

**LITIGATING ECONOMIC, SOCIAL
AND CULTURAL RIGHTS:
LEGAL PRACTITIONERS DOSSIER**



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AND CULTURAL RIGHTS:

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ESC RIGHTS LITIGATION PROGRAMME - CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE)

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PREFACE

Well over a decade ago, the international community reaffirmed in the Vienna Declaration on human rights that “all human rights are universal, indivisible and interdependent and interrelated.” The international community also recognised that it must treat human rights “in a fair and equal manner, on the same footing, and with the same emphasis.” Indeed, these principles are grounded in the understanding that all human rights are vital to living a life with dignity, and no human right can be seen as superfluous or unnecessary.

As human rights advocates know, with human rights come obligations, and when those rights and obligations are violated, the victims are due remedies and the perpetrators should be held accountable. These ideas of rights, obligations and accountability, however, have for too long been denied when they come to the arena of economic, social and cultural rights, with issues of housing, health, education, work, food, water and other economic, social and cultural rights issues seen as somehow beyond the scope of legitimate ‘human rights’. While economic, social and cultural rights are enshrined in the most foundational human rights documents, this antiquated notion of human rights is still alive and well for some. In fact, in apparent defiance of the principles of interdependence and universality, some detractors continue to propagate the myth that economic, social and cultural rights are merely aspirational and are somehow not legally enforceable – in other words, not justiciable.

The case studies, jurisprudence and enforcement mechanisms examined in *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, should once and for all shatter the myth that economic, social and cultural rights are non-justiciable. As this volume illustrates, economic, social and cultural rights have been successfully adjudicated at all levels: in domestic courts in countries in all parts of the world; in all the major regional human rights tribunals; and in UN quasi-judicial mechanisms such as the Human Rights Committee, the Committee to Eliminate Racial Discrimination and the Committee against Torture. The body of jurisprudence built over the past decades has built a solid foundation upon which economic, social and cultural rights judicial advocacy can be successfully undertaken, and upon which persons and communities can rely in order to enforce their human rights.

Human rights practitioners, academics and other advocates will find *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* to be an essential tool in their work to promote and protect human rights. Indeed, each chapter contains not only substantive content on economic, social and cultural rights standards and norms, but concrete and successful strategic means by which those rights have been legally enforced. The comparative examples of legal advocacy demonstrate that a range of successful strategies can be used to hold perpetrators accountable and ensure just and fair remedies for victims. Just like with violations of other human rights, justice is within reach. In cases where economic, social and cultural rights are violated, it is increasingly clear that the obstacles to justice have little to do with the nature of the rights, and more to do simply with lack of political will,

COHRE hopes that *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* proves to be an essential contribution to the continued movement for the full respect, protection and fulfillment of the full indivisible, interdependent and interrelated spectrum of human rights. Indeed, a contribution to the global movement towards a world where all human rights are fully enjoyed – a world where social justice is the norm and those that threaten that reality are held accountable.

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FOREWORD

All those working to achieve economic, social and cultural rights ('ESC rights') – whether community activists, lawyers, researchers, or those few working within the political sphere – continue to work with a comparative disadvantage relative to the more 'classical' human rights actors. ESC rights advocates remain the underdogs of the human rights domain. As we seek to use the *law* of human rights of human rights as a tool to move governments to give effect to these social rights, to empower the human rights have-nots, to transform global consciousness and even to move markets in the right(s) direction, we do so from the perspective that treating the system of rights in a bifurcated or reductionist way does not take us closer to the goal of a world where all people enjoy all rights all the time.

Despite the presence of many obstacles, much has been achieved in the protection and promotion of economic, social and cultural rights over the past half century - new standards, new laws, new procedures and remedies, new institutions and new, albeit often reluctant, engagement by large human rights non-governmental organisations in the struggle for economic, social and cultural rights. ESC rights advocates become almost enraptured with every victory, no matter how small. But this joy stems not only from the fundamental changes it may have brought about. It is also motivated by the reality that, because economic, social and cultural rights remain so marginal, any step forward, even a minute one, has to be seen as a dramatic event given how slim the chances are of significant progress.

