

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA  
[CIVIL DIVISION]

MISCELLANEOUS APPLICATION No. \_\_\_\_\_ OF 2022  
ARISING OUT OF MISCELLANEOUS CAUSE No. 86 OF 2022  
DRFT-HCT-00-CV-MC-0066-2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INTERVENE AS  
AMICUS CURIAE BY THE APPLICANT HEREIN ARISING FROM  
MISCELLANEOUS CAUSE No. \_\_\_\_\_ OF 2022 BETWEEN

PROFESSOR PHILIP ALSTON -----  
APPLICANT

AND

1. INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS (ISER) LTD
2. THE UNWANTED WITNESS (U) LIMITED
3. HEALTH EQUITY AND POLICY  
INITIATIVE LIMITED ----- APPLICANTS IN MAIN  
CAUSE

AND

1. THE ATTORNEY GENERAL
2. NATIONAL IDENTIFICATION  
REGISTRATION AUTHORITY ----- RESPONDENTS IN MAIN  
CAUSE

NOTICE OF MOTION

*[Rule 5, Rule 6 sub-rules (1)(a), (2) and (3) of the Judicature (Amicus Curiae) Rules, S.I- No. 54 of 2022]*

**TAKE NOTICE** that this Honorable Court shall be moved by Counsel for the Applicant on the \_\_\_\_\_ day of \_\_\_\_\_, 2022 at \_\_\_\_\_ O'Clock or soon thereafter for orders that;

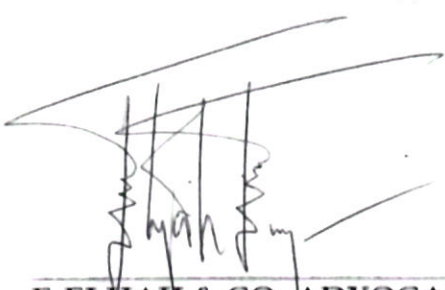
- a. Professor Philip Alston is granted leave to intervene as Amicus Curiae in Miscellaneous Cause No. \_\_\_\_\_ of 2022.
- b. No order as to costs.

**TAKE FURTHER NOTICE** that the Application is premised on the above cited legal provisions and supported by an affidavit sworn by **Prof. PHILIP ALSTON** the Applicant herein which shall be read and relied on at the hearing setting out the grounds which briefly are that;

- i. The Applicant possesses demonstrable expertise and knowledge on matters concerning economic, social and cultural rights as a prominent international scholar and distinguished lecturer of law currently serving as the John Norton Pomeroy Professor of Law at New York University School of Law.
- ii. The Applicant has a lifelong commitment and continuing interest in the promotion, observance and protection of economic, social and cultural rights.
- iii. The applicant has interest in the determination of the main cause as a human rights scholar and advocate in fidelity to the law.
- iv. The Applicant is neutral and impartial of the dispute between the parties in the main cause.
- v. The points of law submitted upon by the Applicant are novel and shall aid the development of jurisprudence in Uganda.
- vi. The Applicant has researched, presented on and published several texts on the correlation between national pre-requisites for access to social services and the violation of human rights.
- vii. The Applicant is aware of the current status-quo in Uganda that requires the presentation of a national identification card/number, or being part of the national identification register, acquired through enrolment in the national digital identification system, *Ndaga Muntu*, as a pre-condition by Ugandans to access SAGE benefits as a form of social security, and public health services.
- viii. The Applicant has examined the existing legal regime, guidelines and regulations pertaining to access of public health services and SAGE benefits by persons in Uganda being tied to the presentation of a national identification card/number, and is intent on making compelling submissions that will aid the court in arriving at a just decision in the main cause whilst progressing respect for human rights, governance, public health and social security reform in Uganda.

- ix. The Applicant has perused the notice of motion and supporting affidavits as filed by the Applicants in the main cause and finds that there are questions pertinent to its determination concerning access to rights and social services vis-à-vis national digital identification requirement not canvassed by the Applicants in the main cause which are imperative for court's consideration in determining the main cause.
- x. The Applicant will make a distinct and compelling contribution to the main cause with relevant matters of law that are useful, focused and principled.
- xi. The applicant's brief shall will give assistance to the court that it would not otherwise have.
- xii. The positive benefits of the intervention of the Applicant as amicus curiae outweighs any possible opposition from the parties to the main cause.
- xiii. It is in public interest, the interests of justice, the protection and progressive development of human rights and socio-economic reform that the leave sought herein is granted.

Dated at Kampala this 19<sup>th</sup> day of SEPTEMBER, 2022



**E. ELJAH & CO. ADVOCATES**  
**COUNSEL FOR THE APPLICANT**

Given under my hand and seal of the Honorable Court this \_\_\_\_\_ day of \_\_\_\_\_, 2022

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**DEPUTY/ASSISANT REGISTRAR**

*Drawn and filed by:*  
*E.Elijah & Co. Advocates,*  
*Plot 125 Ntinda, Mutesa II Road,*  
*Opp. Gardenia Courts, Third Floor,*  
*P.O Box 104046 Kampala.*



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**PROFESSOR PHILIP ALSTON -----**  
**APPLICANT**

**AND**

- 4. INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS (ISER) LTD**
- 5. THE UNWANTED WITNESS (U) LIMITED**
- 6. HEALTH EQUITY AND POLICY**
- INITIATIVE LIMITED ----- APPLICANTS IN MAIN**
- CAUSE**

**AND**

- 3. THE ATTORNEY GENERAL**
- 4. NATIONAL IDENTIFICATION**
- REGISTRATION AUTHORITY ----- RESPONDENTS IN MAIN**
- CAUSE**

**AFFIDAVIT IN SUPPORT**

I, **Professor PHILIP ALSTON** c/o E.Elijah & Co. Advocates, Plot 125 Ntinda, Mutesa II Road, Opposite Gardenia Courts, Third Floor, P.O Box 104046 Kampala do solemnly swear and state on oath as follows;

- 1. That I am an adult male Australian of sound mind being the Applicant herein and swear this affidavit in that capacity.

2. That I am a prominent scholar and distinguished lecturer of law currently serving as the John Norton Pomeroy Professor of Law at New York University School of Law.
3. That I have knowledge coupled with demonstrable expertise in the field of human rights and governance for Economic, Social and Cultural Rights. **A copy of my curriculum vitae is attached hereto marked "A".**
4. That I have researched, presented on and published several articles and text books on the correlation between country specific pre-requisites for access to social services and the violation of human rights. **A summary of my publications are attached hereto collectively marked "B".**
5. That I have had a long life commitment and continuing interest in the promotion, observance and protection of economic, social and cultural rights.
6. That my interest in the matter constitutes fidelity to the law as a human rights scholar and advocate.
7. That I am neutral and impartial of the dispute between the parties in the main cause.
8. That I am aware of the current status-quo in Uganda that requires the presentation of a national identification card/number, or being part of the national identification register, acquired through enrolment in the national digital identification system, *Ndaga Muntu*, as a pre-condition by Ugandans to access SAGE benefits as a form of social security, as well as public health services.
9. That I have examined the existing legal regime, guidelines and regulations pertaining to access of public health services and SAGE benefits by persons in Uganda being tied to the presentation of a national identification card/number, and I am intent on making compelling submissions that will aid this Honorable

court in arriving at a just decision in the main cause whilst progressing respect for human rights, governance, public health and social security reform in Uganda.

10. That I have perused the notice of motion and supporting affidavits as filed by the Applicants in the main cause, and find that there are questions pertinent to its determination concerning access to rights and social services vis-à-vis the national digital identification requirement including the prohibition of retrogressive measures, standards of legality, suitability, necessity and balancing or proportionality *stricto sensu*, and equality protections and special measures of protection not canvassed in the pleadings, but which are imperative for court's consideration in determining the main cause and strengthening the public health and social security rights regime in Uganda.
11. That the points of law I have submitted upon are novel and will aid the development of Uganda's human rights jurisprudence.
12. That my submissions draw attention to relevant matters of law that are useful, focused and principled. **A copy of my intended brief is attached hereto marked "C".**
13. That my submission will give assistance to the court that it would otherwise not have.
14. That it is in public interest, the wider interests of justice, the protection and progressive development of human rights and socio-economic reform that the leave sought herein is granted.
15. That all I have stated herein is true and correct to the best of my knowledge and belief in support of my application for leave to be admitted as amicus curiae.

Sworn by the said **Professor PHILIP ALSTON** at office location of the notary public on this 19<sup>th</sup> day of September, 2022.

Philip Alston

**DEPONENT**

**BEFORE ME;**



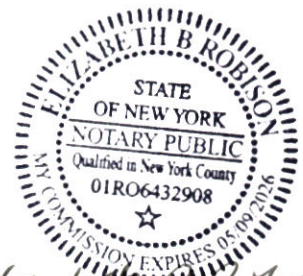
Elizabeth B Robinson

**A NOTARY PUBLIC**

Drawn and filed by:  
E. Elijah & Co. Advocates,  
Plot 125 Ntinda, Mutesa II Road,  
Opp. Gardenia Courts, Third Floor,  
P.O Box 104046 Kampala.



## PHILIP ALSTON: CURRICULUM VITAE



*Elizabeth B. Robison*

### A. PRINCIPAL CURRENT APPOINTMENT

John Norton Pomeroy Professor of Law, New York University School of Law. Appointed to NYU in 2001. Co-director, NYU Law School's Center for Human Rights and Global Justice.

### B. ACADEMIC QUALIFICATIONS

1972 – LL.B (Hons), University of Melbourne, Faculty of Law  
1976 – B. Comm., University of Melbourne, Faculty of Economics and Commerce  
1976 – LL.M by thesis, University of Melbourne, Faculty of Law  
1977 – LL.M, University of California, Berkeley  
1980 – JSD (doctorate in law) University of California, Berkeley

*Philip Alston*

*19 Sept. 2022*

*"A"*

### C. PREVIOUS ACADEMIC APPOINTMENTS

Harvard Law School, Sidley Austin Visiting Professor, 2010-11, James Barr Ames Visiting Professor, Fall 2008, Visiting Professor/Lecturer, Spring 1993, Fall 1984 – Fall 1989. Professor of International Law, European University Institute, Florence, 1996-2002. Head of Department of Law, 1997-98; Co-Director, Academy of European Law, 1996-2003. Global Law School Professor, New York University, 1998-2000. Professor of Law and Foundation Director of the Centre for International and Public Law, Australian National University (ANU), 1989-1995. Helen L. Deroy Visiting Professor of Law, University of Michigan Law School, Fall 1993. Associate Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University, Boston, Fall 1985 to Fall 1989. Teaching Assistant, Boalt Hall Law School, University of California, Berkeley, 1976-1977. Research Associate, Melbourne University Law School and Tutor in Law, Ormond College, 1973-1974.

### D. OTHER PREVIOUS EMPLOYMENT

Discrimination Commissioner for the Australian Capital Territory, Jan. 1992 - Nov. 1994. Human Rights Officer, United Nations Centre for Human Rights, Geneva, 1978 to 1984. Senior Legal Adviser on children's rights, UNICEF (United Nations Children's Fund), New York, 1986 to 1992. Chief of Staff to a Cabinet Minister in the Australian Government, 1974-1975.

### E. UNITED NATIONS ACTIVITIES

#### (a) *Commission of Inquiry*

Commissioner, UN Security Council Commission of Inquiry into the Central African Republic, 2014-15 (Security Council resolution 2127 (5 Dec. 2013) to "investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in the Central African Republic.") Co-presented report to a special closed session of the Security Council on 20 January 2015.

#### (b) *Special Procedures of the UN Human Rights Council*

Special Rapporteur of the UN Human Rights Council on extreme poverty and human rights, 2014 – 2020.

Special Rapporteur of the UN Human Rights Council (and previously of the UN Commission on Human Rights) on extrajudicial, summary, or arbitrary executions, 2004 – 2010.



Chairperson, Annual Meeting of Special Procedure mandate-holders of the UN Commission on Human Rights, June 2005.

Coordinating Committee of UN Human Rights Special Procedures, Chairperson, 2005-2006, member 2006-2007.

Member, Group of Experts on Darfur, appointed by the UN Human Rights Council, 2007.

Member, Joint Mission of four UN Human Rights Council Special Procedures to Israel and Lebanon, September 2006.

*(c) UN Human Rights Treaty Bodies*

United Nations Committee on Economic, Social and Cultural Rights, Rapporteur 1987-1990, Chairperson 1991-1998.

Meeting of Chairpersons of United Nations Human Rights Treaty Bodies, Chairperson 1990, 1993, 1997-98; Rapporteur 1988, 1990, 1992, 1997-98.

*(d) Other UN Human Rights Posts*

Special Adviser to the UN High Commissioner for Human Rights on the Millennium Development Goals, appointed by Sergio Vieira de Mello, 2002-2006.

Member, Millennium Development Goals Task Force on Poverty and Economic Development, chaired by Prof. Jeffrey Sachs (2002-2004)

Independent Expert, appointed by UN Secretary-General, Javier Pérez de Cuéllar, at the request of the General Assembly, to report on measures to ensure the long-term effectiveness of the UN human rights treaty bodies, reports submitted in 1989, 1993 and 1997.

Member, Technical Advisory Group chaired by Graça Machel, United Nations Study on the Impact of Armed Conflict on Children, 1995-1997.

**F. OTHER PROFESSIONAL ACTIVITIES**

Co-founder of both the European Society of International Law and the Australian and New Zealand Society of International Law.

Member, Independent International Commission for Inquiry into the events in the southern parts of the Kyrgyz Republic, October 2010 – June 2011.

Member, Board of Directors, The Fund for Global Human Rights, 2010 –2019

Member, Board of Trustees, Shift, 2011 – 2017

Member, Human Rights Advisory Board for Realizing Rights: the Ethical Globalization Initiative directed by Mary Robinson, 2002-2010.

President, Board of Directors, Center for Economic and Social Rights, New York, 2002-2010.

Member, International Advisory Council, Interights, London, 2007 – 2014

Member, World Economic Forum, Global Agenda Council on the International Legal System, 2008-2009, Global Agenda Council on Human Rights, 2009-2010 and 2010-2011.

