, UN Doc. A/CONF.157/24, July 12, 1993, para. 5, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) [hereinafter Vienna Convention].

²⁴ United Nations Development Programme, Human Development Report 2000, Chapter 4, “Rights Empowering People in the Fight Against Poverty,” p. 73.

²⁵ “Zimbabwe eyes high-value banknotes,” *Mail and Guardian*, November 3, 2008, available at <http://www.mg.co.za/article/2008-11-03-zimbabwe-eyes-highvalue-banknotes>.

²⁶ “Zimbabwe unemployment soars to 94%,” AFP, January 29, 2009, available at http://www.google.com/hostednews/afp/article/ALeqM5imTkGEP84_3QTVcSGu_8W3YrP8wA.

were in need of food aid.²⁷ Recent studies project that over 2.7 million annual cases of malaria persist among Zimbabwe's population.²⁸ Fueled by a lack of safe drinking water, a cholera outbreak began in August 2008 and, as of April 2009, had killed over 4,000 Zimbabweans and affected nearly 100,000 more.²⁹ Twenty percent of the population is estimated to be infected with HIV/AIDS, and life expectancy has dropped to 37 years for men and 34 years for women.³⁰ School attendance rates in 2008 were only 20 percent, and as of February 2009, 94 percent of Zimbabwe's rural schools were closed.³¹

The plethora of economic, social and cultural rights violations that flow from these circumstances cannot be separated from civil and political rights in Zimbabwe.

It is because of circumstances such as those currently experienced in Zimbabwe that international law recognises that all rights are interdependent and indivisible. Rights can protect the most fundamental values of a nation and ensure that the interests of politically vulnerable groups are not abused. At the same time, Zimbabwe's current crisis requires more than simply embedding economic, social and cultural rights in a new constitution's Bill of Rights. Ultimately, economic, social and cultural rights will only be respected, protected and fulfilled within a state that upholds the rule of law, educates its people about their rights, and creates functioning institutions with the mandate, independence and resources necessary to intervene effectively in support of such rights. Thus, a new constitution for Zimbabwe should both provide legal status to economic, social and cultural rights and establish those institutions and procedures necessary to deliver rights protections to ordinary Zimbabweans.

²⁷ "Aid money almost too tight to mention," IRIN, March 12, 2009, available at <http://www.irinnews.org/report.aspx?ReportId=83438>.

²⁸ World Health Organization study quoted in Celia W. Dugger, "Aid Group Says Zimbabwe Misused \$7.3 Million," *New York Times*, November 2, 2008, available at <http://www.nytimes.com/2008/11/03/world/africa/03zimbabwe.html?partner=rssnyt&emc=rss>.

²⁹ World Health Organization and Zimbabwe Ministry of Health and Child Welfare, "Daily Cholera Update and Alerts," April 20, 2009, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7RCGAA-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7RCGAA-full_report.pdf/$File/full_report.pdf).

³⁰ World Health Organization, "Mortality Country Fact Sheet 2006," available at http://www.who.int/whosis/mort/profiles/mort_afro_zwe_zimbabwe.pdf.

³¹ "Zimbabwe education crisis worsens," UNICEF press release, February 10, 2009, available at http://www.unicef.org/infoby-country/media_47915.html.

CHAPTER TWO: ZIMBABWE'S OBLIGATIONS TO RESPECT, PROTECT AND FULFILL ECONOMIC, SOCIAL AND CULTURAL RIGHTS

I. Introduction

Through a number of international treaties, Zimbabwe has agreed to respect, protect and fulfill economic, social and cultural rights. The rule of *pacta sunt servanda* (Latin for “agreements must be kept”) requires that Zimbabwe comply with its treaty obligations in good faith. Moreover, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, Zimbabwe may not invoke provisions of its domestic law as justification for failure to perform its treaty obligations.³²

Zimbabwe has recognised the economic, social and cultural rights of its citizens under the ACHPR.³³ The ACHPR was adopted in 1981 by the Assembly of Heads of State of the Organization of African Unity, now the African Union (AU), and Zimbabwe ratified the ACHPR on May 30, 1986. At the time of the ACHPR's adoption, member states reaffirmed their adherence to the principles enshrined in the UDHR.³⁴ Like the UDHR, Article 22 of the ACHPR recognises that all peoples have the right to their economic, social and cultural development and corresponding rights including the rights to work, health, education and culture.³⁵

Zimbabwe has also accepted its international obligation to respect, protect and fulfill economic, social and cultural rights by acceding without reservations to the ICESCR on May 13, 1991. The ICESCR recognises the rights to work, social security, food, clothing, housing, health, education and culture.³⁶ Zimbabwe has also ratified or acceded to the following treaties which protect economic, social and cultural rights:

³² Vienna Convention, art. 22.

³³ Compare ACHPR, art. 15 with ICESCR, arts. 6 and 7 (right to work); ACHPR, art. 16 with ICESCR, art. 12 (right to health); ACHPR, art. 17 with ICESCR, art. 13 (right to education); ACHPR, art. 18 with ICESCR, art. 10; ACHPR, art. 20 with ICESCR, art. 1 (right to self-determination).

³⁴ The UDHR also provides, in Article 22, that, “Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

³⁵ ACHPR, arts. 15-17 and 22.

³⁶ ICESCR, arts. 6-9, 11-13 and 15.

- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), acceded to on June 12, 1991;³⁷
- the Convention on the Rights of the Child (CRC), ratified on October 11, 1990;³⁸
- the International Convention on the Elimination of Racial Discrimination (CERD), ratified on June 12, 1991;³⁹
- the African Charter on the Rights and Welfare of the Child (ACRWC), ratified on January 19, 1995;⁴⁰ and
- the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, ratified on September 5, 2008.⁴¹

II. The Nature of Zimbabwe's Obligations

As a member state of the AU, Zimbabwe must “recognize the rights, duties and freedoms enshrined in [the AU] Charter.”⁴² Under the ICESCR, Zimbabwe also has an international obligation to respect, protect and fulfill economic, social and cultural rights. Article 2 of the ICESCR states that parties shall “undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization” of these rights.⁴³

A. Duties to Respect, Protect and Fulfill

Like all states, Zimbabwe's obligations to realise human rights are of three types, as outlined in the General Comments of the United Nations Committee on Economic, Social and Cultural Rights:⁴⁴

- **Duty to Respect:** A state must not interfere directly or indirectly with an individual's exercise and enjoyment of a right. This is an immediate obligation and includes respecting an individual's own efforts to realise such rights.
- **Duty to Protect:** A state must ensure that no individuals or groups interfere with an

³⁷ Convention on the Elimination of All Forms of Discrimination Against Women, adopted December 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 47) at 193, U.N. Doc. A/54/49 (Vol. 1) (2000), entered into force December 22, 2000 [hereinafter CEDAW].

³⁸ Convention on the Rights of the Child, adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990 [hereinafter CRC].

³⁹ International Convention on the Elimination of All Forms of Racial Discrimination, adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969 [hereinafter CERD].

⁴⁰ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999 [hereinafter ACRWC].

⁴¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005 [hereinafter Protocol on the Rights of Women].

⁴² ACHPR, art. 1.

⁴³ ICESCR, art. 2.

⁴⁴ The Committee is a body of independent experts, established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 on May 28, 1985, to monitor implementation of the Covenant on Economic, Social and Cultural Rights pursuant to Part IV of the Covenant. All states parties are obliged to submit regular reports to the Committee on how rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of concluding observations.

individual's exercise and enjoyment of a right. This is an immediate obligation and includes implementing measures to prevent, investigate and punish third parties that violate such rights, for example through regulation and remedies.

- **Duty to Fulfill:** A state must promote rights, facilitate access to and utilization of resources to ensure realisation of rights, and provide for those unable to provide for themselves. This obligation is subject to progressive realisation. It nevertheless requires taking legislative, administrative, budgetary, judicial and others steps toward the full realisation of rights. This obligation includes duties to increase access to resources and the means of attaining these rights through immediate measures. States must give priority to meeting the core minimum obligations for each right.⁴⁵

B. Progressive Realisation Still Entails Certain Immediate Obligations

Zimbabwe has an obligation with respect to economic, social and cultural rights to progressively achieve the full realisation of these rights according to available resources.⁴⁶ Governments around the world have widely divergent resources, and Zimbabwe is a painful example of a country with profoundly limited means. International law therefore recognises that making economic, social and cultural rights a reality in countries like Zimbabwe can only be achieved progressively over time. However, economic, social and cultural rights are not merely aspirational; under international law, states have immediate obligations, as well as longer-term duties, with respect to these rights. For example, governments bear immediate duties to respect and protect individuals from violations of these human rights, including ensuring freedom from discrimination; lack of resources is no excuse.⁴⁷ As noted by the Committee on Economic, Social, and Cultural Rights, while the ICESCR provides for progressive realisation and acknowledges constraints due to limited resources, it also imposes various obligations that are of immediate effect.

First, Zimbabwe has an immediate duty to “take steps,” which is not qualified or limited by other considerations.⁴⁸ Although states may require time to fully realise economic, social and cultural rights, this does not mean they can stand idle. “[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s [ICESCR] entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.”⁴⁹ The concepts of progressive realisation and limited resources do not justify inaction, and do not allow for limitations to rights or steps that might be considered regressive.⁵⁰

⁴⁵ General Comment No. 3.

⁴⁶ ICESCR, art. 2(1).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, art. 2.

⁴⁹ General Comment No. 3 at para. 1; *see also ibid.*, para. 9 (progressive realisation “imposes an obligation to move as expeditiously and effectively as possible towards that goal”).

⁵⁰ Amnesty International, “Human rights for human dignity: A primer on economic, social and cultural rights,” 2005, p. 26, available at <http://www.amnestyusa.org/poverty-and-human-rights/report-human-rights-for-human-dignity/3-obligations-under-international-law/page.do?id=1102190> [hereinafter Amnesty International].

Second, Zimbabwe must prioritise “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” in the ICESCR.⁵¹ The “minimum core” of each right will be discussed in detail in Chapter Four, which addresses the substantive rights recommended for inclusion in a new constitution, but in general terms the core represents the essential elements of a right. Absent such essential elements, the right loses its significance, and a state that fails to meet core minimum obligations would be considered in violation of its international obligations.⁵² Core minimum obligations are sometimes considered a floor or baseline below which conditions should not fall. The core may also be understood as outlining what states must do immediately in order to realise a right. Thus, the core of a right is one bridge between aspirational ideals and the reality of limited resources. Although many economic, social and cultural rights will require resources that may not be available at all times and in all countries, the core minimum obligation affirms that even states facing challenging circumstances have irreducible obligations that they are assumed to be able to meet, and to which they will be held accountable.⁵³

Third, Zimbabwe is immediately obligated to guarantee that economic, social and cultural rights “will be exercised without discrimination,” including discrimination on the grounds of race, sex, age, disability, language, religion, class or political affiliation.⁵⁴ The right to non-discrimination is an overarching and immediate obligation not subject to progressive realisation. Discrimination itself violates the ICESCR. Accordingly, Zimbabwe must eliminate and refrain from adopting any laws, policies or practices that may have a direct or indirect discriminatory impact on individuals’ ability to realise their rights. Zimbabwe also has an immediate duty to prioritise the most vulnerable, by attending especially to marginalised and excluded people when allocating resources.⁵⁵

C. Obligations Remain Despite Inadequate Resources

Even when resources are demonstrably inadequate, Zimbabwe must “strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”⁵⁶ For a state to reasonably attribute its failure to meet its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources at its disposal to satisfy, as a matter of priority, those minimum obligations.⁵⁷ Zimbabwe must therefore make substantive efforts to maximise the impact of available resources in fulfilling economic and social rights. As the Committee has noted, “even in times of severe resource constraints, whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”⁵⁸

⁵¹ General Comment No. 3 at para. 10.

⁵² Audrey R. Chapman and Russel Sage, *Core Obligations: Building A Framework for Economic, Social and Cultural Rights* (New York: Intersentia 2002), p. 9.

⁵³ *Ibid.*, p. 10.

⁵⁴ General Comment No. 3 at para. 1.

⁵⁵ Amnesty International at p. 21.

⁵⁶ General Comment No. 3 at para. 11.

⁵⁷ *Ibid.*, para. 10.

⁵⁸ *Ibid.*, para. 12.

D. Obligation to Encourage and Not Prevent International Assistance

The international community has an important role to play in supporting economic, social and cultural rights, especially in states with limited domestic resources. The phrase “to the maximum of its available resources” was intended by the drafters of the ICESCR to refer to the resources existing within a state as a whole, including both the private and the public sectors, as well as to resources available from the international community through international cooperation and assistance.⁵⁹ Although international cooperation must always be based on consent, states are required to seek and facilitate international assistance when they are unable to meet their minimum core obligations alone.⁶⁰

When a state refuses access to humanitarian and aid organisations, it further limits the resources available to its citizens. Under Zimbabwe’s obligation to respect economic, social and cultural rights, it must not impede its citizens’ access to resources that enable them to exercise and fulfill their rights. Zimbabwe has a duty to encourage and ensure, rather than prevent, access to international assistance.

E. Limitations and Derogation

Articles 4 and 5 of the ICESCR describe the narrow circumstances in which a state party can place limitations on economic, social and cultural rights, or can derogate from its obligations under the Covenant. Article 4 allows states to limit rights contained in the ICESCR “only in so far as [the limitation] may be compatible with the nature of [the] rights and solely for the purpose of promoting the general welfare in a democratic society.”⁶¹ Article 5 provides that only limitations specifically provided for in the Covenant—meaning only limitations under Article 4—can affect rights contained in the ICESCR.⁶² Article 5 further specifies that one right in the Covenant cannot be used as justification for violating another and that just because the ICESCR does not contain a right does not mean that a state is not bound to enforce it by another law or treaty.⁶³

The Committee to the ICESCR has indicated that the class of limitations allowed by the Covenant is very limited. “Articles 4 and 5 were not intended by the drafters of the Covenant to be overly permissive of the imposition of limitations by the state on the rights provided for. Rather, these provisions are formulated in such a manner as to be protective of the rights of individuals. They are also not designed to introduce limitations on rights affecting the subsistence or survival of the individual or the integrity of the person.”⁶⁴

Human rights that are considered so fundamental that they can never be violated or suspended,

⁵⁹ *Ibid.*, para. 13.

⁶⁰ See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 12, *The Right to Adequate Food*, 20th Sess., 1999, para. 17 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?Opendocument) [hereinafter General Comment No. 12].

⁶¹ ICESCR, art. 4.

⁶² *Ibid.*, art. 5(1).

⁶³ *Ibid.*, art. 5.

⁶⁴ Committee on Economic, Social and Cultural Rights, Fact Sheet No. 16, Rev. 1, June 25, 1993, available at <http://www.unhchr.ch/html/menu6/2/fs16.htm>.

even in times of war or during states of emergency, are known as non-derogable rights. The ICESCR includes no provision that permits states parties to suspend substantive guarantees during times of public emergency or war. Thus, the ICESCR can be read to indicate that Zimbabwe cannot *per se* derogate from its obligations in such circumstances.

III. Non-Constitutional Implementation Options for Meeting Zimbabwe's International Obligations

A state may pursue a variety of different measures to fulfill its obligations, including legislative and judicial efforts, as well as educational campaigns designed to raise public awareness about the meaning of economic and social rights. ICESCR Article 2(1) notes that a state is obligated to realise these rights "by all appropriate means, including particularly the adoption of legislative measures."⁶⁵

A. Legislative Incorporation under National Law

In many countries, including Zimbabwe,⁶⁶ international agreements are not automatically incorporated into domestic law. Rather, a treaty must either be explicitly self-executing or must be incorporated through legislation in order to become part of domestic law. Incorporation thus refers to the process by which states parties to a treaty implement national legislation giving force to the treaty under domestic law.

Article 1 of the ACHPR states that all parties "shall undertake to adopt legislative or other measures to give effect" to the rights it enumerates.⁶⁷ The regional obligation to give effect to the provisions of the ACHPR at the national level is thus clearly enshrined.

Incorporation of the ICESCR under national law can also be "an essential first step in fulfilling the aims and provisions of the Covenant."⁶⁸ The ICESCR does not stipulate the specific means by which it is to be implemented in the national legal order, and there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific status in national law.⁶⁹ Nevertheless, despite being discretionary, incorporation can serve the essential purposes of the Covenant and some states parties have adopted such an approach.⁷⁰

Indeed, the Committee on Economic, Social and Cultural Rights has made clear that incorporation is preferable: "While the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids

⁶⁵ ICESCR, art. 2(1).

⁶⁶ Constitution of Zimbabwe, art. 111B(1)(b), 1979.

⁶⁷ ACHPR, art. 1.

⁶⁸ Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 9 (1987) p. 166 (citing a member of the Working Group of Government Experts on the Implementation of the International Covenant on Economic, Social, and Cultural Rights) [hereinafter Alston].

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant*, 19th Sess., 1998, para. 5 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?OpenDocument) [hereinafter General Comment No. 9]; see also Alston at p. 166.

⁷⁰ General Comment No. 9 at para. 5.

problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.”⁷¹

The mandatory provision of the ACHPR imposes a positive obligation on Zimbabwe to adopt legislative measures to fulfill economic, social and cultural rights, and this is strongly reinforced by the recommendation of the Committee of the ICESCR. Failure to implement such legislation would entail a violation of Zimbabwe’s obligations.

Although judges can effectively protect rights through the interpretation of legislative measures, there is a growing trend towards according constitutional recognition to economic, social and cultural rights. The advantages of including justiciable economic, social and cultural rights in a new constitution are considered below.

B. Judicial Remedies and Justiciability

The right to an effective remedy is an important principle of international law. Article 8 of the UDHR makes clear that, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁷² In addition, Article 7 of the ACHPR ensures the right of every individual to have one’s cause heard.⁷³ Zimbabwe thus has a regional obligation to provide effective remedies to victims of human rights violations. A remedy need not be interpreted as always requiring a judicial remedy, and in some cases administrative remedies may be adequate.

Justiciability refers to matters appropriately resolved by courts or a judicial body. In the case of economic, social and cultural rights, it implies the “competence of a court to compel the [government] to take measures to create conditions under which a social right can be enjoyed.”⁷⁴ While there is no universal consensus as to the justiciability of economic, social and cultural rights, a human right must be enforceable in order to have meaning. Some criticise vesting such enforcement powers for economic, social and cultural rights in the judiciary, on the grounds that enforcement might involve policy or political determinations arguably more appropriately reserved for the legislature or executive.⁷⁵ This concern is particularly relevant with regards to the duty to fulfill, but may be much less so with regards to the duties to respect and protect. Moreover, these arguments are often based on an exaggerated distinction between civil and political rights and economic, social and cultural rights, and an incomplete understanding of the role that courts play in enforcing the latter.

Many states parties have already made judicial remedies available for violations of rights recognised in the ICESCR. Indeed, the Committee has previously expressed concern that the

⁷¹ *Ibid.*, para. 8.

⁷² UDHR, art. 8.

⁷³ ACHPR, art. 7.

⁷⁴ Alston at p. 169 (quoting Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights,” *Neth. Y.B. Int’l L.*, Vol. 9 (1968) pp. 92-93).

⁷⁵ *Ibid.*

ICESCR cannot be invoked directly in Zimbabwean courts⁷⁶ and has urged the government to provide appropriate access to the courts to uphold relevant rights.⁷⁷ Zimbabwe's own former Chief Justice Anthony Gubbay has stated that "whether ratified or not, all these international and regional instruments embody human rights norms which are broadly accepted by the entire international community. They should and must be incorporated into domestic jurisprudence by judicial interpretation."⁷⁸

C. Additional Measures

Legislative incorporation and adjudication by courts are only two potential methods of giving effect to the rights contained in the ICESCR or the ACHPR. The Committee has highlighted other important measures that a state may adopt to fulfill its obligations, including but not limited to "administrative, financial, educational and social measures."⁷⁹ Indeed, in its recommendations, the Committee noted Zimbabwe's duty to ensure that its obligations under the ICESCR are appropriately reflected in domestic law and policy more generally.⁸⁰

Beyond legal and policy commitments, Zimbabwe must prioritise education and public awareness of economic, social and cultural rights among all citizens. Article 25 of the ACHPR notes that states have a duty to promote and teach respect for rights and freedoms.⁸¹ Such educational measures could include, for example, dissemination of the text of the ICESCR, the ACHPR, and the new constitution, translation into local languages, training and discussion sessions in schools and churches about the meaning of these rights for Zimbabwean citizens, and training courses for judges, lawyers and legislators, as well as for police, army, intelligence and other security forces.⁸²

In its Concluding Observations, the Committee found that "no measures have been taken [in Zimbabwe] to inform the public about the Covenant."⁸³ Zimbabweans must understand their rights and freedoms as well as the obligations and duties of the state pursuant to the ICESCR, the ACHPR, the constitution, and other foundational documents. Legislation and access to courts will mean little if the people of Zimbabwe are not informed of their rights or how to access and protect them.

