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Is state consent necessary for the admissibility of individual communications in relation to the ICESCR?

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Summary

This thesis seeks to examine the interplay of the theory of equal sovereignty between states and justiciability of human rights, in particular the right to health, as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The essay contains an overview of the theory of sovereignty, divided into its two main paradigms of thought, namely universalism and particularism. This to provide a foundation for further discussion on the impact of theories on sovereignty on justiciability and enforcement of human rights. They are intertwined because of the assertion of universality of human rights - meaning that they are applicable to every human on earth, no matter what jurisdiction he or she resides in - collides in quite a considerable way with the principle of equal sovereignty. This, since a sovereign state is contended to have the right to govern its domestic affairs without interference of the international community.

By accounting for the history of theory on sovereignty and global order, as well as integrating two modern theories on the same subject, the legal framework of the ICESCR is questioned, in relation to its application of state sovereignty. Modern universalist theories on sovereignty forces us to question whether it is possible to maintain that state consent is necessary for declaring individual communications (regulated in the optional protocol to the ICESCR) admissible before the Committee on Economic, Social and Cultural Rights. This because, by some academics, human rights of a socio-economic nature are argued to be constitutive of sovereign authority, hence the formerly full autonomy practiced by a state declared sovereign is not accepted as legally justifiable any longer by all. A proportionate intervention in relation to a violation of the ICESCR should be the *justiciability intervention*, which enables the ECOSOC and the Committee

on Economic, Social and Cultural Rights to effectively monitor the implementation of the Covenant.

Sammanfattning

Denna uppsats syftar till att undersöka samspelet mellan principen om jämbördig suveränitet stater emellan och möjligheterna för rättslig prövning och verkställighet av mänskliga rättigheter. I synnerhet undersöks rätten till hälsa, såsom den redogörs för i *International Covenant on Economic, Social and Cultural Rights*.

Uppsatsen innehåller en sammanfattning av suveränitetsteorin och dess klassiska uppdelning i universalism och partikularism. Denna redogörelse anses nödvändig för att kunna fortsätta diskutera den inverkan som suveränitetsteorin haft på möjligheterna för rättslig prövning och verkställighet av mänskliga rättigheter. Dessa koncept är sammanflätade på grund av uppfattningen att universaliteten av mänskliga rättigheter, det vill säga att de är gällande i förhållande till alla människor på denna jord oavsett vilken jurisdiktion de befinner sig i, kolliderar med principen om jämbördig statlig suveränitet. Detta eftersom att en suverän stat påstås ha rätten att handha sina inhemska förehavanden utan inblandning av det internationella samfundet.

Genom att redogöra för suveränitetsteorins historia och försök till global organisering av tidigare inomstatliga förehavanden, samt inkludering av två moderna teorier i samma fåra, så ifrågasätts det legala ramverket kring ICESCR, i relation till dess uppfattning av statlig suveränitet. Modern suveränitetsteori av den universella skolan tvingar oss att ställa frågan huruvida det är möjligt att uppehålla kravet på statligt samtycke för att en individuell kommunikation (reglerad i *optional protocol* till ICESCR) ska förklaras giltig av kommittén för ekonomiska, sociala och kulturella rättigheter. Detta på grund av att mänskliga rättigheter numera, av vissa akademiker, argumenteras vara konstitutiva i förhållande till suveränitet. Således är det ursprungliga antagandet att fullständig autonomi åtnjuts av en påstådd suverän stat inte längre juridiskt hållbart till fullo. Ett proportionellt

ingripande när en rättighet i ICESCR möjligen är kränkt, borde vara 'ingripande till förmån för rättslig prövning', vilket möjliggör för ECOSOC och kommittén för ekonomiska, sociala och kulturella mänskliga rättigheter att på ett effektivt sätt övervaka implementeringen av ICESCR.

Abbreviations

ECOSOC	Economic and Social Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	International Governmental Organisation
IILJ	Institute for International Law and Justice
UN	The United Nations

1 Introduction

After studying international law from different perspectives in my elective courses, at the end of my masters degree of law at the University of Lund, there was a concept that still had not found a place to rest within me: the concept of sovereignty. Sovereignty is often dealt with as a matter of fact, objectively, a legal concept just like anything else one might encounter when studying law. It is a prerequisite for international law because of the classic assumption regarding the nation-state being the main actor in international law and as the sovereign authority it is free to do as it wishes within its jurisdiction.¹ However, regardless of this, sovereignty is very difficult to define in its ever-changing nature and even more so in the globalised world we live in today.

The hypothesis that began to formulate within me, was that international lawyers are not capable of defining sovereignty – and other academic disciplines dealing with sovereignty, such as international relations, might not be better equipped for the task either – because sovereignty *is not a matter of fact*. It is not possible to dissect sovereignty into its empirical building blocks, just as less as one can dissect a human being and detect everything that makes us human. It is logical really; international law has been keen to view the state as an individual and when dissecting the “physical” state as such, one might be able to understand why a state looks like a state, but not why and how it should act in every given situation, which is of course the same for a human being.³

Sovereignty, in itself, is an interesting academic debate, but usually heavily theoretical. It struck me as interesting to think more on sovereignty in

¹ *Case of S.S. Lotus*, Publications of the Permanent Court of International Justice, Series A. – No. 10, September 7th, 1927, Collection of Judgements, p. 18: “[...] the first and foremost restriction imposed by international law upon a State is that [...] it may not exercise its power in any form in the territory of another State.”

³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 28.7/2/2008 (www.iilj.org), p. 35.

relation to justiciability and enforcement mechanisms in international law (with a focus of socio-economic human rights). This because the principle of equal sovereignty always seems to show up as an obstacle for the efficiency of international law. It is understood by the international community that in order to effectively deal with problems of a global nature, trans-state relations are needed. My own understanding of international law though, is that political will is always stronger than arguments based on international law, because of the trump card held by nation-states – namely the principle of equal sovereignty. Also, one must consider that the power of the trump card gets is relative to the power of the state in question.

So, in order to truly evaluate justiciability and enforcement mechanisms, chapter 2 gives a thorough understanding of the two paradigms in sovereignist theory: particularism and universalism. This to serve as a fundament for further discussion on justiciability in chapter 3 and 4. This thesis will take aim at socio-economic human rights and the scope of the essay will therefor be to evaluate the universalist aspirations of socio-economic human rights, but critically forcing sovereignist theory into the debate, to paint a fuller picture of justiciability of socio-economic human rights. The question boils down to whether state consent is necessary for the admissibility of individual communications to ECOSOC when respect for human rights are argued to be constitutive of sovereignty itself?

The socio-economic rights will be narrowed down to the right to health in the International Covenant on Economic, Social and Cultural Rights. It will serve as an example for discussing the relativity of socio-economic rights and the problems that it causes in relation to justiciability.

1.1 Literature and method

The purpose of this thesis is to effectively integrate modern theory regarding sovereignty, into the debate on justiciability of socio-economic human rights. In order to accomplish that, a thorough account of sovereign theory is

needed, both historically and modern perspectives, to lay the groundwork for further discussion on the linkage between sovereignty and justiciability of socio-economic human rights.