Director, European Commission-funded Project on the European Union and Human Rights. Resulted in *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* adopted by a Comité des Sages consisting of Antonio Cassese, Catherine Lalumière, Peter Leuprecht, and Mary Robinson.

Co-Director, Academy of European Law, Florence, 1996 – 2003.

Founding Council Member, International Council for Human Rights Policy, Geneva, 1996-1998.

Member, International Human Rights Council, The Carter Center, Atlanta, Georgia, (established to advise former President Carter), 1994 – 2000.

Senior Fellow, UNICEF International Child Development Centre, Florence, 1995-1998.

Member, Scientific Council, International Institute of Human Rights, Strasbourg, 1997 – .

Consultant to ILO, Geneva; OECD, Paris; UNICEF, New York, Florence and Geneva; OSCE, Warsaw; UNESCO, Paris; OHCHR, Geneva; UNDP, New York; UN Department of Economic and Social Affairs, New York; UN Staff College, Turin.



## G. EDITORIAL ACTIVITIES

Editor-in-Chief, *European Journal of International Law*, 1996 – 2007.

Series co-editor, Oxford University Press series of Commentaries on International Law Treaties, 2002 – .

Co-Editor-in-Chief, *Australian Yearbook of International Law*, from 1991 (Vol. 12) to 1996 (vol. 16). Member, Editorial Advisory Board, 2017 – .

Member, Editorial Advisory Board, *International Journal of Children's Rights*, 1992–

Member, Editorial Board, *International Journal of Health and Human Rights* (Harvard School of Public Health), 1993 – .

Member, Editorial Board, *Human Rights Quarterly*, 1994 – .

Member, Editorial Board, *Peace Review* (San Francisco), 1991 – .

Member, Board of Directors, *Berkeley Journal of International Law*, 1995 – .

Member, Editorial Board of Advisors, *Buffalo Human Rights Law Review*, 1996 – .

Patron, *Australian Journal of Human Rights*, 1994 – .

Member, Honorary Advisory Board, *Melbourne Journal of International Law*, 2001–.

Member, Advisory Board, *New Zealand Yearbook of International Law*, 2003 – .

Member, Editorial Board, *Humanity*, 2010 – .

Member, Advisory Editorial Board, *Nordic Journal of Human Rights*, 2010 – .

Member, Scientific Committee, *European Journal of Human Rights / Journal européen des droits de l'homme*, 2012 –

Member, Editorial Board, *Journal of Human Rights Practice*, 2016 –

Member, Editorial Advisory Board, *Third World Quarterly*, 2018 –

## H. AWARDS

Riesenfeld Award, 2009, from the University of California, Berkeley. Award “given annually to an international legal scholar or practitioner who has made an outstanding contribution in the field”.

Jonas Weiss Memorial Honorary Award, 2010. Awarded by the Swedish Ministry of Foreign Affairs and the Weiss family in honour of someone who “has achieved important results in his/her work for supporting democracy, human rights, crisis management and the avoidance of conflict”.

LLD, Honorary Doctorate of Laws, Maastricht University, 2011.

Aldo Farina Award for Child Rights, 2011. Awarded by UNICEF-the United Nations Children's Fund. The prize is awarded every two years “to an organisation or individual in recognition of their lifetime achievement, outstanding leadership or sustained contribution in the fields of Child Rights Advocacy”.

Australian Academy of Law, elected to membership, August 2016.

Adlai Stevenson Award, presented by the United Nations Association of the USA, at Princeton University, to “an individual whose character and career work reflect the principles of the UN Charter and the Universal Declaration of Human Rights.” December 2016

Honorary Life Member of the American Society of International Law, April 2017. This honor is awarded annually by the Society to one “person who has rendered distinguished contributions or service in the field of international law.” First Australian to have received the award since Julius Stone in 1962.



LLD, Doctor of Laws (Honoris Causa), University of New South Wales, 2017.

LLD, Doctor of Laws (Honoris Causa), Australian National University, 2019.

AO, Officer in the General Division, Order of Australia, 2021.

"B"

## I. PUBLICATIONS: BOOKS

Forthcoming

34. *International Human Rights*, (Oxford University Press, forthcoming, 2023)

Published

33. *Alston & Heyns on Unlawful Killings: A Compendium of the Jurisprudence of the United Nations Special Rapporteurs on extrajudicial, summary or arbitrary executions from 2004 – 2016*. Edited by Philip Alston, Christof Heyns, Sarah Knuckey, and Thomas Probert (University of Pretoria Press, 2020) 736 pp.
32. *The UN and Human Rights: A Critical Appraisal*, co-editor with Frédéric Mégret (2<sup>nd</sup> edition, Oxford, Oxford University Press, 2020), 768 pp.
31. *Tax, Inequality, and Human Rights*, co-editor with Nikki Reisch (Oxford University Press, 2019) xx + 588 pp.
30. *The Transformation of Human Rights Fact-Finding*, co-editor with Sarah Knuckey (Oxford University Press USA, 2015) xii + 549 pp.
29. *International Human Rights*, co-author with Ryan Goodman (Oxford University Press, 2013) xl + 1,580pp.
28. *Human Rights, Intervention and the Use of Force*, co-editor with Euan Macdonald (Oxford, Oxford University Press, 2008) xiv + 294 pp.
27. *International Human Rights in Context: Law, Politics, Morals*, co-author with Henry Steiner and Ryan Goodman, (3<sup>rd</sup> edition, Oxford, Oxford University Press, 2008) xxxix + 1532pp.
26. *Laying the Foundations for Children's Rights*, co-author with John Tobin, (Florence, UNICEF, 2005, xii + 106 pp)
25. *Human Rights and Development: Towards Mutual Reinforcement*, co-editor with Mary Robinson (Oxford, Oxford University Press, 2005) xx + 551 pp.
24. *Monitoring Fundamental Rights in the EU: The contribution of the Fundamental Rights Agency*, co-editor with Olivier de Schutter (Oxford, Hart, 2005) vi + 282 pp.
23. *Labour Rights as Human Rights*, editor, (Oxford, Oxford University Press, 2005) viii + 253 pp.
22. *Non-State Actors and Human Rights*, editor, (Oxford, Oxford University Press, 2005) ix + 387 pp.
21. *Ripensare I diritti umani nel XXI secolo* (Rethinking Human Rights in the 21<sup>st</sup> Century) co-author with Antonio Cassese (Torino, Edizioni Gruppo Abele, 2003) 112 pp.
20. *Peoples' Rights*, editor, Volume in the series of Collected Courses of the Academy of European Law (Oxford, Oxford University Press, 2001).
19. *International Human Rights in Context: Law, Politics, Morals*, co-author with Henry Steiner, (2<sup>nd</sup> edition, Oxford, Oxford University Press, 2000) xxxiii + 1497 pp.).
18. *The Future of UN Human Rights Treaty Monitoring*, co-editor with James Crawford (Cambridge, Cambridge University Press, 2000), xxxv + 563 pp.
17. *Diritti umani e globalizzazione: Il ruolo dell'Europa* (Human Rights and Globalization: The Role of Europe) (Torino, Edizioni Gruppo Abele, 1999) 175 pp
16. *The European Union and Human Rights*, editor (Oxford, Oxford University Press, 1999) xxiii + 946 pp.; *L'Union européenne et les droits de l'homme*, Brussels, Bruylant, 2001) xxii + 983 pp.

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15. *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, editor, (Oxford, Oxford University Press, 1999) xiv + 569 pp.
14. *International Human Rights in Context: Law, Politics, Morals*, co-author with Henry Steiner, (Oxford, Clarendon Press, 1996). xxxix + 1,245 pp.
13. *Human Rights*, editor of volume in *International Library of Essays in Law and Legal Theory* series (Aldershot, Dartmouth Press, 1996), 550pp.
12. *Treaty-Making and Australia: Globalization versus Sovereignty?*, co-editor with Madeleine Chiam (Sydney, Federation Press, 1995) x + 309 pp.
11. *The Australian Year Book of International Law*, Co-Editor of: volume 12 (1992), vii + 555 pp.; volume 13 (1992), iii + 524 pp.; volume 14 (1993), iv + 745 pp.; volume 15 (1994), iv + 761 pp.; volume 16 (1995), iv + 634 pp.
10. *The Best Interests of the Child: Reconciling Culture and Human Rights*, editor, (Oxford, Clarendon Press, 1994), xiii + 297 pp.
9. *Towards an Australian Bill of Rights*, editor (Sydney, Human Rights and Equal Opportunity Commission, 1994), xv + 383 pp.
8. *The United Nations and Human Rights: A Critical Appraisal*, editor (Oxford, Clarendon Press, hardback version 1992, paperback version 1995) xiii + 765 pp).
7. *Children, Rights and the Law*, co-editor (Oxford, Clarendon Press, 1992) xiv + 268 pp.
6. *Whose New World Order: What Role for the United Nations?*, co-editor (Sydney, Federation Press, 1991) xiv + 157 pp.
5. *The UN Children's Convention and Australia*, co-editor (Sydney, Australian Human Rights and Equal Opportunity Commission, 1991), ix + 133 pp.
4. *First Manzur Qadir Memorial Lecture: The Right to Food*, (Lahore, Third World Foundation (London) and Manzur Qadir Memorial Society (Lahore), 1985), 26 pp.
3. *The Right to Food*, co-editor (The Hague, Martinus Nijhoff, 1984), 228 pp.
2. *The International Dimensions of Human Rights*, editor of English edition (Paris, UNESCO, 1982), 2 vols, xxv + 755 pp.
1. *Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy*, (Geneva, International Commission of Jurists, 1981), 125 pp, at <https://www.icj.org/development-and-the-rule-of-law-prevention-versus-cure-as-a-human-rights-strategy/>

## J. PUBLICATIONS: In capacity as UN Human Rights Council Special Rapporteur

### (i) As Special Rapporteur on extreme poverty and human rights, 2014 – 2020

#### *Thematic studies*

- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on **The Parlous State of Poverty Eradication**, UN Doc. A/HRC/44/40 (2020)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on **The Digital Welfare State**, UN Doc. A/74/493 (2019)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on **Climate Change and Poverty**, UN Doc. A/HRC/41/39 (2019)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on **Privatization**, UN Doc. A/73/396 (2018)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on the **International Monetary Fund and Social Protection**, UN Doc. A/HRC/38/33 (2018)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on the **Civil and Political Rights of people living in poverty**, UN Doc. A/72/502 (2017)
- Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on **Universal Basic Income and human rights**, UN Doc. A/HRC/35/26 (2017)
- Report of the Special Rapporteur on extreme poverty and human rights, on the **responsibility of the United Nations for the cholera outbreak in Haiti**, UN Doc. A/71/367 (2016)



Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on the **marginality of economic and social rights**, UN Doc. A/HRC/32/31 (2016)

Report of the Special Rapporteur on extreme poverty and human rights, on the **World Bank and human rights**, UN Doc. A/70/274 (2015)

Report of the Special Rapporteur on extreme poverty and human rights, on **extreme inequality and human rights**, UN Doc. A/HRC/29/31 (2015)

Report of the Special Rapporteur on extreme poverty and human rights, on the implementation of the **right to social protection through the adoption of social protection floors**, UN Doc. A/69/297 (2014)

#### *Country reports*

Report on extreme poverty and human rights in **Spain**, UN Doc. A/HRC/44/40/Add.2 (2020);

Report on extreme poverty and human rights in **Malaysia**, UN Doc. A/HRC/44/40/Add.1 (2020);

Report on extreme poverty and human rights in the **United Kingdom**, UN Doc. A/HRC/41/39/Add.1 (2019);

Report on extreme poverty and human rights in **Lao Peoples' Democratic Republic**, UN Doc. A/HRC/41/39/Add.2 (2019);

Report on extreme poverty and human rights in the **United States of America**, UN Doc. A/HRC/38/33/Add.1 (2018);

Report on extreme poverty and human rights in **Ghana**, UN Doc. A/HRC/38/33/Add.2 (2018);

Report on extreme poverty and human rights in **Saudi Arabia**, UN Doc. A/HRC/35/26/Add.3 (2017); Response to the report by the Government of **Saudi Arabia**, UN Doc. A/HRC/35/26/Add.5 (2017)

Report on extreme poverty and human rights in **China**, UN Doc. A/HRC/35/26/Add.2 (2017); Response to the report by the Government of **China**, UN Doc. A/HRC/35/26/Add.6 (2017)

Report on extreme poverty and human rights in **Mauritania**, UN Doc. A/HRC/35/26/Add.1 (2017); Response to the report by the Government of **Mauritania**, UN Doc. A/HRC/35/26/Add.4 (2017)

Report on extreme poverty and human rights in **Chile**, UN Doc. A/HRC/32/31/Add.1 (2016); Response to the report by the Government of **Chile**, UN Doc. A/HRC/32/31/Add.3 (2016)

Report on extreme poverty and human rights in **Romania**, UN Doc. A/HRC/32/31/Add.2 (2016); Response to the report by the Government of **Romania**, UN Doc. A/HRC/32/31/Add.4 (2016)

#### **(ii) As Special Rapporteur on extrajudicial executions, 2004-10**

##### *General Reports*

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, to the UN General Assembly. Topic: **extrajudicial executions and robotic technologies**. UN Doc. A/65/321 (2010), 22 pp

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions to the UN Human Rights Council, UN Doc. A/HRC/14/24 (2010), 27 pp., and A/HRC/14/24/Add.1, 355 pp

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, to the UN General Assembly, UN Doc. A/64/187 (2009), 23 pp.

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions to the UN Human Rights Council. Topics: **Reprisals; execution of juvenile offenders; killing of witches; and lethal force in policing public assemblies**. UN Doc. A/HRC/11/2 (2009), 23 pp., and A/HRC/11/2/Add.1, 449 pp.



Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, to the UN General Assembly. Topics: **witness protection arrangements; military justice systems**. UN Doc. A/63/313 (2008), 24 pp.