IV. Constitutional Incorporation as a Means of Meeting Zimbabwe's International Obligations

Including economic, social and cultural rights in a new Zimbabwean Constitution would comply

⁷⁶ Committee on Economic, Social and Cultural Rights, *Concluding Observations: Zimbabwe*, May 20, 1997, para. 7 available at <http://www.unhcr.org/refworld/country,,,CONC/OBSERVATIONS,ZWE,456d621e2,3ae6ae628,0.html> [hereinafter *Concluding Observations*].

⁷⁷ *Ibid.*, para 15.

⁷⁸ Anthony R. Gubbay, "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience," *Human Rights Quarterly*, Vol. 19, No. 2 (May 1997) p. 233 [hereinafter Gubbay].

⁷⁹ General Comment No. 9 at para. 7.

⁸⁰ *Concluding Observations* at para. 15.

⁸¹ ACHPR, art. 25.

⁸² Alston at p. 171.

⁸³ *Concluding Observations* at para. 18.

with the expressed will of the Zimbabwean people and the nation's international obligations. While Zimbabwe's treaty obligations do not specifically require entrenchment of economic, social and cultural rights in a new constitution, constitutional protection should be viewed alongside legislative, judicial and administrative measures as a potential means of satisfying Zimbabwe's obligation to "take steps . . . with a view to achieving progressively the full realization of [economic, social and cultural rights] by all appropriate means."⁸⁴ Indeed, constitutional protection may be the most appropriate tool for fulfilling treaty obligations, as a constitution will govern all state action. Thus, by granting constitutional status to a full complement of rights, constitution-makers would take an important step towards ensuring that Zimbabwean citizens can actually realise the rights protections already guaranteed under international law.

Constitutional protections for economic, social and cultural rights need not extend the responsibilities of the Zimbabwean state beyond the obligations to which it is already committed. For example, a constitutional right to food would impose no new duties on the government, as it is already obliged under the ICESCR to respect, protect and fulfill that right.⁸⁵ Indeed, including economic, social and cultural rights in a justiciable Bill of Rights would merely provide domestic accountability for obligations that Zimbabwe has already undertaken pursuant to its acceptance and ratification of numerous human rights treaties.

⁸⁴ ICESCR, art. 2.

⁸⁵ ICESCR, art. 11; General Comment No. 12.

CHAPTER THREE: OPTIONS FOR CONSTITUTIONAL PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The drafting of a new constitution provides an opportunity to secure for Zimbabweans the rights protections to which they are entitled. However, simply placing economic, social and cultural rights in a new constitution is not enough to ensure that they will become a reality for the men, women and children of Zimbabwe. There are a number of different ways that economic, social and cultural rights may be incorporated into a new constitution, each with attendant advantages or disadvantages. Moreover, constitutional rights will be of limited value without the rule of law, reliable state institutions and appropriate procedural protections. Beyond just asserting rights, a new constitution must establish a framework for governance that assures that those rights will become a reality in practice.

I. Ways of Including Economic, Social and Cultural Rights in a Constitution

Economic, social and cultural rights may be protected in a constitution in a number of ways.

At the most basic level, economic, social and cultural rights may be “indirectly protected” through the action of other constitutional provisions such as due process protections, liberty rights and equal protection clauses.⁸⁶ For example, some nation’s constitutional courts have used due process rights to ensure that individuals cannot be deprived of social welfare entitlements.⁸⁷ This method of rights enforcement, however, is very limited in scope and provides insufficient protection for the broad classes of economic, social and cultural rights that many Zimbabweans demand be entrenched in a constitution.

In addition, economic, social and cultural rights are sometimes given constitutional protection when a court implies the existence of such a right within a recognised civil or political right. For example, India’s Supreme Court has held that the rights to food and water are implied in the right

⁸⁶ Craig Scott and Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,” *University of Pennsylvania Law Review*, Vol. 141, No. 1 (1992) pp. 131-32 [hereinafter Scott].

⁸⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

to life, and issued orders demanding the implementation of nutrition programmes.⁸⁸ While such jurisprudence can have benefits, constitution-makers should not rely on the favourable interpretation of civil and political rights to ensure that economic, social and cultural rights are protected. The constitutions of most countries include a right to life, but few have used that enumerated right to protect related economic, social and cultural rights. Moreover, the interpretation of additional rights from existing rights may fail to achieve the full complement of economic, social and cultural rights demanded by the people of Zimbabwe.

Alternatively, economic, social and cultural rights can be included in a constitution as non-justiciable directive principles of state policy. As noted above, the 1999 Constitutional Commission proposal and the more recent Kariba Draft Constitution took this approach by including economic, social and cultural rights as “National Objectives” which “guide all organs and agencies of the State and Government . . . in taking and implementing policy decisions.”⁸⁹ This method of addressing economic, social and cultural rights offers some benefits over non-inclusion, including giving guidance to the legislature. It also allows for the possibility of the principles serving as presumptions of statutory interpretation, but ultimately leaves primary enforcement to the legislature rather than the judiciary.⁹⁰ Therefore, directive principles may ultimately fail to protect vulnerable groups, serve as a restraint on the exercise of government power, or provide many of the benefits discussed in Chapter Five, such as creating a political culture of transparency and accountability. In fact, making economic, social and cultural rights explicitly non-justiciable would likely limit the ability of courts to enforce such rights through judicial interpretations and may be used as justification for circumscribing the protections offered by civil and political rights.⁹¹

A. Justiciability of Economic, Social and Cultural Rights: Inclusion in a Bill of Rights

In a constitution, economic, social and cultural rights are best provided for by explicit inclusion in a fully justiciable Bill of Rights. International law requires that the Zimbabwean government respect, protect and fulfill all rights. It is therefore essential that the new constitution make clear that economic, social and cultural rights are justiciable. The enforcement of a duty to respect an economic, social or cultural right is not necessarily a more difficult task for a judge than enforcing a civil or political right. For example, the determination of whether a forceful eviction by the state is a violation of the right to housing does not require a judge to play a different role than he would in determining whether a banning order on a political party violates the freedom of association.

In considering the duty to fulfill, international law requires that certain aspects of economic, social and cultural rights be immediately implemented, allowing judges to avoid difficult policy considerations.⁹² For example, the right to education under the ICESCR requires that children

⁸⁸ *People's Union for Civil Liberties v. Union of India & Another*, Supreme Court of India, Writ Petition (Civil) No. 196 of 2001, May 2, 2003 available at <http://www.righttofoodindia.org/orders/nov28.html> [hereinafter PUCL v. India].

⁸⁹ Constitutional Commission Draft, section 13; Kariba Draft Constitution, section 13.

⁹⁰ Cass R. Sunstein, “Social and Economic Rights? Lessons from South Africa,” John M. Olin Law & Economics Working Paper No. 124, The Law School, The University of Chicago, 2001, p. 3 [hereinafter Sunstein].

⁹¹ Etienne Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution,” *South African Journal on Human Rights*, Vol. 8 (1992) p. 469 [hereinafter Mureinik].

⁹² General Comment No. 9 at para. 4.

be provided with free, universal primary education. Were Zimbabwe to include the right to education in its new constitution, a judge could evaluate and determine whether primary education has been provided.

In addition, judges, when ruling on cases involving civil and political rights, often commit the government to undertake certain actions and obligate the expenditure of state resources. Consider, for example, the legal rights of the accused. When a court determines who must be provided with free legal counsel or how quickly an accused person must be brought to trial, it can impact how the resources of lawyers, judges, court clerks and prison guards are allocated. Modern courts regularly require the government and other parties to take positive action.⁹³ Courts may order the construction of prisons, the desegregation of schools, or the provisions of additional employment benefits. The Committee on Economic Social and Cultural Rights commented:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁹⁴

Economic, social and cultural rights may appear indeterminate because in many countries these rights have not yet been constitutionally entrenched and, as a result, there have been few opportunities to develop case law and analyze the contours of such rights.⁹⁵ After rights are put into a constitution, the judiciary begins to develop tests and standards that will clarify the precise meaning of the various protections. However, economic, social and cultural rights are not necessarily less precise, or more taxing on judicial capacity, than civil and political rights. The right to free speech, for example, is not absolute and may be restricted when competing rights or interests of the state so require. Therefore, when a litigant alleges that his right to free speech has been violated, it is incumbent upon the state to be able to justify any restrictions it has placed on such a right.⁹⁶ The judicial review of state justifications for restricting a right can thus take place with regards to civil and political rights or economic, social and cultural rights.

The drafters of a new constitution may also, if they so desire, specify the precise meaning of a right by using explicit language in the text of the constitution. For example, the right to education could require, “free, universal primary education, with free, universal secondary

⁹³ Herman Schwartz, “Do Economic and Social Rights Belong in a Constitution?” *American University Journal of International Law and Policy*, Vol. 10 (1995) p.1237.

⁹⁴ General Comment No. 9 at para. 10.

⁹⁵ Scott at pp. 72-73.

⁹⁶ Mureinik at p. 470.

education to be provided within ten years of the enactment of this constitution.”

In addition, international law provides increasing guidance on the exact meaning of economic, social and cultural rights protections, and the cores of such rights are fairly well-established. Litigation in international courts and comments by the Committee on Economic, Social and Cultural Rights provided relatively detailed interpretations about the duties to respect, protect and fulfill economic, social and cultural rights. A constitution that reflects international obligations, or calls upon judges to look to international law when interpreting economic, social and cultural rights, would ensure a level of precision that might otherwise be lacking.

Economic, social and cultural rights are not absolute entitlements to certain goods or services. Zimbabwe’s duty under international law is to satisfy the minimum core obligation relating to each right and then “take steps . . . to the maximum of its available resources, with a view of achieving progressively the full realization of the rights.”⁹⁷ Constitutional courts, when interpreting economic, social and cultural rights, have referred to the qualifications of “available resources” and “progressive realization” to establish standards of judicial review that do not threaten the separation of powers or place impossible obligations on the state.⁹⁸

In cases alleging that a state has not taken adequate measures to fulfill its obligations relating to an economic, social or cultural right, courts have looked to whether measures taken are reasonable or justifiable. States are therefore required to proffer reasons for policy choices. The decision the court must then make is not whether the policy chosen was the best one, but rather whether it was reasonable given the state’s obligation to pursue progressive realisation of the relevant right. In this way, the courts are “reviewing policy choices, not making them.”⁹⁹

Reasonableness review is not something new for modern courts. Constitutional courts considering economic, social and cultural rights cases have employed many of the reasonableness tests commonly used in administrative law, comparing the seriousness of the violation with the importance of the state justification.¹⁰⁰ For example in *Minister of Health v. Treatment Action Campaign*, a case heard before the South African Constitutional Court, the court considered the state’s reasons for restricting the distribution of a drug meant to prevent mother-to-child transmission of HIV, which included the financial burden of broader distribution. After weighing the state’s justifications against the potential benefits to the children of HIV-positive mothers, the court ruled that wider distribution was necessary to satisfy the state’s obligation to progressively realise the right to health.¹⁰¹ This type of disciplined consideration of a social right does not strain judicial capacity or infringe on the prerogatives of other branches of government.

⁹⁷ ICESCR, art. 2(1).

⁹⁸ The standards of “available resources” and “progressive realization” may be incorporated into constitutional protections for economic, social and cultural rights in a number of different ways. A Constitution may state in its text that such rights obligations are subject to “available resources” and “progressive realizations.” Alternatively, the approach of the South African Constitution may be used—including an explicit command to consider international law when interpreting rights. It is also possible to decline to directly address such standard in the Constitution, allowing courts to develop their own standards.

⁹⁹ Mureinik at p. 472.

¹⁰⁰ Danie Brand, “Socio-economic rights in practice in South Africa,” *Unlock Democracy*, available at <http://www.unlockdemocracy.org.uk/?p=722>.

¹⁰¹ *Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, 5 SA 721, July 5, 2002, available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=403050. For more information about this case, see Chapter Four’s discussion of the right to the highest attainable standard of health.

II. Constitutional Provisions Relating to Economic, Social and Cultural Rights

Rights protections do not stand alone in a constitution. Rather, they are supported and influenced by various constitutional provisions that affect the way that rights are interpreted, implemented and altered. The degree to which economic, social and cultural rights will be realised in Zimbabwe depends to a large extent on the content of a new constitution that supports the enumerated rights.

A. The Role of International Law

A new constitution should require that courts look to international law when interpreting economic, social and cultural rights. The constitution could also allow Zimbabwean judges to review foreign law when considering rights protections. The South African Constitution contains an article that accomplishes both tasks: “When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and may consider foreign law.”¹⁰² Including this type of provision would clarify the role of international law in Zimbabwe’s new constitutional framework and assist judges in determining the precise meaning of rights protections.

Zimbabwe is party to numerous international treaties that could help establish the exact meaning of economic, social and cultural rights protections. In general, international jurisprudence and comments by the Committee on Economic, Social and Cultural Rights provide relatively detailed guidance about the duties to respect, protect and fulfill these rights. Moreover, tying domestic rights protections to international standards would prohibit a politicised court from interpreting a right in such a way that deprives it of all meaning.

In practice, Zimbabwean courts have previously relied on international and foreign law in decisions related to civil and political rights. For instance, the Supreme Court has conducted several surveys of international and foreign law in reaching decisions that recognise and even expand the scope of existing constitutional rights. In *Rattigan*, the Court relied on a Botswana case and various United States Supreme Court decisions in interpreting the meaning of freedom of movement,¹⁰³ and in the *Juvenile* and *Ncube* decisions, Chief Justice Gubbay relied upon a variety of international and foreign sources to determine the unconstitutionality of whipping and caning.¹⁰⁴ This kind of consideration, which has been helpful to Zimbabwean courts in the

¹⁰² The Constitution of the Republic of South Africa, art. 38, 1996. This section of the South African Constitution includes a number of other guidelines for interpreting rights that may be utilised in Zimbabwe, as well. The text is as follows:

1. When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁰³ See Vicki C. Jackson, “Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality,” *Loyola of Los Angeles Law Review* (2003) p. 298.

¹⁰⁴ Richard B. Lillich, “The United States Constitution in its Third Century: Foreign Affairs,” *American Journal of International Law*, Vol. 83 (1989) p. 854.

past, should be required by a new constitution.

B. Remedial Powers

To protect economic, social and cultural rights, courts must have broad remedial powers when violations of these rights occur. Typical court remedies, such as injunctions or monetary damages, may be insufficient to correct such violations. For example, awarding monetary damages to a child whose right to education has been violated will not remedy the violation. Rather, the court must have the power to devise remedies appropriate to ensure protection of the right. These remedies may include issuing supervisory orders, requiring the legislature or an administrative agency to devise or revise a plan, or ordering reparations in kind.¹⁰⁵ The judiciary should be granted the power to devise these kinds of remedies in a new constitution of Zimbabwe.

South Africa's Constitution ensures that the judiciary has discretion to order the proper relief. In the Bill of Rights, the constitution allows the court to "grant appropriate relief."¹⁰⁶ Later, in the section concerned with the more general powers of the judiciary, the constitution states that courts "may make any order that is just and equitable."¹⁰⁷ These provisions grant courts the necessary latitude to enforce economic, social and cultural rights. Similar broad remedial powers should be given to the judiciary under Zimbabwe's new constitution.

C. Standing

Under Zimbabwe's current constitution, only the person who alleges a violation of the Declaration of Rights "in relation to him[self]," may bring such a case in court.¹⁰⁸ While the Supreme Court has at times granted standing to human rights organisations acting on behalf of their own members, the constitution prohibits third parties, whether individuals or groups, from acting on behalf of unconnected individuals. This restriction limits the ability of human rights and civil society organisations to engage in public interest litigation.

Other countries, including South Africa and India, have specifically provided for public interest litigation by allowing third parties to bring cases on behalf of individuals whose rights have been violated. South Africa's Constitution states:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The persons who may approach a court are –

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of

¹⁰⁵ Liebenberg at p. 70.

¹⁰⁶ South African Constitution, art. 38.

¹⁰⁷ *Ibid.*, art. 172.

¹⁰⁸ Constitution of Zimbabwe, art. 24(1). A narrow exception exists for detained persons.

- persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.¹⁰⁹

Zimbabwe's new constitution should similarly provide broad standing rules, which could be used to allow human rights organisations to act on behalf of those alleging violations of their economic, social and cultural rights. Such standing rules could be further strengthened by including a constitutional provision waiving court fees for litigation involving the Bill of Rights. These measures would open up courts to individuals with few resources, namely those in the most desperate need of rights protections.

D. Enforceability against Private Parties

Zimbabwe may benefit from including a provision that allows the negative components of economic, social and cultural rights in the constitution to be enforceable against private parties. This provision would not allow individuals to sue other private parties to fulfill a right, but it would allow private parties to bring suit against others for violating the obligation to respect a right.¹¹⁰

South Africa was one of the first countries to allow this type of suit, which is explicitly permitted in its constitution. The text of the constitution states that, "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."¹¹¹ This kind of provision could be a valuable addition to protect the rights of Zimbabweans.

E. Scrutiny of Legislation

Zimbabwe's current constitution requires that a Parliamentary Legal Committee (PLC) examine any legislation and report whether "any provision of the Bill . . . would, if enacted, be . . . in contravention of the Declaration of Rights."¹¹² However, the PLC is appointed by the Committee on Standing Rules and Orders,¹¹³ which is appointed according to parliamentary Standing Orders.¹¹⁴ In practice this allows the Speaker of Parliament to appoint members of his party to the PLC, and as a result the PLC has often failed to block legislation that violates rights protected in the constitution.¹¹⁵

A truly independent Legal Committee or similar entity should be established by a new constitution. This body should be specifically tasked with verifying that proposed legislation does not violate constitutionally-entrenched rights, including economic, social and cultural ones.

¹⁰⁹ South African Constitution, art. 38.

¹¹⁰ See Sandra Liebenberg, "The Protection of Economic and Social Rights in Domestic Legal Systems," *Economic, Social and Cultural Rights: A Textbook 2nd ed.* (Holland: Martinus Nijhoff Publishers, 2001) p. 68 [hereinafter Liebenberg].

¹¹¹ South African Constitution, art. 8.

¹¹² Constitution of Zimbabwe, art. 40B(1).

¹¹³ *Ibid.*, art. 40A(1).

¹¹⁴ *Ibid.*, art. 57(2).

¹¹⁵ Adrian De Bourbon, "Human Rights Litigation in Zimbabwe: Past, Present and Future," *African Human Rights Law Journal*, Vol. 3, No. 2 (2003) p. 197.

F. Self-Executing Treaties

Until the enactment of a 1993 constitutional amendment, treaties in Zimbabwe were self-executing. A new constitution should restore the pre-1993 state of affairs and specify that treaties, once ratified, do not require additional implementing legislation to have effect. Various actors, including the executive, ministries, the courts and citizens could then work to implement and enforce treaty obligations. For example, combined with the standing provisions discussed above, a constitutional provision making all treaties self-executing would allow an individual to bring a suit alleging that he or she has been harmed by an action of the Zimbabwean state which violates its treaty obligations. Allowing such suits would help to ensure that Zimbabweans have access to domestic remedies for rights promised to them in treaties but not specifically protected, or protected to a lesser degree, by Zimbabwe's new constitution.