Chapter 2, ‘Sovereignty in theory’, 2.1.2 – 2.1.4 describes the great divide of international law, the one between universalism and particularism, using mainly one source of information: the New York University School of Law’s Institute for International Law and Justice Working Paper, written by Armin von Bogdandy and Sergio Dellavalle, named ‘Universalism and Particularism as Paradigms of International Law’. The paper provided for a main part of the information needed for chapter two, since the main purpose of the IILJ working paper is to in brief present the debate of international law over time as unbiased as possible, not including personal opinions until the very end of the paper, in chapter five. In other words, it is not a publication written with a goal of arguing for a certain cause, rather to give account of the history of international law without picking sides. Although history obviously can be subjected to distortion in preference for a certain opinion, I deem the quality of the information in the IILJ working paper to be well up to standard for the purpose of my thesis. The vast number of sources in the IILJ working paper is also important to consider, because it helps to guarantee the scientific value of my thesis, since the IILJ working paper is the primary source for my account of universalism and particularism. For this reason, I found it of lesser importance than in many other situations to collect alternative sources to protect chapter two from suffering from unbalanced information. I believe that the decision is strengthened by the validity and expected quality of the source, since New York University School of Law’s Institute for International Law and Justice is associated with renowned experts in the field of international law.⁷

In chapter 2.2 the objective is the opposite. The theory of *the New Sovereignists* from International Studies Quarterly and *the Disaggregated State* from Anne-Marie Slaughter’s book ‘A New World Order’ was chosen

⁷ See http://www.iilj.org/aboutus/faculty_committees.asp, 2013-07-19, 10:49.

to articulate the differences between particularist, respectively universalist thought in the most obvious way possible. By adding this section, I wanted to open up for the possibility to discuss a global order already operating (the International Covenant on Economic, Social and Cultural Rights, more information on that below), in direct relation to two theoretical views on global order, which are each other opposites.

The main purpose of chapter 3, ‘the Right to Health – a Human Right Worthy of Universal Jurisdiction’, is to provide for basic understanding of the ICESCR, with a focus on the country reporting system and individual communications. To put it differently, the work of ECOSOC and the Committee on Economic, Social and Cultural Rights. The main source of information is therefore the Covenant itself and publications from U.N. organs connected to the Covenant.

To sum up, the thesis is relying on academic publications on theories regarding sovereignty and global order and to some extent international law substantiated by the ICESCR and ‘soft law’ connected to the Covenant. The material is used to provide an understanding of the chasm dividing international legal theory in the debate on sovereignty and global order, to enable a discussion on what modern sovereign theory might provide for in strengthening justiciability and enforcement of socio-economic rights, mainly the right to health (ICESCR article 12). That analysis is dealt with in chapter 4.

2 Sovereignty in theory

2.1 Terminology

This chapter serves to give an understanding of the terminology used when sovereignty is discussed, both in history and in modern times.

2.1.1 Particularism

In order to grasp a particularist view on global order and specify sovereignty with a certain definition within particularism, there are two pillars on which this theory rests (along with the different sub-categories belonging to particularism as well):

1. “order [is] possible only within the particular polity”.⁸
2. “a polity is only viable if particular”.⁹

So, in a particularist view the world comprises of many different polities, made particular by its members, their shared “experience” of some sort, exclusive for that particular polity.¹⁰ The second pillar tells us that if this particularity is not found, then it is not a *particular polity*. The first pillar is quite self-evident, but it might need clarification in as much as it cannot extend to the whole of human kind.¹¹ That would be a universalist line of thought, which will be dealt with further on in the essay.

A world made up by particular polities, paint the picture of a conflicting co-existence between a large numbers of islands of self-interest. It is important though to distinguish that the particularist in general takes a holistic view on

⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 28.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized

the polity's interest.¹² The individual takes a step back in particularist theory to the advantage of the state.

We now turn to three sub-categories developed under the particularist paradigm, namely realism, nationalism and hegemonism.

2.1.1.1 Realism

Particularist realism boils down to the belief that “politics is nothing but struggle for power”¹³. The realistic approach has been discussed for many years, starting with Thucydides (460-400 b. Chr), picked up by Machiavelli (1469-1527) and in modern times elaborated on by Hans J. Morgenthau.¹⁴

The contention that all politics is a struggle for power is a graspable theory in external politics, since the international arena is considerably more lawless than the national arena, but realists have always struggled with dissecting internal politics by the same formula.¹⁵ Applying the same politics/struggle-assertion to nation-states, which in general are governed by the rule of law to a much greater extent than the international community, the realists struggle to hold the theory together.¹⁶

This in-built problem of realism resulted in the development of “structural realism” or “neo-realism”, which limited its focus to the international arena and quite creatively erased the problem of classical realism.¹⁷ Morgenthau was one of the founders of neo-realism and through his contribution to the

¹² *Ibid.*

¹³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 29.

¹⁴ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 29-30.

¹⁵ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 29.

¹⁶ *Ibid.*

¹⁷ Slaughter, *supra* note 5, at 30 as cited in IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 29-30.

debate, the domestic arena was left out and neo-realism focused exclusively on the most hostile state relations and their organisation of the same.¹⁸

2.1.1.2 Nationalism

Nationalism provides a clear answer to the particularity of a polity that particularism depends on. A particular *history*, *destiny*, *culture* or *ethos* links the individuals together to the extent needed for a particular polity in a particularist sense.¹⁹ The realists' problem with explaining differences between external and internal policies, find a probable solution in the nationalist theory, where the particular factor holding the state together, allows for the rule of law to prevail in the domestic arena, but not in the global.²⁰

Nationalism is centred on the self-sufficient state and the theory as such “justifies the quest for solidarity and inclusion inside as well as collision and exclusion outside”.²¹ This might have worked in theory before globalization started, but in modern times when states are ever more linked to each other, nationalism as a particularist theory is more difficult to uphold.²² This insight paved the way for hegemonism.²³

2.1.1.3 Hegemonism

Based on the idea that some states enjoy a more powerful position than others, the idea of the hegemon in international relations and international law emerged. Carl Schmitt put forward a theory in the 1930s, the so-called “large-range-order” (*Großraumordnung*). The theory took as its starting

¹⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 30.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 31.

²³ *Ibid.*

point the challenges of the European nation-states at that time and proposed that in order to effectively deal with the same challenges, a global order should be based on a few great states.²⁴ The hegemon, i.e. one of the great states, should have the possibility and resources to bring order to a greater extent than merely within the borders of that state according to the theory of “large-range-order”.²⁵

The world would then comprise of several different “large-range-order” hegemonies and between these the principle of non-intervention would apply.²⁶ The particular polity of the “large-range-order-State” would be defined, according to Schmitt, as an “ethnically and ideologically homogenous group”, but in his hegemonic interpretation of the particularist-holistic paradigm, the particular polity could extend beyond the nation-state, due to a wider margin incorporated into the definition of the particularity.²⁷

Although hegemonism in theory presents a global order, it is important to remember that it is not *universal* and in Schmitt’s mind “[n]o universal law or order is recognized [...] to be more than a mere deceit.”²⁸

As is pointed out by Armin von Bogdandy and Sergio Dellavalle in their IILJ working paper: “[a]mong the variants of the particularist-holistic paradigm, hegemonism appears to be most in tune with the challenges of globalisation [...]”²⁹. For that reason a brief summary of their presentation on US-American neoconservative movement (further on: neocons) will be included here, since it is a good example of modern hegemonism.

So in what way have the neocons brought something new to the table? Two aspects on the neocons vision of global order should be mentioned:

²⁴ *Ibid.*

²⁵ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 31.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

1. neocons have no theoretical boundary on the hegemon's usage of power,
2. the democratic principle is the axis of the theory, which is used to justify intervention in non-democratic states to install the hegemon's interest and it also provides as the main argument for scepticism of international law.³⁰

These fundamental principles of the hegemonistic theory of the neocons leads to a few interesting arguments put forward by Jeremy A. Rabkin.³¹ Bogdandy's and Dellavalle's description of his attitude towards international law is telling: "[i]n Rabkin's view, international law is an instrument for restraining the well-motivated and legitimate national interests of the United States, as the paladin of the free world, and of all other liberal and democratic nation-states".³² The principle of sovereign nation-states is held high and some of the neocons deny international institutions any legal effect at all.³³ The structure of international institutions, they argue, which invite non-democratic states in the decision-making procedure, is an obstacle for the battle of the liberal hegemon to effectively defend its ideology.³⁴

What is interesting with the neocons is that with its most extreme advocates, the subordination of the neocons under the particularist theories becomes questionable. The first criteria of particularism are dislodged; the particular polity is hard to define and it is explained in the following section.

Deepak Lal removes the theoretical boundaries of hegemony completely and insists on the possibility of the United States hegemonic order becoming

³⁰ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 32 and 35.