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions to the UN Human Rights Council. Topics: **national commissions of inquiry; the right to seek pardon; and prisoners running prisons**. UN Doc. A/HRC/8/3 (2008), 30 pp., and A/HRC/8/3/Add.1, 400 pp.

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, to the UN General Assembly. Topic: **review of the mandate's development over 25 years**. UN Doc. A/62/265 (2007), 21 pp.

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions to the UN Human Rights Council. Topics: **SR's mandate in armed conflicts; 'Mercy killings'; the 'most serious crimes'; and the mandatory death penalty**. UN Doc. A/HRC/4/20 (2007), 33 pp., and A/HRC/4/20/Add.1, 350 pp.

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, to the UN General Assembly. Topic: **use of lethal force by law enforcement officials**. UN Doc. A/61/311 (2006), 21 pp.

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court in arriving at a just decision in the main cause whilst progressing respect for human rights, governance, public health and social security reform in Uganda.

10. That I have perused the notice of motion and supporting affidavits as filed by the Applicants in the main cause, and find that there are questions pertinent to its determination concerning access to rights and social services vis-à-vis the national digital identification requirement including the prohibition of retrogressive measures, standards of legality, suitability, necessity and balancing or proportionality *stricto sensu*, and equality protections and special measures of protection not canvassed in the pleadings, but which are imperative for court's consideration in determining the main cause and strengthening the public health and social security rights regime in Uganda.
11. That the points of law I have submitted upon are novel and will aid the development of Uganda's human rights jurisprudence.
12. That my submissions draw attention to relevant matters of law that are useful, focused and principled. **A copy of my intended brief is attached hereto marked "C".**
13. That my submission will give assistance to the court that it would otherwise not have.
14. That it is in public interest, the wider interests of justice, the protection and progressive development of human rights and socio-economic reform that the leave sought herein is granted.
15. That all I have stated herein is true and correct to the best of my knowledge and belief in support of my application for leave to be admitted as amicus curiae.



THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA  
[CIVIL DIVISION]

MISCELLANEOUS APPLICATION No. \_\_\_\_\_ OF 2022  
ARISING OUT OF MISCELLANEOUS CAUSE No. 86 OF 2022  
DRFT-HCT-00-CV-MC-0066-2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INTERVENE AS  
AMICUS CURIAE BY THE APPLICANT HEREIN ARISING FROM  
MISCELLANEOUS CAUSE No. 86 OF 2022 BETWEEN

PROFESSOR PHILIP ALSTON ----- APPLICANT

AND

1. INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS (ISER) LTD
2. THE UNWANTED WITNESS (U) LIMITED
3. HEALTH EQUITY AND POLICY

INITIATIVE LIMITED ----- APPLICANTS IN MAIN CAUSE

AND

1. THE ATTORNEY GENERAL
2. NATIONAL IDENTIFICATION

REGISTRATION AUTHORITY ----- RESPONDENTS IN MAIN CAUSE

AMICUS BRIEF





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## **I. Statement of Questions to be Addressed**

In the current legal matter, the High Court is being asked to determine, in essence, whether the use of the national digital ID system in Uganda as the sole, mandatory means of identification when accessing benefits under the Social Assistance Grants for Empowerment (SAGE) scheme and public health services is in violation of the right to social security and the right to health. Based on an analysis of relevant international human rights law and comparative human rights case law, this amicus brief will address the following questions:

- 1) Under which circumstances, if any, may a state make the human right to social security contingent on inclusion in a mandatory national digital ID system according to international human rights law?
- 2) Under which circumstances, if any, may a state make the human right to health contingent on inclusion in a mandatory national digital ID system according to international human rights law?
- 3) Under which circumstances, if any, does making the human right to social security and to health contingent on inclusion in a mandatory digital ID system amount to a violation of the prohibition of discrimination according to international human rights law?



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### III. Identity and Interest of the *Amicus Curiae*

1. This amicus brief is being presented in my personal capacity. I am currently the John Norton Pomeroy Professor of Law at New York University School of Law. Previously, I was the United Nations (UN) Special Rapporteur on extreme poverty and human rights from 2014 until 2020, appointed by the UN Human Rights Council in Geneva. In my previous capacity as UN Special Rapporteur, I was one of the first independent experts within this international human rights system to address the implications of national digital ID systems with biometric components (“digital ID”) for the protection of human rights, which poses many novel questions of law. I addressed these issues in a widely cited report on ‘digital welfare states’ to the UN General Assembly at its 74rd session in 2019.<sup>1</sup> I subsequently addressed similar legal issues in my capacity as Special Rapporteur in an April 2020 letter to the government of Ireland, dealing with that country’s Public Services Card, which had many characteristics of a *de facto* digital ID scheme.<sup>2</sup> As Special Rapporteur, I also addressed novel issues of law at the intersection of human rights, especially social rights of persons living in poverty, and the digitalizing state in countries such as the United States,<sup>3</sup> the United Kingdom,<sup>4</sup> and the Netherlands.<sup>5</sup>
2. My interest in the digitalization of the state, and the novel questions of law it poses in the field of economic and social rights, relates to my long-term interest in government social protection systems and their intersection with human rights. As is evident from my below statement of expertise and attached CV and list of publications, I have spent my entire career working on these matters. In the past decade, in my capacity as UN Special Rapporteur on extreme poverty and human rights, I also submitted multiple thematic<sup>6</sup> and country reports addressing human rights issues related to social protection systems to UN human rights institutions.
3. My interest in the legal matter currently pending before the High Court is based on this experience. This case is, to the best of my knowledge, one of the first globally to address whether a state may subject the right to social security and the right to health to limitations through a mandatory national digital ID system. As *amicus curiae*, I would like to address novel points of international and comparative human rights law, which I believe are relevant to the court’s deliberations. These and related points of law on which I hold particular expertise have not yet been comprehensively addressed by the parties to the dispute. My proposed participation in this case as a “friend of the court” is motivated by my fidelity to the law as well as my life-long commitment to the promotion and protection of human rights. I believe that by drawing attention to relevant matters of international and comparative human rights law that are useful to this court, a judgment may aid the development

<sup>1</sup> U.N. Special Rapporteur on extreme poverty and human rights, Report of the Special Rapporteur on extreme poverty and human rights, U.N. Doc. A/74/493 (11 October 2019).

<sup>2</sup> Official Communication to the Irish Government from the U.N. Special Rapporteur on extreme poverty and human rights, dated 14 April 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25176>.

<sup>3</sup> U.N. Special Rapporteur on extreme poverty and human rights, Report of the U.N. Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, U.N. Doc. A/HRC/38/33/Add.1 (4 May 2018).

<sup>4</sup> U.N. Special Rapporteur on extreme poverty and human rights, Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United Kingdom, U.N. Doc. A/HRC/41/39/Add.1 (23 April 2019).

<sup>5</sup> Brief by the U.N. Special Rapporteur on extreme poverty and human rights as *Amicus Curiae* in the case of NJCM c.s./De Staat der Nederlanden (26 September 2019), available at <https://www.ohchr.org/Documents/Issues/Poverty/Amicusfinalversionsigned.pdf>.

<sup>6</sup> U.N. Special Rapporteur on extreme poverty and human rights, Report of the U.N. Special Rapporteur on extreme poverty and human rights, U.N. Doc. A/69/297 (11 August 2014); U.N. Special Rapporteur on extreme poverty and human rights, Report of the U.N. Special Rapporteur on extreme poverty and human rights, U.N. Doc. A/HRC/32/31 (28 April 2016); U.N. Special Rapporteur on extreme poverty and human rights, Report of the U.N. Special Rapporteur on extreme poverty and human rights, U.N. Doc. A/HRC/38/33 (8 May 2018).



of relevant jurisprudence on these matters in Uganda as well as internationally. Given the manifold implications that digital ID systems may have on the human rights of individuals in Uganda and many countries around the world, I hope that my contribution as *amicus curiae* may contribute to the public interest, especially the promotion and protection of human rights.

#### **IV. Statement of Expertise**

4. I have over forty years of experience as a scholar and practitioner in the field of human rights, as evidenced by the attached CV (Appendix A) and list of publications (Appendix B), with publications which I consider especially relevant for the present legal matter highlighted.
5. As a scholar in the field of international human rights law and international law, I have published extensively in the world's foremost human rights and international law journals and am or have been a member of the editorial boards of, *inter alia*, the European Journal of International Law, Human Rights Quarterly, Journal of Human Rights Practice and the International Journal of Health and Human Rights. I have furthermore authored a widely acclaimed and globally used textbook on international human rights law. At New York University School of Law, I teach courses on Economic and Social Rights, International Human Rights Law, Strategic Human Rights Litigation, as well as a course on International Human Rights and Digital Governance, which specifically addresses novel human rights issues related to digital government and national digital ID systems.
6. I have held numerous positions in international human rights bodies as an independent expert. Among other roles, I served for more than a decade as a member and chairperson of the UN Committee on Economic, Social and Cultural Rights (CESCR), consisting of independent human rights experts that monitor implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by its States' Parties. I also served as UN Special Rapporteur on extrajudicial, summary, or arbitrary executions (2004–10), was a member of the Group of Experts on Darfur appointed by the UN Human Rights Council in 2007, Special Adviser to the UN High Commissioner for Human Rights on the Millennium Development Goals (2002–06) and Commissioner of the UN Security Council Commission of Inquiry into the Central African Republic (2014–15).
7. In recognition of my work, I have received the Adlai Stevenson Award, presented by the United Nations Association of the USA at Princeton University to "an individual whose character and career work reflect the principles of the UN Charter and the Universal Declaration of Human Rights." I am also an Honorary Life Member of the American Society of International Law, awarded annually to one "person who has rendered distinguished contributions or service in the field of international law."

#### **V. Summary of Arguments**

8. Before exploring the arguments, it is helpful to briefly review the current national and international landscape of national digital ID systems and the relevance for human rights.
9. As follows from the pleadings by the parties, this litigation centers on the functioning of the national digital ID system with biometric components, *Ndaga*



*Muntu*, introduced in 2014, and the Registration of Persons' Act (ROPA) passed by the Ugandan Parliament in 2015 to provide a legal framework for this new system. As I understand it, the digital ID system in Uganda consists of three main components: the national identity register (NIR), the national identity card (NIC), and the national identity number (NIN). Section 65 of ROPA establishes that the use of information in the NIR "shall be used" for a wide range of purposes, including "public administration" and "providing social services, including social security services, health, education, and welfare benefits." ROPA further provides in Section 66 for "Mandatory use of national identification cards," stating that "any ministry department or agency of government or any other institution providing a public service shall require a person accessing the service to produce a national identification number or national identification card or alien's identification number or alien's identification card." Section 66 enumerates a different list of services than Section 65, but includes "pension and social security transactions," and affords the government discretion to apply the provision to "any other purpose as may be prescribed by the Minister."

10. At the same time, I understand from the pleadings that the Minister for Health (MoH) and the Minister for Gender, Labour & Social Development (MGLSD) have begun to integrate the digital ID into certain aspects of public service delivery. Based on the pleadings and publicly available information that I have reviewed in the preparation of this brief, this integration with healthcare has thus far been limited to a requirement to present a national ID card or number when seeking access to some health services. Meanwhile, MGLSD has sought to integrate the national digital ID system in its Social Assistance Grants for Empowerment (SAGE) scheme, which delivers cash transfers to older persons over the age of 80 through the Senior Citizens' Grant (SCG). This integration includes i) using the NIR as the sole means of identifying beneficiaries by their date of birth, ii) requiring individuals to present either a NIC or NIN for use by program administrators and Payment Service Providers (PSPs), and iii) requiring individuals to biometrically authenticate their identity in order to enroll and receive payments.
11. Many other countries around the world have made efforts to introduce similar national digital ID systems, and several have attempted to integrate such systems with public service delivery. This has resulted in common concerns arising in different contexts. One commonality is the persistent problem of exclusion. There are often financial, administrative, legal, technological, and physical barriers erected in the context of digital ID systems, which prevent certain groups from accessing the ID system and enjoying the human rights that become contingent on having an ID. In a report to the Human Rights Council in 2020, the UN Secretary General highlighted some of these concerns, saying that such systems "can themselves be sources of exclusion, contrary to their purpose."<sup>7</sup>

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<sup>7</sup> U.N. Secretary General, Report of the U.N. Secretary General on the role of new technologies for the realization of economic, social and cultural rights, U.N. Doc. A/HRC/43/29 (05 March 2020), available at: <https://daccess-ods.un.org/tmp/4407128.09562683.html> ("Costly or difficult registration requirements, for example, may prevent poor and disadvantaged populations from fully participating in an identity system. Women in some regions face legal or customary barriers to obtaining official identification. A lack of Internet connectivity, needed for online authentication, also can contribute to exclusion. Older persons and members of some occupational groups performing mostly manual labour may have difficulties providing fingerprints that are clear enough for the purposes of the identify systems. Services that require authentication at the point of delivery create problems for older persons or persons with disabilities who may not be able to travel. Difficulties also arise when the name and gender in identity documentation are not properly reflected in the identity system, exposing people with non-binary gender identity to particular risks. Lastly, exclusion can also result from a particular group being given identity documents that are different from those of others.").