G. Amending the Constitution

Any amendment to the current constitution must pass both houses of Parliament with a two-thirds majority.¹¹⁶ However, if a bill has passed the House with a two-thirds majority, but has not passed the Senate within 180 days, the President may nevertheless sign the amendment into law.¹¹⁷ Under these provisions, the government has passed nineteen amendments, some of which have substantially weakened constitutional rights. For example, the Constitutional Amendment (No. 14) Act effectively overruled two constitutional decisions holding that the freedom of movement required foreign spouses to be granted citizenship and allowed to work.¹¹⁸

Going forward, a new constitution in Zimbabwe should limit the ability of the executive or the legislature to amend the Bill of Rights. At a minimum, the exception allowing the President to sign an amendment affecting a constitutional right without Senate approval should be removed. Additional strength could be added by requiring public assent in a national referendum in addition to two-thirds passage in both houses when a constitutional right is concerned. Some constitutions require that successive terms of Parliament approve the same constitutional amendment, imposing a waiting period until a general election is held.¹¹⁹ Finally, a constitution could specify that the Bill of Rights is unalterable, or that enumerated rights may only be added or augmented, not removed or diminished.¹²⁰

III. Constitutional Institutions to Protect Economic, Social and Cultural Rights

An enormous challenge with respect to economic, social and cultural rights is to identify effective approaches to implementation, including both the means by which these rights are

¹¹⁶ Constitution of Zimbabwe, art. 52(3), 1979.

¹¹⁷ *Ibid.*, art. 52(4).

¹¹⁸ Gubbay at p. 243 (describing the Amendment in response to *Rattigan v. Chief Immigration Officer*, 1995 (2) SA 182 (Zimb. Sup. Ct.) and *Salem v. Chief Immigration Officer*, 1995 (4) SA 280 (Zimb. Sup. Ct.)).

¹¹⁹ See, e.g., Constitution of Iceland, art. 79, 1944; Constitution of Denmark, art. 88, 1849, Constitution of Norway, art. 112, 1814; Constitution of the Netherlands, art. 137, 1815.

¹²⁰ See, e.g., Constitution of Namibia, art. 131.

given effect and the ways in which government can be held accountable to fulfill its obligations. For economic, social and cultural rights to be realised in Zimbabwe, a new constitution must establish domestic institutions that are able to investigate rights abuses and provide effective remedies. These institutions should complement international bodies and mechanisms designed to protect economic, social and cultural rights.

Zimbabwe's existing institutions are plagued by numerous problems that must be resolved if they are to have any chance of fulfilling their mandate under a new constitutional framework. For example, political intervention has largely prevented the judiciary and other institutions from functioning independently. Additionally, resource constraints have affected the ability of non-judicial institutions to protect economic, social and cultural rights. Critics contend that the actions of these institutions often represent attempts to disguise human rights violations committed in Zimbabwe rather than genuine efforts to bolster protection of human rights. A new constitution must grant the institutions described below the independence, resources and mandate to operate in a way that ensures they can help realise economic, social and cultural rights.

A. The Judiciary

Zimbabwe's current constitution stipulates that "a member of the judiciary shall not be subject to the direction or control of any person or authority."¹²¹ However, in recent years, there has been a well-documented pattern of political influence over the judiciary and politically-motivated decisions handed down by Zimbabwean courts.

The constitution's pledge of judicial independence is not supported by the substance of the document itself. Under the current constitution, the President appoints judges after consultation with the Judicial Service Committee,¹²² which is comprised entirely of presidential appointees.¹²³ A judge may be removed for "any cause," and to do so the President must only receive a recommendation for removal from a tribunal that he personally appoints.¹²⁴

Although the Zimbabwean judiciary was at one time considered highly independent and effective, the constitution's deference to the executive on the matters of judicial appointments and dismissal has allowed the ruling party to pack the bench with judges willing to do its bidding.¹²⁵ Moreover, the independence of the judiciary has been threatened by material rewards offered to compliant judges. In recent years, judges have received farms, homes, luxury cars, plasma television sets and other gifts, many of which were provided directly from the Reserve Bank.¹²⁶

¹²¹ *Ibid.*, art. 79(B).

¹²² *Ibid.*, art. 84.

¹²³ *Ibid.*, art. 90.

¹²⁴ *Ibid.*, art. 87.

¹²⁵ Gugulethu Moyo, "Corrupt Judges and Land Rights in Zimbabwe," *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge: Cambridge University Press, 2007) [hereinafter Moyo]; Human Rights Watch, *Zimbabwe—Our Hands Are Tied: Erosion of the Rule of Law in Zimbabwe*, November 19, 2008, pp. 14-15, available at <http://www.hrw.org/en/reports/2008/11/19/our-hands-are-tied>. Judges forced into exile include Michael Gillespie, Ishmael Chatikobo, Sandra Mungwira, Ahmend Ibrahim, James Devittie, Nick McNally, and Michael Majuru.

¹²⁶ Human Rights Watch, *Our Hands Are Tied* at p. 15; Fidelis Munyoro, "Judges Get Vehicles, Goods," *The Herald* (Harare), August 1, 2008; see, e.g., Moyo at pp. 37-38.

Violence and intimidation of judges, magistrates and lawyers also hamper the justice system.¹²⁷

The drafting of a new constitution offers Zimbabwe the opportunity to reestablish an independent judiciary committed to upholding rights and liberties. A new constitution must provide more protections against political influence over the judiciary. Most importantly, the means of appointing and removing judges must be reformed, giving autonomous bodies, the Senate, or a truly independent commission the ability to block a presidential appointment made for overtly political reasons. Judges must also be protected from intimidation and influence by financial incentives or penalties. Constitution-makers could also consider inclusion of constitutional provisions that review the performance of sitting judges.

The United Nations Basic Principles on the Independence of the Judiciary provide a useful guide about immediate steps to ensure that rights can be effectively enforced through the judiciary.¹²⁸

B. Zimbabwe Human Rights Commission

In 2007, the government amended the constitution to provide for a Zimbabwe Human Rights Commission.¹²⁹ The Commission is mandated to “promote the development of human rights and freedoms” and “to monitor and assess the observance of human rights in Zimbabwe.”¹³⁰ The Commission is granted considerable investigative powers.¹³¹ However, most of the more significant powers require implementing legislation, and Parliament has not indicated that it intends to grant these powers to the Commission. Moreover, as of the end of May 2009, the Commission has yet to be formed, although the inclusive government has requested applications from potential Commissioners.¹³²

If the Human Rights Commission is formed in the near future, it is unclear whether it will be able to act independently to enforce constitutional rights. The President dominates the process of appointing Commissioners,¹³³ making it likely that they will be chosen for political loyalty rather than commitment to the protection of human rights. Moreover, there are insufficient protections in the constitution to ensure that the Commission will not be subjected to the same kind of intimidation and financial incentives experienced by the judiciary. These factors, combined with the Commission’s limited powers absent implementing legislation, may make the Commission ineffective in promoting rights observance in Zimbabwe.

National human rights institutions (NHRIs) can have an important impact on the respect of human rights in a country. South Africa’s Human Rights Commission, one of the world’s most renowned NHRIs, has a variety of functions, ranging from educational campaigns to individual

¹²⁷ See Moyo at p. 38.

¹²⁸ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, August 26 to September 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

¹²⁹ Constitution of Zimbabwe, Constitutional Amendment Bill (No. 18) of 2007.

¹³⁰ Constitution of Zimbabwe, art. 100R(5)(b-c).

¹³¹ *Ibid.*, art. 100R.

¹³² “Bill Watch Special: Call for Applicants for Constitutional Commissions This Week,” *Veritas*, June 2, 2009, available at http://www.zimbabwesituation.com/jun3_2009.html.

¹³³ *Ibid.*, art. 100R(1-3).

complaint mechanisms.¹³⁴ A NHRI could serve similar functions in Zimbabwe and provide an additional way for both individuals and groups to seek remedies for the violation of their rights. A NHRI may be more accessible than courts as there are no court fees and an attorney is not required.

Zimbabwe's new constitution should provide for a Human Rights Commission or similar NHRI with the authority, independence and support to protect, promote, monitor and assess human rights in Zimbabwe. Of utmost importance is the establishment of appropriate means for appointing Commissioners that correct the improper influence the executive now holds over appointments. The Zimbabwean human rights community should be involved in making such appointments and be given access to the ongoing operations of the Commission. Moreover, the Commission should be granted broad powers that do not require implementing legislation but are constitutionally mandated. These should include the power to conduct educational campaigns, receive complaints, initiate investigations and prosecutions, and visit government detention facilities.

The "Paris Principles" provide a reference for minimal standards concerning NHRIs.¹³⁵

C. The Public Protector

Zimbabwe's current constitution provides for a Public Protector, appointed by the President and charged to "investigate action taken by any officer, person or authority . . . in the exercise of the administrative functions . . . where . . . a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available" by going to court.¹³⁶ Unfortunately, Parliament may alter the powers of the Public Protector and limit the officers or bodies that he or she may investigate.¹³⁷ These exceptions mean that the Public Protector's powers are entirely subject to the permission of Parliament, significantly limiting the independence of the office.

¹³⁴ The functions of the South African Human Rights Commission (SAHRC) are enumerated in article 138 of the Constitution:

1. The South African Human Rights Commission must
 - a. promote respect for human rights and a culture of human rights;
 - b. promote the protection, development and attainment of human rights; and
 - c. monitor and assess the observance of human rights in the Republic.
2. The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power
 - a. to investigate and to report on the observance of human rights;
 - b. to take steps to secure appropriate redress where human rights have been violated;
 - c. to carry out research; and
 - d. to educate.
3. Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
4. The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

¹³⁵ Principles Relating to the Status of National Institutions (The Paris Principles), December 20, 1993, G.A. Res. 48/134, UN.N. Doc. A/RES/48/134.

¹³⁶ Constitution of Zimbabwe, art 108(1).

¹³⁷ *Ibid.*, art. 108(2-3).

There is little publicly available information about the office of the Public Protector, reflecting the office's inactivity and ineffectiveness in recent years.

Zimbabwe should consider incorporating the office of Public Protector in a new constitution. However, for the Public Protector to influence rights protection in Zimbabwe, the position must have both independence and the power to investigate violations of rights by any public officer or body. This means that the appointment and operation of the Public Protector must be free from political control, whether by the executive or Parliament. Moreover, the Public Protector must have a mandate that permits investigation of abuses at all levels of government, as well as by the military and police, without interference by other branches of government.

D. Other Constitutional Bodies

Zimbabwe's current constitution establishes an Anti-Corruption Commission.¹³⁸ However, observers in Zimbabwe indicate that at best, this body is ineffective, and at worst, it is a "smokescreen set up solely to divert attention from the greed and avarice of the powerful and influential within the ruling party."¹³⁹ Corruption is a major cause of the material deprivation suffered by Zimbabweans. The establishment of an effective and independent Anti-Corruption Commission in a new constitution could help establish a political environment conducive to the full realisation of economic, social and cultural rights.

Zimbabwe may also benefit from the establishment of additional domestic institutions under a new constitution. For example, both South Africa and India have a Gender Commission to protect women's rights. India also has a Minorities Commission, while Ghana has a commission dedicated to civil education about the constitution. Nepal has an Improper Use of Authority Commission, which is similar to the Anti-Corruption Commission, but this institution also monitors improper conduct by government officials. The NCA Draft provides for commissions to address gender and anti-discrimination; truth, justice, reconciliation and conflict prevention; labour; media; land; and health and education. Zimbabwe may also wish to create a commission specifically dedicated to the protection of economic, social and cultural rights. However, careful consideration must be given to the creation of any such bodies, to ensure that work is not duplicated and that certain issues are not isolated or ignored.

IV. Conclusion

As discussed above, although there are a number of ways to incorporate economic, social and cultural rights in a constitution, these rights are best protected by explicit inclusion in a fully justiciable Bill of Rights. Courts have demonstrated their competence to consider the implementation and enforcement of economic, social and cultural rights and to craft appropriate remedies for violations of such rights. In addition to entrenching specific economic, social and cultural rights in a justiciable Bill of Rights, however, a new Constitution should also create a framework for governance that ensures that such rights become a reality for ordinary

¹³⁸ *Ibid.*, art 100K-100M.

¹³⁹ Mary Revesai, "Zimbabwe has leeches, not scorpions," *newzimbabwe.com*, January 12, 2008, available at <http://www.new-zimbabwe.com/pages/mary.15044.html>.

Zimbabweans, for example by including a role for international law in the interpretation of rights, or by granting liberal standing rules that allow third parties to bring cases, or by including protections against constitutional amendments that manipulate the Bill of Rights. Finally, a new constitution might create other institutions, in addition to courts, charged with protecting economic, social and cultural rights, and should ensure that such institutions are granted the independence, resources and mandate necessary to help realise such rights.

CHAPTER FOUR: THE RIGHTS

I. Introduction

This chapter outlines several economic, social and cultural rights recommended for inclusion in a new Zimbabwean Constitution: the rights to work, food, housing, health, education, and culture. Many of these rights are interrelated. This list is not exhaustive, but rather is intended to provide a deeper understanding of each right and to offer ideas about how such rights could be enshrined and protected.

With respect to each right discussed, this chapter considers constitutional provisions concerning that right contained in three prior constitutional proposals created in Zimbabwe:

- **The Constitutional Commission Proposal:** This document was prepared by the government-sponsored Constitutional Commission and was rejected in a national referendum in 2000. The Constitutional Commission Proposal places economic, social, and cultural rights in a non-justiciable “National Objectives” section.
- **The NCA Draft:** This document was prepared by the National Constitutional Assembly after nationwide public consultation and released in 2001. It is often viewed as a response to the inadequacy of the Constitutional Commission Proposal. The NCA Draft includes many economic, social and cultural rights in a justiciable Bill of Rights.
- **The Kariba Draft:** This document was quietly drafted in 2007 by representatives of Zimbabwe’s three primary political parties. Its treatment of economic, social and cultural rights is identical to that of the Constitutional Commission proposal.

Additionally, this chapter examines the treatment of economic, social and cultural rights in the Zimbabwe People’s Charter, which was adopted in February 2008 at the Zimbabwe People’s Convention. Although not a constitutional proposal *per se*, this document calls on the government to meet the basic needs of Zimbabwean citizens and demands a people-driven constitution that includes economic, social and cultural rights.

For each right recommended for inclusion in the constitution, this chapter: (a) explains the content of that right, (b) outlines Zimbabwe’s obligations relating to the right, (c) highlights the importance of that right in the Zimbabwean context, (d) includes a comparative discussion of how the right has been enshrined or protected in other constitutions and countries, (e) outlines the current constitutional protections, if any, of the right in the Zimbabwean Constitution and proposed constitutional drafts, and (f) offers specific recommendations about how the right should be recognised and protected in a new Zimbabwean Constitution.

II. The Right to Work

*The right to work is a fundamental right . . . essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.*¹⁴⁰

A. What is the Right to Work?

The right to work is not an “absolute and unconditional right to obtain employment.”¹⁴¹ Rather, this right can be understood to encompass multiple dimensions. According to the ICESCR, the right to work “includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”¹⁴² In addition, this right is commonly understood to include the following elements:

- The right of individuals to experience safe, just and favourable working conditions;
- The right to be free from forced labour or servitude;
- The right of individuals to form and participate in labour unions;
- Non-discriminatory access to training, employment and promotion opportunities;
- Equal pay for equal work; and
- Specific protections for vulnerable groups including children, women, and disabled persons.

The right to work has been described by the International Labour Organization (ILO), a specialised United Nations agency, as the “main route out of poverty.”¹⁴³ Employment contributes to social and economic advancement, and strengthens individuals and communities. Preserving the right to work contributes to economic stability, integral to achieving many other human rights,

¹⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 18, *The Right to Work*, 35th Sess., 2005, para. 1 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.18.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.18.En?OpenDocument) [hereinafter General Comment No. 18].

¹⁴¹ *Ibid.*, para. 6.

¹⁴² ICESCR, art. 6.

¹⁴³ International Labour Organization, “Working Our of Poverty,” International Labour Conference, 2003, p. 69, available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd00116.pdf>.

including the right to attain an adequate standard of living, the right to food, and the right to housing. Ensuring safe, just and favourable labour standards is essential for safeguarding individual health. In addition to providing a steady income, stable work affords individuals a sense of purpose, and contributes to emotional well-being. Conversely, the right to work is also dependent on the fulfillment of other rights. For instance, the right to an education may facilitate employment and enhance career opportunities.

In General Comment Number 18, the Committee on Economic, Social and Cultural Rights identifies the core minimum obligations of states necessary to realise the right to work. The core obligations with respect to the right to work include:

- Ensure right of access to employment, especially for marginalised or disadvantaged groups, permitting them to live with dignity;
- Avoid measures resulting in discrimination or unequal treatment in private/public sectors for disadvantaged or marginalised individuals;
- Adopt or implement a national employment strategy and plan of action based on addressing the concerns of all workers, with special attention to disadvantaged or marginalised individuals.¹⁴⁴

B. The Importance of the Right to Work in Zimbabwe

Zimbabwe currently suffers from one of the highest unemployment rates in the world. By the end of 2008, only six percent of Zimbabweans were formally employed, a dramatic drop from an already-low employment rate of 30 percent in 2003.¹⁴⁵ In the past five years, Zimbabwe has entered into a full-blown economic crisis. Since 2003, the economy has shrunk by 45 percent, with inflation rates soaring to 231 million percent or more before the complete collapse of the local currency.¹⁴⁶ Zimbabwe is in need of major legislative and policy reforms and international assistance to address these economic problems. Reducing unemployment rates and increasing access to jobs must be an integral aspect of these comprehensive reforms.

C. Zimbabwe's Obligation to Ensure the Right to Work

The right to work is well established in numerous international instruments to which Zimbabwe is a state party:¹⁴⁷

- ACHPR: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."¹⁴⁸

¹⁴⁴ General Comment No. 18 at para. 31.

¹⁴⁵ "Zimbabwe unemployment soars to 94%," AFP, January 29, 2009, available at http://www.google.com/hostednews/afp/article/ALeqM5imTkGEP84_3QTVcSGu_8W3YrP8wA

¹⁴⁶ *Ibid.*

¹⁴⁷ Additionally, Article 23 of the UDHR states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests."

¹⁴⁸ ACHPR, art. 15.

- ICESCR: the right to work includes “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts,” and binds states to “take appropriate steps to safeguard this right.”¹⁴⁹ It also obligates states to “recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure: remuneration which provides all workers. . . . Fair wages and equal remuneration for work of equal value without distinction of any kind . . . a decent living for themselves and their families. . . . Safe and healthy working conditions. . . . Equal Opportunity for everyone to be promoted in his employment. . . . Rest, leisure and reasonable limitation of working hours.”¹⁵⁰ Finally, state parties to the ICESCR must undertake to ensure “the right of everyone to form trade unions and join the trade union of his choice . . . the right of trade unions to function freely [and] the right to strike.”¹⁵¹
- ICCPR: “No one shall be required to perform forced or compulsory labour.”¹⁵²
- CRC: “States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”¹⁵³ States Parties to the CRC also bind themselves to take legislative measures to achieve these ends, including regulation of the hours and conditions of employment, as well as appropriate sanctions and penalties for those who fail to comply.¹⁵⁴
- CEDAW: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.”¹⁵⁵ States Parties take certain specified actions including the prohibition of dismissal on the grounds of pregnancy, the introduction of maternity leave, the facilitation of social services relating to work responsibilities and protective legislation for women.¹⁵⁶

In addition to this recognition in regional and international human rights instruments, the right to work is also promoted by the ILO. The ILO has developed and implemented a broad range of international labour standards, and facilitates negotiations, information sharing and general coordination between governments, employers and workers organisations.

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. Through the Declaration, member states of the ILO, including Zimbabwe, commit to upholding various rights that can be categorised under four general principles:¹⁵⁷

¹⁴⁹ ICESCR, art. 6.

¹⁵⁰ *Ibid.*, art 7.

¹⁵¹ *Ibid.*, art 8.

¹⁵² ICCPR, art 8.

¹⁵³ CRC, art. 32.

¹⁵⁴ *Ibid.*

¹⁵⁵ CEDAW, art 11(1).

¹⁵⁶ *Ibid.*, art 11(2-3).

¹⁵⁷ ILO Declaration on Fundamental Principles and Rights at Work, adopted at 86th Session, Geneva, June 1998, available at

(1) *Freedom of association and effective recognition of collective bargaining.* All workers and employers have the right to form organisations or associations free from state interference, for the purpose of defending their occupational interests. In addition, these groups should have the ability to elect representatives to negotiate employment relations.