³¹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 32.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

global.³⁵ However, Lal does not contend that a universality of values (such as fundamental human rights) is constitutive of the hegemonic order of the United States.³⁶ There are neocons that interestingly enough do propose such a universality of values. Robert Kagan argues that liberty is a principle shared universally by all human beings.³⁷ With those basic assumptions comes the right, according to Kagan, to intervene in domestic affairs formerly protected by the principle of equal sovereignty, if the intervention serves to protect a fundamental right, such as freedom.³⁸ With Kagan's contribution to the neoconservative line of thought, hegemony is arguably a particularist theory, but with a universal aim, based on the assumption of universal values shared by all humans.³⁹ This makes the particularity, not so particular anymore.

2.1.2 Universalism

Leaving the particularistic paradigm, which only give credits to theories of international law where the ambition is not universal, focus now shift to universalism. A paradigm based on the assumption that all human beings share a set of values and upon these values a universally binding international law can be built.⁴⁰

Much like with particularism, it is possible to explain the gist of universalism by dividing the theory in its two sub-categories: the metaphysical tradition and contract theory.⁴¹

³⁵ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 36.

³⁶ *Ibid.*

³⁷ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 37.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 37-38.

2.1.2.1 The metaphysical tradition

The metaphysical tradition dates further back than contract theory, which is why it is dealt with first.⁴² Before Christianity became a factor in Western philosophical thought, the universal laws that arguably existed, were the laws of nature.⁴³ The philosophical conviction that the laws of nature were universal and divided from the laws of human were developed in ancient Greece and Rome.⁴⁴ The laws of humans were at this time still thought to be specific for every different polity.⁴⁵ Stoicism introduced universality of the laws of humans later on, with the interesting addition that in order to have legally valid law in a specific polity, it had to be in accordance with the universal law, which in theory were hierarchically placed above internal laws of polities.⁴⁶

However, it was with the birth of Christianity that a true universalist thought began to formulate.⁴⁷ The universality of the Stoics never reached more than theoretical interest, but the strong connection Christianity in short time developed with the political and legal dimensions of societies, forced the universalist thought to be materialized since Christianity was based on the idea of a community encompassing all humans.⁴⁸

Firstly, this inspired the idea of a universal monarchy, which proved to be impossible in reality because of Christianity – despite its ambitious campaigning – actually was not the religion of choice all over the world.⁴⁹ The idea of a universal monarchy evolved into *jus inters gentes*, which is to be understood as international law based on shared principles, derived from

⁴² IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 37.

⁴³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 38.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 38-39.

⁴⁹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 39.

Christianity.⁵⁰ However, it became evident that the direct linkage to Christianity and international law, would not truly be international as long as the linkage persisted, because as mentioned earlier not that many people are in fact Christians.⁵¹ The linkage was broken with the theories developed by Hugo Grotius, who placed the universality in the very nature of humans.⁵² As Bogdandy and Dellavalle put it when describing Grotius' contribution to universality: "[...] international law can be seen as the common law of humankind [...]".⁵³ The theories of Grotius also serve as a fundament of the modern theory of the international community.⁵⁴

Last, but not least, some light must be shed on the biggest flaw of the universalist approach under the metaphysical sub-category, namely the fact that a global community with universal principles shared by all human beings is harder to prove, than it is to dream of.⁵⁵ This is of course a big problem for these theories, since its core assumption is not yet proved to be true.⁵⁶

2.1.2.2 Contract theory

Thomas Hobbes introduced contract theory, in which he reversed the prior assertion that the society was superior to the individuals living within it and placed the individual in centre as the bearer of fundamental rights and acknowledged the individual as owner of the right to give legitimacy of authority.⁵⁷ This is what gave name to theory, namely the contract between the individual and the state, enabling for the latter to take on the duty of

⁵⁰ *Ibid.*

⁵¹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 39-40.

⁵² IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 40.

⁵³ *Ibid.*

⁵⁴ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 41.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

guaranteeing a better life for the individual and her fellow citizens.⁵⁸ Contractualism was later developed by Immanuel Kant, into a theory with universalist aspirations.⁵⁹

2.1.3 Democratic legitimacy

2.1.3.1 Globalisation and public international law

The world is getting more globalised than it ever has been before and globalisation is not easy to define, the concept includes a range of factors. For international law and especially for sovereignty, it suffices, for the scope of this essay, to say that the core meaning of globalisation is that the traditional nation-state has been transformed into something much less undefined.⁶⁰ When globalisation partly erases the boundaries within which sovereignty and democratic legitimacy has found a workable balance, this creates a problem.⁶¹ It is argued that it might create a deficit of popular sovereignty⁶² in the arena of international law, which will be explained in the forthcoming sections.

Traditionally, there are several factors, on which the academic community have to a large extent agreed upon, which is demanded of a state in order to be considered democratic.⁶⁴ Governing institutions must derive their power from general, free, equal and periodic elections in which the citizens have the right to vote.⁶⁵ Furthermore, the rule of law needs to be respected and the range of the same has to be controlled with a guaranteed possibility of

⁵⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 41-42.

⁵⁹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 42.

⁶⁰ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 12.

⁶¹ *Ibid.*

⁶² "Under a democratic constitution, popular sovereignty is nothing but the realisation of democracy on which the legitimacy of all public power rests", IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 12.

⁶⁴ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 14.

⁶⁵ *Ibid.*

replacing the government.⁶⁶ In a globalised world where a large portion of the legally binding decision that are being taken, emanate from outside the nation-state, the necessary criteria demanded by classic democratic theories, evolved in relation to a internationally detached sovereign state, are hard to maintain.⁶⁷

The scope of this essay does not include democratic theory as such, but I will allow myself a minor exception, explaining the debate on who is the primary subject of democracy and what is democracy's main purpose.

With regard to the subject of democracy, particularists often argue that theoretical considerations on democracy should define the people as a macro-subject, which is called the holistic-concept of democracy.⁶⁸ Universalists on the other hand, usually considers democratic theory to emanate from the individual and this view is called individual, civil or fundamental rights concepts of democracy.⁶⁹ The purpose of democracy is also debated and this discussion concerns whether democracy is about self-determination or whether democracy's primary task is to maintain control over the government, in whatever form it might exist.⁷⁰ The former opinion is called the emphatic or emancipatory conception of democracy, the latter the sceptical understanding of democracy.⁷¹

These above mentioned different points of references are necessary to have in mind when discussing democratic legitimacy, since depending on what fundamental values are put into the term democracy, the process of granting legitimacy might differ.

⁶⁶ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 14-15.

⁶⁷ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 9 and 14.

⁶⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 15.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

To sum up, globalisation is putting pressure on the prior definition of what was to be considered a legitimate democratic decision and international law is slipping further away from national parliaments, increasing the public nature of international law.⁷²

2.1.3.2 In-put/out-put legitimacy

What has been discussed in the previous section on democratic legitimacy is also defined as in-put legitimacy.⁷³ It is, in other words, legitimacy that derives from whatever theory on what is considered democratic as such. If the decision has been taken in accordance with democratic principles, whatever they may be, it is to be considered legitimate.

There is however a completely converse theory called out-put legitimacy.⁷⁴ This theory obviously considers the out-put of a decision as the most important factor.⁷⁵ If public international law effectively protects common interests, the out-put is motivating the decision to be considered legitimate, rather than depending on formal procedure, which is the case of in-put legitimacy.⁷⁶

2.1.3.3 Globalisation: the particularist vs. the universalist

In the previous sections the issue of globalisation has been dealt with in short, as have different theories on legitimacy. The two next sections will organize these different views of legitimacy into the two categories particularism and universalism.

⁷² Bogdandy and Dellavalle define public as: “[...] international law consists of increasingly more norms which bind a state irrespective of its consent”, IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 9.