12. The most well-known examples of exclusion come from over a decade of experience in India, one of the first movers in the field of national digital ID systems. The Indian *Aadhaar* unique identification system uses biometrics and a unique number, and has been linked to various public services such as food rations, fuel subsidies and education. This has led to instances of exclusion from these public services and rights.<sup>8</sup> In Kenya, historically marginalized groups have claimed that they faced significant barriers to register for the new system and risked being completely excluded from some public and private services as a result. These recurring concerns in different countries around the world suggest that there are common challenges and human rights concerns related to introducing national digital ID systems, especially when they are linked to the provision of social protection and other public services. The UN Secretary General, in raising concerns about similarly broad digital ID systems, thus called on States to “take appropriate measures to ensure that digital or biometric identity programmes are designed, implemented and operated with appropriate legal and technical safeguards in place and in full compliance with international human rights law.”<sup>9</sup>
13. This brief will rely on applicable international treaties to which Uganda is a State Party, as well as decisions and interpretative guidance from authoritative sources, including UN treaty bodies and the African Commission on Human and Peoples’ Rights. The brief will also draw on comparative caselaw from countries including India, Kenya, Jamaica, Mauritius, and South Africa, and from regional human rights systems in Europe and Latin America. While courts in other jurisdictions have begun to grapple with legal questions related to digital ID systems, it should be noted that the current matter presents novel questions that, as far as the *amicus* is aware, have not yet been sufficiently addressed by any court,<sup>10</sup> especially since digital ID cases in other jurisdictions have focused predominantly on the human right to privacy. This brief will focus on these novel issues around the human right to social security and to health, as well as specific obligations of states on non-discrimination and equality in relation to these rights.
14. This brief does not purport, however, to address the entire range of human rights concerns related to the *Ndaga Muntu* system. For instance, I will not address questions relating to the right to privacy and data protection standards governing personal information, including biometrics, collected and processed by digital ID systems. While this brief will not focus on all legal issues raised in this matter, the *amicus curiae* would be pleased to provide further assistance to the Court in addressing legal questions not addressed in this initial brief.
15. My main arguments will be further developed below. However, they can be concisely summarized as follows:

<sup>8</sup> See, e.g., Karthik Muralidharan et. al., *Identity Verification Standards in Welfare Programs: Experimental Evidence from India* (Nat’l Bureau of Econ. Rsch., Working Paper No. w26744 (2020)).

<sup>9</sup> U.N. Human Rights Council, Resolution on the right to privacy in a digital age, U.N. Doc. A/HRC/RES/42/15 (9–7 September 2019), available at: <https://daccess-ods.un.org/tmp/5012597.44167328.html>.

<sup>10</sup> For instance, two recent legal challenges to biometric national ID systems in Kenya and in Jamaica dealt with prospective systems, which had not yet been implemented and were primarily challenges based on the right to privacy. The court in Kenya also considered equality and non-discrimination claims and directed the respondents to enact a regulatory framework to address potential exclusion, *Nubian Rights Forum & Others v. Attorney General & Others*, Consolidated Petitions No. 56, 58 & 59 of 2019, ¶ 1044 High Court of Kenya at Nairobi (20 January 2020). Meanwhile, in India, where the *Aadhaar* system has been in place for several years, the judgment of the Supreme Court focused on the right to privacy, and the majority opinion did not pronounce itself on whether exclusion from certain social programs was justified, *Puttaswamy v. Union of India & Others*, Petition No. 494 of 2012, ¶ 318 Supreme Court of India (26 September 2018).

- 1) Under international human rights law, State Parties to the ICESCR have an obligation to respect, protect and fulfill the right to social security and the right to health. An essential element of these obligations is ensuring equal access to services and schemes which are necessary for everyone to enjoy minimum essential levels of these rights. Digital ID systems which function as mandatory qualifying or eligibility conditions for access to the right to social security or health may have the effect of completely or partially denying access to these rights, and may therefore amount to a violation of human rights, if such restrictions are not sufficiently justified.
- 2) In case of a restriction of the right to social security or health, courts must determine whether such a restriction may be justified. Under international human rights law, any infringement of the right to social security or health must not amount to a retrogressive measure, which would be in violation of State obligations under Article 2(1) of the International Covenant on Economic and Social Rights (ICESCR) to progressively realize human rights to the maximum of available resources. Furthermore, a State may only justify violations of these rights if it complies with stringent requirements. One relevant standard is Article 4 of the ICESCR, which dictates under which circumstances a State may impose express limitations on these rights, while other tests of legality, necessity and proportionality may also apply.
- 3) Under relevant international human rights law, the State has an immediate and cross-cutting obligation to recognize, protect, and promote non-discrimination and equality. Special measures of protection are afforded to women and older persons. In cases involving both direct and indirect discrimination, the Court should apply a strict level of scrutiny and a heightened burden on the State to prove that a discriminatory measure is justified.



## VI. Arguments

### **(1) The right to social security and the right to health under international human rights law**

16. The right to social security and the related right to an adequate standard of living have been firmly established in international law.<sup>11</sup> The Universal Declaration of Human Rights of 1948 (UDHR), recognizes the right to social security in Article 23, and the right of everyone to an adequate standard of living in Article 25. These rights have been further established in the following international treaties to which Uganda is a State Party: the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>12</sup> Article 9 (social security) and Article 11 (adequate standard of living); the International Convention on the Elimination of Racial Discrimination (CERD),<sup>13</sup> Article 5(e); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>14</sup> Article 11(1); and the Convention on the Rights of the Child (CRC), Article 26.<sup>15</sup>
17. While the African Charter on Human and Peoples' Rights (African Charter) does not include a provision explicitly recognizing the right to social security, both the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) have consistently asserted that such a right is implied in several enumerated rights, including Articles 4, 5, 6, 15, 16, 18(1), (2), and (4).<sup>16</sup> In 2004 Member States of the African Union adopted the Pretoria Declaration on Economic, Social and Cultural Rights, which confirms the implied recognition of the right to social security within the African Charter.<sup>17</sup>
18. The U.N. Committee on Economic, Social and Cultural Rights (CESCR) has stated that the right to social security serves as a fundamental means of "guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize" their economic, social and cultural rights.<sup>18</sup> As a part of their core obligations to respect, protect, and fulfill<sup>19</sup> the rights to social security and an adequate standard of living under the ICESCR, States Parties "are required to ensure access to a social security scheme that provides a minimum essential level of benefits, without discrimination of any kind."<sup>20</sup>

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<sup>11</sup> See Nsongurua J. Udombana, *Social Rights are Human Rights: Actualizing the Right to Work and Social Security in Africa*, 39 CORNELL L. J. 181, 195–96 (2006).

<sup>12</sup> Ratified by Uganda 21 Jan 1987.

<sup>13</sup> Ratified by Uganda 21 Nov 1980.

<sup>14</sup> Ratified by Uganda 22 Jul 1985.

<sup>15</sup> Ratified by Uganda 17 Aug 1990.

<sup>16</sup> African Commission on Human and Peoples' Rights, Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 45 (October 2011) [hereinafter African Commission, Guidelines and Principles on ESCR].

<sup>17</sup> African Commission on Human and Peoples' Rights, Pretoria Declaration on Economic, Social and Cultural Rights, ACHPR/Res.73(XXXVI)04, § 10 (2004).

<sup>18</sup> U.N. Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 19: The right to social security (art. 9), ¶ 1 U.N. Doc. E/C.12/GC/19, (4 February 2008).

<sup>19</sup> See, e.g., Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 6 (1997) ("Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any of these obligations constitutes a violation of such rights."); *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/1996, African Commission on Human and Peoples' Rights [ACHPR] ¶¶ 43–48 (17 October 2001).

<sup>20</sup> U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The economic, social and cultural rights of older persons, ¶¶ 20–21, 30 U.N. Doc. E/1996/22 (8 December 1995); *Marcia Cecilia Trujillo Calero v. Ecuador*, Comm. No. 10/2015, Views adopted by the U.N. Committee on Economic, Social and Cultural Rights (CESCR), ¶ 11 U.N. Doc. E/C.12/63/D/10/2015 (26 March 2018).



19. The African Commission has also stated in its Guidelines and Principles on Economic, Social and Cultural Rights that part of the core obligations of States Parties' to the African Charter on Human and Peoples' Rights should "[e]nsure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education consistent with human life, security and dignity."<sup>21</sup>
20. The specific obligations of States to ensure the right to social security for older persons have been further recognized in Article 9 of the ICESCR, which explicitly mentions the right of individuals to enjoy an adequate standard of living in old age. The CESCR has said that States Parties "should give special attention to those individuals and groups who traditionally face difficulties in exercising this right," which includes women and older persons.<sup>22</sup> In General Comment No. 6 on the rights of older persons, the CESCR emphasized that States Parties' to the ICESCR have a specific obligation to provide non-contributory old-age benefits for those who would not otherwise qualify for a public or private pension.<sup>23</sup> The African Commission has similarly stated that provisions should be made to ensure social security for those in old age.<sup>24</sup>
21. In response to the need to ensure minimum essential levels of social security for older persons, many governments have established social assistance programs that provide non-contributory cash transfers in the form of a social pension.<sup>25</sup> Especially in the wake of the COVID-19 pandemic and the subsequent public health and economic crises, these programs have proven crucial in protecting older persons from the effects of extreme poverty. For such programs to be effective, however, they must be designed in a way that is inclusive and non-discriminatory.<sup>26</sup>
22. The right to health is recognized in the UDHR (Article 25), the ICESCR (Article 12), and the African Charter (Article 16). The right to health for women is recognized in Article 12 of CEDAW, requiring States Parties' to take appropriate measures to eliminate discrimination against women in healthcare. In its Guidelines and Principles on ESCR, the African Commission further clarified that States must "[e]nsure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups."<sup>27</sup>

## **(2) Analysis of violations of the right to social security and the right to health**

23. In addition to the frequently referenced "respect, protect and fulfil" framework for understanding State obligations under international human rights law, an equally important framework known as the 4As ("availability, accessibility, acceptability and adaptability") evolved simultaneously and is often relied upon by governments, rights-holders and courts to apply international human rights instruments, including

<sup>21</sup> African Commission, Guidelines and Principles on ESCR, *supra* note 16, at ¶ 82(a).

<sup>22</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 31.

<sup>23</sup> CESCR, General Comment No. 6, *supra* note 20, at ¶ 30.

<sup>24</sup> African Commission, Guidelines and Principles on ESCR, *supra* note 16, ¶ 82(d)(3).

<sup>25</sup> See generally Gijsbert Vonk & Marius Olivier, *The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)*, 21 EUR. J. SOC. SEC. 219 (2019), <http://journals.sagepub.com/doi/10.1177/1388262719867337>; United Nations Development Programme (UNDP), *THE STATE OF SOCIAL ASSISTANCE IN AFRICA* (2019).

<sup>26</sup> U.N. Special Rapporteur on extreme poverty and human rights, Non-take-up of rights in the context of social protection, ¶ 25 U.N. Doc. A/HRC/50/38 (19 April 2022). ("A social protection system designed to exclude cannot be considered in compliance with article 9 of the International Covenant on Economic, Social and Cultural Rights.")

<sup>27</sup> African Commission, Guidelines and Principles on ESCR, *supra* note 16, at ¶ 16.



the ICESCR.<sup>28</sup> According to the CESCR, the essential element of accessibility has four overlapping dimensions, including a) non-discrimination, b) physical accessibility, c) economic accessibility, and iv) information accessibility.<sup>29</sup> Failure to meet the core obligations under the Covenant, discussed in para. 20 and 23, may also amount to violations of the right to health and the right to social security.<sup>30</sup>

24. Accessibility of health facilities, goods and services has been identified as an essential element of the right to health,<sup>31</sup> and an essential factor of the right to social security.<sup>32</sup> The Pretoria Declaration adopts the same structure, stating that the African Charter requires States to ensure “[a]vailability of accessible and affordable health facilities, goods and services of reasonable quality for all.”<sup>33</sup> Violations of either right may occur through both acts of *commission*, or the direct action of States Parties’, or through acts of *omission*, including the failure to take sufficient and appropriate action to realize these rights.<sup>34</sup> The CESCR has expressly stated that denying or limiting equal access for all persons to preventative, curative, and palliative health services may be construed as a violation of the state’s obligation to respect the right to health.<sup>35</sup> Violations may also include “the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.”<sup>36</sup>
25. Despite the good intentions underpinning them, many of the digital ID systems that have been rolled out globally have been shown to interfere with and restrict human rights, and particularly the essential element of access.<sup>37</sup> Such interference may occur because of *de jure* or direct limitations, laws, policies and/or practices, such as when the law dictates that registration in a national digital ID system is a precondition for accessing a specific right and provides for no alternatives where necessary.<sup>38</sup> However, they may also be the result of a *de facto* or indirect limitation, for instance: where the financial cost of registration for a national ID system is an insurmountable barrier for individuals or certain groups; where administrative or technological failure results in unreasonable delays in registration processes; or where individuals are unable to comply with technological qualifying conditions, such as providing clear biometrics through fingerprints.

<sup>28</sup> See, e.g., U.N. Special Rapporteur on the Right to Education, Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, ¶¶ 51–74 UN Doc. E/CN.4/1999/49 (13 January 1999); Annual report of the special rapporteur on the right to education, Katarina Tomasevski, ¶¶ 32–65 UN Doc. E/CN.4/2000/6, (1 February 2000); Annual report of the special rapporteur on the right to education, Katarina Tomasevski, ¶¶ 64–77 UN Doc. E/CN.4/2001/52 (11 January 2001); Annual report of the special rapporteur on the right to education, Katarina Tomasevski, ¶¶ 22–45 UN Doc. E/CN.4/2002/60 (7 January 2002). See also, U.N. CESCR, General comment No. 13: The right to education (art. 13), ¶ 6 U.N. Doc. E/C.12/1999/10 (1999).

<sup>29</sup> U.N. CESCR, General Comment No. 14: the right to the highest attainable standard of health (article 12), ¶ 12(b) U.N. Doc. E/C.12/2000/4 (11 August 2000).

<sup>30</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 62.

<sup>31</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 12(b).

<sup>32</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶¶ 23–27.

<sup>33</sup> Pretoria Declaration, *supra* note 17, at § 7.

<sup>34</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶¶ 48–49.

<sup>35</sup> *Id.* at ¶ 50.

<sup>36</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶¶ 46–52. See also CESCR, General Comment No. 19, *supra* note 18, at ¶ 65.

<sup>37</sup> A selection of court cases in which these systems have been discussed includes *Nubian Rights Forum & Others v. Attorney General & Others*, High Court of Kenya at Nairobi (20 January 2020); *Julian J. Robinson v. Attorney General*, 2018 HCV01788 [2019], Supreme Court of Jamaica (12 April 2019); *Puttaswamy v. Union of India & Others*, Petition No. 494 of 2012, Supreme Court of India (26 September 2018); *Madewhoo M. v. the State of Mauritius and Another*, 2015 SCJ 177 [Mauritius] Record No. 108696, at 33 (29 May 2015).