We need to consider how far the field of economic, social and cultural rights has advanced in recent decades. How equitable is the enjoyment of these rights with the classic rights of a civil and political nature? How are economic, social and cultural rights experienced on a daily basis by rights-holders throughout the world now as contrasted to 10, 20 or even 50 years ago? Have the institutions required to enforce these rights been put in place to do so? Where do we stand now and what future awaits the arena of economic, social and cultural rights?

It is all too clear to me, after working for much time in this field, that the structural changes required to ensure the sustained enjoyment of economic, social and cultural rights are as distant as they have ever been. The combination of market fundamentalism, corruption and the exclusion of the voices of the poor has often led to higher costs for housing, education, health care, water and food. These factors have surely benefited the world's haves, while simultaneously squeezing the human rights have-nots even tighter, so that the have-nots find themselves even further from the basic attributes of life that economic, social and cultural rights were meant to provide.

Violating civil and political rights has, to some extent, become more difficult during the last half century, and levels of impunity for such abuses are eroding, albeit slowly; the movement has seen many reverses. However, the world remains a veritable free-for-all for those responsible under international law for securing economic, social and cultural rights - States, private individuals, businesses and the international community itself. A significant number of human rights organisations, from which one would expect the full embrace of economic, social and cultural rights, continue to employ 1950s think-

ing on what constitutes a human rights violation important enough for them to address. Thus, many violations of social rights fall by the wayside.

In our painfully unequal world, the time is right for ESC rights advocates to begin to re-assess our collective strategies for achieving global social and economic justice and to ask and answer the hardest questions of all. Only if we do this may we hope that the next evolutionary phase of the human rights movement once and for all results in an integral embrace by all of all - all people, all rights.

Let us first ask how far we may expect to advance in a world where the number of States that might be classified as true champions of economic, social and cultural rights is extremely small. And, next, perhaps an even harder question to consider: to what extent can we empirically show that economic, social and cultural rights *treated as rights* have led to improved standards of living for the urban or rural poor? Within a given State, has the ratification of the International Covenant on Economic, Social or Cultural Rights or the inclusion of ESC rights within a constitutional framework fundamentally altered the position of the poor or resulted in real redistribution? Or was it actually the market or an all-powerful State that precipitated change beneficial to the poor? One would hope, of course, that rights will fill the gap where markets or States fail, as they both inevitably do. No matter how we slice it, deprivation, poverty, inaccessible health, education and welfare systems and immense human suffering remain distressingly commonplace because States and markets have failed *and* because economic, social and cultural rights - the most promising path of potential hope - have been rejected in practice by those failing institutions of governance and economy.

We are thus left with a predicament for which there is only one realistic solution if we aim to rejuvenate economic, social and cultural rights. This is simply that our leaders and most respected commentators need to take a step back and re-evaluate the questionable virtues of treating economic, social and cultural rights and their civil and political counterparts as if they were separate and distinct, rather than interrelated and indivisible. These actors must embrace a cohesive, inclusive approach to human rights, whereby powerful terms such as indivisible, inter-dependent and inter-related take on the more profound meanings that one intended to bestow on them.

Many of the proverbial bricks in the wall required for the full protection of economic, social and cultural rights are in place, but the openings in our wall remain gaping and daunting.

With respect to legal remedies for violations of ESC rights, the Universal Declaration of Human Rights, in 1948, provided that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Despite this promise made by the international community, victims of violations of economic, social and cultural rights have historically been accorded few avenues to seek redress at either the national level or the international level. Furthermore, remedial mechanisms have been piecemeal and have traditionally favoured civil and political rights. Litigation has also been hindered by the lack of awareness about economic, social and cultural rights among judges, lawyers, advocacy organisations and victims.

However, a growing body of case law concerning economic, social and cultural rights is now evident at the national, regional and international levels and has supplied inspiration for those advocates wishing to take the legal option in addressing issues of poverty and exclusion. This manual provides an introduction to the theory and practice of legal aspects of economic, social and cultural rights. It is hoped that, by assembling and analysing legal issues, procedures and resources, this publication will serve as a use-

ful tool to satisfy the increasing interest in litigating economic, social and cultural rights at the international, regional and national levels.