⁷³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 14.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

2.1.3.3.1 Particularism: sovereign equality, informality and unilateralism

Particularist theories, generally speaking, do not try to find a way to deal with globalisation as it spreads, they rather try to slow it down or even stop it.⁷⁷ In its most radical form, particularism suggests a complete safeguarding of the principle of sovereign equality and simply advocates co-ordination between states.⁷⁸ This is based on the particularist assumption that democracy is only possible within a nation-state, i.e. a particular polity.⁷⁹

There are however particularist thoughts on allowing co-operation between states (co-operation is terminologically stronger than co-ordination), but still downplaying the role of international law.⁸⁰ International relations should be guided by the principle of informality, rather than organized under a legal framework.⁸¹ The idea is that if nothing is bestowed with binding qualities under international law, the national decision-making process is still in control and consequently the principle of democratic self-determination is respected.⁸²

A third particularist theory on responding to globalisation is unilateralism.⁸³ The state should act unilaterally in order to use globalisation to serve its own interests as much as possible.⁸⁴

⁷⁷ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 20-21.

⁷⁸ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 21.

⁷⁹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 20.

⁸⁰ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 21.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 22.

⁸⁴ *Ibid.*

2.1.3.3.2 Universalism: cosmopolitan law and state-centred integration

The most radical universalist proposition would be that of the cosmopolitan democracy, which is a federalist idea placing the former equally sovereign nation-states into a grander scheme where a supranational democratic instance is the venue for the creation of public international law.⁸⁵ A democratic world federation in other words.⁸⁶

Climbing a step down on the ladder of radicalism, there is the universalism idea of state-centred integration; a theory focusing on co-operation rather than full integration.⁸⁷ The nation-state should persist and close co-operation amongst nation-states is deemed satisfactory for meeting the challenges of globalisation, but still respecting the democratic principles, which are acknowledged to be best realized within the borders of a sovereign state.⁸⁸ The main argument in preference for state-centred integration over the cosmopolitan democracy, is the fear for setting up a framework in which despotism can grow to reach the entire world.⁸⁹

State-centred integration can be divided into two sub-categories: the unitarian model of legitimation and the pluralist model of legitimation.⁹⁰

In the unitarian model the democratic principle is asserted to be protected if decisions are being made: “*only* through the choices of the electorate”.⁹¹ This can be done in a direct manner through referenda where the complete citizenry has taken part in the decision or if the decision has been taken by elected bodies (as Bogdandy and Belleville describes the phenomena:

⁸⁵ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 22-23.

⁸⁶ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 23.

⁸⁷ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 24.

⁸⁸ *Ibid.*

⁸⁹ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 25.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

“chain of democratic legitimation”⁹². Applying this in the arena of international law the believer in the unitarian model would suggest international institutions comprised of a parliament elected in accordance with an unbroken chain of democratic legitimation or, if possible, equip the institution with a referendum.⁹³ Including other actors than those who can be traced back in the chain of democratic legitimation is not recommended in the unitarian model, since this would have a negative impact of the democratic legitimation of the decision.⁹⁴

The pluralist model on the other hand, objects to that last assertion of the unitarian model.⁹⁵ The fundamental rights understanding of democracy, which often entails the pluralist model, emphasizes the need of civic participation, since the fundamental democratic principle to pluralists is transparency and involvement.⁹⁶

2.1.4 Universal jurisdiction

Universal jurisdiction is a concept that has developed in international criminal law, which means that some offences are recognised as being of universal concern and therefore fall within the jurisdiction of every state, regardless of the nationality of who did it, the nationality of who the victim is and where the offence was committed.⁹⁷ Generally speaking the offences that attract universal jurisdiction is genocide, crimes against humanity and war crimes.⁹⁸ In other words it is offences that could be labelled as the worst

⁹² E. –W. Böckenförde, *Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie*, in *Festschrift für Kurt Eichenberg* 301 et seq., 315 (G. Müller ed., 1982), as cited in IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 25.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 26.

⁹⁶ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 26-27.

⁹⁷ *Solidarity in a Disaggregated World – Universal Jurisdiction and the Evolution of Sovereignty*, Nyst, Carly, *Journal of International Law and International Relations*, vol. 8, pages 36-61, 2012, p. 38.

⁹⁸ Nyst, Carly, p. 46.

offences that exists and even with that in mind the concept of universal jurisdiction is still a debated issue.⁹⁹

Universal jurisdiction is interesting because as Carly Nyst puts it: “[u]niversal jurisdiction has persevered in the face of a norm that should dispense with it – state sovereignty”.¹⁰⁰ Instead, Nyst argues, universal jurisdiction alters the definition of state sovereignty and that respect for human rights (and especially respect for international criminal justice) has become a constitutive element of international society.¹⁰¹ This line of thought is shared by Hallie Ludsin, who asserts that the government of a state: “[...] must fulfil duties necessary for abiding by the will of the people and acting in accordance with the common good”.¹⁰² If this requirement is not met, then the authority, i.e. the government of the state, loses some of its sovereignty and in effect legitimizes intervention in the state.¹⁰³ Nyst’s and Ludsin’s ways of thinking are similar, since they define state sovereignty as something that is earned in the international society, rather than fixed condition on which states can justify their domestic behaviour.

Another interesting aspect of Ludsin’s line of argument is how much sovereignty is to be considered as lost in relation to non-compliance or violation of human rights. Ludsin argues that “[...] governments have a duty to protect the human rights of their citizens”.¹⁰⁴ Exactly what is meant to be covered by the term ‘human rights’ is a difficult question, not answered completely by Ludsin,¹⁰⁵ although what is interesting for this thesis is that Ludsin does include some socio-economic rights into the definition.¹⁰⁶ Ludsin argues that, although socio-economic rights are much more debated than civil and political rights, some of the socio-economic rights are of such

⁹⁹ Nyst, Carly, p. 38.

¹⁰⁰ Nyst, Carly, p. 47.

¹⁰¹ Nyst, Carly, p. 47.

¹⁰² *Returning Sovereignty to the People*, Ludsin, Hallie, Vanderbilt Journal of Transnational Law, Vol. 46:97, pages 97-169, 2013, p. 119.

¹⁰³ Ludsin, Hallie, p. 119.

¹⁰⁴ Ludsin, Hallie, p. 123.

¹⁰⁵ For further discussion on this see: Ludsin, Hallie, p. 123-128.

¹⁰⁶ Ludsin, Hallie, p. 127.

fundamental value to human beings that in violating them the government of a state would lose some of its sovereignty.¹⁰⁷ To get back to the point, the amount of sovereign rights lost in violation of human rights should be proportionate to the violation in question. So while socio-economic rights might in some cases be a less grave violation of human rights and thus not justify humanitarian intervention, Ludsin adds:

“A representative government that violates its duties to the people on a much smaller scale retains sovereign authority in most areas and therefore most of its sovereign rights, *but not the right to demand non-interference in relation to those specific violations* [author’s emphasize].”¹⁰⁸

More on the impact on this contention will be discussed below in chapter 4.

2.2 Two contemporary theories regarding Sovereignty

This section will present two contemporary theories regarding sovereignty and its future definition and subsequently its preferred application. The impact of globalisation is the axis, on which modern theory of sovereignty spins around, which will be presented in the following. This is important to keep in mind because of the linkage between universal human rights and an ever-shrinking world, which is the focus of this thesis, in discussing justiciability and enforcement mechanisms of socio-economic human rights. The first section 2.2.1 will present *the new sovereigntists*, a school of thought I have labelled as radically particularist.¹⁰⁹ Section 2.2.2 will offer a description of Anne Marie Slaughter’s thoughts on what she has named *the*

¹⁰⁷ Ludsin, Hallie, p. 127.

¹⁰⁸ Ludsin, Hallie, p. 132.