<sup>38</sup> U.N. Special Rapporteur on extreme poverty and human rights, Non-take-up of rights in the context of social protection, ¶ 25 U.N. Doc. A/HRC/50/38 (19 April 2022). (“A social protection system designed to exclude cannot be considered in compliance with article 9 of the International Covenant on Economic, Social and Cultural Rights.”) See also U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Racial and Xenophobic discrimination and the use of digital technologies in border and immigration enforcement, ¶¶ 26–27 U.N. Doc. A/HRC/48/76 (22 September 2021).



26. In situations where mandatory preconditions exist, this may result in the withdrawal or denial of access to health services or social pensions. This may well amount to a severe restriction of the right to social security and to health. As the Constitutional Court in South Africa noted in a case concerning access to government social security benefits, the consequences of this restriction may be grave, with excluded individuals “relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights [...]”<sup>39</sup> Such a restriction may amount to a failure of a State to meet its minimum core obligations under the ICESCR.
  27. Furthermore, the CESCR has noted that a violation of human rights occurs when there is “failure to remove promptly obstacles which the State party is under a duty to remove in order to permit the immediate fulfilment of a right guaranteed by the Covenant.”<sup>40</sup> Therefore, the continuing interference created by both *de jure* and *de facto* limitations on the right to social security and health may constitute violations of the State’s obligations to respect, protect, and fulfill these rights under international human rights law.
  28. In the present matter, should the Court conclude that there has been a *prima facie* violation of the right to social security or health, the Court must then consider at least two further legal questions. The first is whether use of the mandatory national ID system may amount to a retrogressive measure that interferes with a State Party’s minimum core obligations, under Article 2(1) of the ICESCR. The second is whether the mandatory national ID is a permissible express limitation on the right to health and social security under Article 4 of the ICESCR or whether it meets other tests of legality, necessity and proportionality. Separately, the same rights must be accorded on an equal and non-discriminatory basis, a mandate that is linked with State obligations that are explored in Section (3).
- (a) Prohibition on Retrogressive Measures and minimum core obligations, under Article 2(1) of the ICESCR
29. Article 2(1) of the ICESCR requires State Parties to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” In General Comment No. 3 and subsequent authoritative statements, the CESCR interpreted this to mean that “any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”<sup>41</sup> There is a strong presumption that retrogressive measures taken in relation to the right to social security and health are not permissible.<sup>42</sup>

<sup>39</sup> *Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, ¶¶ 81, 115 (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004).

<sup>40</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 65.

<sup>41</sup> U.N. CESCR, General Comment No. 3: The nature of States parties’ obligations, ¶ 9 U.N. Doc. E/1991/23 (15 November 2006); U.N. CESCR General Comment No. 13: The right to education, ¶ 45 U.N. Doc. E/C.12/1999/10 (8 December 1999); CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 32; U.N. CESCR General Comment No. 15: The right to water ¶ 19 U.N. Doc. E/C.12/2002/11 (2003); U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15, paragraph 1 (c), of the Covenant), ¶ 27 U.N. Doc. E/C.12/GC/17 (2006); U.N. CESCR, General Comment No. 18: The right to work ¶ 21 U.N. Doc. E/C.12/GC/18 (2006). *See also*, Maastricht Guidelines, *supra* note 19, Guideline 14(e); Ben T C Warwick, *Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights*, 19 HUM. RTS. L. REV. 467 (2019).

<sup>42</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 42; CESCR, General Comment No. 13, *supra* note 41, at ¶ 32.



30. A retrogressive measure is “any measure that implies a step back in the level of protection accorded to the rights in ICESCR as a consequence of an intentional decision by the state.”<sup>43</sup> The term “deliberate” used by the CESCR should not be approached in absolutist terms,<sup>44</sup> nor should the term “measure” be read to exclude omissions or policy and practice level state actions and their effects. Failure to consider other forms of retrogression, both empirical and indirect, would deprive the non-retrogression doctrine of significant practical application as a safeguard against human rights backsliding.<sup>45</sup> Indeed, to paraphrase the CESCR, it would go against the “raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.”
31. The CESCR has said in General Comment No. 3 that if the State adopts any deliberately retrogressive measures, then *they have the burden* of proving that any restrictions “have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.”<sup>46</sup> It is not sufficient to merely assert that the government has considered other options, this assertion must be backed up by sufficient evidence demonstrating that a proper assessment of the alternatives have been carried out. “Under the jurisprudence of the CESCR, the State has the burden of proving that the measures were taken in pursuit of a *pressing* goal, that they were *strictly necessary*, and that there were *no alternative or less restrictive measures available*. In other words, retrogressive measures are deemed to be breaches of the duty of progressive realization, unless the State can prove, under heightened scrutiny, that they are justified.”<sup>47</sup>
32. While no court or tribunal has yet examined the impact of digital overhauls of social protection, health and other public service systems from the perspective of non-retrogression, several national courts and the CESCR have considered analogous systemic measures and their effects as instances of prohibited retrogressive actions.<sup>48</sup> It is accordingly possible, and from the perspective of progressive realization under Article 2(1) it is important, to consider a mandatory ID requirement and its implementation and effects as a potentially retrogressive measure; that is, a policy decision or practice that excludes certain groups from their enjoyment of social rights, moving them backward in the enjoyment of these rights, even though such action or inaction may be couched as an inclusive, progressive measure by the State.

<sup>43</sup> Maria Magdalena Sepúlveda Carmona, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights 323 (2003).

<sup>44</sup> International Commission of Jurists (ICJ), A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa 90 (August 2019) (“[T]hrough it is *deliberately* retrogressive measures that require “*the most careful* consideration,” interpreted purposively, the obligation to ensure progressive realization calls into question any reasonable [sic] foreseeable retrogressive measures, whether such “measures” are in the form of state action or inaction.”) (citing Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution*, Juta Law, 2010, p. 190).

<sup>45</sup> See Warwick, *supra* note 41, at 471 (citing and expanding upon the distinction between normative (on paper) and empirical (in practice) retrogression); *id.* at 473 (noting the “danger” that without this additional distinction to make non-retrogression real, alongside affordances to account for the difficulties of providing real-life retrogressive effects, the lived experience of backsliding will go unaddressed). See also *id.* at 476 (citing Nolan, “Putting ESR-Based Analysis into Practice: Addressing the Conceptual Challenges,” in Nolan et al. (eds.), Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights 50–51 (2013) (“[T]he [CESCR] Committee has never addressed the difference between retrogressive measures that are deliberate and those that are not.”)).

<sup>46</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, ¶ 32.

<sup>47</sup> See, e.g., ICJ, *supra* note 44, at 47, 86.

<sup>48</sup> Belgian Court of Arbitration, Case No. 5/2004, (14 January 2004), ¶ B 25.3 (public housing); *Aquino, Isacio c. Cargo Servicios Industriales S.A. s/accidentes ley 9.688*, Supreme Court of Argentina (21 September 2004); *Mohamed Ben Djazia and Naouel Bellili v. Spain*, Comm. No. 5/2015, Views adopted by the U.N. Committee on Economic, Social and Cultural Rights (CESCR), UN. Doc. E/C.12/61/D/5/2015 (20 June 2017).



In other words, the fact that a new or emerging technology is at play should not prevent the State from considering whether a new universal ID system and its mandatory linking to the enjoyment of social rights are foreseeably likely to roll back these protections, akin to physical evictions in connection with a public housing development or social security reforms that introduce non-technological burdens.

33. Not only does article 2 (1) ICESCR place severe restrictions on retrogressive measures, the CESCR has said that each State Party has a “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” in the ICESCR.<sup>49</sup> Thus, the CESCR has stated that “for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>50</sup> In the context of the right to social security, this means that the State Party has to ensure “access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.”<sup>51</sup> The State Party should also ensure “the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups” and “to respect existing social security schemes and protect them from unreasonable interference.”<sup>52</sup> With relation to the right to health this obligation requires the State “[t]o ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.”<sup>53</sup> These core obligations are non-derogable, and the State Party cannot under any circumstances justify its non-compliance with its core obligations.<sup>54</sup>
34. Just as the mandatory requirement of linking access to the right to social security and health to inclusion in a national digital ID system may lead to or amount to deliberately retrogressive measures by a State Party, there is also an obligation to ensure at least minimum essential levels of the right to social security and health regardless of the circumstances. The requirements of a national digital ID system must therefore never lead to a failure by the State to comply with its minimum core obligations under the ICESCR.

(b) Limitation on rights, invoking Article 4 of the ICESCR

35. In situations where a violation of rights has been alleged, for instance where individuals have shown evidence that *de facto* or *de jure* barriers have resulted in full or partial denial of access to minimum essential levels of rights, the State Party may raise certain defenses. This includes arguments that the restrictive measure is either a permissible limitation of the right under international human rights law, or that, despite the alleged violation, the measure is justified as the legitimate, necessary and proportionate exercise of State authority. However, such limitations or violations should be subject to strict judicial scrutiny, and found permissible only insofar as they meet applicable high standards of, *inter alia*, legality, proportionality, and

<sup>49</sup> CESCR, General Comment No. 3, *supra* note 41, at ¶ 10.

<sup>50</sup> *Id.*

<sup>51</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 59.

<sup>52</sup> *Id.* at ¶ 59.

<sup>53</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 43(a).

<sup>54</sup> *Id.* at ¶ 47.



necessity. This section discusses some of the relevant standards under both international human rights and comparative constitutional law.

36. Under the ICESCR, measures which *expressly* limit the right to social security and the right to health are permissible only when they meet a set of strict criteria, articulated in Article 4. Article 4 allows for limitations “as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>55</sup> The *travaux préparatoires* to the ICESCR suggest that the intent of the drafters was to insure that “States would not be free to limit the rights arbitrarily in any manner they might choose.”<sup>56</sup> A specific concern was that Article 2, which provides for the progressive realization of rights within the Covenant, “did not indicate when limitations could be legitimate and it was necessary to state clearly that limitations would be permissible only in certain circumstances and under certain conditions.”<sup>57</sup> The drafting committee thus aimed to strike a balance between allowing a sufficient margin for States to decide on appropriate actions to achieve progressive realization, but also to safeguard rights from arbitrary, unreasonable, and unfair limitations.<sup>58</sup>
37. Subsequent commentary by the CESCR has emphasized that the provisions under Article 4 are “primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States.”<sup>59</sup> Such “limitations must respect the minimum core obligations of the right, and must be proportionate to the aim pursued.”<sup>60</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, which were unanimously adopted by a group of distinguished experts in 1987, stated that Article 4 was “not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.”<sup>61</sup>
38. In the context of social security, and particularly non-contributory social pensions, the CESCR has clarified that a state may impose certain “qualifying conditions,” meaning rules that determine eligibility. Specifically, the CESCR has held that qualifying conditions for benefits must be “reasonable, proportionate and transparent.” Qualifying conditions are not identical to ‘limitations’ and there are subtle differences between the specific rules on ‘qualifying conditions’ that the CESCR has specified in relation to the right to social security versus the general rules on ‘limitations’ in Article 4 ICESCR in the context of other rights. However, the CESCR has applied the framework of Article 4 to qualifying conditions,<sup>62</sup> further stating that the “withdrawal, reduction or suspension of benefits should be

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<sup>55</sup> ICESCR, Article 4. See also Amrei Müller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 557–601 (2009).

<sup>56</sup> U.N. General Assembly, Tenth Session, Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General), U.N. Doc. A/2929 (1 July 1955).

<sup>57</sup> U.N. Economic and Social Council (ECOSOC), Council Committee on Non-Governmental Organizations, Draft International Covenant on Human Rights and Measures of Implementation, Report to the Economic and Social Council on the Eighth Session of the Commission, E/2256; ¶ 156 U.N. Doc. E/CN.4/669 (14 April 1952–14 June 1952).

<sup>58</sup> For a detailed assessment of drafting history of the ICESCR, see Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 Hum. Rts. Q. 156, 197–99 (1987).

<sup>59</sup> *S.C. and G.P. v. Italy*, Comm. No. 22/2017, Views adopted by the U.N. Committee on Economic, Social and Cultural Rights (CESCR), ¶ 9 U.N. Doc. E/C.12/65/D/22/2017 (28 March 2019); CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 28.

<sup>60</sup> U.N. CESCR, General Comment No. 25: On science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), ¶ 21, U.N. Doc. E/C.12/GC/25 (30 April 2020).

<sup>61</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 47 U.N. Doc. E/CN.4/1987/17, Annex (1986).

<sup>62</sup> *Trujillo Calero v. Ecuador*, ¶ 11.



circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.”<sup>63</sup>

39. Unlike the ICESCR, the African Charter does not contain an express general limitation clause, although some rights include specific claw-back clauses that allow for internal limitations of the specific right.<sup>64</sup> The African Commission, however, has applied the provisions of Article 27 (2) as a general limitations clause to a number of rights under the Charter.<sup>65</sup> The Commission has clarified that such “limitations must be strictly proportionate with and absolutely necessary for the advantages which follow”<sup>66</sup> and “any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible.”<sup>67</sup>
40. Article 27(2) of the African Charter has been applied extensively to civil and political rights, and increasingly to cases involving economic and social rights as well. It is notable that apart from the right to property, none of the economic and social rights enumerated in the African Charter are subject to a claw-back clause. In the *Endorois* case, which dealt in part with the cultural rights of the Endorois community in Kenya, the Commission said that “[t]he absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people’s right to culture.”<sup>68</sup> The Commission went on to say that any limitation “must not be applied in a manner that would completely vitiate the right.”<sup>69</sup>
41. When dealing specifically with qualifying conditions for social security, the African Commission has specified that the State must “[e]nsure that qualifying conditions for benefits are reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.”<sup>70</sup> These conditions must also “[e]nsure no direct or indirect discrimination in social security schemes on any of the prohibited grounds of discrimination particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.”<sup>71</sup>
  - (i) *Burden of proof*
42. In cases alleging a violation of rights through measures that limit or restrict the right, there is a two-stage process for evaluating claims. The first step is an evaluation of whether the right has been restricted, or whether there has been a *prima facie* violation, while the second is whether such a restriction is justifiable in law.<sup>72</sup>

<sup>63</sup> CESCR, General Comment No. 19, *supra* note 18, at ¶ 24.