(2) *Elimination of all forms of forced or compulsory labour.* Although labour exploitation may take many forms, forced labour occurs where work or service is exacted by the state or individuals by threat of infliction of severe deprivations, including withholding food, land or wages, physical violence or sexual abuse. Forced labour also occurs by taking away a worker's freedom to leave a job, restricting movement or detainment.

(3) *Effective abolition of child labour.* This provision aims to stop all work by children that threatens to undermine their education and/or development.

(4) *Elimination of discrimination in respect of employment and occupation.* All persons should be granted equal opportunities to develop fully the knowledge, skills and competencies that are relevant to the economic activities they wish to pursue, free from discrimination. Direct discrimination occurs when a law, regulation or other restriction explicitly denies access to an equal opportunity on a particular ground, such as race, gender, or ethnicity. Indirect discrimination occurs when a restriction appears to be neutral but results in unequal access to an employment opportunity. For example, a minimum height requirement may effectively exclude most women and/or certain ethnicities.

The ILO has also promulgated hundreds of binding and non-binding international labour standards, drafted by employers, workers and governments and adopted by states in the form of conventions (binding standards) and recommendations (non-binding standards). Once adopted by the ILO, a member state may choose to adopt that standard. After adoption, a government must take steps such as implementing new legislation or policies to bring itself into compliance with the instrument. Various conventions have created labour standards on subjects including child labour, collective bargaining, maternity protection and occupational safety and health.¹⁵⁸

As with other human rights, states are required to fulfill three levels of legal obligations in relation to the right to work:

- **Respect:** states must not subject individuals to forced or compulsory labour, and must refrain from denying equal access of all groups to “decent work.” Decent work is defined in General Comment Number 18 as “work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of

<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

¹⁵⁸ International Labour Organization, subjects covered by International Labour Standards available at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Subjects/lang--en/index.htm.

work safety and remuneration.”¹⁵⁹

- **Protect:** states have a duty to take all measures, such as adopting new legislation, to ensure equal access to work and training, to ensure that minimum labour standards are safeguarded, and to prevent private parties from subjecting individuals to rights violations, including compulsory or forced labour.
- **Fulfill:** states must provide, facilitate and promote access to work.
 - *Provide:* states must formulate and implement employment policies to stimulate economic growth, effective measures to reduce unemployment, and appropriate steps to establish employment services at national and local levels.
 - *Facilitate:* states must take positive measures to enable and assist individuals seeking employment including, for example, technical and vocational training plans.
 - *Promote:* states must implement educational programmes to raise public awareness about the right to work.

D. Special Groups

1. Women

Gender discrimination is a significant barrier to ensuring equal employment opportunities and equitable treatment of men and women in the workplace. States must take steps to ensure that women are not prevented from pursuing employment opportunities because of their gender; that women receive fair and equal compensation for work; and that women are not subjected to harassment or other mistreatment in the workplace.¹⁶⁰ In many cultures, women have less access to education than men. In light of this reality, states must also strive to improve educational opportunities for women, for example through educational and vocational training programmes specifically targeting women.

2. Disabled Persons

States are under an obligation to ensure that disadvantaged persons have access to employment opportunities. The ICESCR prohibits discrimination in access to or maintenance of employment with respect to race, color, sex, ethnicity, religion, language, political or other opinion, or physical or mental disability. General Comment Number 5 specifically addresses access to employment for disabled persons: “The ‘right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ is not realized where the only real opportunity open to disabled workers is to work in so-called ‘sheltered’ facilities under substandard conditions.”¹⁶¹ According to the Convention on the Rights of Persons with Disabilities, states parties have an obligation to “prohibit discrimination on the basis of disability with regard to all matters concerning all

¹⁵⁹ General Comment No. 18 at para. 7.

¹⁶⁰ CEDAW, art. 11.

¹⁶¹ Committee on Economic, Social and Cultural Rights, General Comment No. 5, *Persons with Disabilities*, 11th Sess., 1994, para. 21 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4b0c449a9ab4ff72c12563ed0054f17d?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?OpenDocument) [hereinafter General Comment No. 5].

forms of employment,” and to “protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work.”¹⁶² Zimbabwe has not signed or ratified the Convention, but should do so immediately.

3. *Children*

Children are particularly vulnerable to economic exploitation. Various international instruments, including the CRC and the ICESCR, expressly recognise the need to protect children from any form of economic exploitation and forced labour.¹⁶³ These instruments prohibit all forms of work that are likely to interfere with the development, and physical and mental health of a child., and call upon states parties to set a minimum age for employment. States parties must also strive to ensure that all children receive an adequate education that allows them to maximise their potential.

E. Constitutional Models of the Right to Work

The right to work embodies several distinct rights and protections, and constitutional provisions recognizing the right to work should emphasize and incorporate its different aspects. The Constitution of Bulgaria captures several of these elements, including the right to freely choose work, the right to safe, hazard free working conditions, prohibition of forced labour, and protections for trade unions. By contrast, the South African Constitution primarily emphasizes the right to form trade unions and the right of such unions to remain free of government interference.

- **Bulgaria:**

Article 48

- (1) Citizens shall have the right to work. The state shall take care to provide conditions for the exercising of this right.
- (2) The state shall create conditions favorable to the exercise of the right to work by the physically or mentally handicapped.
- (3) Everyone is free to choose an occupation and place of work.
- (4) No one shall be compelled to do forced labour.
- (5) Workers and employees shall be entitled to healthy and non-hazardous working conditions, to guaranteed minimum pay and remuneration for the actual work performed, and to rest and leave, in accordance with conditions and procedures established by law.

Article 49

- (1) Workers and employees shall be free to form trade union organizations and alliances in defense of their interests related to work and social security.
- (2) Employers shall be free to associate in defense of their economic interests.

¹⁶² Convention on the Rights of Persons with Disabilities, adopted December 13, 2006, G.A. Res. 61/106, UN Doc. Doc.A/61/611, entered into force May 3, 2008, art. 45(1), art. 27(1).

¹⁶³ CRC, art. 32; ICESCR, art. 10(3).

Article 50

Workers and employees shall have the right to strike in defense of their collective economic and social interests. This right shall be exercised in accordance with conditions and procedures established by law.

- **South Africa**

Article 23

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.
- (3) Every employer has the right to form and join an employers' organisation; and to participate in the activities and programs of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities; to organise; and to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

F. Constitutional Protection of the Right to Work in Zimbabwe

Zimbabwe's current constitution does not recognise or protect the right to work. Nevertheless, several constitutional proposals have reflected the right to work.

Both the Constitutional Commission Proposal and the Kariba Draft include an article under "National Objectives" on work and labour relations:

- (1) The State must adopt reasonable policies and measures, within the resources available to it, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.
- (2) In particular, the State must endeavour to secure
 - (a) full employment;
 - (b) just, equitable and satisfactory conditions of work, particularly with respect to—
 - (i) adequate remuneration;
 - (ii) equitable opportunity for promotion;
 - (iii) safety at work;
 - (iv) maternity leave; and
 - (v) rest, leisure, limitation of working hours, periodic holidays with pay and remuneration for public holidays;
 - (c) the removal of restrictions that unnecessarily inhibit or prevent people from

working and otherwise engaging in gainful economic activities;
 (d) vocational guidance and the development of vocational and training programmes, including those for persons with disabilities;
 (e) the implementation of measures such as family care that enable women to enjoy a real opportunity to work; and
 (f) the rights of employers and employees to engage in collective bargaining and, where necessary, to engage in appropriate collective job action to enforce their rights.¹⁶⁴

The NCA Draft includes two relevant articles in its justiciable Bill of Rights. The first, on freedom of trade, occupation and profession states: “Every person has the right to practise any profession, or carry on any occupation, trade or business of his or her choice.”¹⁶⁵ The second, on labour relations, provides:

- (1) Every worker has the right to fair and safe labour practices and standards and to be paid at least a living wage consistent with the poverty datum line.
- (2) Every person has the right to form and join trade unions or employers’ associations of their choice.
- (3) Every worker has the right to strike, sit-in or stay-away, or such other concerted action.
- (4) Every trade union, employers’ organisation or employer has the right to engage in collective bargaining.
- (5) Men and women are entitled to equal remuneration for work of equal value.
- (6) Women workers are entitled to fully paid maternity leave.¹⁶⁶

The Zimbabwe People’s Charter demands a constitution that protects “labour rights and the right to informal trade.” It also discusses the obligation of the state to create jobs and the right of Zimbabweans to “decent work, employment and [means of] earn[ing] a living.”¹⁶⁷

Following comparative models and these draft constitutions, a provision safeguarding the right to work should be incorporated in the new Zimbabwe Constitution and should explicitly address each of the distinct elements of this right, including:

- The right to freely seek employment;
- The right to safe, just and favourable working conditions;
- Non-discriminatory access to training, employment, and promotions, and equal pay for equal work;
- The right to be free from forced labour or servitude;
- Prohibitions on child labour;
- The right to form and participate in trade unions; and
- The right of such trade unions to operate with minimal governmental interference.

¹⁶⁴ Constitutional Commission Proposal, section 25; Kariba Draft, section 25.

¹⁶⁵ NCA Draft, section 27.

¹⁶⁶ *Ibid.* at section 28.

¹⁶⁷ People’s Charter, sections 3–4.

In addition to these elements, the provision should also recognise the vulnerable status of women and disabled persons, and should commit the government to targeting programmes and services to ensure the right to work is protected for members of these groups.

III. The Right to Food

[T]he right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of all human rights for all. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food . . . more than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of . . . the use of food as a political weapon. . . . Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food.¹⁶⁸

A. What is the Right to Food?

The right to food recognises the fundamental right of all persons to be free from hunger, and to have access to food sufficient to promote healthy development and survival. Safeguarding this right is integral to upholding social justice and respecting the dignity of every individual.

¹⁶⁸ General Comment No. 12 at paras. 4-5.

“All human rights are universal, indivisible, interdependent and interrelated.”¹⁶⁹ The right to food is no exception; it is an important aspect of the general right of every individual to enjoy an adequate standard of living, and is essential to the protection of other basic human rights, including the rights to health and life.

Conversely, the achievement of other rights is crucial to fulfilling the right to food. For example, education is an important means of ensuring economic security for both individuals and societies. Ensuring equal access to education promotes individual prosperity and economic growth, fosters opportunities, and reduces poverty, which is a primary cause of hunger.

Although the right to adequate food is identified in several international instruments, it is addressed most comprehensively in the ICESCR and in the comments of the Committee on Economic, Social and Cultural Rights. In 1999, the Committee responded to the request of UN member states and issued General Comment Number 12 to provide “a better definition of rights relating to food in article 11 of the Covenant, and...to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.”¹⁷⁰

General Comment 12 identifies the core elements essential to the effective protection of the right to food. These include:

- **Dietary needs:** adequate quantity and quality of food to provide nutrients for physical and mental growth, development and maintenance.
- **Food free from adverse substances:** implement protective measures to ensure that food is safe and uncontaminated.
- **Cultural and consumer acceptability:** the need to account for non nutrient-based values attached to food.
- **Availability:** people have the ability to obtain food themselves directly, or processing and distribution systems exist to make food available in accordance with demand.
- **Economic accessibility:** the cost of food must be at a level attainable to average households; socially vulnerable groups including landless and particularly impoverished people may need assistance through special programmes.
- **Physical accessibility:** food must accessible to everyone, including the disabled, elderly and children.

¹⁶⁹ Vienna Declaration and Programme of Action, adopted June 25, 1993, G.A. Res. 48/121, UN. Doc. A/CONF.157/23 (1993).

¹⁷⁰ General Comment No. 12 at para. 2.

B. The Importance of the Right to Food in Zimbabwe

Persistent economic problems, poor agricultural harvests, hyperinflation, and high unemployment have contributed to widespread hunger within Zimbabwe. According to a coalition of aid organisations operating in Zimbabwe, seven million Zimbabweans, well over half of the population, rely on food aid to survive, and relief organisations have recently had to cut supplies because of donor shortfalls.¹⁷¹ Most Zimbabweans do not have access to the U.S. dollars and South African rand required to buy basic food items in stores.¹⁷² Many Zimbabweans now eat only one meal each day, supplementing meager rations by scavenging for wild fruits.¹⁷³ Moreover, agricultural production and the distribution of food aid in Zimbabwe have often been used as political tools, leaving some sectors of society with no means of providing for their basic dietary needs. Dire economic circumstances demand that the new Zimbabwean Constitution recognise the right to food and compel the Zimbabwean government to commit to upholding this right for all citizens.

C. Zimbabwe's Obligation to Ensure the Right to Food

A commitment to the right to food has been articulated over the last fifty years in numerous international instruments to which Zimbabwe is a state party.¹⁷⁴ These include:

- ACHPR: although the right to food is not explicitly guaranteed in the ACHPR, the African Commission on Human and Peoples' Rights has recognised that the right to food is implicitly guaranteed under the rights to life and health.¹⁷⁵
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: "Right to Food Security: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security."¹⁷⁶
- ACRWC: "Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health . . . to ensure the provision of adequate nutrition and safe drinking water."¹⁷⁷
- ICESCR: States parties "recognize the right of everyone to an adequate standard of living . . . adequate food . . . the fundamental right of everyone to be free from hunger, [and] shall . . . improve methods of production . . . and distribution of food [by] reforming

¹⁷¹ "Aid money almost too tight to mention." IRIN, March 12, 2009, available at <http://www.irinnews.org/report.aspx?ReportId=83438>.

¹⁷² "Shops shelves fill up but customers stay away," IRIN, April 14, 2009, available at <http://www.irinnews.org/Report.aspx?ReportId=83923>.

¹⁷³ "WFP slashes food aid," *The Zimbabwean*, April 10, 2009, available at http://www.thezimbabwean.co.uk/index.php?option=com_content&task=view&id=20369&Itemid=103.

¹⁷⁴ In addition, Article 25 of the UDHR provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food."

¹⁷⁵ See *Center for Economic and Social Rights v. Nigeria*, African Commission on Human and People's Rights, Case No. 155/96, October 27, 2001, available at www.usos.be/download.aspx?c=*USOS&n=45780&ct=45979&e=109447.

¹⁷⁶ Protocol on the Rights of Women, art. 15.

¹⁷⁷ ACRWC, art. 14.

agrarian systems [and ensuring] equitable distribution of . . . food supplies.”¹⁷⁸

- CRC: “State Parties shall strive . . . to combat disease and malnutrition, including within the framework of primary health care, through . . . the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” Article 27, “State Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development. . . . State Parties . . . shall take appropriate measures to . . . implement this right . . . in case of need provide material assistance . . . particularly with regard to nutrition.”¹⁷⁹

In addition to these treaty-based protections, the international community has reaffirmed its commitment to reducing world hunger through various conferences and public declarations, including General Assembly resolutions, the 1974 World Food Conference, and the 1996 World Food Summit.

In 2000, world leaders gathered to attend the UN Millennium Summit and draft the UN Millennium Declaration. As a part of that Declaration, states agreed upon eight concrete goals to eradicate extreme poverty by 2015. The first of these goals is to halve the number of people that suffer from extreme poverty and hunger.¹⁸⁰ Thus, ensuring the right to adequate food for all persons is central to realising the aims of the Millennium Declaration.

As with all other human rights, the right to food imposes three types of obligations upon states:

- **Respect:** states must not take any measures to prevent access to adequate food, including allowing humanitarian assistance from the international community.
- **Protect:** states must ensure that third parties do not deprive individuals of their right to adequate food.
- **Fulfill:** states must pro-actively engage in activities to improve people’s access to food, use of resources and efforts to ensure livelihood, and states must provide the right directly, including by provision of food to victims of natural or other disasters.¹⁸¹

General Comment Number 12 also indicates that a state violates the right to food if:

- The state fails to provide the minimum essential level of food for all persons to be free from hunger. In fulfilling this obligation, a state must take the necessary steps to the maximum of its available resources. A state claiming that it is unable to carry out this obligation for reasons beyond its control has the burden of demonstrating that it has utilised all available resources and has unsuccessfully sought international support to

¹⁷⁸ ICESCR, art. 11.

¹⁷⁹ CRC, art. 24.

¹⁸⁰ United Nations Millennium Declaration, adopted September 8, 2000, G.A. Res. 55/2, UN Doc. A/55/L.2 (2000), available at <http://www.un.org/millennium/declaration/ares552e.htm>.

¹⁸¹ General Comment No. 12 at para. 15.

ensure the availability and accessibility of the necessary food.

- The state sanctions discrimination in access to food. A state must ensure that all persons enjoy equal access to food including any public entitlements, regardless of race, sex, language, age, religion, political or other opinion, national or social origin, property, birth or any other status.
- The state fails to respect existing access to adequate food, or interferes with these modes of access. In addition, states must ensure that third parties (individuals or enterprises) do not deprive individuals of their right to access adequate food.

Due to constraints of available resources, the right to food may be realised progressively. However, states must take targeted, concrete steps to ensure that this right is realised within a reasonably short period of time. Furthermore, a state is obligated to maximise the resources at its disposal and utilise available international assistance to mitigate and alleviate hunger at all times, even in times of natural or other disasters.

Access to food may be severely compromised following natural disasters or during periods of conflict. States have an obligation to provide food to the maximum extent possible. Supplemental food aid and other forms of assistance should be sought from the international community when necessary. Such aid should be organised so as not to interfere with local markets, and to encourage food self-reliance of beneficiaries. Priority in food aid should be given to the most vulnerable populations, including children, pregnant women, disabled, ill and elderly.

D. Special Groups

Hunger is a consequence of extreme poverty. Thus, individuals who are excluded from participation in economic life or unable to secure a livelihood are the most likely to suffer from food insecurity. Certain groups are economically dependent or may suffer severe consequences from malnutrition. It is imperative that states target and prioritise food aid for these vulnerable populations, including pregnant women, breastfeeding women, and children. An adequate diet is particularly vital for healthy growth and development of infants and children. Elderly, disabled, and ill persons are similarly vulnerable.

E. Constitutional Models of the Right to Food

In addition to mobilizing international efforts to reduce hunger, it is imperative that individual states respect, protect and fulfill their obligation to ensure all persons have access to adequate food. General Comment Number 12 indicates that states will be granted a “margin of discretion” in devising approaches to ensure all persons are free from hunger and enjoy the right to adequate food.¹⁸² To this end, many states have adopted instructive, although varied, constitutional provisions and other legislative measures protecting the right to food.¹⁸³

¹⁸² General Comment No. 12 at para. 21.

¹⁸³ The Constitutions of the Congo (Art. 34), Haiti (Art. 22), Nicaragua (Art. 63), South Africa (Art. 27), Uganda (Art. 14) and Ukraine (Art. 48) specifically recognise the right to adequate food. The Constitutions of Bangladesh (Art. 15), Ethiopia (Art. 90), Guatemala (Art. 99), India (Art. 47), the Islamic Republic of Iran (Arts. 3, 43), Malawi (Art. 13), Nigeria (Art. 16),

Several constitutions explicitly recognise the right to food as indispensable to the protection of other fundamental human rights, such as the right to life and the right to health.

- **Democratic Republic of Congo:** Article 34 of the Constitution of the Congo protects the right to food. This provision underscores the importance of the right to food by emphasizing its connection to the realisation of another important human right, the right to health.¹⁸⁴

Article 34 declares: “The State is the guarantor of public health. Every citizen shall have the right to a level of life sufficient to assure his health, his well-being and that of his family, notably food, clothing, shelter, medical care as well as necessary social services.”¹⁸⁵

- **Bangladesh:** In Article 15, the Constitution of Bangladesh deems that the state is fundamentally responsible for the: “Provision of basic necessities...with a view to securing to its citizens...the basic necessities of life, including food, clothing, shelter, education and medical care.”¹⁸⁶
- **Uganda:** The Ugandan Constitution guarantees the right to food under the broader heading of “Social and Economic Objectives.”

Article 14 provides: “All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.”¹⁸⁷

Although the specific methods of protecting the right to food will necessarily vary across states, it is useful to examine how this right has been introduced and enforced in other countries, through both litigation and human rights advocacy.

Case Study: Nepal

In October 2008, the Nepalese Supreme Court responded to a crisis fuelled by food shortages and rising food prices that led over 2.5 million Nepalese to need urgent assistance to access food. In a landmark decision, the court enforced the “Right to Food Sovereignty” contained in Article 18 of Nepal’s interim constitution,¹⁸⁸ and ordered the government to provide food to individuals in twelve food scarce districts in the western region of the country.