¹⁰⁹ Goodhart, M, & Taninchev, *The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty*, International Studies Quarterly, 55, 4, pp. 1047-1068, S 2011, Political Science Complete, EBSCOhost, viewed 16 April 2013.

disaggregated state.¹¹⁰ Her theory is chosen by me since it contrasts that of *the new sovereigntists*, by being of a universalist nature. Although Slaughter's proposition is not strictly cosmopolitan (and therefore not diametrically opposite the thoughts of *the new sovereigntists*), but it has received scholarly attention as a probable universalist theory and not been dismissed as utopian, which is why I prefer it to more hard-core universalist theories.¹¹¹

2.2.1 The new sovereigntists

A group of American scholars has emerged as *the new sovereigntists* and their particularist definition of global order, with its fundamentals in popular sovereignty as arguably the only democratically justifiable means of state-governance, will be the first to take the stage in the small battle over sovereignty in this thesis.¹¹²

2.2.1.1 Popular sovereignty as the guiding principle

The new sovereigntists are radical in their safeguarding of popular sovereignty. The internationalized world of today and the global governance that entails it poses a problem to popular sovereignty since international law, with its disregard for constitutional principles, thrashes the chain of accountability and thus operates in a democratic deficit.¹¹³ In arguing this, they accede to the idea of popular sovereignty being the “dominant conception of democracy among political theorists and widely taken for granted by scholars as well as citizens”.¹¹⁴

¹¹⁰ *A new world order*, Slaughter, Anne-Marie, Princeton University Press, Princeton, New Jersey, 2005.

¹¹¹ See for example: *Human Rights, Global Justice, and Disaggregated States* – John Rawls, Onora O'Neill, and Anne-Marie Slaughter, Bernstein, Alyssa R., *American Journal of Economics and Sociology*, Vol. 66, No. 1, January, 2007; *Solidarity in a Disaggregated World – Universal Jurisdiction and the Evolution of Sovereignty*, Nyst, Carly, *Journal of International Law and International Relations*, Vol. 8, pages 36-61, 2012.

¹¹² Goodhart and Taninchev, p. 1047.

¹¹³ Goodhart and Taninchev, p. 1047.

¹¹⁴ Goodhart and Taninchev, p. 1051.

To spell it out even further, *the new sovereigntists* contend that international law emanating from sources other than constitutionally established national legislative organs undermines the popular sovereignty vested in the people of a certain sovereign state.¹¹⁵ In their most radical view, the very existence of international law, such as treaties and customary international law, does not even exist, since it is not emanating from a “legitimate coercive authority” elected by the popular sovereignty of a nation-state.¹¹⁶ The chain of accountability of international governmental organisations (IGOs), international courts and tribunals is too weak in the eyes of *the new sovereigntists* to be considered binding law.¹¹⁷

The internationalized world poses a threat to *the new sovereigntists* since popular sovereignty, i.e. the power of the people to govern their own state, might be eradicated if globalization continues to vest power into intergovernmental and supranational institutions, without constitutional support and (by extension) popular support.¹¹⁸ Or as Goodhart and Bondanella Taninchev explains Jeremy Rabkin’s (a follower of *the new sovereigntists* school of thoughts)¹¹⁹ view on sovereignty:

“[s]overeignty is first and foremost the means of saying no to outsiders; when governments can be intimidated into giving up sovereignty, individuals can be intimidated into giving up rights.”¹²⁰

The new sovereigntists are, by definition, concerned with in-put legitimacy, that is they argue on the basis that globalisation and international law might very well be called for in the modern world, but the effects of global governance (i.e. international law)

¹¹⁵ Goodhart and Taninchev, p. 1048-1049.

¹¹⁶ Goodhart and Taninchev, p. 1049.

¹¹⁷ *Ibid.*

¹¹⁸ Goodhart and Taninchev, p. 1050.

¹¹⁹ Goodhart and Taninchev, p. 1048-1047, see footnote 2.

¹²⁰ Goodhart and Taninchev, p. 1050.

still does not make it democratically legitimate.¹²¹ It is also interesting to note that *the new sovereigntists* think of globalisation and, by extension, global governance to be optional and since popular sovereignty might be severely damaged by globalisation, it should be avoided.¹²² This take on globalisation is not the only one that can be found. It has been argued that globalisation is an effect of American hegemony, or that capitalist interests drive it on, or to be more of a spontaneous matter without a subject in particular behind the steering wheel.¹²³

So, in line with what was discussed in section 2.1.4.3.1 above, *the new sovereigntists* particularist solution to global order, is to fall back on a concept that has been proven to work, namely democracy governed by popular sovereignty in a particular polity, which would be the nation-state. Only then is the interest of a nation-state's people safeguarded.

2.2.2 The disaggregated state

Anne-Marie Slaughter draws up a theory on modern international relations and seeks to redefine sovereignty with her concept of *the disaggregated state*.¹²⁴ The core of Slaughter's argument lies within her new conception of sovereignty, where the basic assumption that autonomy is the key ingredient of international relation between states, is pushed back by the assumption that sovereignty is really "the status and recognition to states in the international system to the extent that they are willing and able to engage with other states [...]".¹²⁵

¹²¹ Goodhart and Taninchev, p. 1051. Regarding in-put legitimacy, see section 2.1.4.2, p. 17-18 above.

¹²² Goodhart and Taninchev, p. 1056.

¹²³ IILJ Working Paper 2008/3 (History and Theory of International Law Series) Finalized 7/2/2008 (www.iilj.org), p. 16-17.

¹²⁴ Slaughter, Anne-Marie, p. 12.

¹²⁵ Slaughter, Anne-Marie, p. 267.

The concept of the disaggregation of the state is encouraging us to drop the notion of the unitary state, the state that presumably speaks in one voice, and instead apply the way we look at domestic governments when depicting a state in the international arena.¹²⁶ Slaughter argues that unitary states is a simplification of the true nature of a state and that all the institutions, with their different areas of responsibilities, must be recognised as sovereign in their particular field.¹²⁷

When embracing sovereignty as the concept of willingness and ability to engage with other states, thus eradicating the unitary state, it opens up possibilities for, what Slaughter calls, horizontal and vertical government networks.¹²⁸ The horizontal government networks would be one where counterpart national officials interact with each other in their specific areas of responsibility.¹²⁹ Vertical government networks would be when a supranational institution exists and counterparts within that institution interact with their national peers.¹³⁰ This is not strictly hypothetical in Slaughter's view, many relations of the abovementioned sort already exists, but they are prevented from their full capabilities because of the principle of equal sovereignty and the notion of a unitary state.¹³¹

I am going to focus on the juridical branch of *the disaggregated state*, since that is most relevant for this thesis, even though Slaughter's theory covers other areas of international relations. The horizontal and vertical networks of judges over the world, in both national and supranational courts, are forming a global community of courts, in Slaughter's view, rather than formal international legal system.¹³² The question of supranational courts and the delegating of actual sovereignty to them is actually dealt with caution. Slaughter openly admits that "vertical government networks should

¹²⁶ Slaughter, Anne-Marie, p. 12-13.

¹²⁷ Slaughter, Anne-Marie, p. 13.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Slaughter, Anne-Marie, p. 12-13, 267 and 268.

¹³² Slaughter, Anne-Marie, p. 15.

be used sparingly” to avoid slipping down the slope towards a world government.¹³³ However, as globalisation is a fact, Slaughter means that the need for establishing supranational institutions might arise.¹³⁴ When that path is chosen, Slaughter maintains that sovereignty cannot be given away without state consent.¹³⁵

This is of course interesting, since Slaughter is trying to redefine sovereignty and in doing so arguing that autonomy is no longer a workable attribute of the concept, since the world has undergone changes. In Slaughter’s conclusion in *A new world order*, she even includes the remark:

“If the background conditions for the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, then sovereignty-as-autonomy makes no sense.”¹³⁶

So, in sum, Slaughter’s view on supranational institutions is somewhat ambiguous. The importance of supranational institutions are not downplayed, since such an institution can “pierce the shell of state sovereignty”¹³⁷ and “harness the coercive power of national officials”¹³⁸, in Slaughter’ view. But in the same time, Slaughter points out that the balance that need to be struck between supranational institutions must enable a state “to be able to more than hold its own”.¹³⁹ Then the question seems to be how much piercing of the shell of sovereignty is to be desired. More on that issue will follow in section 4 below.