<sup>64</sup> The existence of these claw-back clauses has attracted considerable criticism. See, e.g., Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples’ Rights*, 23 HUM. RTS. Q. 327, 349–51 (2001).

<sup>65</sup> Manisuli Ssenyonjo, “The Protection of Economic, Social and Cultural Rights under the African Charter,” in Danwoord Mzikenge Chirwa (ed.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* 93–4 (2016), citing *Constitutional Rights Project and Others v. Nigeria (Constitutional Rights Project)*, African Commission on Human and Peoples’ Rights [ACHPR], Comm. Nos. 140/94, 141/94 and 145/95, ¶ 42 (15 November 1999).

<sup>66</sup> *Constitutional Rights Project*, ¶ 42.

<sup>67</sup> *Constitutional Rights Project*, ¶ 172.

<sup>68</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, African Commission on Human and Peoples’ Rights [ACHPR], Comm. 276/2003, Decision on the Merits, ¶ 249 (November 25, 2009).

<sup>69</sup> *Id.*

<sup>70</sup> African Commission, Guidelines and Principles on ESCR, *supra* note 16, at ¶ 82(f).

<sup>71</sup> *Id.* at ¶ 82(i).

<sup>72</sup> Other regional and national courts and tribunals apply similar analysis in constitutional and human rights adjudication. See, e.g., *Julian J. Robinson v. Attorney General*, 2018 HCV01788 [2019], Supreme Court of Jamaica, ¶ 268 (12 April 2019);



43. The applicant has the initial burden of showing that there has been a *prima facie* violation of the right.<sup>73</sup> However, once this burden has been met, then the onus is on the government to prove that the limitation is justified. Comparative jurisprudence from the apex courts of India and Jamaica on the application of rights limitation in cases involving digital identification and service delivery sheds further light on the respective burdens of claimants and the State in furnishing sufficient evidence. In *Julian J. Robinson v. Attorney General of Jamaica*, decided most recently and which gives ample treatment to the relevant Indian jurisprudence, Chief Justice Sykes of the Jamaican Supreme Court adopted a “strict application” of the limitations [proportionality] test. Specifically, the claimants’ initial burden is “minimal” in showing a *prima facie* violation of constitutional rights. The State, on the other hand, holds a “heightened burden” to demonstrate an appropriate objective and tailored means of attaining it. The CESCER has similarly placed a high burden on the “State party imposing a restriction on the enjoyment of a right under the Covenant [ ] of justifying such serious measures in relation to each of the elements identified in article 4.”<sup>74</sup>
44. A Court applying this framework should therefore avoid imposing unreasonably high burdens on claimants to demonstrate that a right is infringed, and to ensure that the Government provides sufficient evidence to prove each element of the criteria for permissibility.<sup>75</sup> Indeed, in such cases relevant information regarding the nature and scope of violations is likely to be in the exclusive possession of the State. In *Robinson*, furthermore, the majority opinion underscores that “[i]n the event that the court is over the view that there is a tie [between the parties] then the claimant must prevail for the reason that in constitutional litigation the attitude of the court must be that the right or freedom prevails unless the violation is clearly justified.”<sup>76</sup>

(ii) Legality

45. Under the ICESCR, the Article 4 requirement of being “determined by law,” includes both the formal requirement that the limitation have some basis in a national law of “general application,” as well as a substantive requirement that the limitation conforms with the principles of law, including international human rights law. The Limburg Principles clarified that such laws must not be “arbitrary or unreasonable or discriminatory,” and that they must be “clear and accessible to everyone.” Furthermore, the national law in question must include “adequate safeguards and effective remedies.”<sup>77</sup>
46. The European Court of Human Rights has established a commonly used test for legality in *S and M. v. Marper*, asserting that the law must be accessible, foreseeable, and sufficiently precise that it allows an individual to anticipate its effects and regulate their conduct accordingly.<sup>78</sup> Both the African Commission and the African Court follow a similar approach, stating that “domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and

<sup>73</sup> *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples’ Rights [ACHPR], Comm. No. 211/98, ¶ 67 (7 May 2001).

<sup>74</sup> *S.C. and G.P. v. Italy*, ¶ 9; CESCER, General Comment No. 14, *supra* note Error! Bookmark not defined., at ¶ 28.

<sup>75</sup> *Trujillo Calero v. Ecuador*, ¶ 17.1 (“Even if it is assumed that the aim of penalty is to protect the resources of the social security system, which is a valid and legitimate objective, the State party has not shown that it was the only way to achieve this purpose. In this regard, it has not shown that there were no alternative measures that did not seriously affect the author’s access to a pension, such as excluding months in which no contributions were made from the contributory pension calculation.”)

<sup>76</sup> *Julian J. Robinson v. Attorney General*, 2018 HCV01788 [2019], Supreme Court of Jamaica, ¶ 130 (12 April 2019).

<sup>77</sup> Limburg Principles, *supra* note 61, at ¶¶ 48–51.

<sup>78</sup> *S. and Marper v. United Kingdom*, App. nos. 30562/04 and 30566/04, ¶ 95 European Court of Human Rights [Eur. Ct. H.R.] (Grand Chamber) (4 December 2008).



compatible with the purpose of the Charter and international human rights conventions.”<sup>79</sup> The purpose of such a provision is “to enable an individual to adapt his/her conduct to the Rules and to enable those in charge of applying them to determine” what constitutes a legitimate restriction.”<sup>80</sup>

47. Precision and foreseeability have been key concerns in cases related to national digital ID systems, especially given the broad application of such systems to different rights. In Jamaica, for instance, the Supreme Court in *Robinson* found that the planned national ID system was excessively broad, due to the fact that the Government had failed to identify specific purposes and applications which could be evaluated to assess the legitimate purpose of the law.<sup>81</sup> In Mauritius, the Supreme Court found that a system which allowed for the indefinite retention of personal and biometric data and allowed for an expansive sharing of this data without judicial oversight was not constitutional because of the potential for misuse and abuse.<sup>82</sup>
48. Finally, the principle of legality requires that “[a]dequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on economic, social and cultural rights.”<sup>83</sup> In the context of national digital ID systems, the relevant law or laws should therefore include such adequate safeguards and effective remedies, which should provide avenues for individuals to complain about any illegal or abusive imposition or application of limitations on economic, social and cultural rights. Such safeguards and remedies should not remain so-called paper tigers, but should be effectively implemented by setting relevant mechanisms and procedures that are properly resourced, and supported and functioning adequately, effectively and properly in practice. These systems must also be inclusive and accessible.

(iii) *Proportionality*

49. Proportionality is a widely used legal concept in both international human rights law and national constitutional interpretation to assess whether a restriction of rights is permissible. Various formulations that invoke different elements of the proportionality tests have been used by courts in different jurisdictions.<sup>84</sup> The test of proportionality has also been applied to a range of civil and political rights,<sup>85</sup> as well as a more limited set of cases dealing with social and economic rights.
50. In some of the more recent jurisprudence on digital ID systems, both the court in Kenya and the court in Jamaica applied a form of the test expressed by the Supreme

<sup>79</sup> *Umuhoza v. Rwanda*, African Court on Human and Peoples' Rights [AfCtHPR], App. no. 003/2014, ¶ 136 (24 November 2017).

<sup>80</sup> *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013, African Court on Human and Peoples' Rights [AfCtHPR] (December 5, 2014).

<sup>81</sup> *Robinson*, 2018 HCV01788, ¶¶ 39–45.

<sup>82</sup> *Madewhoo M. v. the State of Mauritius and Another*, 2015 SCJ 177 [Mauritius], Record No. 108696, at 33 (29 May 2015). (“In view of what we have stated above, it is inconceivable that there can be such uncontrolled access to personal data in the absence of the vital safeguards afforded by judicial control. The potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act.”)

<sup>83</sup> Limburg Principles, *supra* note 61, at ¶ 51.

<sup>84</sup> For instance, the Constitutional Court in South Africa has applied the test of whether a limitation is rational and reasonable by looking at: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and the less restrictive means to achieve the purpose. *Khosa*, ¶ 67.

<sup>85</sup> Gilles Giacca, “Limitations on Conventional Economic, Social and Cultural Rights on Security Grounds,” in *Economic, Social, and Cultural Rights in Armed Conflict* (2014), ¶ 82; *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, ¶ 87 European Court of Human Rights (23 March 2017) (“even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued, they may not go beyond what is necessary to reach such goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate.”)



Court of Canada in *R. v. Oakes*. In summary, the four elements of this proportionality test are:

- 1) Legitimate purpose: The law must have a proper purpose, which is sufficiently important to warrant violation of the right;
  - 2) Suitability: the measure must be carefully designed and capable of achieving the objective;
  - 3) Necessity or minimum impairment: the measures must impair the right or freedom as little as possible;
  - 4) Proportionality *stricto sensu*, or balancing: there must be a fair balance between the important objective(s) and the effects of the measures restricting the right(s).
51. The framework provided by Article 4 of the ICESCR has been interpreted as requiring both the requirement of legality, or “established by law,” as well as a form of proportionality assessment, which has been applied by the CESCR in several recent communications.<sup>86</sup> In fact, in situations where the penalty for non-compliance with a restrictive measure is severe, the CESCR has said that the State must justify not only the proportionality of the qualifying condition itself but also that the penalty is reasonable and proportionate.<sup>87</sup>

#### *Legitimate purpose*

52. Under international human rights law, when seeking to impose a measure that restricts rights, the State is limited to a predetermined range of permissible purposes. Article 4 of the ICESCR allows for limitations “solely for the purpose of promoting the general welfare in a democratic society.” This implies a two-part test, which requires that such limitations must first “further the wellbeing of the people as a whole,”<sup>88</sup> and ensures that such measures must not “impair the democratic functioning of society.”<sup>89</sup> The *travaux préparatoires* to the ICESCR suggest that the drafters deliberately avoided including references to purposive statements such as the protection of public order, morals, national security and the rights and freedoms of others as a means of legitimate purpose,<sup>90</sup> thus restricting the number of instances where such a restriction would be justifiable. Under the African Charter, in the absence of a specific clawback clause, the African Commission has stated that “[t]he only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2).”<sup>91</sup> This includes “the rights of others, collective security, morality and common interest.”<sup>92</sup> The State must provide “evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter.”<sup>93</sup>
53. Under the *Oakes* test, which has been applied in Kenya and Jamaica in cases concerning digital ID systems, it is not sufficient to merely state a legitimate

<sup>86</sup> *Maribel Viviana López Albán v. Spain*, Comm. No. 37/2018, U.N. Committee on Economic, Social and Cultural Rights (CESCR) ¶¶ 11.1–11.7 U.N. Doc. E/C.12/66/D/37/2018 (29 November 2019).

<sup>87</sup> *Trujillo Calero v. Ecuador*, ¶ 171. (“Even if it is assumed that the aim of penalty is to protect the resources of the social security system, which is a valid and legitimate objective, the State party has not shown that it was the only way to achieve this purpose. In this regard, it has not shown that there were no alternative measures that did not seriously affect the author’s access to a pension, such as excluding months in which no contributions were made from the contributory pension calculation.”)

<sup>88</sup> Limburg Principles, *supra* note 61, at ¶ 52.

<sup>89</sup> *Id.* at ¶ 54.

<sup>90</sup> Müller, *supra* note 55, at 570–71.

<sup>91</sup> *Media Rights Agenda and Others v. Nigeria*, African Commission on Human and Peoples’ Rights [ACHPR], Comm. Nos. 105/93, 128/94, 130/94 and 152/96, ¶ 70 (1998).

<sup>92</sup> African Charter on Human and Peoples’ Rights, Article 27(2).

<sup>93</sup> *Constitutional Rights Project*, (2000) AHRLR 227, ¶ 44.



purpose, it is also necessary for the government to prove that this purpose must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”<sup>94</sup> This implies a higher threshold for assessing the purpose of the restriction, as it requires any court assessing a violation to weigh the importance of the purpose against the importance of the right being restricted.

#### *Suitability*

54. The suitability inquiry addresses whether the measure itself is capable of achieving the stated purpose, or in other words whether there is a rational nexus between the intended purpose and the restrictive measure proposed. Under the suitability requirement, these measures cannot be arbitrary, unfair, or irrational.
55. The Constitutional Court in South Africa has set a relatively minimal bar for satisfying the suitability requirement, saying in *Khosa* that the measure will satisfy the test insofar that “the connection between the law and the government purpose is rational and not arbitrary,”<sup>95</sup> nor must it manifest a “naked preference.”<sup>96</sup> However, the government must have sufficiently set out and evidenced the legitimate purpose with enough specificity to allow the court to assess whether there is a rational connection between the purpose and the measures taken. Therefore, in *Robinson*, the Court rejected the notion that the broadly drawn purposes of building a national identification system may be used as a justification for making a national digital ID system the only means of verification for access to public services because the government had not demonstrated the rational connection between the two.<sup>97</sup>
56. In evaluating limitations that involve digital technologies, the Court must often look at whether different technical aspects of the system are capable of achieving the stated purpose. This is a context-based analysis that requires the Court to gain sufficient technical input to assess whether there is sufficient evidence to suggest that the capabilities of the system allow it to achieve its aims. Claims about, for instance, the efficacy of certain technologies to deliver key aspects of the system should not be accepted without scrutiny.

#### *Necessity*

57. Article 4 requires that any restrictive measure must be “*strictly necessary* for the promotion of the general welfare in a democratic society.”<sup>98</sup> In general, international human rights law relating to economic and social rights sets a high threshold for evaluating the necessity of a proposed limitation, often applying a “least restrictive means” test that requires the government to ensure that there are no alternative measures capable of achieving the same end which would be less restrictive of the right.<sup>99</sup> In a 2012 Letter that addressed the use of restrictive measures during crises, the CESCR reinforced this high threshold, saying that proportionality required “that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights.”<sup>100</sup> In its communication on the case of *Marcia*

<sup>94</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, at 69 (Can.), citing *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295 at 352 (Can.).