In Part I, the opening chapter provides an analysis of the various legal issues commonly encountered in economic, social and cultural rights litigation. These include identifying the relevant sources of law, establishing justiciability, defining the nature and scope of rights and obligations, responding to the defences available to governments, and the crafting of appropriate remedies. The next chapters address the right to legal aid for economic, social and cultural rights litigation, specific rights (social security, housing, health and education), as well as the social rights of children. This will provide the user of the manual with a sense of how the application and interpretation of economic, social and cultural rights may vary depending on the group claiming the right and the particular right at issue.

In Parts II and III, the various regional and international complaints procedures are outlined. For each human rights mechanism, there is a description of the relevant legal instruments, the applicable economic, social and cultural rights standards and the responsible adjudicatory body. The procedure for making a complaint is set out in detail, together with the limitations of the various procedure. Each chapter concludes with a brief analysis of the jurisprudence of judicial or quasi-judicial bodies and a list of useful resources. The remainder of the manual seeks to provide the user with a range of practical resources for litigation.

Part IV sets out summaries of leading cases on economic, social and cultural rights, while a list of contact details on individuals and organisations with experience and expertise in the area of social rights litigation and a select bibliography can be found online at www.cohre.org/litigation.

We hope you find this manual a valuable tool in your struggle to defend and promote economic, social and cultural rights through legal avenues.

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PART I

LAW

1 COMMON LEGAL ISSUES



In any legal complaint concerning economic, social and cultural rights ('ESC rights'), the law and rules of the relevant jurisdiction will obviously play a paramount role in the shaping of the legal arguments, the evidence tendered and the requests for remedies. However, while these aspects of legal action may vary considerably across jurisdictions, common issues frequently arise in the litigation of ESC rights and regular patterns can be seen in legal argument and judicial determinations in cases across the world. They include issues concerning the invocation and use of international human rights treaties, the justiciability of ESC rights, the use of civil and political rights to defend ESC rights, the separation of powers doctrine, or the formulation of appropriate remedies.

This opening chapter therefore provides an analysis of the legal issues commonly encountered in ESC rights litigation. This examination includes identifying the relevant sources of law, establishing justiciability, defining the nature and scope of rights and obligations, responding to the defences presented by States and the crafting of appropriate remedies.

1. SOURCES OF LAW

The available sources of law relating to ESC rights will obviously depend on the jurisdiction in which litigation is being conducted. Each court or international human rights adjudication mechanism is expressly or implicitly limited as to which rights it may apply and the manner in which rights are interpreted and implemented.

In all contexts, it is important to note that ESC rights (or aspects of them) have been brought before and have been dealt with by adjudicative mechanisms in numerous ways. First, these rights have been litigated before adjudicative mechanisms, resulting in judgments and orders expressly made on the basis of such rights, or laws have been interpreted in accordance with such rights. Second, many civil and political rights have social and economic aspects or implications,¹ and the acknowledged inter-relationship and indivisibility of both kinds of rights have led to situations in which elements of social and economic rights have been protected by means of provisions relating to civil and political rights.

¹ At a regional level, the European Court of Human Rights has stated that, "While the Convention [European Convention on Human Rights] sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. ... [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention". (*Airey v. Ireland* (European Court of Human Rights, 32 Eur Ct HR Ser A (1979): [1979] 2 EHRR 305, para. 26). See, for example, *Henry and Douglas v. Jamaica*, Communication No. 571/1994, 25 July 1996. In this case, the Human Rights Committee held that the failure to provide adequate medical care to prisoners (a violation of the social and economic right to health) constituted a violation of the right to freedom from torture or to cruel, inhuman, or degrading treatment, or punishment and of the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (provided for by Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR), respectively.