Pakistan (Art. 38), Seychelles (Preamble) and Sri Lanka (Art. 27) explicitly designate access to adequate food as a responsibility of the State. The Constitutions of Brazil (Art. 227), Guatemala (Art. 51), Paraguay (Art. 53), Peru (Art. 6), and South Africa (Art. 28), recognise the right of children to adequate food and nutrition.

¹⁸⁴ Other Constitutions, in contrast, approach the right to food as part of the broader right of individuals to an adequate standard of living. For example, the right to food may be cited as part of a group of basic necessities (i.e., clothing, shelter) required for an individual to enjoy a comfortable living.

¹⁸⁵ The Constitution of the Democratic Republic of Congo, art. 34.

¹⁸⁶ The Constitution of Bangladesh, art. 15.

¹⁸⁷ The Constitution of Uganda, art. 14.

¹⁸⁸ “UN welcomes order by Nepal’s Supreme Court, to supply food to hungry,” UN News Centre, October 3, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=28415&Cr=Nepal&Cr1=>.

Case Study: India

*The Right to Food Campaign in India was launched by a network of organisations and individuals committed to reducing hunger and malnutrition in India. Although the Indian Constitution contains no fundamental right to food, justiciability of the right to food is derived from the “right to life and liberty” as enshrined in Article 21(iv). In addition, Article 47, which forms a part of the Directive Principles of State Policy, provides: “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties...” Using these constitutional provisions, the Right to Food Campaign has successfully pursued litigation and advocacy to enforce the right to food. In 2001, the Campaign was instrumental in the implementation of a mid-day meal programme for school children. As a result of a Supreme Court Order, state governments in India now ensure that 100 million children attending government schools receive cooked meals, making this the largest nutrition programme in the world.*¹⁸⁹

F. Constitutional Protection of the Right to Food in Zimbabwe

No provision in the current Zimbabwe Constitution addresses the right to food. However, several constitutional proposals have incorporated this right.

Both the Constitutional Commission Proposal and the Kariba Draft include an article on food security under “National Objectives,” which provides that the state must encourage people to grow and store adequate food, secure the establishment of adequate food reserves, and encourage and promote adequate and proper nutrition through mass education and other appropriate means.¹⁹⁰

The NCA Draft states that “[e]very person has a right... to sufficient food and water” in an article on health care, food, water, and environment.¹⁹¹ Unlike the other two proposals, the NCA Draft includes this provision in the Bill of Rights, allowing it to be judicially enforced.

The People’s Charter demands that the state pursue, “Food security and the availability of basic commodities at affordable prices, where necessary, to ensure universal access.”¹⁹²

A new constitution should incorporate a provision that explicitly recognises and protects the right to food. This right is so fundamental to the achievement of other human rights, including an adequate standard of living, that it merits either its own provision, in conjunction with the related right to water, or incorporation as an independent subsection within a provision discussing the right to other basic necessities, including water, clothing and shelter.

The provision should take into account:

- The need to ensure an adequate quantity and quality of food to provide nutrients for

¹⁸⁹ *PUCL v. Union of India and others* (Writ Petition [Civil] No. 196 of 2001), Supreme Court of India.

¹⁹⁰ Constitutional Commission Proposal, section 17; Kariba Draft, section 17.

¹⁹¹ NCA Draft, section 37.

¹⁹² People’s Charter, section 4.

- physical and mental growth, as well as development and maintenance;
- The need to ensure that food is safe, uncontaminated, available and accessible, and that the cost of food is kept at a reasonable level attainable at the average income level; and
- The particular needs of special groups including pregnant and breastfeeding women, children, the ill, and the elderly.

IV. The Right to Housing

The right to adequate housing is universally recognized by the community of nations. . . . All nations, without exception, have some form of obligation in the shelter sector, as exemplified by their creation of housing ministries or housing agencies, by their allocation of funds to the housing sector, and by their policies, programmes and projects. . . . All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them.¹⁹³

A. What is the Right to Housing?

All people deserve the right to a decent standard of living, so access to adequate housing is widely accepted as a basic human need. Housing provides physical protection from the weather, offers personal security, and satisfies psychological demands for individual space and privacy. Housing establishes integral social functions by providing a gathering space for families and communities. In certain societies, housing further serves as an economic centre for commercial production. Housing is a foundational right,¹⁹⁴ closely linked with concerns for

¹⁹³ Global Strategy for Shelter to the Year 2000, adopted December 19, 1991, UN Doc. A/Res/46/163 (1991), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/582/51/IMG/NR058251.pdf?OpenElement>.

¹⁹⁴ The right to housing is recognised in numerous other international human rights treaties, declarations, and resolutions, including: United Nations Declaration on Social Progress and Development (1969), part II, art. 10; Declaration on the Rights of Disabled Persons (1975), art. 9; United Nations Vancouver Declaration on Human Settlements (1976), section III (8); International Labour Organization (ILO) Recommendation No. 115 (1961), principle 2; ILO Recommendation No. 62 Concerning Older Workers (1980), art. 5(g); Declaration on the Right to Development (1986), art. 8(1); United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1994/8, "Children and the Right to Adequate Housing," adopted August 23, 1994; United Nations Commission on Human Rights, Resolution 1993/77, "Forced Evictions," adopted March 10, 1993; United Nations Commission on Human Settlements, Resolution 14/6, "The Human Right to

environmental hygiene and the right to the highest attainable standard of health. The World Health Organization has labeled housing the single most important environmental correlative to disease and mortality.¹⁹⁵

The right to housing should be defined expansively. Beyond providing a roof over each person's head, the right to housing should be recognised to include the right to live in security, peace, and dignity.¹⁹⁶ Thus, the right to adequate housing should incorporate sufficient privacy, security, space, lighting, ventilation, basic infrastructure and proximate location to necessary facilities and work.¹⁹⁷

As explained by the Committee on Economic, Social and Cultural Rights in General Comment Number 4, the right to housing is comprised of a series of core elements that are legally guaranteed to all persons. These include:

- Legal security of tenure;
- Availability of services, materials and infrastructure;
- Affordable housing;
- Habitable housing;
- Accessible housing;
- Location; and
- Culturally adequate housing.¹⁹⁸

B. The Importance of the Right to Housing in Zimbabwe

Approximately 75 percent of the population in developing countries lives in informal housing, defined as “dwellings which have been constructed without the required permission, without the full title to land.”¹⁹⁹ These homes do not meet the minimum core requirements of the right to housing, however narrowly defined.

In 2005, the Zimbabwean government, through Operation Murambatsvina, forcibly removed more than 700,000 of its citizens from their homes and cast them to the streets.²⁰⁰ UN officials estimate that another 2.4 million Zimbabweans—approximately 18 percent of the population—were also affected by this demolition operation.²⁰¹ According to Amnesty International, “the evictions and demolitions were carried out without adequate notice, court orders, due process,

Adequate Housing,” adopted May 5, 1993; United Nations General Assembly, Resolution 42/146, “Realization of the Right to Adequate Housing,” adopted December 7, 1987.

¹⁹⁵ Office of the United Nations High Commissioner for Human Rights, “The Human Right to Adequate Housing,” Fact Sheet No.21, available at <http://www.unhchr.ch/html/menu6/2/fs21.htm>.

¹⁹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, 6th Sess., 1991, para. 7 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument) [hereinafter General Comment No. 4].

¹⁹⁷ Global Strategy for Shelter to the Year 2000.

¹⁹⁸ General Comment No. 4 at para. 8.

¹⁹⁹ Theo R.G. Van Banning, *The Human Right To Property* (Antwerpen: Intersentia, 2002) p. 85.

²⁰⁰ “Zimbabwe as Bad as It Can Get,” Reuters, June 1, 2006, available at http://www.kubatana.net/html/archive/urbdev/060601reuters.asp?sector=URBDEV&year=0&range_start=1.

²⁰¹ “Zimbabwe: Mugabe’s Housing Programme Grinds to a Halt,” ZimOnline, December 3, 2005, available at http://www.kubatana.net/html/archive/urbdev/051203zol.asp?sector=URBDEV&year=0&range_start=1.

legal protection, redress or appropriate relocation measures. . . . They were carried out despite the government's acknowledgement that the country already faced a severe housing shortage."²⁰²

Few concrete gains resulted from the June 2005 government launch of Operation Garikai/Hlalani Kuhle to provide housing to those who lost homes during Operation Murambatsvina. While over 92,460 homes were destroyed during Operation Murambatsvina, as of late 2006 only some 3,325 houses had been constructed, and construction has virtually ceased since that time.²⁰³ Many of the new homes are uninhabitable because they lack doors, windows, floors, and even roofs. Moreover, to qualify for housing under Garikai required proof of formal employment, a specified salary, and the payment of an initial deposit and monthly installments, thereby guaranteeing that housing was inaccessible or unaffordable to the vast majority of those displaced.²⁰⁴ Victims of displacement who received some compensation through land generally received extraordinarily small plots that often lacked access to water and sanitation. Moreover, government officials have allocated 20 percent of newly built housing to civil servants, police officers and soldiers, reorienting the housing focus away from those whose homes were demolished in Operation Murambatsvina.²⁰⁵

Recent estimates suggest that between 880,000 and 960,000 Zimbabweans have moved involuntarily in the past five years.²⁰⁶ These numbers do not include the tens of thousands—estimated at anywhere between 36,000 and 200,000—who were displaced when their homes were destroyed by political violence surrounding the March 29 and June 27, 2008 elections.²⁰⁷

C. Zimbabwe's Obligation to Ensure the Right to Housing

The right to housing is contained in numerous international conventions.²⁰⁸

- ACHPR: while it does not specifically mention the right to adequate housing, the right to life (Article 4) and the right to physical and mental health (Article 16) may be construed to provide a basis for the right to housing. The African Commission has assumed this

²⁰² Amnesty International, "Zimbabwe: No Justice for the Victims of Forced Evictions," September 8, 2006, available at <http://www.amnesty.org/en/library/asset/AFR46/005/2006/en/dom-AFR460052006en.html>.

²⁰³ "Housing Policy Built On A Foundation of Failures and Lies," Association of Zimbabwe Journalists, September 11, 2006, available at http://www.zimbabwejournalists.com/story.php?art_id=975&cat=2.

²⁰⁴ Human Rights Watch, *Zimbabwe – Evicted and Forsaken*, November 30, 2005, available at <http://www.hrw.org/en/node/11512/section/2>.

²⁰⁵ Amnesty International, "Zimbabwe: Housing Policy Built on Foundation of Failures and Lies," September 8, 2006, AI Index: AFR 46/015/2006 available at <http://www.amnesty.org/en/library/asset/AFR46/015/2006/en/dom-AFR460152006en.html>.

²⁰⁶ United Nations Office for the Coordination of Humanitarian Affairs, Zimbabwe Consolidated Appeal, December 10, 2007, p. 36, excerpt available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/E4565BEC1F871F9EC125748E004CA905?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/E4565BEC1F871F9EC125748E004CA905?OpenDocument).

²⁰⁷ Internal Displacement Monitoring Centre, "The Many Faces of Displacement: IDPs in Zimbabwe," August 2008, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/1989E123180C0FD8C12574AC002E6C20/\\$file/Zimbabwe_SCR_Aug08.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/1989E123180C0FD8C12574AC002E6C20/$file/Zimbabwe_SCR_Aug08.pdf).

²⁰⁸ In addition, Article 25 of the UDHR recognises that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." The related right to private property ownership is also articulated in Article 17 UDHR, which provides that "everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property."

cumulative interpretation in a number of its decisions.²⁰⁹

- ACRWC: Article 20 on parental obligations requires states, according to their means and conditions, to actively take measures to assist parents, if necessary by providing material assistance and promoting programmes in support of nutrition, health, education, clothing and housing.²¹⁰
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: states that "women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing."²¹¹
- ICESCR: offers one of the most important frameworks for protecting the right to housing by establishing the right of all persons to "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."²¹² The Covenant obligates the state to take adequate steps to ensure the right's full realisation.

The Committee expands on the right to housing contained in the ICESCR in General Comment Number 4 and bars forced evictions in General Comment Number 7. General Comment Number 4 articulates the parameters of the right to housing, by outlining a series of obligations to ensure minimum core standards. Like all human rights, these obligations can be separated into three categories:

- **Respect:** states must not interfere with actions taken by individuals to satisfy the right to housing and should facilitate "self-help" initiatives of affected groups. States in particular must refrain from carrying out or advocating forced or arbitrary eviction of persons and groups. States must respect people's right to build their own homes in the manner they or their culture may desire, and must honor their right to privacy and equality of treatment under law.
- **Protect:** states must prevent third parties such as landlords or developers from interfering with the right to housing. When violations occur, public authorities must act to prevent further deprivations and guarantee opportunity for legal redress. The government should enact legislation prohibiting discrimination, harassment, and withdrawal of services in regard to housing. States should also work to ensure that the cost of housing is commensurate with income levels, and establish housing subsidies for parts of society that are unable to afford adequate housing.

²⁰⁹ "Urgent Appeal on Ongoing Forced Evictions and Destruction of Housing Settlements Throughout Zimbabwe," Zimbabwe Lawyers for Human Rights press release, June 7, 2005, available at http://www.kubatana.net/html/archive/hr/050607zlhhr.asp?sector=LANDR&year=2005&range_start=1.

²¹⁰ ACRWC, art. 20.

²¹¹ Protocol on the Rights of Women, art. 16.

²¹² ICESCR, art. 11.

- **Fulfill:** states should make efforts to provide access to land as an entitlement. States must allocate resources towards the right to housing, and if most productive, apply public funds directly towards the construction of new housing. States must establish funding levels reflective of society's housing needs and consistent with national and international obligations.²¹³

As articulated by the United Nations High Commissioner for Human Rights, the state also has immediate obligations to enact a national housing strategy by identifying available resources, necessary standards, and implementation timelines. In so planning, the state must ensure that people at all levels of society—including the homeless—are consulted and able to participate. The state must comprehensively review current national legislation to ensure its compatibility with international obligations on the right to housing.²¹⁴

The state must also ensure equitable and efficient use of and access to available resources. Regardless of economic circumstances, vulnerable members of society should be protected through targeted, low-cost programmes to provide adequate housing, and the state must demonstrate that all efforts are being made to satisfy basic needs and obligations.²¹⁵

D. Special Groups

Women, children, and migrant workers face special hurdles in accessing adequate housing.

1. Women

Under CEDAW, states are required to eliminate gender discrimination against women in rural areas such that these women have the right “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”²¹⁶

2. Children

Both the United Nations Declaration of the Rights of the Child and the CRC address the right to housing for children. Principle 7 of the Declaration states that “the child shall have the right to adequate nutrition, housing, recreation and medical services.”²¹⁷ Article 27 of the Convention requires states parties to “take appropriate measures to assist parents and others responsible for the child to implement this right and in case of need [to] provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”²¹⁸

²¹³ Office of the United Nations High Commissioner for Human Rights, “The Human Right to Adequate Housing,” Fact Sheet No. 21.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ CEDAW, art. 14.

²¹⁷ United Nations Declaration of the Rights of the Child, adopted November 20, 1959, G.A. Res. 1386 (XIV), U.N. Doc. Principle 7, available at <http://www.unhchr.ch/html/menu3/b/25.htm>.

²¹⁸ CRC, art. 27.

3. Workers

The 1961 ILO Recommendation Number 115 on Worker's Housing offers one of the most robust documents protecting the right to housing, stating that: "It should be an objective of national [housing] policy to promote, within the framework of general housing policy, the construction of housing and related community facilities with a view to ensuring that adequate and decent housing accommodation and a suitable living environment are made available to all workers and their families. A degree of priority should be accorded to those whose needs are most urgent."²¹⁹ An additional 37 other ILO conventions and recommendations mention the right to housing.

4. Non-Discrimination

CERD protects the right to housing in Article 5(e), which obligates states parties to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law... notably in the enjoyment of economic, social and cultural rights in particular . . . the right to housing."²²⁰

E. Constitutional Models of the Right to Housing

- **South Africa:** the Constitution of South Africa establishes the right to housing:

Article 26:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other means, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

This right is reinforced in Section 28(1)(c): "Every child has the right... to basic nutrition, shelter, basic health care services and social services."

Case Study: South Africa

*Adequate housing has been a substantial challenge for South Africa. A decade ago, an estimated 2.2 million families lacked adequate housing, and with population growth, these figures were expected to increase by 204,000 annually.*²²¹

In 2000, Irene Grootboom brought a case before the Constitutional Court of South Africa alleging that the government had failed to meet its obligation to provide adequate housing to residents of Cape Town's Wallacedene informal settlement, pursuant to sections 26 and 28(1)(c) of South

²¹⁹ ILO Recommendation concerning Worker's Housing, June 28, 1961, ILO No. R115.

²²⁰ CERD, art. 5(e).

²²¹ "The Grootboom Case and Women's Housing Rights," Institute for Democracy in South Africa, Budget Brief No. 111, October 2002, available at www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=655.

Africa's Constitution. The residents of Wallacedene live in extreme poverty and lack basic services such as water, sewage or refuse removal. After placing their names on a waiting list for low-income housing to no avail, Grootboom and about 900 others moved to an empty, privately-owned lot nearby that was reserved for low-income housing. The group was evicted.

With legal assistance, Grootboom and the group urgently appealed to the Cape High Court. The court acknowledged that while parents may be primarily responsible to provide shelter for their children, the state is obligated to provide aid under section 28(1)(c) of the constitution if parents are unable to meet their obligations. The right to shelter was extended to parents as well, on the rationale that it was not in a child's best interest to be separated from his or her family.

On appeal by the government, the Constitutional Court further strengthened the evicted person's right to housing. Looking to Section 26, the Court found that available housing options fell short of the state's obligation to aid people in need and that a portion of the national housing budget should be allocated for relief.

F. Constitutional Protection of the Right to Housing in Zimbabwe

While the Zimbabwean Constitution currently recognises the right to “protection against deprivation of property” in Section 16, this recognition has been primarily symbolic, and is subject to broad exceptions to government acquisition of property outlined in Section 16(a)(ii).²²²

Nevertheless, several constitutional proposals have included the right to housing.

The Constitutional Commission Proposal and the Kariba Draft each include a provision on shelter in the non-justiciable “National Objectives” section, which provides that: “The State must take reasonable legislative and other measures, within the resources available to it, to enable everyone to have access to adequate shelter.”²²³

The People's Charter emphasizes the importance of “decent and affordable public funded housing.”²²⁴ The NCA Draft places the right to housing in a justiciable Bill of Rights. The Draft states that “[e]very person has the right to have access to adequate housing.”²²⁵

Particularly given Zimbabwe's problematic history with respect to housing rights, a new Zimbabwean Constitution should explicitly address each of the distinct elements of this right by:

- Including provisions protecting legal security of tenure and barring forced evictions;

²²² Section 16(a)(ii) of the Zimbabwean Constitution reads: “In the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public.”

²²³ Constitutional Commission Proposal, section 29; Kariba Draft, section 29.

²²⁴ People's Charter, section 4.

²²⁵ NCA Draft, section 35.

- Stressing the affirmative right of inhabitants to adequate, affordable, accessible housing in a location that is proximate to goods and services; and
- Ensuring that housing is culturally adequate.

In addition, special protection should be afforded to vulnerable groups, such as women, children, and migrant workers.

V. The Right to the Highest Attainable Standard of Health

*Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.*²²⁶

A. What is the Right to Health?

The right to health fundamentally impacts upon the exercise of other human rights. Good health is critical to ensure that people of all ages can participate in the social, economic and political processes of their communities.

The right to health thus extends beyond the right to medical care to encompass a range of socio-economic factors that influence healthy lives. These “underlying determinants of health” include food, safe drinking water, adequate sanitation, a healthy environment, and access to health-related information.²²⁷

The interdependence of health and other individual rights is especially crucial in the context of poverty. For impoverished persons, health may be the first step to accessing other economic and social rights, including, for example, the right to work and the right to education. The rights to food, water and housing, in turn, support and foster an individual’s right to health.²²⁸ In addition, the right to health includes freedoms barring non-consensual, inhuman and degrading activities.

In General Comment Number 14, the Committee on Economic, Social and Cultural Rights detailed the minimum core obligations of the right to health:

²²⁶ Committee on Economic Social and Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, 22nd Sess., 2000, para. 1 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) [hereinafter General Comment No. 14].