<sup>95</sup> *Khosa*, ¶ 67.

<sup>96</sup> *Id.* at ¶ 53.

<sup>97</sup> “There is no doubt that if one chooses to access public services it is normally necessary to satisfy that entity of one’s identity. That is not what makes section 41 offensive. Section 41 is unconstitutional because it purports to make a national identification card or number the only method of verification of identity. This, for the reasons adumbrated above, is not justified in a free and democratic society.” *Robinson*, 2018 HCV01788, at ¶ 363.

<sup>98</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 28. [emphasis added]

<sup>99</sup> *Id.* at ¶ 29.

<sup>100</sup> Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (May 16, 2012), available at: <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>.



*Cecilia Trujillo Calero v. Ecuador*, which dealt with the suspension of social security benefits, the CESCR found that the government had failed to demonstrate that the restrictive measure was the “only way to achieve this purpose” and that there were no other “alternative measures that did not seriously affect” the rights.<sup>101</sup>

58. The African Commission has similarly said that limitations must be “strictly proportionate” and “absolutely necessary.”<sup>102</sup> The Inter-American Court has interpreted the necessity requirement to mean that the purpose “cannot reasonably be achieved through a means less restrictive of a right protected by the Convention.”<sup>103</sup>
59. The necessity analysis requires a detailed examination of the specific components of a proposed measure, particularly when dealing with a technologically complex project like a national digital ID system. But a consensus appears to be emerging that one alternative measure that should be considered in this context would be alternative forms of identification. This has been endorsed, for example, in a recent report to the Human Rights Council by the current UN Special Rapporteur on extreme poverty and human rights.<sup>104</sup> In *Puttaswamy*, the Supreme Court in India similarly agreed that in instances where authentication failures prevented individuals from accessing services, alternative forms of identification should be allowed.<sup>105</sup> The existence of less restrictive alternatives that would less seriously infringe on rights should be a key consideration at the necessity stage.

#### *Balancing, or proportionality stricto sensu*

60. The balancing stage of the proportionality requirement calls upon the court to balance the intended purpose against the importance of the right and the severity of the restriction. In describing the proportionality test, the African Commission has said that the “principle of proportionality seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole.”<sup>106</sup> The balancing inquiry must therefore recall that the absence of a general limitations clause “must be understood as the desire to avoid abusive restriction of rights, a restriction which will be apply only under very limited and legally circumscribed conditions.”<sup>107</sup>
61. An important principle in the balancing phase of the proportionality assessment has been that regardless of the importance of the intended purpose, the restrictive measure should not go so far as to render the right “illusory,”<sup>108</sup> or to completely vitiate the right. This is in conformity with the requirement under Article 4 ICESCR that any limitations be “compatible with the nature of these rights,” combined with

<sup>101</sup> *Trujillo Calero*, at ¶ 17.1.

<sup>102</sup> *Constitutional Rights Project*, ¶ 42.

<sup>103</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 And 29 American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion Oc-5/85 ¶ 46 (13 November 1985) (“Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”)

<sup>104</sup> Report of the Special Rapporteur on extreme poverty and human rights on non-take-up of rights in the context of social protection, *supra* note 26, at ¶¶ 33–34. (“As long as such situations persist, digital identity systems should not be a prerequisite for benefiting from social protection schemes and when they are set up, they should be designed in a way that is inclusive. Alternative forms of identification . . . should be accepted until all individuals receive digital identity cards.”)

<sup>105</sup> *Puttaswamy*, ¶ 318–19.

<sup>106</sup> *Zimb. Lawyers for Human Rights v. Zimb.*, African Commission on Human and Peoples’ Rights [ACHPR], Comm. 294/2004, ¶ 176 (Dec 2008–May 2009).

<sup>107</sup> *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, ACHPR, Comm. 259/2002, ¶ 66 (20–24 July 2011).

<sup>108</sup> *Media Rights Agenda and Others v. Nigeria*, ACHPR, Comm. Nos. 105/93, 128/94, 130/94 and 152/96, ¶ 70 (1998).



the core obligation of the government to provide minimum essential levels of rights. In that sense, measures that infringe on the minimum core obligations may often fail at the balancing phase of the proportionality assessment because to allow a restriction to prevent minimum essential levels of rights would not be compatible with the nature of rights. For example, in deciding the *Khosa* case the South African Constitutional Court found that “the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.”<sup>109</sup> Since failure to comply with the condition led to total denial of access social assistance payments, the severity of this impact heavily on the Court’s decision that the citizenship requirement was disproportionate to the interests raised by the state.

62. In similar cases concerning digital ID systems, whether such a system is mandatory or optional has been found to be determinative during the balancing stage of the proportionality assessment. For instance, the Indian Supreme Court in *Puttaswamy* emphasized that the Aadhaar system was “optional and voluntary,” and that especially for fundamental services such as those that affect the rights of children, for which Aadhaar system was mandatory, “insistence on Aadhaar would not satisfy the test of proportionality.”<sup>110</sup> The Court also noted that authentication failures would not necessarily lead to denial of services, as alternative forms of identification would be acceptable in the Aadhaar system.
63. The balancing phase should also take into account whether the State has established sufficient procedural safeguards that allow for a detailed consideration of the proportionality of the measure, weighed against the impact that it has had on an individual in specific circumstances. The CESCR in *López* sought evidence that prior to an eviction order, the authorities had undertaken a detailed assessment of the “an analysis of the proportionality of the legitimate objective of the eviction to its consequences for the persons evicted.”<sup>111</sup> The European Court of Human Rights has similarly sought evidence that the government has considered the impact that a measure may have, particularly on vulnerable groups, and ensured that there was “proportionality between the goals pursued and their negative consequences for the enjoyment of social rights.”<sup>112</sup> Finally, the balancing phase of proportionality must take into account not only the actual impact of the restrictive measures on the right, but also of prospective impacts that the measure may have on rights.

### **(3) Non-Discrimination and Equality: Essential Foundations for Understanding State Obligations**

64. Non-discrimination and equality rights<sup>113</sup> entail fundamental, immediate, and cross-cutting state obligations, standing alone and in connection with securing the right to social protection for older persons and the women’s right to health. Equality law protections appear extensively throughout national and international legal doctrine dedicated to the promotion and protection of rights and freedoms in society, transcending various fields and groupings of rights.<sup>114</sup> Since the instant case engages

<sup>109</sup> *Khosa*, ¶ 42.

<sup>110</sup> *Puttaswamy*, ¶ 325 Supreme Court of India.

<sup>111</sup> *López Albán*, ¶ 11.5.

<sup>112</sup> *Greek General Confederation of Labour (GSEE) v. Greece*, ¶ 87.

<sup>113</sup> Hereafter referred to collectively as “equality law,” which should be read to encompass the broad array of state (and private) obligations to address all forms of discrimination, including legacies of past discrimination and related forms of intolerance.

<sup>114</sup> See U.N. Human Rights Committee (HRC), General Comment No. 18: Non-discrimination, ¶ 3 (10 Nov. 1989) (“Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the



significantly with what are traditionally categorized as “economic, social and cultural” rights (ESCR),<sup>115</sup> this section briefly explains the critical intersection of equality law and the construction of state obligations to “respect,” “protect” and “fulfil” ESC rights,<sup>116</sup> including the right to social protection and the right to health. Importantly, considering the integrated nature of equality with all human rights, any suggestion that ESC rights require exclusively “positive” obligations on the part of states, contrasting with “civil and political” rights like free expression entailing exclusively “negative” obligations, should be discarded.<sup>117</sup> Both spheres—equality law and ESCR—necessitate *both* restraint *and* promotion, and both spheres also include obligations to provide special measures of protection for older persons and for women, a nexus which is also alluded to above and further discussed here where relevant.<sup>118</sup>

65. Because equality law protections receive such ample elaboration in human rights frameworks, and owing to the well-established vulnerability and marginality of older persons and women in society, a mandatory identification scheme engages these obligations in multiple overlapping ways.

(a) Equality law as indivisible: all components of state obligations apply comprehensively

66. State obligations in the field of equality law in fact comprise a set of interrelated means of eliminating inequality comprehensively. Whether these measures are classified as positive and negative obligations, or the discrimination in question is defined in a particular way (“direct” or “indirect,” for instance), the underlying objective is to address *all forms* of inequality. Equality law thus includes different forms of state obligations, providing for, *e.g.*:

- Equality before the law: requiring that laws be *enforced* in a non-discriminatory fashion, without distinction of any kind.
- Equal protection of the law: such that the law “does not *create* discrimination, either by making distinctions that cannot be reasonably or objectively justified (direct discrimination) or by treating equally situations which require a differentiated treatment (indirect discrimination).”<sup>119</sup>
- Guarantees of equal and effective *protection* against discrimination (also referred to as affirmative action or positive obligations)<sup>120</sup>

67. For the above framework to meet the imperative of elimination of inequality, “discrimination” cannot be understood in a simplistic or formal sense, but rather as

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law are sometimes expressly referred to in articles relating to particular categories of rights.”); CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 2, 5 U.N. Doc. E/C.12/GC/20 (2 July 2009).

<sup>115</sup> As I have argued in scholarly publications, the distinction between economic and social rights as “fundamentally different” from civil and political rights due to the resources required for their implementation has been discredited: “All rights cost money and society is always called upon to make choices.” Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRACTICE (2017).

<sup>116</sup> See *supra* para. 9 (introducing the tripartite analytical framework and the 4As framework).

<sup>117</sup> See, *e.g.*, CESCR, General Comment No. 9: The domestic application of the Covenant, ¶ 15 U.N. Doc. E/C.12/1998/24 (3 December 1998) (“Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.”).

<sup>118</sup> In *Puttaswamy*, the majority underscored the interconnection between equality and ESCR, citing a “paradigm shift” from a welfare approach to poverty eradication to a human rights approach (¶ 263). Noting the Court’s “evolving jurisprudence” in this area, the majority holds that social protection schemes “subserve” the Constitutional requirements of equal protection and anti-inequality. *Id.*

<sup>119</sup> Olivier de Schutter, *International Human Rights Law* 596 (2010).

<sup>120</sup> CESCR, General Comment No. 20, *supra* note 114, at ¶ 14; Human Rights Committee, General Comment No. 18, *supra* note 114, at ¶ 1; Olivier de Schutter, *International Human Rights Law* 576 et seq. (2010) (covering the “range of states’ obligations”).



covering situations of factual discrimination, including where seemingly neutral laws, policies and practices of public authorities have an unintended negative effect upon a particular group or class of individuals.<sup>121</sup>

(b) Equality protections are “immediate and cross-cutting” in ESCR

68. Recognizing, protecting, and promoting non-discrimination and equality is an *immediate obligation* and *cross-cutting* obligation under the international ESCR framework.<sup>122</sup> In the African human rights system, the link between equality and ESCR is likewise well-established. The African Commission’s resolution on ESCR in Africa affirmed this proposition, for instance, stating that: “[N]on-discrimination and equal treatment are the key components of economic social and cultural rights, since vulnerable and marginal groups including refugees and internally displaced persons are disproportionately affected by a failure of the state to respect, protect, and fulfil these rights.”<sup>123</sup>
69. The significance of equality norms as *immediately applicable* derives from the general mechanics of ESCR obligations, articulated as a tripartite framework to *respect*, *protect*, and *fulfil* rights, including the right to social security and the right to health.<sup>124</sup> The tripartite framework derives from Article 2(1) of the Covenant, and state obligations expressed there regarding the progressive realization of ESCR. The “respect, protect, fulfil” framework clarifies the immediate effect of certain relevant obligations in a manner that has been embraced in the African regional human rights system.<sup>125</sup>

(c) Equality law obligations and the obligations to *respect* and *fulfil* ESCR

70. It is essential to bear in mind that the full range of state obligations attached to combatting discrimination apply comprehensively under each tenet of the tripartite framework. Such that, for example, whereas the obligation to *respect* includes a positive component to *equalize* access to potable drinking water, that obligation to *equalize* carries the full range of non-discrimination and equality protections. This would mean, in the present example, that a measure designed to ensure equal or even “universal” access to potable drinking water may still contravene the right to

<sup>121</sup> HRC, General Comment No. 18, *supra* note 114, at ¶ 7 (noting that “discrimination” as conceived in ICERD and CEDAW, for example, covers distinctions that have the “purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms” (emphasis added)). *Id.* at ¶ 12, noting that ICCPR Art. 26 prohibits discrimination “in law or in fact in any field regulated and protected by public authorities.”

<sup>122</sup> See CESCR, General Comment No. 20, *supra* note 114, at ¶ 6 & n. 4 (citing CESCR general comments regarding specific Covenant rights relating to “housing, food, education, health, water, authors’ rights, work and social security.”). For example, see CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), ¶ 17, E/C.12/2002/11 (20 January 2003) (“States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2)”) [emphasis added]. See also *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v. Attorney General*, Constitutional Petition 16 of 2011 [2020] UGCC 12 (19 August 2020); citing High Court of Kenya, *Patricia Asero Ochieng (P.A.O.) v Attorney General*, Petition No. 409 of 2009 (2012) eKLR.

<sup>123</sup> ACHPR, Pretoria Declaration, ACHPR/Res.73/XXXVI/04. See also *Legal Resources Foundations v. Zambia*, ACHPR, Comm. 211/98, ¶ 63; ACHPR, Fourteenth Activity Report 2000–2001, Annex V, (observing that “equality, or the lack of it, affects the capacity of on to enjoy many other rights”).

<sup>124</sup> See Rory O’Connell, “A human rights framework part I: Exploring Article 2(1) ICESCR obligations,” in *Applying an International Human Rights Framework to State Budget Allocations* 88 & n.4 (2014). See also various general comments of CESCR, in which the Committee has reaffirmed the approach to articulating and applying ESCR obligations using the tripartite framework. O’Connell et al. note that “ComESCR [CESCR] first adopted the tripartite typology in ComESCR, General Comment No. 12 The Right to Adequate Food, UN Doc E/C.12/1999/5 (1999) paragraph 15” with the approach echoed in CESCR, General Comment No. 13, The right to education, UN Doc E/C.12/1999/10 (1999) ¶¶ 46–7 and 50; CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (2000) ¶¶ 33–7; CESCR, General Comment No. 15, The Right to Water, UN Doc E/C.12/2002/11 (2002) ¶¶ 20–9; CESCR, General Comment No. 19, The Right to Social Security, UN Doc E/C.12/GC/19 (2007) ¶¶ 43–50.