In some instances, economic and social rights have been derived from civil and political rights.² Third, some rights, which may be classified as either civil and political or social and economic in nature - for example, trade union rights and equality rights - may be employed by litigants and the courts in order to give effect to social and economic interests.³

1.1 International human rights mechanisms

International and regional adjudicative mechanisms concerned with human rights are ordinarily restricted to applying the rights set out in their constituent instruments, the relevant human rights treaty in most cases: see Parts II and III of this book. The United Nations Human Rights Committee is empowered to oversee the International Covenant on Civil and Political Rights (ICCPR), the European Committee of Social Rights applies the European Social Charter, and so on. There are some exceptions though. The African Commission on Human and Peoples' Rights is expressly entitled to apply, as appropriate, relevant international and regional human rights instruments and principles.⁴ The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights not only hear complaints concerning many American human rights treaties, they have also interpreted Article 29(d) of the American Convention on Human Rights, which prohibits the Court from interpreting any provision of the Convention contrary to any treaty ratified by a State Party, as a mechanism by which to draw inspiration from other international instruments in their interpretations of the content and scope of human rights. Likewise, the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises allow 'National Contact Points' to refer to and apply all the human rights obligations of a State that is host to or the home of a multinational enterprise.

Moreover, there is a growing tendency by judicial and quasi-judicial bodies to refer to other sources of human rights law. The Committee against Torture, for example, has relied on European jurisprudence to buttress its conclusion that the prohibition on cruel and degrading treatment covers the destruction of housing in certain circumstances.⁵ In other cases, human rights (or related legal) reasoning in one jurisdiction is accepted as an authoritative description of an aspect of a right in another jurisdiction.⁶

1.2 National courts and tribunals

The ability of national courts, tribunals and other adjudicative bodies to apply ESC rights in legal disputes will depend on both the national legal order and the interpretive attitudes of those adjudicative bodies to their very own authority. Potential sources of law include international law, constitutional

2 For instance, the courts in the Republic of India have held that the right to life "take[s] within its sweep" the right to food, the right to clothing, the right to decent environment and the right to a reasonable accommodation to live in. See *Shantistar Builders v. Narayan Khimatal Tomtame*, Supreme Court of India, Civil Appeal No. 2598/1989, 31 Jan. 1990.)

3 For example, the Human Rights Committee has held that the right to equality and non-discrimination provided for in Article 26 of the ICCPR applies to the enjoyment of social and economic rights, including social security benefits. See, for example, *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, CCPR/C/29/D/182/1984 (1987).

4 Articles 60 and 61 of the African Charter on Human and Peoples' Rights. The Commission has relied upon these provisions, for example, in reading the right to food and housing into the provisions of the Charter; see *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96, decision taken at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001. See Chapter 18 on the broad mandate of the African Court on Human and Peoples' Rights.

5 See *Hajrizi Dzemajl et al v. Yugoslavia Communication*, No. 161/2000, CAT/C/29/161/2000. See summary in chapter 20.

6 The International Court of Justice, for example, has held that international humanitarian law provides the *lex specialis* for understanding the application of the right to life in the ICCPR: "The test of what is an arbitrary deprivation of life [under the ICCPR], however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities": 'Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly)', *ICJ Reports* (1996), p. 226, para. 25. The African Commission quotes extensively from the General Comments of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) (see *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96, decision taken at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001). The CESCR refers to International Labour Organisation Conventions in interpreting labour and social security rights: see CESCR, *General Comment No. 6, The Economic, Social and Cultural Rights of Older Persons* (Thirteenth session, 1995), U.N. Doc. E/1996/22, 20 (1996). The European Committee of Social Rights regularly refers to judgments of the European Court of Human Rights where relevant.

provisions, legislative and administrative provisions and common law. Ideally, ESC rights will be legally enshrined (e.g., in either the constitution or in legislation) and may be relied upon directly. Alternatively, at a minimum, such rights may be utilised to provide interpretive guidance on other laws. Legislation and regulations also may provide effective protection for ESC rights.