So, in line with what was discussed in section 2.1.4.3.2 above, I find that *the disaggregated state* is a universalist theory belonging to the sub-category of

¹³³ Slaughter, Anne-Marie, p. 145.

¹³⁴ Slaughter, Anne-Marie, p. 12 and 145.

¹³⁵ Slaughter, Anne-Marie, p. 146.

¹³⁶ Slaughter, Anne-Marie, p. 267.

¹³⁷ Slaughter, Anne-Marie, p. 145.

¹³⁸ *Ibid.*

¹³⁹ Slaughter, Anne-Marie, p. 148.

the pluralist school of thought. Slaughter is not as radical as to suggest a completely cosmopolitan world order, such as a democratic world federation. She maintains that the state should persist, although in a looser way than argued by particularists. However, it is difficult to compare the two strands of thoughts here (that is *the new sovereigntists* and *the disaggregated state*), since they are interested in different aspects of global governance and in particular its legitimacy. While, as mentioned before, *the new sovereigntists* are placing considerable weight in the importance of input legitimacy, Slaughter as a universalist is more interested in output legitimacy. Followers of the particularist thought might very well agree that *the disaggregated state* and its conception on sovereignty could work for managing global problems. They would not agree however, that it is in compliance with normative ideals, conceptualized around popular sovereignty, which for them is what matters most.¹⁴⁰

¹⁴⁰ Goodhart and Taninchev, p. 1051-1052, for a similar way of arguing when comparing universalist and particularist thought.

3 The right to health – a human right worthy of universal jurisdiction?

3.1 The right to health

This chapter will focus on the right to health, as laid down in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenant is part of what is usually called the International Bill of Human Rights and has one hundred and sixty state parties, which in itself makes it suitable for examining the universality of the rights enshrined in the Covenant.¹⁴¹ When considering the preamble to the Covenant, it is clear that universal aspirations were a guiding principle of the agreements made, since the rights of the Covenant is said to “derive from the inherent dignity of the human person” and the express reference to the Universal Declaration of Human Rights and the reference to the “obligation of states under the Charter of the United Nations to promote universal respect for, and the observance of, human rights and freedoms [...]”.¹⁴² The Covenant is clearly at least aiming for the universality of economic, social and cultural human rights.

In the first section (3.1.1) of this chapter, I will give a brief overview on how the Covenant is set up to work. It will begin with looking closer at the right to health, both from the individual’s and the state’s perspective, as such and then proceed with examining what mechanisms are built into the Covenant in relation to justiciability and enforcement.

¹⁴¹ For further information on the status of the treaty:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, 2013-07-17, 13:16.

¹⁴² International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, preamble.

3.1.1 ICESCR – article 12

3.1.1.1 Rights conveyed to the individual by article 12

Firstly, it is important to be aware of that the right to health is considered a ‘key human right’, which means that its realisation is important for the realisation of a lot of other fundamental human rights.¹⁴³ Essentially, this means that if one is not entitled to one’s health, no other human rights matter; fundamental human rights are dependant on each other.

The right to health includes more than just mere health care and by way of example General Comment No. 14 mentions, *inter alia*, adequate housing and access to clean drinking water to be included into the normative content of the right to health.¹⁴⁴ The right to health is fleshed out by the Committee on Economic, Social and Cultural Rights, in its definition of its normative content, by applying the concepts of *availability*, *accessibility*, *acceptability* and *quality*.¹⁴⁵

The *availability* takes its aim on the quantity of health care related facilities and programmes, which must be sufficient to address the public demand.¹⁴⁶ Although the Council adheres to the fact that, depending on the available resources at hand in a specific state, this availability will vary.¹⁴⁷ Nonetheless, notwithstanding the developmental status of the state, there are minimum requirements that must be met:

“[...] such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs”.

¹⁴³Committee on Economic, Social and Cultural Rights (CESCR), E/C.12/2000/4, 11 August 2000, General Comment No. 14, para. 1 and 3.

¹⁴⁴ General Comment No. 14, para. 4.

¹⁴⁵ General Comment No. 14, para. 12.

¹⁴⁶ General Comment No. 14, para. 12 (a).

¹⁴⁷ *Ibid.*

The *accessibility* requires that the pursuit of the highest attainable standard of health is of a non-discriminatory nature, physically accessible, economically accessible and information on health issues is accessible as well.¹⁴⁸

The *acceptability* is concerned with medical ethics and understanding of cultural differences.¹⁴⁹

Lastly, the demand for *quality*, is rather straightforward, since the aid given at health care facilities of different kinds is to be “medically appropriate and of good quality”.¹⁵⁰

I will not elaborate further on the normative content of the right to health, although a lot more can be said on the subject. My goal here is simply to give an understanding of the relativity of the right to health being a socio-economic right, governed by the principle laid down in ICESCR article 2, which will be presented in further detail in the next section.

3.1.1.2 State obligations under article 12

In ICESCR article 2 (1) the nature and scope of the state’s obligation under the Covenant is elaborated on, in relation to the rights enshrined therein. The provision requires of the state to:

“[...] 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 the rights recognized in the present Covenant

¹⁴⁸ General Comment No. 14, para. 12 (b) i-iv.

¹⁴⁹ General Comment No. 14, para. 12 (c).

¹⁵⁰ General Comment No. 14, para. 12 (d).

by all appropriate means, including particularly the adoption of legislative measures” [author’s emphasizing].¹⁵¹

Since the world comprises of states in different stages of development, this obligation is relative in its nature, obligating states to systematically move forward to full realization of the rights in the Covenant.¹⁵² If a state should be found unwilling to take steps within the range of their available resources at disposal, the state would be in violation of the Covenant.¹⁵³ If a violation of the Covenant should occur, domestic judicial remedies should be available, as well as remedies on an international level.¹⁵⁴

Interestingly enough, the Committee only extends incorporation of the Covenant into the domestic legal order, to a recommendation aimed at state parties of the Covenant.¹⁵⁵ This is somewhat disappointing for me since incorporating it into national law seems like an effective measure, to help people’s awareness of their human rights. The Council also includes a remark on the aspiration that “judges and members of the legal profession *should be encouraged* by states to pay greater attention to violations of the right to health in the exercise of their functions” [author’s emphasizing].¹⁵⁶ In my view, this seems to be an unsatisfactory recommendation, when the optional protocol to the ICESCR demands for exhaustion of domestic remedies before declaring a case admissible.¹⁵⁷

3.1.1.3 Justiciability and enforcement mechanisms

The justiciability of the human rights in the ICESCR is primarily centred on national legislation and national legal action, through the

¹⁵¹ ICESCR article 2 (1).

¹⁵² General Comment No. 14, para. 30-31.

¹⁵³ General Comment No. 14, para. 47.

¹⁵⁴ General Comment No. 14, para. 59.

¹⁵⁵ General Comment No. 14, para. 60.

¹⁵⁶ General Comment No. 14, para. 61.

¹⁵⁷ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly adopted resolution A/RES/63/117, on 10 December, 2008, article 3 (1).

popular elected parliament and the judicial branch of the state.¹⁵⁸ This is clearly expressed in ICESCR article 2.¹⁵⁹ The problem with socio-economic rights however, is the vagueness of the provisions in the ICESCR (as have been exemplified above with regard to the right to health); a vagueness which often persists in national legislation.¹⁶⁰ The fact that socio-economic human rights are often vaguely regulated in international instruments, as well as in national legislation, leaves the individual trying to claim a certain right in a highly vulnerable situation. The low level of awareness of international human rights further reduces the justiciability of socio-economic human rights by national first instance administrative bodies.¹⁶¹ When the legislature admits that the task of providing for precise legislation in the field of international socio-economic rights is impossible, professionals working in the different fields connected to the socio-economic arena are left with interpreting the provisions on a case-by-case basis.¹⁶² This is a troubling situation, since it endangers both the democratic legitimacy of content of the socio-economic rights, when the task of interpreting the obligation in question is left to the administrative branch of the state, and the expected predictability of the outcome of a contested right.¹⁶³

Notwithstanding the problem with legislation regarding socio-economic human rights and the problems it causes for justiciability of the same, the ICESCR and the monitoring bodies connected to it, are responsible for overseeing the implementation of the Covenant and the structure of this process will be dealt with in the next section.