<sup>125</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, ACHPR, Communication No. 155/96 (27 October 2001) [SERAC v Nigeria].



water if it creates or perpetuates disparities in access, in purpose or effect.<sup>126</sup> This section will further describe how the equality law protections outlined above *map onto* the tripartite framework, as relevant to the present matter.<sup>127</sup>

(i) *The obligation to respect*

71. As noted immediately above, the obligation to respect ESCR includes both negative and positive dimensions. These may be distilled to an obligation both to *uphold the existing supply or status quo* of a particular ESC right (such as the right to health or adequate housing) and to *guarantee equal access*. As articulated in the CESCR's General Comment on the Right to Social Security, "[t]he obligation [to respect] includes, inter alia, refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security." The African Commission, in its seminal case in the field of adequate housing rights and forced evictions, *SERAC v. Nigeria*, similarly interpreted the African Charter on Human and Peoples' Rights to require that states "abstain from carrying out or sponsoring any practice that impedes individual access to the resources most appropriate to satisfy housing needs."<sup>128</sup>
72. The CESCR has further interpreted the obligation to respect explicitly to cover—and be contravened by—situations in which proffered "solutions" to unequal access to ESCR fail to address the situation of marginalized or otherwise vulnerable groups. In the context of the right to health, for instance, the Committee highlighted that:
- "With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population."<sup>129</sup>
73. Similarly, in the context of the right to water, the Committee has used two illustrations of violations of the obligation to respect ESCR that reinforce equality law protections in the context of ESCR: "(i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water...."<sup>130</sup>

<sup>126</sup> See, e.g., *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), Constitutional Court of South Africa (4 October 2004) ("To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavor to realize. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realization of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right.").

<sup>127</sup> The *amicus* will not cover the obligation to protect in any detail as this area applies to protection requirements in relation to the actions of third parties or private actors and is not relevant here.

<sup>128</sup> O'Connell, et al., *supra* note 124, at 88 & n. 4.

<sup>129</sup> CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 19.

<sup>130</sup> CESCR, General Comment No. 15, *supra* note 41, at ¶ 44(a).



74. Because the obligation to respect is concerned with maintaining and equalizing the status quo, it is an obligation of immediate effect, just as cross-cutting non-discrimination and equality obligations carry immediate effect.<sup>131</sup>

(ii) *The obligation to fulfil*

75. The obligation to fulfil requires positive action on the part of states to enhance access to and quality of ESC rights. “Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right.”<sup>132</sup> The obligation to fulfil is further disaggregated into the obligations to facilitate, promote, and provide. The obligations to facilitate and to provide are most relevant here. The obligation to *facilitate* “requires the State to take positive measures to assist individuals and communities to enjoy the right.” The obligation to *provide* requires that states undertake positive action to fulfil the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.<sup>133</sup>
76. The CESCR has consistently pointed to examples of violations of the obligation to fulfil in which states fail to undertake expenditures or misallocate public resources where the results are discriminatory against vulnerable or marginalized groups and where states fail to undertake measures to reduce inequitable distribution of resources and services.<sup>134</sup> Similar to the failure to take into account the role of privilege and disadvantage in projects designed to equalize access (see paragraph 72), where states introduce new measures or seek to extend new allocations of public resources in the name of ESC rights, violations of the obligation to fulfil occur where the design or implementation of such endeavors fails to accord adequate protections to ensure coverage of the most vulnerable members of society.
77. The International Commission of Jurists has compiled comprehensive analysis of ESCR litigation in international and national contexts,<sup>135</sup> which references numerous cases concerning the obligations to fulfil the provisions of ESC rights, involving both “access to the provision of services and assessing whether legislation and regulations that are necessary to provide services exist. Even if they do exist, they must satisfy standards of reasonableness, adequacy, equality, and non-discrimination.”<sup>136</sup> The *Grootboom* case of the Constitutional Court of South Africa, for example, addresses a housing program adopted in overcrowded urban areas, which neglected to consider the vulnerable situation of residents of informal settlements in those areas who were evicted under the program and rendered homeless.<sup>137</sup>

<sup>131</sup> See O’Connell, et al., *supra* note 124, at 90.

<sup>132</sup> This framing is used, for instance, by the CESCR in relation to the right to water.

<sup>133</sup> CESCR, General Comment No. 15, *supra* note 41, para. 25. “To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies...” *Id.* at ¶ 27.

<sup>134</sup> *Id.* at ¶ 44(c); CESCR, General Comment No. 14, *supra* note 41, at ¶¶ 41, 52.

<sup>135</sup> See, e.g., International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (2008).

<sup>136</sup> *Id.* at 49–50, citing, e.g. *Grootboom* case (*The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), Constitutional Court of South Africa, (4 October 2000) (housing policy failed to take into account vulnerable groups); *Autism-Europe v. France* (*See International Association Autism-Europe v. France*, European Committee of Social Rights, Complaint No. 1/2002, 7 November 2003); ample case law from Latin America (Colombia Constitutional Court, T-17901993 (right to health of pregnant women; SU-480/1997, T-283/1998; T-328/1998 and T-329/1998 (access to treatment and medication not provided by health plan and arbitrary exclusion from coverage)); India Supreme Court interim orders directing extensive positive obligations in time of famine for most vulnerable members of society (*See People’s Union For Civil Liberties v. Union of India and others*, Supreme Court of India, (May 2, 2003))

<sup>137</sup> *Grootboom*, 2001 (1) SA 46 (CC), ¶ 69 (concluding a violation of the right to adequate housing because the program failed to provide “relief to the categories of people in desperate need”). In *Puttaswamy*, Justice Chandrachud also focuses on the effects of the



(d) Special Measures of Protection: The Right to Social Protection for Older Persons and Women's Right to Health

78. As outlined above, both equality law and ESCR encompass negative and positive state obligations. For groups that are recognized as marginalized or vulnerable, both areas of law provide for heightened levels of protection in the form of additional scrutiny where the state fails to refrain from interfering with rights of these groups, as well as positive obligations, where the failure by a state to affirmatively act in safeguarding or promoting the rights of such groups, if insufficiently justified, will amount to a violation.<sup>138</sup> Such special protection structures apply in the case of both women<sup>139</sup> and older persons.<sup>140</sup> It is also well-established that limited resources will not be a viable excuse for failure to accord heighten protection in nearly all cases involving recognized marginalized and vulnerable groups.<sup>141</sup>
79. It is worth emphasizing the strong recognition in ESCR law that older persons, as a group, require heightened protection, and acts or omissions that fail to respect, protect, or fulfil ESC rights on behalf of older persons will frequently violate state obligations on the basis of both ESCR and equality law. In this regard, the evolving interpretation given to the Ugandan Constitution's Article 21 (Non-Discrimination and Equality), read together with Article 45, in the *Ayikoru* case favors a stronger equality law regime that would comprehensively safeguard the rights of older persons, and consequently better align with the obligations Uganda has undertaken as a party to the ICESCR.<sup>142</sup>
80. Finally, the role of digital technologies in relation to marginalized and vulnerable groups' access to and enjoyment of ESC rights must be considered in this case, in the context of limited previous treatment of the question by judicial or quasi-judicial bodies. However, significant evidence has emerged from the rapid shift toward digital service provision in the context of the Covid-19 pandemic that is relevant to how states should approach digitalization and exclusion on social protection and social services platforms. In its comprehensive World Social Protection Report for 2020–22, for example, the International Labour Organization (ILO) highlighted the

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*Aadhaar* system for those already so marginalized and poorly integrated that the *Aadhaar* system has difficulty serving them and calls out interference with state obligations towards the right to social security as one of the main failings of the Act. [dissent ¶ 253]

<sup>138</sup> See, e.g., CESCR, General Comment No. 20, *supra* note 114, at ¶ 7 (non-discrimination requires both measures to prevent and special measures to attenuate and suppress conditions that perpetuate discrimination).

<sup>139</sup> See, e.g., CESCR, General comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 21 ("The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.")

<sup>140</sup> Age is an "internationally prohibited ground of discrimination" in the ESCR context. See CESCR, General Comment No. 6; CESCR, General Comment No. 20, *supra* note 114, at ¶ 29; CESCR, General Comment No. 15: Right to Water, ¶ 13; CESCR, General Comment No. 19, *supra* note 18, ¶ 2; CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 25 ("With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of general comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment.")

<sup>141</sup> "Respecting the principle of non-discrimination requires specific measures to ensure the protection of the rights of marginalized populations as a priority. Even when resources are limited, the State has a duty to adopt measures to protect those most at risk. Such measures may include taxation and social transfers to mitigate inequalities that arise or are exacerbated in times of crisis." <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>. The CESCR has made clear that even where resources are constrained, "the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programs." CESCR, General Comment No. 3, *supra* note 41, at ¶ 12. See also CESCR, General Comment No. 14, *supra* note **Error! Bookmark not defined.**, at ¶ 18.

<sup>142</sup> See *Ayikoru v. The Board of Governors of St. Marys Ediofe Girls Secondary School* [2018] UGHCCD 17 (22 March 2018) ("However, according to article 45 thereof, the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the Constitution are not to be regarded as excluding others not specifically mentioned. In this regard, the concept of discrimination will not be limited to the nine protected categories or groups listed in that article, but will extend to situations of discrimination occurring on the basis of unwarranted stereotypical assumptions based on group identity, of groups that are recognizably different.")



magnification of obstacles to benefits access for already marginalized groups, leaving them “doubly excluded.”<sup>143</sup> Two primary groups impacted by the introduction of digital technologies include those with low digital literacy and access to technology generally (a category which disproportionately includes older persons) and women, who specifically face “uneven distribution of ownership of, access to and knowledge of new technologies.”<sup>144</sup> The report, like many others that have identified these exclusionary effects of digital service delivery tools, recommends “ensuring that non-digital solutions remain in place for those who may not be able to use the digital technology.”<sup>145</sup>

(e) Justification and the burden of proof in non-discrimination and equality cases

81. Discriminatory actions or omissions must be reasonably and objectively justified, pursue a legitimate aim, must be compatible with the nature of ESC rights and solely for the purpose of promoting the general welfare in a democratic society, and, where such an aim can be identified and defended, the means of achieving that aim must be appropriate and necessary.<sup>146</sup> Importantly, as described herein, the law affords compound and cross-cutting protections to address discrimination and move toward more equal societies, thus a cursory treatment of any purported justification would fail to do justice to the level of protection codified in the human rights framework. Stricter scrutiny and a more searching examination of the claimant’s case will often be required to ensure that state obligations are satisfied. The Committee has also clarified that the failure to remove differential treatment due to resource constraints “is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.”<sup>147</sup>
82. With respect to the burden of proof, many courts recognize that in human rights cases, and particularly in discrimination cases, claimants are entitled to less stringent burdens under certain circumstances. In such cases, for instance, the state will often be in sole and exclusive possession of crucial evidence. The Inter-American Court on Human Rights has developed a presumption that rebalances the information power between parties in these circumstances, such that “the State’s defence cannot rest on the applicant’s inability to submit evidence, when that evidence cannot be produced without the State’s cooperation.”<sup>148</sup> The CESCR has also stated that in relation to remedies and accountability for discrimination and inequality, “[w]here the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.”<sup>149</sup>
83. In addition to these techniques to account for imbalances in accessibility of proof between private victims of discrimination and state respondents, the burden of proof in discrimination cases is shared in another important fashion. Numerous laws and judicial doctrine in many jurisdictions employ a burden-shifting scheme in discrimination cases that likewise differentiates the *onus* of proof (sometimes referred to as the “burden of persuasion”) that falls upon of victims and alleged perpetrators

<sup>143</sup> International Labour Organization (ILO), World Social Protection Report 2020–22: Social Protection at the Crossroads – in pursuit of a better future 73–74 (2021).

<sup>144</sup> *Id.* at 109.

<sup>145</sup> *Id.* at 213.

<sup>146</sup> CESCR, General Comment No. 20, *supra* note 114, at ¶ 13.

<sup>147</sup> *Id.*

<sup>148</sup> *Case of Velásquez Rodríguez v. Honduras (Merits)*, Inter-American Court of Human Rights, Judgment, ¶ 4 (29 July 1988).

<sup>149</sup> CESCR, General Comment No. 20, *supra* note 114, at ¶ 40.



of discrimination, respectively. Claimants will have an initial, modest burden of making out a *prima facie* case of differential treatment, with the burden of production (furnishing evidence) and persuasion then shifting to the respondent(s) to prove that the discrimination meets the above tests—that it is objectively justified, pursues a legitimate aim, and is proportionate.<sup>150</sup> This approach is superior in ensuring the effectiveness of anti-discrimination and equality law, and better reflects the primacy of equality across the entire international human rights framework.

## VII. Conclusion

84. As governments around the world continue to experiment with the integration of biometric systems with public services, there will be an increasing need for judicial scrutiny to ensure that the rights of the most poor and marginalized are not sacrificed in the rush to adopt new technologies. This case provides the opportunity to set new standards for the protection of economic and social rights in the age of digital government, and I appreciate the opportunity to provide information that may assist the Court in its deliberations.

Submitted by **Professor PHILIP ALSTON** on this 19<sup>th</sup> day of September, 2022.



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*Philip Alston*

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<sup>150</sup> See, e.g., *D.H. v. Czech Republic*, European Court of Human Rights, App. No. 57325/00, Grand Chamber Judgment ¶ 139 (13 November 2007); *Social Justice Coalition et al. v. Ministry of Police et al.*, Equality Court of South Africa, Western Cape Division, Judgment ¶ 39 (14 December 2018). See also Marie Mercat-Bruns et al. (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative tools* 8 (2018).