It is important to note that States Parties have obligations under international human rights treaties to ensure that domestic remedies are provided in cases of violations. Article 2(3) of the ICCPR obliges contracting parties to provide an effective remedy to those whose Covenant rights are violated, which includes examination of a claim by a competent or other authority and enforcement of remedies when granted.⁷ States that have ratified the Convention on the Elimination of All Forms of Discrimination against Women are required “To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”

The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not expressly provide that victims must have recourse to legal remedies; it only notes that appropriate means to implement the Covenant include legal methods (Article 2(1)). A similar provision is found in the Convention on the Rights of the Child (*see* Article 3(2)). However, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has stated that the rights are capable of judicial application and that States should justify why such methods are not used to further the implementation of the Covenant.⁸ It has also called on countries to make the rights domestically applicable and justiciable at the national level.⁹

[W]hile the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

Furthermore, the Universal Declaration of Human Rights states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

Use of international treaties

International human rights treaty law¹⁰ is ordinarily directly applicable in those jurisdictions that subscribe to the monist model of law. In such cases, international and domestic law both apply, and, where there is a conflict in a particular situation, international law prevails. In countries that subscribe to the

7 Article 2(3) states that each State Party to the Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

8 CESCR, *General Comment No. 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

9 *Ibid.* para. 8.

10 *See* Article 38(1)(c), Statute of the International Court of Justice.

dualist model¹¹, domestic law generally applies unless international law has been explicitly incorporated in the legal system. One example of a dualist country where there has been extensive incorporation of international law is the Argentine Republic. The Constitution of Argentina includes 10 major international human rights treaties, according to them “higher hierarchy than laws” and providing for a complex procedure for their removal.¹²

With the growing influence and awareness of international law, human rights covenants and declarations are commonly utilised by national judiciaries as interpretive guides. They are often used in one or more of three ways.¹³ First, if there is a lacuna or a gap in a law, the relevant international human rights legal principle may be utilised to correct the legal uncertainty.¹⁴ Second, where there is a legal presumption that laws should be interpreted as far as possible to make them consistent with international human rights, international human rights law provisions may be employed in interpreting domestic standards.¹⁵ Lastly, in those jurisdictions that contain ‘evolutionary’ customary and common laws, the development of law should be in a direction consistent with human rights standards, including ESC rights.

Constitutional law

An increasing number of constitutions include the full catalogue of ESC rights.¹⁶ In some cases, the constitutions go further than the international ESC rights framework,¹⁷ while in other countries, the constitutions only include a small number of ESC rights. Information on particular countries may be obtained from a number of reference sources and websites.¹⁸

It is important to note that many countries (particularly Eastern European and Latin American countries, as well as a growing number of African, Asian and Western European countries) have not only incorporated ESC rights within their constitutional frameworks, but expressly allowed for the possibility of access to judicial remedies for violations of these rights. But many citizens, lawyers and judges are *unaware* (unintentionally or intentionally)¹⁹ of the existence of both the rights and their latent justiciability, and it has often taken time for them to be ‘discovered’. Therefore, the first crucial step is not to assume that human rights protecting social interests are not available for invocation in litigation.

11 See further Gerald Fitzmaurice, ‘The General Principles of International Law from the Standpoint of the Rule of Law’, *Hague Recueil*, Vol. 92, No. 5, pp. 70-80 (1957-II). The Privy Council, on appeal from the Supreme Court of Canada, summarised the justification for this model in this way: “the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action”; see *Attorney-General for Canada v. Attorney General for Ontario* [1937] AC 326, 347.

12 See Article 75(22) of the Constitution of Argentina.

13 Michael Kirby, ‘The Road from Bangalore’, speech given on 26 Dec. 1998. The full speech is available through the Law and Justice Foundation of New South Wales, www.lawfoundation.net.au/resources/kirby/papers

14 See Michael Kirby, *Role of International Standards in Australian Courts*, speech delivered at the University of New South Wales Faculty of Law, 10 May 1995, www.lawfoundation.net.au/resources/kirby/papers