¹⁵⁸ *Human Rights as Indivisible Rights: the protection of socio-economic demands under the European Convention on Human Rights*, Koch, Ida Elisabeth, International Studies in Human rights, Vol. 101, Martinus Nijhoff Publishers, Leiden, Netherlands, 2009, p. 259-260.

¹⁵⁹ Ibid. p. 260.

¹⁶⁰ Ibid. p. 260.

¹⁶¹ Ibid. p. 262.

¹⁶² Ibid. p. 261 and 263.

¹⁶³ Ibid. 260.

The reporting mechanism is regulated in ICESCR, part IV, articles 16-23. When it comes to justiciability and enforcement, this is what can be found in the Covenant. A signatory state is expected to submit country reports “in accordance with a programme to be established by the Economic and Social Council [...]”.¹⁶⁴ This country report mechanism has a history of being to burdensome for states and actually not working very well.¹⁶⁵ Since there are several others U.N. human right treaties, with their own country report mechanism, it has lead to a systemic collapse in some sense, where states are unable to provide for reports in time for all the monitoring bodies or actually stop reporting completely.¹⁶⁶

Nonetheless, ECOSOC is responsible to review the reports submitted by states and leave concluding observations on the reports,¹⁶⁷ which are made public and submitted to the state in question.¹⁶⁸ Obviously, these concluding observations are not binding legal decisions.¹⁶⁹

The Covenant has been added with an optional protocol, which enables individual communications and inter-state communications to be examined by the Committee on Economic, Social and Cultural Rights.¹⁷⁰ The Committee is a group of experts, put together to assist ECOSOC in their monitoring duties of the ICESCR.¹⁷¹ With regard to individual communications the Committee examines the question at hand, then provide its views on the communication and add recommendations if there are any and transmits this to the parties at

¹⁶⁴ ICESCR, article 17 (1).

¹⁶⁵ *Out of the Abyss: the Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, Alston, Phillip, Human Rights Quarterly 9, 332-381, 1987, p. 332-333.

¹⁶⁶ United Nations, General Assembly, A/57/387, 9 September, 2002, para. 53.

¹⁶⁷ ICESCR, article 16 (2) (a).

¹⁶⁸ Excerpt from the Report on the Forty-Fourth and Forty-Fifth Sessions (E/2011/22 – E/C.12/2010/3), paras. 19-59, para. 30-32, available at: <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm>, 2013-07-18, 10:47.

¹⁶⁹ *Treaty Bodies and the Interpretation of Human Rights*, Mechlem, Kerstin, Vanderbilt Journal of Transnational Law, Volume 42:905, 2009, p. 905-906.

¹⁷⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, articles 1, 2 and 10.

¹⁷¹ Alston, Phillip, p. 332.

hand.¹⁷² Inter-state communications are either solved through a friendly settlement, which the committee then describes shortly in a brief statement of the matter.¹⁷³ Or, if such a friendly settlement is not reached, a complete statement of the matter is accounted for by the Committee and any views that the Committee might have is attached to the statement.¹⁷⁴ As with the country report mechanism, the Committee's statements in relation to individual and inter-state communications are not considered to be legally binding decisions.¹⁷⁵

¹⁷² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 9.

¹⁷³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 10 (1) (h) (i).

¹⁷⁴ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 10 (1) (h) (ii).

¹⁷⁵ Mechlem, Kerstin, p. 905-906.

4 Analysis

4.1 Pinpointing ICESCR's treaty bodies on the map of international law

Up to this point, the aim of the inquiry made, has been to paint a comprehensive picture of the debate on sovereignty. A plunge into the history of the concept has been accounted for, as well as modern thinking on the subject to some extent, focused on universal jurisdiction and the particularist thinkers embodied in *the new sovereigntists* and the universal line of thought framed into the concept of *the disaggregated state*. It is time to tie it all together by applying the theoretical instruments together with ICESCR article 12, the right to health, to pinpoint the legal framework of the ICESCR on the map of international law. Let us see what theories on sovereignty tell us about ICESCR's current status in relation to the principle of equal sovereignty and glimpse at the impact the same theories might have on the future of the ICESCR.

4.1.1 ICESCR – universalist or particularist?

It is difficult to argue that the ICESCR is not an agreement between states governed by the idea of the existence of universal human rights. The mere number of state parties to the convention signals that the content of the Covenant is something that most states willingly admit to be of great importance for the dignity of human kind. The preamble to the Covenant also speaks the language of universality.

When examining the human rights catalogue in part III of the Covenant, the feeling of true universality of the Covenant is upheld. The only indication of a glitch in the universal aspirations of the Covenant is found in article 2, where the progressive nature of the realisation of socio-economic rights is acknowledged. However, this provision does not necessarily mean that the universality of the rights enshrined in the Covenant is watered down. The

Covenant obviously needs to be anchored to reality and be honest of the fact that states worldwide are in different developmental stages. The provision opens up for the possibility for the legal framework of the ICESCR to develop through the work of ECOSOC and the Committee of Economic, Social and Cultural Rights.

Turning to the optional protocol to the ICESCR the situation somewhat changes. Starting with the fact that an optional protocol is needed to be signed and ratified in order for states to give their consent to recognise the competence of the Committee to receive and consider communications. This model of treaty making adheres to the classic interpretation of state sovereignty, where the international community only is permitted to intervene in domestic affairs after the state in question has given its consent. Even after consent has been given through becoming a party to the optional protocol, the Committee is not granted with any real power. The decisions that can be taken under the auspices of the Committee are not considered binding, but merely soft law at its best. This is striking me as a particularist pattern, where the particular polity is still considered to be the one sphere where legal decisions are acknowledged as binding. The individual states parties to the Covenant are not ready to vest power, delegate a piece of their own sovereignty, to the international community, in this case the Committee on Economic, Social and Cultural Rights.

So, when the Covenant and the optional protocol are viewed together it is showing signs of both universalism and particularism. This discovery is of course not very surprising, since the world is seemingly divided between universalist and particularist thought. An international agreement trying to abridge this inconvenience is bound to end up in a compromise between the two schools of thought.

4.1.2 Individual communications in clash with sovereignty

The willingness of states to be able to fulfil their human rights obligations in relation to their citizens seems to be provided for. The ICESCR is widely accepted as inherent dignities of the human kind and it seems safe to contend that no state, considering themselves as democratic and a part of the international community, would openly argue that the rights in ICESCR are too far reaching. The way to get there, applying the Covenant in a correct way, is really the question that has yet to be answered satisfyingly. This is the main task of the ECOSOC and the Committee on Economic, Social and Cultural Rights.

In issuing general comments and raising questions of relevance for the ICESCR in other organs of the UN concerned with the Covenant and taking up individual communications and inter-state communications, delivering decisions in the matters, the ECOSOC and the Committee on Economic, Social and Cultural Rights see to that the knowledge of the application of the Covenant is maturing. Since the Covenant is a treaty drafted on the principle of relativity and progressive realisation of the rights therein, these tasks of the monitoring bodies of the Covenant are of crucial importance. In order to release the full power of the Covenant the practice of the application needs to be constantly tested and scrutinized, in relation to specific cases of specific states. This would effectively crystallize the understanding of the relativity of socio-economic rights. If the monitoring bodies of the Covenant deepened the knowledge of the application of the Covenant, the justiciability and enforcement on a national level would be strengthened. The encouragement called on in General Comment No. 14, for judges and members of the legal profession to pay greater attention to violations of the Covenant, is a duty that first and foremost lies with the monitoring bodies of the ICESCR themselves.