²²⁷ *Ibid.*, para. 4.

²²⁸ *Ibid.*, para. 11.

- **Available:** public health and healthcare facilities, goods, and services must be functioning and of a sufficient quantity within the state. People must have an equal opportunity to attain the highest standard of health.
- **Accessible:** health facilities, goods, and services must be both physically and financially accessible to all on an equal basis, without discrimination. Health-related information and education should also be accessible.
- **Acceptable:** health facilities, goods, and services must respect medical ethics and be gender sensitive and culturally appropriate.
- **Good quality:** health facilities, goods, and services must be scientifically and medically appropriate and of good quality.²²⁹

Because no state can guarantee a specific level of health, the right to health should not be perceived as the right to be healthy. The most accurate description of the right to health is rather the right to the highest attainable standard of health.²³⁰

B. The Importance of the Right to Health in Zimbabwe

Zimbabwe made impressive gains in health care in the 1980s. Life expectancy increased to 60 years, immunization programmes covered over 80 percent of the population, and infant mortality dropped to 40 in every 1,000 live births. The country served as a model for other countries in the region. One Oxfam report of that era described Zimbabwe as a “beacon for progress towards child development in sub-Saharan Africa.”²³¹

Unfortunately, the country’s public health system today is a faint relic of its former self. Since 1990, the average life expectancy has decreased from 62 to 34 years.²³² While HIV/AIDS rates have reportedly dropped among adults from 25.8 percent in 2004 to 15.6 percent in 2007,²³³ most of those living with HIV/AIDS currently do not have access to essential antiretroviral drugs.²³⁴ Child mortality has risen from 76 per 1,000 in 1990 to 105 per 1,000 in 2006,²³⁵ and only half of Zimbabwe’s children receive all the recommended vaccinations, including protection against diphtheria and polio.²³⁶ After HIV/AIDS, malaria is the largest killer of children under five;

²²⁹ *Ibid.*, para. 12.

²³⁰ *Ibid.*, para. 8.

²³¹ Jean Lennox, *Paying for Health: Poverty and Structural Adjustment in Zimbabwe* (Oxfam, 1994).

²³² While life expectancy at birth in Zimbabwe had dropped to 43 as of 2006, the country’s healthy life expectancy at birth (HALE) figure is more commonly cited and hence has been included here. World Health Organization, World Health Statistics 2008, available at http://www.who.int/whosis/whostat/EN_WHS08_Table1_Mort.pdf, p. 44

²³³ United Nations General Assembly, “Report on HIV and AIDS: Follow-Up to the Declaration of Commitment on HIV/AIDS,” January 2006 – December 2006 available at http://data.unaids.org/pub/Report/2008/zimbabwe_2008_country_progress_report_en.pdf, p. 4.

²³⁴ World Health Organization, “Zimbabwe Country Profile 2007” June 2007, available at http://www.who.int/hac/crises/zwe/background/Zimbabwe_Jun07.pdf, p. 1.

²³⁵ UNICEF, “The State of the World’s Children 2008,” available at http://www.unicef.org/publications/files/The_State_of_the_Worlds_Children_2008.pdf, p. 117.

²³⁶ World Health Organization at p. 2.

only seven percent of children under the age of five sleep under bed nets.²³⁷

The infrastructure of the public health system has disintegrated. As of February 2009, cholera had claimed over 4,000 lives since an outbreak began in late 2008.²³⁸ Doctors are leaving the country due to low salaries and poor working conditions, and nurse and support-staff strikes due to lack of pay and deplorable working conditions are common.²³⁹ The capital's two largest referral hospitals, Parirenyatwa and Harare Hospital, have all but closed. Facing critical shortages of drugs and equipment, they have been forced to turn patients away and treat only the critically ill. Moreover, hospitals have become centres for the spread of infection, and a number of doctors have begun to discharge patients, describing their facilities as "death traps."²⁴⁰ Remarking on the state of health in June 2007, the Zimbabwe Association of Doctors for Human Rights wrote, "It can no longer be said the health service is near collapse. The emptying of central and other hospitals of staff, and therefore patients, means the health service has collapsed."²⁴¹

C. Zimbabwe's Obligation to Ensure the Right to Health

Zimbabwe is obligated to ensure the right to health under numerous national and international covenants to which it is a state party.²⁴²

- ACHPR: guarantees the right to the "best attainable" state of health, obligating parties to the charter to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."²⁴³
- ACRWC: enshrines the right to health. Article 14 articulates nearly a dozen steps that states should take toward full realisation of this right, including ensuring necessary medical assistance and health care to all children and mothers; providing adequate nutrition and safe drinking water, reducing mortality and combating disease and malnutrition through technology; integrating basic health service programmes in national development plans; and supporting mobilization of local community resources to develop primary health care for children.²⁴⁴
- ICESCR: often considered the primary instrument for protecting the right to health, Article 12 establishes that states must take steps necessary for provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; improvement of all aspects of environmental and industrial hygiene; prevention,

²³⁷ UNICEF at p. 125.

²³⁸ World Health Organization and Zimbabwe Ministry of Health and Child Welfare, "Daily Cholera Update and Alerts," April 20, 2009, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7RCGAA-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7RCGAA-full_report.pdf/$File/full_report.pdf).

²³⁹ "Zimbabwe: No health services to talk of," *The Standard* (Zimbabwe), October 25, 2008, available at <http://www.thezimabwestandard.com/local/19138-zimbabweno-healthservicesto-talk-of-.html>.

²⁴⁰ *Ibid.*

²⁴¹ "Zimbabwe: Health sector operating in a 'war zone' environment," IRIN, June 8, 2007, available at <http://www.irinnews.org/report.aspx?ReportID=72637>.

²⁴² In addition, Article 25 of the UDHR states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care."

²⁴³ ACHPR, art. 16.

²⁴⁴ ACRWC, art. 14.

treatment and control of epidemic, endemic, occupational and other diseases; and creation of conditions that would assure medical services and medical attention to all in the event of sickness.²⁴⁵

Like all human rights, the right to health may be classified through obligations to respect, protect, and fulfill:

- **Respect:** states must neither interfere directly nor indirectly with the right to health. This includes, for example, not preventing or limiting access to health care; not discriminating in relation to women's health needs; and not limiting access to or information about contraceptives and other means of sexual and reproductive health.
- **Protect:** states must prevent third parties from interfering with the right to health. This involves, for example, preventing private actors from threatening the availability, accessibility, acceptability or quality of health care facilities and services; protecting individuals from unwarranted or coercive third party acts that violate the right to health.
- **Fulfill:** states must adopt legislative, administrative, budgetary, judicial, and promotional measures to ensure the full realisation of the right to health. For example, states must adopt national health plans; ensure the provision of health care, including immunization programmes; realise equal access to the underlying determinants of health, including safe food, water, sanitation; ensure the provision of sexual and reproductive health services and the proper training of doctors and medical staff.²⁴⁶

While the right to health is subject to progressive realisation, it is worth remembering that Zimbabwe recently enjoyed one of the most admired health systems in Africa. Zimbabwe's previous attainment of high levels of health indicates that the country has the necessary capacity and human resources. Zimbabwe, like all countries, has immediate obligations to ensure that the right to health is exercised without discrimination and to demonstrate concrete steps toward its full realisation. Such steps could include inviting international organisations to offer sufficient temporary support services and resources until Zimbabwe is again able to independently ensure the right to health is protected.²⁴⁷

D. Special Groups

Specific groups, including women, children, people living with HIV/AIDS and those with disabilities, face greater obstacles in regard to health. To uphold health as a human right requires that these individuals be afforded additional protections in order to achieve the highest attainable standard of health.

²⁴⁵ ICESCR, art. 12.

²⁴⁶ General Comment No. 14 at paras. 33-37.

²⁴⁷ The right to health is also recognised in numerous international human rights treaties and declarations including: The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5(e)(iv)); the 1978 Declaration of Alma-Ata (Arts. 5 and 7); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Arts. 11(1)(f), 12, and 14(2)(b)); the 1989 Convention on the Rights of the Child (Art. 24); the 2000 United Nations Millennium Declaration and Millennium Development Goals; the 2006 Convention on the Rights of Persons with Disabilities (Art. 25).

1. *Women*

Women are afflicted with many of the same health problems as men yet poverty, economic dependence, violence, discrimination, gender bias within the health care system, and a common lack of agency over their sexual and reproductive lives often result in particularly dire health realities for women.

Article 10(h) of CEDAW establishes the need for access to health-related information, including advice on family planning. Article 12(1) affirms that states must take appropriate measures to eliminate discrimination against women in health care and to ensure equal access to health care and family planning services. Article 12(2) obligates states to provide services and nutrition during pregnancy, childbirth, and the post-natal period, including free services where necessary.

2. *Children*

Children are especially vulnerable to malnutrition and infectious diseases. Most childhood deaths result from a small set of causes that includes acute respiratory infections, diarrhea, measles, malaria and malnutrition. Increasingly, children are also at risk from HIV through mother-to-child transmission. Governments must ensure that children are treated in a non-discriminatory manner regardless of origin, social or economic standing, or gender.

In addition to duties contained in Article 14 of the ACRWC described above, Article 24 of the CRC requires that states recognise the right of the child to enjoy the highest attainable standard of health and to access health facilities. It commits states to strive to reduce infant and child mortality, ensure necessary medical assistance and health care to all children, specifically improving primary health care, provide adequate nutritious food and drinking water, provide pre-natal and post-natal health care to mothers, and educate all individuals in society about basic child health and nutrition.

3. *Non-Discrimination*

Article 5 of CERD requires that states prohibit and eliminate discrimination on the basis of race, color, or national or ethnic origin pertaining to economic, social and cultural rights and specifically the rights to public health, medical care, social security and social services.

E. Constitutional Models of the Right to Health

States must respect, protect and fulfill their obligations to ensure adequate health and access to health care. Over 115 constitutions recognise either the right to health or the right to health care.²⁴⁸ Within Africa, Ghana and South Africa provide two instructive models for constitutional entrenchment of the right to health.²⁴⁹

²⁴⁸ World Health Organization, "The Right to Health," Fact Sheet No. 31, available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, p. 10.

²⁴⁹ Jeremy Perelman, "Lawyering for the Right to Health in Africa: The Tale of Two Legal Resources Center," paper presented at the annual meeting of The Law and Society, J.W. Marriott Resort, Las Vegas, NV, October 10, 2008.

- **Ghana** has taken a community-based, legal empowerment approach toward the right to health. Under its constitution, the country's president is required to report to Parliament at least annually on all steps that have been taken to ensure the realisation of policy directives toward the "right to good health care." Article 30 further signals a guarantee of the right to health by noting:

"A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs."

- **South Africa** offers a model for how the right to health has been enforced through public interest impact litigation. Article 27 of the South African Constitution protects the right to health care, food, water and social security:

"Everyone has the right to have access to: health care services, including reproductive health care; no one may be refused emergency medical treatment."

Case Study: South Africa

In 2001, the Treatment Action Campaign (TAC), a coalition formed by South African AIDS-related organisations in 1998, brought suit against the South African government for restrictions on the availability of nevirapine, a drug that prevents the transmission of HIV from mother to child. Nevirapine reduces transmission of HIV by up to 50 percent if delivered at the onset of labour. Nevertheless, the government maintained a policy allowing only two hospitals per province to provide the drug to patients.

Launching a constitutional challenge, TAC alleged that the South African government was in violation of the right to access health care and demanded that the government make nevirapine available throughout the country. In the trial court, the judges ruled that restriction of the drug to limited pilot programmes "[was] not reasonable and [was] an unjustified barrier to the progressive realisation of the right to health care." In turn, the court required that the government make the drug available to infected mothers and outline plans to achieve that result.

In July 2002 the South African Constitutional Court affirmed that the government's policy violated the country's constitutional provision of the right to health care for women and their children, rejecting the argument that progressive realisation and available resources justified a delay in distribution.²⁵⁰

Despite this ruling, over 60,000 babies nevertheless become infected with HIV in South Africa each year. The government has lagged in issuing new guidelines geared towards reducing mother-to-child transmission. TAC has emphasized the need for dual-antiretroviral prophylaxis and provider-

²⁵⁰ George Annas, "The Right to Health and the Nevirapine Case in South Africa" in Sofia Gruskin et al., *Perspectives on Health and Human Rights* (Sofia Gruskin, ed., 2005) p. 498; *Minister of Health v Treatment Action Campaign*, Constitutional Court of South Africa, 5 SA 721, July 5, 2002, available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=403050.

*initiated testing and counseling, and has placed sole responsibility for the delayed guidelines on the Minister of Health.*²⁵¹

F. Constitutional Protection of the Right to Health in Zimbabwe

Zimbabwe's current constitution does not guarantee the right to health. Nevertheless, several constitutional proposals have included the right to health.

The Constitutional Commission Proposal and the Kariba Draft contain identical provisions in a section on health services, included in the "National Objectives" section, which states that: "(1) The State must take all practical measures to ensure the provision of basic, accessible and adequate health services to the population. (2) The State must take appropriate measures to ensure that no one is refused emergency medical treatment at any health institution."²⁵²

The NCA Draft, protects the right to health by stating in its Bill of Rights: "Every person has a right to bodily and physical integrity and to access basic health care services...Every person has a right to guaranteed emergency medical treatment."²⁵³

The Zimbabwe People's Charter demands that the state provide "free and quality public health care including free drugs, treatment, care and support for those living with HIV and AIDS," and facilitate the construction of hospitals."²⁵⁴

A robust provision for the right to health should be included in Zimbabwe's new constitution. An effective provision should protect the underlying determinants of health alongside the necessary access to medical care and freedom from physical interference. At a minimum, the constitution should ensure:

- The availability of healthcare facilities, goods, and services that are functioning and of a sufficient quantity, that respect medical ethics, and that are gender and culture sensitive;
- An equal opportunity to attain the highest standard of health for all people, without discrimination; and
- The physical and financial accessibility of healthcare facilities, goods, and services, and well as accessibility of health-related information and education.

The constitution could also take special note of the need for maternal, childhood and reproductive health care, and include a provision on the importance of popular participation in national and community health decision-making.

²⁵¹ Treatment Action Campaign, TAC Electronic Newsletter, January 23, 2008, available at <http://www.tac.org.za/community/node/2121>.

²⁵² Kariba Draft, section 30.

²⁵³ NCA Draft, section 37.

²⁵⁴ People's Charter, section 4.

VI. The Right to Education

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.²⁵⁵

A. What is the Right to Education?

The right to education recognises the crucial role that education plays in the enhancement of human dignity, and protects the right to an education directed at fully developing the human personality. Education promotes autonomy, self-esteem, and respect by enabling people to develop their personality and capabilities, and to choose how they will live their lives. Further, education strengthens an individual's cultural identity and commitment to community values, expands their understanding of and respect for other peoples and cultures, and provides the knowledge and skills necessary to be independent and contributing members of society.

Education is also a fundamental element in the attainment of other human rights. Educated individuals are better able to support themselves and their families, assert their civil and

²⁵⁵ Committee on Economic, Social, and Cultural Rights, General Comment No. 13, *The Right to Education*, 21st Sess., 1999, para. 1 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument) [hereinafter General Comment No. 13].

political rights, and monitor the actions of their governments. Indeed, studies have found that education promotes higher economic growth, increases labour productivity, lowers fertility rates, lowers infant and child mortality rates, and raises levels of child health, education and democratization.²⁵⁶

In recognition of the importance of education, two separate educational objectives were included in the United Nation's Millennium Development Goals. One goal requires the achievement of universal primary education by 2015, while another goal requires the elimination of gender disparities in primary education by 2005 and at all levels of education by 2015. The importance of education in assessing a person's well-being also led to the incorporation of education levels as one of three factors that determine a country's human development index ranking.²⁵⁷

The Committee on Economic, Social and Cultural Rights has emphasized four different core aspects of the right to education in General Comment Number 13.²⁵⁸

- **Availability:** educational institutions must be available in sufficient quantity, and must contain adequate and appropriate infrastructure.
- **Accessibility:** educational institutions and programmes must be accessible to everyone, without discrimination. In addition, education must be geographically accessible and free or affordable to all.
- **Acceptability:** the form and substance of education, including curricula and teaching methods, must be relevant, culturally appropriate, and of high quality.
- **Adaptability:** education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

B. The Importance of the Right to Education in Zimbabwe

For many years, Zimbabwe was lauded for its rapid post-independence achievement of universal primary education. By 2000, Zimbabwe was one of just five sub-Saharan countries to have achieved universal primary education.²⁵⁹ Consequently, many researchers looked to Zimbabwe

²⁵⁶ See, e.g., R.J. Barro, "Economic Growth in a Cross Section of Countries," *Quarterly Journal of Economics*, Vol. 106, No. 2 (1991); R.J. Barro, "Determinants of Democracy," *Journal of Political Economy*, Vol. 107, No. 6 (1999); R.J. Barro, "Human Capital and Growth in Cross-Country Regressions," *Swedish Economic Policy Review*, Vol. 6, No. 2 (1999); J.B. Knight and R.H. Sabot, *Education, Productivity, and Inequality: The East African Natural Experiment*, (Oxford: Oxford University Press for the World Bank, 1990); L.H. Summers, "Investing in All the People: Educating Women in Developing Countries," Economic Development Institute Seminar Paper, No. 45, (Washington, D.C.: World Bank, 1994).

²⁵⁷ The education component of the HDI is based on a combination of adult literacy rates and school enrollment rates. The other two components are income (PPP-adjusted GNP per capita) and health (longevity).

²⁵⁸ General Comment No. 13 at para. 6.

²⁵⁹ The report defined universal primary education to mean that at least 95% of children were completing primary school. The other four were Botswana, Cape Verde, Mauritius and South Africa. Paul Glewwe and Meng Zhao, "Attaining Universal Primary Education by 2015: How Much Will it Cost?", referencing Barbara Bruns, Alain Mingat, and Ramahatra Rakotomalala, "Achieving Universal Primary Education by 2015: A Chance for Every Child," The World Bank, Washington, D.C., 2003.

for lessons about how to improve education in other African countries.²⁶⁰

Unfortunately, the ongoing economic and political crises in the country have devastated the education sector. Raymond Majongwe, secretary general of the Progressive Teachers Union of Zimbabwe (PTUZ), compared the current state of education in Zimbabwe to that of a war-torn country: “It is difficult to imagine the meltdown in the education sector happening in a country that is at peace. You only see this kind of degeneration in countries that are experiencing civil strife or a full-fledged war.”²⁶¹ A PTUZ survey found that there were only 23 days of normal learning during the 2008 school year,²⁶² due to teacher strikes over inadequate pay, the use of schools as bases for ZANU-PF supporters, post-election violence that kept schools closed, and targeting of violence against teachers suspected of supporting the MDC.²⁶³ Similarly, UNICEF estimated in early October 2008 that only 40 percent of the country’s teachers were working, and only one-third of the students were attending classes.²⁶⁴ Shortly thereafter, the government cancelled the academic year for approximately 4.5 million children.²⁶⁵ Many teachers returned to the classroom in 2009, but it is unclear whether this will be a permanent improvement, with teachers threatening further strikes unless they receive improved compensation.²⁶⁶

Although the education crisis has accelerated over the past year, the educational system in Zimbabwe has been in decline for several years. Since 2004, about 45,000 teachers have left the profession, due in part to inadequate salaries that in some cases do not even pay for transportation to and from work.²⁶⁷ Drastically reduced public financing has led to the deterioration of school infrastructure, and many schools lack basic educational necessities such as books, desks, chalk, pens, water, and power.²⁶⁸ School fees have increased so dramatically that education is unaffordable for many families. Enrollment of girls remained a particular problem in districts throughout the country, with eight districts registering a gender gap of five percent or more, including two districts with a gender gap of over 20 percent.²⁶⁹ Perhaps as a result of all of these factors, the pass rate for the O-levels²⁷⁰ fell to 11 percent in 2007, from a high

²⁶⁰ See, e.g., Santosh Mehrotra, “Education for All: Policy Lessons from High-Achieving Countries,” *International Review of Education*, Vol. 44, No. 5/6 (1998).

²⁶¹ “Zimbabwe: School’s really out,” IRIN, October 20, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=80997>, last accessed on Nov. 18, 2008.

²⁶² The Zimbabwe school year begins in January.