The way the Covenant and the optional protocol is understood to be functioning right now is however not making this task easy on the

monitoring bodies of ICESCR. In order to monitor effectively states must give consent beforehand. To this date, ten states are parties to the optional protocol, which is of course quite a big difference in comparison to the Covenant itself.¹⁷⁶ The possibility of the monitoring bodies to receive communications is obviously rather scarce and they are forced to remain fleshing out the understanding of the ICESCR on a general level. Clarifying an already generally held treaty, in general recommendations are not the cure that is needed in order to truly make the economic, social and cultural rights justiciable and enforceable. But since granting admissibility to individual communications without prior state consent, is considered to be violating the principle of equal sovereignty, as it is applied today in relation to ICESCR, the monitoring bodies are tied with their hands behind their back.

4.1.3 Justiciability intervention

Previously in this thesis, the debate whether reaction by the international community to a specific state's neglect of respect for socio-economic rights might be justified, as long as the reaction is proportionate to the violation at hand, has been accounted for. In other words, the question is whether it might be legally justified to intervene in domestic affairs, by for example overseeing the fact that the state in question has not ratified the optional protocol and the committee in spite of this grants an individual communication admissibility?

Yes, I think that one might argue in that direction. This is what Ludsin argues and she includes socio-economic rights and in particular mentions the right to health.¹⁷⁷ When a state is in violation of the right to health, the state in question would lose its sovereign rights in relation to that particular field and the international community has the right to intervene to protect the interest of the individuals of that state. Now, Ludsin does not expand on

¹⁷⁶ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en, 2013-07-21, 14:22.

the intervention as such, more than that it needs to be proportionate in relation to the violation. I will try to put forward a concrete suggestion as to what could be done in such a case, where the right to health is violated by a state.

It has been argued that, in relation to international criminal law and human rights of that field, respect for human rights is constitutive of the modern interpretation of sovereignty. Without respect for basic human rights, there can be no true sovereignty by elected officials, since the rights of the true sovereigns, the people, is violated. This interpretation serves to justify the doctrine of universal jurisdiction, in relation to international crimes and – although still debated – it persists in the international community. Taking Ludsin’s argumentation in consideration, I would like to suggest that the concept of universal jurisdiction could arguably be expanded to justify intervention in matters relating to socio-economic rights, such as the right to health. The Committee on Economic, Social and Cultural Rights should have universal jurisdiction to grant admissibility to possible violations of the ICESCR.¹⁷⁸ The reason for this will be expanded on in the next section.

States parties to the ICESCR have acknowledged the existence of economic, social and cultural rights of all human kind in their ratification of the Covenant. However, the way forward, how to progressively achieve these obligations, are not included into the acknowledgement of the existence of the rights in the actual Covenant, since this is a much more complicated issue. The monitoring bodies and the optional protocol were set up to see to the Covenant’s effective implementation, but at the same time their power to do so were harnessed by the principle of equal sovereignty. But if respect for socio-economic human rights is argued to be constitutive of sovereign power, the sovereignty enabling a state to give consent for intervention in that matter would be lost if a violation has occurred or is at risk of occurring. To put it differently, picture yourself the following: the right to

¹⁷⁸ The jurisdiction will not extend to the whole of the world, since I only argue that state parties to the ICESCR should be considered within the jurisdiction of the Committee on Economic, Social and Cultural Rights.

health is at risk of being violated in a state, which is a party to the ICESCR, and this possible violation is brought to the Committee's attention through an individual communication. The state in question is not a party to the optional protocol, which by adhering to the classical definition of sovereignty, would prevent the Committee from declaring the communication admissible. However, applying modern theories of sovereignty, where respect for human rights is constitutive for the authority's claim to sovereignty the interpretation of the optional protocol would be differently. The true sovereign is of course the people of the state and the government decisions are only considered legitimate when in conformity of the people's will. If the inherent dignities of human kind are at risk of being violated, the government then loses its sovereign rights in relation to the right to health (i.e. in relation to this specific human right). As Ludsin argues, the government might very well be suited to still be considered sovereign for the most part. As long as the government is in compliance with all others human right obligations, it keeps its sovereign position in relation to those obligations. But, in relation to the right to health the international community should have the right to intervene in a proportionate manner. My suggestion for such a proportionate intervention, would be what I call the 'justiciability intervention'. In other words the Committee on Economic, Social and Cultural Rights, is granted the right to declare individual communications admissible, even if it originate from a state not party to the optional protocol.

So, in this fictitious case above the optional protocol to ICESCR is actually superfluous and the state would not have the authority to give consent in the matter. This would lead to the conclusion that the Committee for Economic, Social and Cultural Rights should have a justified right to intervene. The monitoring bodies should have a right to a proportionate intervention in the domestic affairs and admissibility of a possible violation of the covenant. This could only result in a decision of a non-binding nature, so even if the Committee decision would fall in favour of the state, the intervention should

be considered as proportionate in my view, because of its rather non-invasive nature.

If the outcome only would be a decision that the state could choose not to adhere to, what would the use of this ‘justiciability intervention’ be? As explained above, the relativity of the progressive realisation of the ICESCR needs to be clarified on a much more specific basis than through general comments. If the monitoring bodies could examine possible violations in states that has not given consent, this would enable the understanding of rights in the Covenant to be pinpointed to different developmental stages of states, different political situations, expanded to a variety of alternatives for implementation tailor made for different cultures, but still in relation to a global treaty.

This would also help national jurisdictions to pay attention to the ICESCR in their respective domestic jurisdictions, which have considerably more tools to use in relation to enforcement of juridical decisions, than an international monitoring body. Together the monitoring bodies and the national courts could “nationalize” the rights in the covenant, giving it the relativity asked for in ICESCR article 2. Viewing the interaction between the international monitoring bodies and national courts in this way, would be an effective example of the vertical networks, described in Slaughter’s theory on *the disaggregated state*. And states of similar political structures and developmental stages could engage in horizontal networks, further driving the understanding of economic, social and cultural rights of the ICESCR forward. As discussed above in section 3.1.1.3, the vagueness of socio-economic rights has resulted in a situation where no one takes full responsibility for the interpretation of the ICESCR. The Covenant itself is vaguely formulated, delegating the task to national legislatures, which in their turn implement imprecise international legal norms into national legislation in an equally imprecise manner. The monitoring bodies can only monitor the implementation through a malfunctioning country-reporting system and through a communications made admissible through an optional

protocol ratified by only ten states. If applying a modern take on sovereign theory and admitting the respect for socio-economic human rights as constitutive of sovereign authority, the international community could arguably have an obligation to admit to its responsibility for effectively monitoring the implementation of a system that does not work properly. If socio-economic human rights are in the risk of being violated and individuals are not given a proper chance of national justiciability, because of vague legislation, which is impenetrable because of the low level of knowledge of international human rights obligations in national administrative bodies, then the Committee on Economic, Social and Cultural Rights should have the possibility of granting admissibility to communications without prior state consent. This to effectively create vertical governmental networks and break the stalemate of the implementation of the ICESCR. With a greater amount of cases dealt with by the monitoring bodies, greater understanding of the content of socio-economic rights is achieved. The process of understanding the ICESCR must be jump-started somewhere in the process, in which everybody falls back on the same excuse; namely the difficulty of knowing what obligations are created by socio-economic human rights in specific situations.

So, in relation to for example the right to health, the juridical branches of states could – with a greater mass of international ‘soft case law’ to pinpoint their actions to – effectively work on deciding what is minimum requirements of the economic accessibility of health care, or what is to be understood as good practice of medical ethics in relation to cultural differences, or if a national health policy plan is in compliance with the demands on the maximum availability of resources and progressive realisation in relation to a specific state.

To conclude, the monitoring bodies of the ICESCR could stop waiting on delayed country reports and more ratifying states of the optional protocol and start monitoring to show the people of the world that the Covenant is alive. States would probably object to the liberties taken by the monitoring

bodies, but let us be honest: all sovereignty was once taken on more or less violent terms by states we now consider legitimate. Maybe it is time for the international community to do the same.

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