²⁶³ “Zimbabwe: School’s really out,” IRIN, October 20, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=80997>, last accessed on Nov. 18, 2008; Jan Raath, “Zimbabwe chaos wipes out education for 4.5 million pupils,” *TimesOnline*, available at <http://www.timesonline.co.uk/tol/news/world/africa/article4902920.ece>, last accessed on Nov. 17, 2008.

²⁶⁴ UNICEF, “Zimbabwe education system in a state of emergency,” available at http://www.unicef.org/media/media_45950.html.

²⁶⁵ Jan Raath, “Zimbabwe chaos wipes out education for 4.5 million pupils,” *TimesOnline*, available at <http://www.timesonline.co.uk/tol/news/world/africa/article4902920.ece> [hereinafter Raath].

²⁶⁶ Patience Rusere, “Zimbabwe’s Teachers Threaten New Strike If Wage Demands Not Met,” *Voice of America News*, April 8, 2009, available at <http://www.voanews.com/english/Africa/2009-04-08-voa63.cfm>.

²⁶⁷ “Zimbabwe: School’s really out,” IRIN, October 20, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=80997>.

²⁶⁸ Raath; “It is All Zero Here, We have nothing,” *Inter Press Service*, April 12, 2008, available at <http://ipsnews.net/news.aspx?idnews=37332>.

²⁶⁹ UNICEF, “Zimbabwe’s ground-breaking plan for girls and orphans and vulnerable children’s education,” accessible at http://www.unicef.org/media/media_36452.html.

²⁷⁰ An exam taken at the end of Form IV, generally equivalent to the 11th grade.

of 72 percent in the mid-1990s.²⁷¹

C. Zimbabwe's Obligation to Ensure the Right to Education

The ACHPR guarantees every individual the right to an education.²⁷² Specific elements of the right to education are detailed in the ACRWC, which requires states to take all appropriate measures to achieve the full realisation of this right, including:²⁷³

- provide free and compulsory primary education;
- develop secondary education in its different forms and progressively make it free and accessible to all;
- make higher education accessible to all on the basis of capacity and ability;
- take special measures for female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community;
- ensure that children who become pregnant before completing their education have an opportunity to continue their education;
- take measures to encourage regular attendance at schools and reduce drop-out rates;
- ensure that a child who is subjected to school discipline be treated with humanity and with respect for the inherent dignity of the child;
- respect the right of individuals and bodies to establish and direct educational institutions, provided that they meet minimum state standards; and
- respect the rights of parents and legal guardians to choose their children's schools, including schools other than those established by public authorities provided that they conform to minimum state standards.

The guarantees contained in the ACRWC include all of the key provisions of the right to education enshrined in a number of major international declarations and covenants, including the UDHR,²⁷⁴ the ICESCR²⁷⁵ and the CRC.²⁷⁶ These agreements concur that the state must make primary education compulsory and freely available to all, make secondary education, including both technical and professional education, generally available, and make higher education equally accessible to all. The ICESCR and the CRC specify that secondary education must be made increasingly accessible through the introduction of free education, a requirement that the ICESCR also extends to higher education. The agreements also recognise the right of parents to choose the kind of education provided to their children, and the ICESCR recognises the right of individuals and organisations to establish and run educational institutions, provided they meet minimum state standards. The ACRWC's provisions require states to take measures to increase attendance and reduce drop-out rates, as well as ensure that school discipline is administered in a manner consistent with the child's human dignity. Such provisions are also included in the CRC. The only provisions not explicitly included in the two African Charters are the ICESCR's requirements that fundamental education should be extended to those who did not receive or

²⁷¹ Raath.

²⁷² ACHPR, art. 17.

²⁷³ ACRWC, art. 11.

²⁷⁴ UDHR, art. 26.

²⁷⁵ ICESCR, art. 13.

²⁷⁶ CRC, arts. 28-29.

complete their primary education and that the state must provide for the improved conditions of teaching staff.

As with other rights, states have three levels of obligation in ensuring the right to education:

- **Respect:** states must avoid measures or policies that hinder or prevent individuals from exercising the right to education. This responsibility could include, for example, obligations to refrain from imposing excessive fees on educational access, ensuring that school textbooks include gender and culture-sensitive representations of women and minority groups, and ensuring that instruction is available in the community's language as well as in the national language.
- **Protect:** states must take measures to prevent third parties from interfering with anyone's right to an education. This protection could include, for example, encouraging families to send their children to school regardless of gender, prohibiting school directors and teachers from preventing pregnant girls from returning to school after giving birth, and ensuring that teachers are not harassed by political party supporters for their political beliefs.
- **Fulfill:** states must take positive measures to enable and assist individuals and communities to exercise their right to education. This obligation could include, for example, rehabilitating and equipping formerly functioning schools, providing adequate teacher salaries so that teachers can focus on their classrooms rather than on looking for supplemental income, or expanding facilities for higher education.²⁷⁷

D. Special Groups

States have a special obligation to ensure that the right to education is available to all, without discrimination. The ACHPR mandates that the rights it contains, including the right to education, be free from distinctions of any kind, including race, ethnicity, color, sex, language, religion, political affiliation or opinion, national origin, economic class, birth or other status.²⁷⁸ The ACRWC reiterates that this requirement of non-discrimination in education applies not only to children, but also to distinctions made on the basis of a child's parents.²⁷⁹ International conventions, such as the Convention Against Discrimination in Education,²⁸⁰ similarly prohibit discrimination in education.

Beyond the requirement of non-discrimination, however, states have a duty to provide additional support to groups that have been and continue to be disadvantaged in education, including girls, the mentally or physically handicapped, and cultural or linguistic minorities. The ACRWC specifically requires states to take special measures to ensure equal access to

²⁷⁷ General Comment No. 13 at paras. 46-48.

²⁷⁸ ACHPR, art. 2.

²⁷⁹ ACRWC, art. 3.

²⁸⁰ Convention Against Discrimination in Education (CADE), adopted December 14, 1960, 429 U.N.T.S. 93, art. 1 [hereinafter CADE].

education for girls,²⁸¹ a requirement defined in detail in Article 10 of CEDAW. This requirement includes eliminating stereotyped conceptions of the roles of women and men through gender-sensitive textbooks and teaching methods, the reduction of girls' drop-out rates and the creation of special programmes for girls and women who have left school prematurely, and equal opportunities to participate in sports. The CRC highlights the special needs of the handicapped, requiring states to ensure that the handicapped have effective access to education so that they can achieve the fullest level of personal development and social integration possible.²⁸² The CRC also recognises the importance of developing children's respect for their own cultural identity, language, and values.²⁸³ In order to foster this respect, cultural or linguistic minorities must be allowed to pursue their own educational activities and to provide education in their own languages as long as these activities do not provide lower standards of education, prevent members from understanding the culture and language of the larger community, or prejudice national sovereignty.²⁸⁴

E. Constitutional Models of the Right to Education

Numerous African countries have incorporated the educational guarantees of the international covenants into their constitutions, in some cases even going beyond the protections they afford. Indeed, the incorporation of the right to education in the constitution could involve establishing institutions related to education or devising budgetary minimums and procedures. For example:

- **South Africa:**

Article 29

(1) Everyone has the right

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where the education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

²⁸¹ ACRWC, art. 11.

²⁸² CRC, art. 23.

²⁸³ *Ibid.*, art. 29.

²⁸⁴ CADE, art. 5.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

- **Ghana:** The Constitution of Ghana enshrines nearly all of the rights guaranteed in the international covenants.

Article 26

(1) All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right –

- (a) basic education shall be free, compulsory and available to all;
- (b) secondary education in its different forms, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
- (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education;
- (d) functional literacy shall be encouraged or intensified as far as possible;
- (e) the development of a system of schools with adequate facilities at all levels shall be actively pursued.

(2) Every person shall have the right, at his own expense, to establish and maintain a private school or schools at all levels and of such categories and in accordance with such conditions as may be provided by law.

Case Study: Indonesia²⁸⁵

In Indonesia, educational associations have successfully used the courts to increase state support for education under a constitutional provision that sets a mandatory minimum funding level for education. Article 31 of the Indonesian Constitution requires the government to allocate at least 20 percent of the national budget to the education sector.

In 2006, members of the Association of Teachers, the Association of Educational Science Graduates, and a local foundation promoting educational quality petitioned the Constitutional Court of Indonesia to declare the national budget null and void because it only allocated 8.1 percent to education. The court had already ruled in two cases in 2005 that the previous year's budget violated the constitutional requirement, but declined to invalidate the budget due to concerns about the resulting chaos that might ensue.

In the 2006 case, however, the Constitutional Court found that the state should have been aware of its earlier decisions and made a good faith effort to comply with its rulings. It therefore declared the state budget null and void. Although the Court allowed the overall state budget to be applied, it required the government to allocate additional resources to education during a mid-year adjustment if additional resources became available. The Court further held that future budgets

²⁸⁵ This case study is drawn from Varun Gauri and Daniel M. Brinks, eds., *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) pp. 258-61.

would also be in violation of the constitution if they did not allocate 20 percent to education. However, in determining the effect of that ruling on particular state budgets, the court would consider the economic circumstances and needs facing the government.

Although Indonesia has not yet attained the constitutional requirement of 20 percent allocation to education, the government has increased funding annually, with 11.8 percent of the budget allocated to education in 2008. By providing a very specific constitutional requirement about what constituted adequate investment in education, the Indonesian Constitution created a favourable context for judicial enforcement of the right to education, because a clear standard was defined to which government could be held.

F. Constitutional Protection of the Right to Education in Zimbabwe

In contrast to the generous educational protections contained in other African constitutions, the current Zimbabwe Constitution's treatment of the right to education is extremely limited. The only mention of the right to education in the Zimbabwean Constitution is in Chapter 3, Article 20, which protects freedom of expression. This article stipulates that religious denominations and groups of persons shall not be prevented from establishing and maintaining schools, and that a person may not be prevented from sending his children to a school merely because it is not a state school. Guarantees of primary, secondary and higher education are conspicuously absent, as is any mention of education for those who never received or completed their schooling. Even the grant of freedom to parents is more limited than that contained in the international covenants, since it leaves open the possibility that the state may restrict a parent from sending a child to the school of his choice for some reason other than that it is not a state school.

Nevertheless, several constitutional proposals have included the right to education. The Constitutional Commission Proposal and the Kariba Draft both include a provision on education in the non-justiciable "National Objectives" section. It provides:

- (1) The State must take all practical measures to promote free and compulsory basic education for children.
- (2) The State must take appropriate measures, within the resources available to it²⁸⁶
 - (a) to afford adults access to basic and continuing education; and
 - (b) to afford equitable access to higher education.²⁸⁶

The NCA Draft's Bill of Rights states that, "(1) Every person has a right to state funded education from pre-school to tertiary level. (2) Every person has the right to establish and maintain, at their own expense, independent educational institutions of reasonable standards, which are registered by the state and do not discriminate on the basis of race or ethnicity, or on any other ground prohibited in section 19."²⁸⁷

The Zimbabwe People's Charter, in a section on the national economy and social welfare, notes the "obligation on the state, provincial and local authorities to initiate public programmes to build schools" as well as to provide "free and quality public education from crèche to college

²⁸⁶ Constitutional Commission Proposal, section 28; Kariba Draft, section 28.

²⁸⁷ NCA Draft, section 36.

and university levels.”²⁸⁸

A new Zimbabwe Constitution must recognise the right to education and should include specific provisions outlining the content of that right in light of the aforementioned African and international covenants. At a minimum, a new constitution should ensure:

- Educational institutions are available in sufficient quantity, and contain adequate and appropriate infrastructure to operate;
- Educational institutions and programmes are geographically and financially accessible to everyone, without discrimination;
- The form and substance of education, including curricula and teaching methods, are relevant, culturally appropriate, and of high quality; and
- Education is adaptable to the needs of changing societies and communities and responds to the needs of diverse students.

Although education is a right that is generally subject to progressive realisation, Zimbabwe’s previous attainment of high levels of education indicates that the country has the capacity and human resources to ensure the right to education for its citizens. Zimbabwe has an immediate obligation to take all the steps necessary, both political and financial, to create the conditions necessary to restore the education system.

VII. The Right to Culture

*[T]he processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities . . . give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage. Communities, in particular indigenous communities, groups and . . . individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity. . . . [The Committee considers] the invaluable role of the intangible cultural heritage as a factor in bringing human beings closer together and ensuring exchange and understanding among them.*²⁸⁹

²⁸⁸ People’s Charter, section 4.

²⁸⁹ Convention for the Safeguarding of the Intangible Cultural Heritage, adopted October 17, 2003, UNESCO Doc.

A. What is the Right to Culture?

International human rights law recognises the right of all individuals to express and enjoy their culture.

The preservation and protection of cultural heritage is vital to maintaining diversity and creativity within modern society. In 2003, the United Nations Educational, Scientific and Cultural Organization (UNESCO) member states drafted the Convention for the Safeguarding of the Intangible Cultural Heritage, which Zimbabwe accepted on May 30, 2006, to specifically recognise and clarify the protection of this right, which had previously been included in numerous international instruments. The Convention explicitly recognised that intolerance and processes of social transformation, such as globalization, threaten cultural practices.

Intangible cultural heritage, or “living heritage,” can be defined as “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognise as part of their cultural heritage.”²⁹⁰ Common examples of intangible cultural heritage include:

- Oral traditions and expressions, including language;
- Performing arts;
- Social practices, rituals and festive events;
- Knowledge and practices concerning nature and the universe; and
- Traditional craftsmanship.²⁹¹

The right to culture is interdependent and indivisible from many other important human rights. For example, the right to language is an essential component of the free expression of culture and heritage. For many people, language is not just a medium of their culture, but an important part of their cultural identity. Cultural preferences are also relevant to the right to food. In General Comment Number 12, the Committee on Economic, Social and Cultural Rights required that to fulfill the right to adequate food, state parties must ensure that food provided is “acceptable within a given culture.”²⁹² The right to education requires universal access to education, regardless of gender or any other status, and thereby potentially conflicts with traditional cultural practices that limit females’ access to education.

In addition to these rights, many civil and political rights, including freedom of thought, conscience and belief, freedom of expression, freedom of association, the right to hold opinions without interference, and the right to constitute a family are interrelated with the right to culture and may be protected as part of an individual’s intangible cultural heritage.

MISC/2003/CLT/CH/14, Preamble [hereinafter CSICH].

²⁹⁰ *Ibid.*, art. 2.

²⁹¹ *Ibid.*

²⁹² General Comment No. 12 at para. 8.

B. The Importance of the Right to Culture in Zimbabwe

Zimbabwe is a country rich with cultural diversity. Although the country's three official languages are Shona, Ndebele and English, many other languages, including Ndaou and Kalanga, are spoken as well.

Zimbabwe is home to many different indigenous groups, each with their own specific cultural heritage. Nearly 80 percent of Zimbabweans identify with the Shona ethnic group. The Shonas consist of different clans, including the Manyika, Zezuru, Karanga, Korekore, Rozwi and Ndaou. The second most common ethnic group in Zimbabwe is the Ndebele group. Approximately fourteen percent of Zimbabwe's population is comprised of the Ndebele minority, whose members are primarily concentrated in the Southwest.²⁹³ Other indigenous groups within Zimbabwe include the Kalanga, Tonga, Shangaan and Venda groups. Each of these sub-groups has distinct spiritual beliefs and cultural practices.

Given the diversity of cultural heritage within Zimbabwe, it is imperative that the right to culture is protected in Zimbabwe. As a result of colonization, many of these groups remain fragmented and are in jeopardy of abandoning aspects of their cultural heritage. Ensuring the cultural rights of individuals is essential to protecting the interests of these different ethnic groups and preserving the rich cultural diversity of Zimbabwe.

C. Zimbabwe's Obligation to Ensure the Right to Culture

In addition to the Convention for the Safeguarding of Intangible Cultural Heritage, which Zimbabwe has ratified, the right to culture is explicitly recognised and protected in numerous international instruments,²⁹⁴ including:

- ACHPR: "Every individual may freely take part in the cultural life of his community."²⁹⁵
- The Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."²⁹⁶
- ACRWC: "Every child shall have the right to an education. The education of a child will be directed to...the preservation and strengthening of positive African morals, traditional values and cultures."²⁹⁷

²⁹³ CIA World Factbook – Zimbabwe, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/zi.html>.

²⁹⁴ In addition, Article 27 of the UCHR states that "Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." The Constitution of the United Nations Educational, Scientific and Cultural Organization provides: "The wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern." The United Nations Educational, Scientific and Cultural Organization, Principles on International Cooperation states, in Article 1, "Each culture has a dignity and value which must be respected and preserved. Every people has the right and the duty to develop its culture. In their rich variety and diversity...all cultures form part of the common heritage belonging to mankind."

²⁹⁵ ACHPR, art. 17.

²⁹⁶ Protocol on the Rights of Women, art. 17.

²⁹⁷ ACRWC, art. 11.

- ICESCR: “State Parties...recognize the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its applications.”²⁹⁸
- The Convention on the Prevention and Punishment of the Crime of Genocide, which has been interpreted broadly to prohibit the intended destruction, in whole or in part, of a particular culture.²⁹⁹

In addition to recognition of cultural rights, the protection of minority groups is an important aspect of many international instruments. As discussed above, the right to self-determination is crucial to the expression of minority interests. This right encompasses the right of individuals to freely determine their own political, social and economic status and is considered a *jus cogens* right, meaning it is widely accepted by the international community and non-derogable. The ACHPR,³⁰⁰ the ICCPR,³⁰¹ and the ICESCR³⁰² all recognise the right to self-determination.

In upholding the right to culture, states are required to:

- **Respect:** states must not take any measures to prevent individuals from expressing their cultural heritage.
- **Protect:** states must ensure that third parties do not interfere with the expression of intangible cultural heritage of groups or individuals. In protecting the cultural rights, states may choose to conduct an inventory of intangible cultural heritage in its territories and monitor specific practices, or states could establish an independent body to safeguard cultural heritage.³⁰³
- **Fulfill:** states must take the necessary measures to safeguard the cultural rights of individuals. These obligations may include developing and implementing education campaigns to raise awareness about different cultures, keeping the public informed when the cultural heritage of a group or individuals is threatened, and strengthening institutions that foster scientific, artistic, technical or other cultural studies.³⁰⁴

D. Special Groups

Minority groups are the most likely to encounter persecution with respect to their cultural practices. As members of a group whose goals and values are not shared by all, minority groups are often subject to scrutiny or discrimination. Thus, the right to culture is particularly relevant to the protection of minority interests. The ICCPR explicitly recognises the vulnerability of minority groups, and requires states parties to refrain from interfering with the rights of

²⁹⁸ ICESCR, art. 15.

²⁹⁹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 UNTS 227, entered into force January 12, 1951, art. 2 (accession May 13, 1991).

³⁰⁰ ACHPR, art. 20.

³⁰¹ ICCPR, art. 1.

³⁰² ICESCR, art. 1.

³⁰³ CSICH, arts. 12-13.

³⁰⁴ *Ibid.*, arts. 13-14.

“ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language.”³⁰⁵ Indigenous minority groups, or groups of people who have a historical connection with a particular geographic region, are often subject to persecution and abandon cultural practices to assimilate into the mainstream population. Similarly, immigrant groups often abandon aspects of their cultural heritage when adapting within a new society. Defeated or minority cultural groups in post-conflict areas are often subject to persecution by the dominant population. Preserving the rich and unique cultural heritage of minority groups is an important aspect of the right to culture.

The right to culture also encompasses self-determination, or the right of individuals to “freely determine their political status and freely pursue their economic, social and cultural development.”³⁰⁶ In essence, self-determination preserves the right of individuals to pursue the lifestyle of their choosing. This right has been integral to the protection of minority groups and the free expression and enjoyment of minority cultures.

E. Limitations on the Right to Culture

The right to culture is interdependent and indivisible from many human rights, including the right to self-determination, the right to language, freedom of speech, and freedom of thought, conscience and religion. At the same time, the right to culture often exists in tension with other human rights, including the right to education, the right to health, and non-discrimination. Certain cultural practices may have a negative impact on an individual’s well-being or interfere with other basic human rights to which all individuals are entitled. States only have an obligation to safeguard cultural rights to the extent that these practices do not violate other human rights. Thus, it is important to distinguish cultural practices that have harmful consequences, and ensure that these practices are discouraged and modified when necessary so that individuals are protected.

The ACRWC explicitly recognises that children must be protected against “Harmful Social and Cultural Practices.”³⁰⁷ These include, but are not limited to, customs that may impair a child’s health, discriminatory treatment on the basis of sex or any other status, and child marriage. The Protocol on the Rights of Women in Africa requires state parties to “commit themselves to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.”³⁰⁸ These provisions underscore the importance of remedying harmful cultural practices and balancing the right to culture against other human rights.

F. Constitutional Models of the Right to Culture

Although the right to culture has only recently emerged as an important human right in its own respect, its protection is guaranteed in several constitutions.

³⁰⁵ ICCPR, art. 27.

³⁰⁶ ICCPR, art. 1.

³⁰⁷ ACRWC, art. 21.

³⁰⁸ Protocol on the Rights of Women, art. 2.

- **Namibia:** Article 19 provides, “Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.”
- **Ghana:** Article 25 provides, “Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this constitution. All customary practices which dehumanise or are injurious to the physical and mental well being of a person are prohibited.”
- **South Africa:** Article 30 provides. “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” Article 31 provides, “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community (a) to enjoy their culture...and use their language; and (b) to form, join and maintain cultural . . . and linguistic associations . . . The rights . . . may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

Case Study: South Africa

Judicial enforcement of the right to culture has been relatively infrequent. In South Africa, several cases were brought challenging the right to practice one’s culture when traditional cultural practices conflict with the right to gender equality. These practices were reevaluated in light of the rights to gender equality and non-discrimination included in the South African Constitution.

For example, in Mabena v. Latsoalo, a husband and wife had a marriage under customary law. When the husband died, his widow applied for an exemption from customary law to allow her to exert property rights upon his death, because customary wives were not traditionally eligible to inherit property. The deceased husband’s family challenged the validity of the marriage on two grounds: first, the husband’s father never consented to the marriage, and second, the payment of lobola (dowry) was made to the wife’s mother, and woman were not valid guardians under customary law.

The judge rejected the first contention because cultural practices had changed, such that men had begun to negotiate their own marriages. The judge rejected the second contention because single female-headed households had become sufficiently common, that women could be considered guardians. In this ruling, the judge respected the marriage formed by customary law, and reinterpreted potentially discriminatory customary norms in light of changing cultural practices and perceptions toward gender equality.³⁰⁹

³⁰⁹ Lisa Fishbayn, “Litigating the Right to Culture: Family Law in the New South Africa,” *International Journal of Law, Policy and the Family*, Vol. 13 (1999).

G. Constitutional Protection of the Right to Culture in Zimbabwe

The current constitution does not explicitly address the right to culture. Nevertheless, several constitutional proposals have included the right to culture.

Both the draft of the Constitutional Commission Proposal and the Kariba Draft include a provision on cultural objectives in the section on “National Objectives” which provides that:

- (1) The State must—
 - (a) promote and preserve cultural values and practices which enhance the dignity and well-being of Zimbabweans; and
 - (b) encourage the preservation, development and enrichment of all indigenous languages spoken in Zimbabwe.
- (2) The State and all citizens must endeavour to preserve and protect Zimbabwe’s heritage.³¹⁰

The NCA Draft’s Bill of Rights contains one article on language and culture, which reads: “Every person has the right to use the language, and to participate in the lawful cultural life, of his or her choice.”³¹¹ It also has a separate article on the rights of minority groups, which states that: “Minority groups have a right to participate in decision-making processes at all levels of State organs.”³¹²

In order to properly uphold the right to culture, a provision should be incorporated into the new constitution that, at a minimum:

- Guarantees the ability to engage in cultural and religious practices of one’s choosing or form groups affiliated for cultural or religious purposes;
- Protects the right to language, which is an important aspect of the right to culture. The right to culture may be inherently threatened when states impose an official language that is taught in schools and used predominantly in public life. Many international instruments and national constitutions address both of these rights explicitly and together; and
- Contains a “clawback” provision limiting the protection of the right to culture. The right to culture may sometimes be subject to limitation, particularly in circumstances where traditional practices have potentially harmful consequences and conflict with other fundamental human rights. The Constitution of Ghana offers an instructive example of a provision that guarantees the protection of culture while ensuring that such protection does not hinder development or threaten the realisation of other human rights.

³¹⁰ Constitutional Commission Proposal, section 19; Kariba Draft, section 19.

³¹¹ NCA Draft, section 26.

³¹² *Ibid.*, section 43.

CHAPTER FIVE: THE BENEFITS OF PLACING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN A CONSTITUTION

While rights may first invoke images of courts and cases, the advantages of including economic, social and cultural rights in a justiciable Bill of Rights extend beyond the benefits accrued by those who are successful in courts of law. Entrenching these rights in a constitution can give voice to the collective hopes and aspirations of a country, encourage individuals and groups to actively confront societal ills, provide guidance to political leaders and promote accountability and transparency in government.

Moreover, constitutional provisions protecting the rights outlined in Chapter Four would impose no new obligations on the Zimbabwean government, as it is already bound under the ICESCR and ACHPR to respect, protect and fulfill such rights. Indeed, including economic, social and cultural rights in a justiciable Bill of Rights would simply provide domestic accountability for obligations that Zimbabwe has already undertaken pursuant to its acceptance and ratification of numerous human rights treaties.

By including economic, social and cultural rights in a justiciable Bill of Rights, Zimbabwe would take a significant step towards meeting such obligations under international law. It would also satisfy the expressed will of the Zimbabwean public, and help ensure that Zimbabwe's citizens can obtain basic life necessities. In sum, a variety of benefits accrue from entrenching economic, social and cultural rights in a justiciable Bill of Rights.

I. Protecting All Members of Society

Modern constitutions routinely include a Bill of Rights or similar instrument that enumerates the fundamental protections enjoyed by citizens and other specified persons. Generally, constitutional rights are those that society views as being essential to ensure the dignity of human existence and deliver the promises of citizenship, including the ability to participate in political life.

The presence of rights in a constitution reflects an acknowledgment that the democratic process alone cannot adequately protect all persons and interests within a country. Therefore, some matters are put beyond the reach of legislative or executive authority. The distrust of the arms of the state is rooted in several concerns about the operation of modern democracies.

First, rights are meant to protect electoral minorities, whether racial, ideological or other, from domination by a majority that controls the legislative and executive branches of government. Democracy is more than simple majoritarian decision-making.³¹³ Rather, democracy should protect the interests of those who cannot gain control of, or significantly influence, the political mechanisms that determine how they are governed.

Second, rights are meant to protect groups that lack political influence. People who are poor, uneducated or from remote geographic regions often lack political power and representation and therefore rely on rights protections to ensure that their interests are not suppressed by those who more easily grasp the reins of power.

Third, rights are meant to protect against the depredations of unresponsive or self-interested politicians. Even in a healthy democracy, it is not possible for the electorate to hold a politician accountable for every one of his or her actions or decisions. Therefore, a nation may decide that certain freedoms should be permanently protected rather than remaining vulnerable to political discretion.

These reasons for entrenching rights in a constitution—protection of fundamental interests and values, promotion of human dignity, protection of minorities, protection of the politically powerless and protection against unresponsive government—apply equally to economic, social and cultural rights as to civil and political rights. In fact, the rights to food, water, health care, education and work touch upon the most basic concerns of populations experiencing severe poverty. Many Zimbabweans would consider the establishment of conditions to provide for their daily sustenance to be the most fundamental obligation of the government. Moreover, a breakdown in the functioning of electoral democracy is as likely to affect economic, social and cultural rights as it is to affect civil and political rights. For example, a democratically elected majority may use the allocation of public resources as a political weapon in the same way as imprisonment without charge or limitations on the freedom of association. Vulnerable minorities may be no better equipped to protect against government incursions into their economic lives than they are to defend their personal liberties.³¹⁴

II. Breaking with Zimbabwe's Past

The drafting of a new constitution offers Zimbabwe the opportunity to reestablish national priorities and break from past patterns of destructive governance. The Lancaster House Constitution is widely recognised as a deficient document that perpetuated many of the injustices of the colonial era. The inclusion of economic, social and cultural rights in a new constitution is an important component of a broader transformation from an authoritarian past to a future of justice and greater prosperity.

The colonial and post-colonial periods in Zimbabwe were characterised by deprivation of

³¹³ Scott at pp.135-36.

³¹⁴ Louise Arbour, "Economic and Social Justice for Societies in Transition," Second Annual Transitional Justice Lecture, New York University School of Law Center for Transitional Justice, October 25, 2006.

the means of human sustenance and advancement. Black Africans were dispossessed of their land and labour under minority white rule, leaving many without the ability to meet their most basic human needs or participate in the cultural life of their communities. Although the establishment of majority rule brought dignity and justice to a previously disenfranchised and disempowered population, the promises of economic justice and prosperity have not yet been realised. The complete collapse of the Zimbabwean economy in the past decade has created a new marginalised majority that is characterised by hunger, disease and homelessness. Moreover, most Zimbabweans are denied the benefits of the nation's natural and financial resources. Attempts to reverse the unjust accumulation of land and capital by the white minority during the colonial era have resulted in the emergence of a new economic elite rather than the empowerment of ordinary Zimbabweans. Including economic, social and cultural rights in a new constitution is one important step in bringing economic justice to the people of Zimbabwe.

As noted above, rights protections are also particularly important to minority groups that cannot rely on the political process to protect their interests. Zimbabwe contains a number of ethnic and linguistic minorities. Besides the sizable Ndebele community, which has secured significant representation in Parliament, a number of smaller ethnic groups including the Kalanga, Nambya, Tonga, Venda and Suthu cannot count on political representation at the national level. Additionally, women, youth and the disabled have historically been underrepresented in Zimbabwean political circles. These groups have often been neglected in the implementation of state economic programmes and would benefit greatly from guarantees of justiciable economic, social and cultural rights.

Constitutions can be instruments of societal transformation.³¹⁵ The drafters of the South African Constitution and justices of that nation's Constitutional Court have been explicit about the role that economic, social and cultural rights can play in a transition from an authoritarian past to a "caring and socially just society."³¹⁶ In a case where the Constitutional Court considered the right to emergency medical care, Justice Chaskalson wrote:

We are living in a society in which there are great disparities involved. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. . . . A commitment to address [these conditions], and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.³¹⁷

The promise of positive societal transformation that was offered at Zimbabwe's independence has yet to come to fruition. A constitutional drafting process offers renewed opportunities, however, to fulfill the promises offered after independence, and properly protecting economic,

³¹⁵ Sunstein at p. 4.

³¹⁶ *The Minister of Finance and Another v. Van Heerden*, Constitutional Court of South Africa, Case No. CCT63/03, July 29, 2004.

³¹⁷ *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)*, Constitutional Court of South Africa, Case No. CCT32/97, November 27, 1997.

social and cultural rights in a new constitutional order should be part of that transformative process.

III. Other Benefits of Incorporating Economic, Social and Cultural Rights into the Constitution

A. Giving Expression to Societal Values

A constitution is important not only because of its legal power in the courtroom, but also because it is the foundational document of the nation that can give voice to the goals, aspirations and fears of the people. A nation that feels its collective interests are embodied in a constitution will embrace the document with a sense of pride and ownership. In contrast, when the document is seen to address the concerns of only a segment of society, the vast majority may become complacent or hostile.

The Inter-Party Political Agreement signed on September 15, 2008 commits the inclusive government to facilitate a constitutional reform process that is “owned and driven by the people.”³¹⁸ Over the past decade, Zimbabweans have made clear their desire to see justiciable economic, social and cultural rights entrenched in a new Constitution of Zimbabwe. In 1999, when the state-sponsored Constitutional Commission conducted a nationwide public consultation, Commissioners recorded widespread support for constitutional protection of the rights to shelter, education, and health, among others.³¹⁹ In February 2008, a broad coalition of Zimbabwean civil society organisations and members of the public adopted the Zimbabwe People’s Charter, calling for, among other things, the drafting of a new constitution with a “justiciable Bill of Rights that recognises civil, political, social, economic, cultural and environmental rights.”³²⁰ A constitution-making body that is obligated to oversee a “people-driven” process of constitutional reform cannot ignore overwhelming popular support for the constitutional protection of economic, social and cultural rights.

Currently, most Zimbabweans are concerned with their struggle to provide minimal daily sustenance. A new constitution that omits economic, social and cultural rights, or affords those rights a status inferior to that of civil and political rights, risks alienating the Zimbabwean people by sending a signal that their priorities are not shared by the country’s political leaders. In contrast, a new constitution that entrenches economic, social and cultural rights in a justiciable Bill of Rights informs Zimbabweans that remedies exist when their rights are violated, empowers the public, and communicates that the government is responsive to their needs.

B. Promoting Participation in Public Life

Rights inspire people to become active citizens who struggle to overcome personal challenges and societal ills. The mere existence and awareness of rights can combat civic apathy and help

³¹⁸ September 15 Agreement, art. 6, Preamble.

³¹⁹ Constitutional Commission of Zimbabwe, “What the People Said,” October 22, 1999. Editions for all ten provinces of Zimbabwe.

³²⁰ People’s Charter, section 3, Constitutional Reform.

individuals identify ways to improve their lives. As one commentator wrote, “The discovery of injustice as such depends upon the feeling that one has rights.”³²¹

Further, benefits result from efforts to litigate abuses of guaranteed rights. The organisation and cooperation required to litigate rights cases can create collaborative networks and coalitions that have benefits beyond the outcomes of a particular court case.

Additionally, rights litigation can help expose the underlying causes of poverty and inequality, and create broader movements for rights realisation. The process of litigation may lead to favourable legislation or administrative action even if the result in court is unfavourable.³²² In short, litigation can put rights in context, providing tangible evidence of the difficulties faced by individuals and groups.³²³

Finally, placing economic, social and cultural rights in a constitution can encourage individuals and groups to make direct demands of the government. At times, members of the public may feel that they have no basis for challenging an executive action or legislative policy that is ineffective, improper or unjust, but not illegal. Making economic, social and cultural rights matters of constitutional concern will provide marginalised groups with a platform for presenting their grievances to those in power.

C. Guiding Legislation and the Executive

Incorporating economic, social and cultural rights into a justiciable Bill of Rights can influence the legislative and executive branches in ways that benefits marginalised groups. The entrenchment of a right in a constitution offers immediate persuasive influence, as the constitution is an authoritative document describing the will of the people. Legislators, ministries and bureaucracies in functioning systems generally avoid actions that may appear to contravene the constitution.

Political decision-makers will likely be influenced to a relatively larger degree when laws, administrative actions or government programmes can be reviewed by a court or challenged by citizens. Providing individuals with the ability to demand rights protections, including through constitutional challenges, will affect the actions of legislators, ministers and bureaucrats more than merely mentioning a right in the constitution.

Challenges to government policies involving constitutional rights frequently attract considerable media attention. Even when a court case or public campaign fails to produce a favourable ruling or the intended policy change, the pressure caused by media attention and increased awareness of issues related to economic, social and cultural rights can encourage government officials to

³²¹ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *Hastings Law Journal*, Vol. 805 (1988) pp. 814-53.

³²² Jorge Contesse and Domingo Lovera Parmo, “Access to Medical Treatment for People Living with HIV/AIDS: Success without Victory in Chile,” *International Human Rights Journal*, Vol. 8 (2008) p. 143 [hereinafter Contesse].

³²³ Philip Alston, “No Right to Complain About Being Poor: The Need for an Optional Protocol to the UN Covenant,” *The Future of Human Rights Protection in A Changing World: Fifty Years Since the Four Freedoms Address* (Asbjorn Eide & Jan Helgensen eds., 1991) pp. 91-92.

consider the issue in question.³²⁴

D. Promoting Accountability and Transparency

Justiciable economic, social and cultural rights make the state justify policy approaches that affect the most impoverished and disenfranchised. Knowing that a court can review the reasoning behind a government programme or action may lead legislators and government officials to more rigorously analyze competing options and bypass policy choices driven by overtly political or personal reasons. As one commentator has noted:

A central deficiency of the present order is that the economic case for a government programme, if it is made at all, is made at the level of slogan and newspaper headline, and, occasionally, at the not much less superficial level permitted by the constraints of parliamentary procedure. Nothing requires the case to submit to searching scrutiny. Even if the constitutional review of the kind suggested here proved to have no substantive bite at all—even, that is, if it resulted in the annulment of not a single programme—the procedural benefits would be immense. The knowledge that any government programme could be summoned into court for searching scrutiny would force its authors closely to articulate their reasons for dismissing the objections and the alternatives to the programme, and precisely to articulate the reasons that link evidence to decision, premises to conclusion.³²⁵

The jurisprudence of the South African courts offers a powerful example of how litigation of economic, social and cultural rights can promote transparency and accountability.³²⁶ For example, in *Minister of Health v. Treatment Action Campaign*, a case discussed in Chapter Four, the Constitutional Court required the state to provide its justification for restricting the use of a drug intended to prevent mother-to-child transmission of HIV. The state was unable to do so, and the Court ruled that the distribution of the drug had to be liberalised.³²⁷ In the setting of another country that did not have economic, social and cultural rights in its constitution, the state may have been able to maintain such a policy without ever having to reveal the reasoning upon which the policy was based.

IV. Conclusion

The commitment of Zimbabwe's people and political leaders to the drafting of a new constitution offers a unique opportunity to delineate societal values, reform systems of governance and satisfy Zimbabwe's international obligations. The inclusion of economic, social and cultural rights in a justiciable Bill of Rights is an important part of this process, and one that Zimbabweans have consistently demanded.

³²⁴ Contesse at p. 152.

³²⁵ Mureinik at p.472.

³²⁶ Davis at p. 710.

³²⁷ *Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, 5 SA 721, July 5, 2002, available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=403050.

Modern constitutions give legal status to certain rights and freedoms that are considered to be necessary to fulfill the promise of citizenship in a democratic society. Rights are intended to protect the interests of electoral minorities, marginalised groups and others that cannot grasp the reins of political power. Rights are also placed in a constitution to defend against the depredations of unresponsive or self-interested political forces.

Past and present realities in Zimbabwe dictate that economic, social and cultural rights be granted the same recognition and status as civil and political rights in a new constitution. Zimbabwe's colonial past created deep economic and cultural divisions that persist even decades after independence. Today, ordinary Zimbabweans face enormous challenges in their efforts to secure the basic means of human sustenance. Indeed, many lack adequate housing, food, education, health care and employment. Government bears a primary responsibility to ensure that its people are able to access these basic necessities, but people often feel helpless in the face of government inactivity or injustice. The inclusion of economic, social and cultural rights in a new Zimbabwean Constitution would empower citizens to demand just and responsive conduct by all branches of government.

Besides benefiting litigants, the incorporation of economic, social and cultural rights in a new constitution would provide a number of benefits to Zimbabwe. The inclusion of these rights would give expression to the values and priorities expressed by the people of Zimbabwe and thus build confidence in the government. Moreover, enshrining such rights would promote participation in public life by giving individuals and groups a platform for united struggle against societal problems. Finally, the constitutional entrenchment of economic, social and cultural rights would create a culture of transparency, accountability and responsiveness in government, by requiring political leaders to justify policy decisions that affect vulnerable groups and by providing citizens with grounds for demanding action by government.

Zimbabwe's new constitution could potentially be the centrepiece of a broader societal transformation from an authoritarian past characterised by injustice and deprivation to a future of freedom, prosperity and respect for human dignity. The inclusion of economic, social and cultural rights in a justiciable Bill of Rights is an essential component of such a transformative document—and is something that the people of Zimbabwe deserve.

This report is intended to inform the constitution-drafting process in Zimbabwe. It contends that the inclusion of economic, social and cultural rights in a justiciable Bill of Rights is an essential component of a new Zimbabwean Constitution. The report examines Zimbabwe's obligations, under international law, to respect, protect and fulfill human rights and outlines different options for constitutional protections of such rights. It also offers a detailed analysis of six economic, social and cultural rights recommended for incorporation in a new constitution: the rights to work, food, housing, health, education and culture. Finally, the report describes the many benefits of enshrining economic, social and cultural rights in a constitution.

Universal Declaration of Human Rights

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

African Charter on Human and People's Rights

“All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”

Zimbabwe People's Charter

“Social and Economic justice [is] a fundamental principle that guides a new people driven constitution and in particular the specification of the people's social-economic rights in the Bill of Rights.”