15 See, for example, *Mabo v. Queensland* [No. 2] (1992) 175 CLR 1 (Commonwealth of Australia).

16 See, for example, the constitutions of the Republic of South Africa and of the Republic of Latvia.

17 See the constitutions of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Bolivarian Republic of Venezuela.

18 See Centre on Housing Rights and Evictions, *Sources No. 4: Legal Resources for Housing Rights: International and National Standards* (2000) (www.cohre.org/library); Centre on Housing Rights and Evictions, *Sources No. 8: Legal Resources for the Right to Water: International and National Standards* (2003) (www.cohre.org/water); Food and Agriculture Organisation of the United Nations, *The Right to Food in National Constitutions* (www.fao.org/docrep/w9990e/w9990e12.htm); E. Kinney and B. Clark, ‘Provisions for Health and Health Care in the Constitutions of the Countries of the World’ (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=687962). For the right to education, see <http://www.right-to-education.org/> (click on ‘Country-by-Country Tables’ and ‘Constitutional guarantees’; then select a country).

19 Lawyers and judges in many jurisdictions exhibit a tendency to discount the possible application of human rights; see the survey of lawyers and judges in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva, 2003).

Judiciaries in many countries have displayed a growing willingness to imply ESC rights from other human rights. For example, the Constitutional Court of the Swiss Confederation has held that rights to democracy and liberty are meaningless without recognition of a right to a basic minimum level of subsistence, a right to basic necessities.²⁰ In the decision of the Supreme Court of the Republic of Ireland in *G v. An Bord Uchtála*,²¹ Justice Walsh observed that “[t]he child also has natural rights. ... [t]he child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his/her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State”.²² The Indian courts have famously implied the full catalogue of ESC rights by reading the rights to life and equality together with the Directive Principles (which contain policy objectives in the social and economic domains). The Supreme Court of India stated:

The fundamental right to life which is the most precious human right ... must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may ... enhance the dignity of the individual and the worth of the human person. We think that the right to life includes [the] right to live, with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and co-mingling with fellow human beings.²³

The Federal Constitutional Court of Germany stated in respect to the right to choose an occupation freely:

In the field of education the constitutional protection of basic rights is not limited to the function of protection from governmental intervention traditionally ascribed to the basic liberty rights. The Federal Constitutional Court has repeatedly declared that basic rights in their capacity as objective norms also establish a value order that represents a fundamental constitutional decision in all areas of the law.²⁴

The Court went on to find that this right required that the Government provide an adequate number of university places.

Many constitutions contain a series of ‘directive principles’ that correspond to ESC rights. Such constitutions include those of Ireland, India, the Republic of Namibia and the Republic of Uganda. For example, Article 47 of the Indian Constitution states that “[t]he State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”. The principles are often phrased as policy goals and made non-justiciable. They are particularly common in the constitutions of countries that are former colonies of the United Kingdom. However, the principles have often been used as interpretive tools to ensure that laws and decisions are consistent

²⁰ The Court determined that there was an implied constitutional right to *conditions minimales d'existence* (a basic minimum level of subsistence). The right was a condition for the exercise of other written constitutional rights (rights to liberty and justice) or was indispensable for a State based on democratic principles and the rule of law, as well as the constitutional principles of human dignity and the right to life. A sufficient societal consensus for such an implication was found, particularly given the constitutional principle of human dignity; see *V v. Einwohnergemeinde X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995). The Constitutional Court of the Federal Republic of Germany has done likewise; see BverfGE 40, 121 (133) (Federal Constitutional Court of Germany).

²¹ [1980] IR 32 (*G v. ABU*).

²² *Ibid.* p. 69.

²³ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802. See further P. Craig and S. Dehpande, ‘Rights, Autonomy and Process: Public Interest Litigation in India’, *Oxford Journal of Legal Studies*, Vol. 9, Autumn (1989).

²⁴ See *Numerus Clausus I Case* (33 BverfGE 303).

with ESC rights. In the case of India (see, for example, footnote 2), the principles have played an important role in deriving ESC rights from the right to life.

Other laws

In many cases, national legislation or common law could be relied upon. While such laws are vulnerable to repeal or amendment by governments, and may not cover the full extent of a specific right, judges usually prefer to base their decisions on legislative (rather than constitutional) provisions, and these may contain a greater amount of detail on the content of the right. Many countries have passed legislation that provides judicial remedies for violations of the right to non-discrimination in the social and economic fields, particularly on the grounds of race and gender.²⁵ Likewise, many countries have passed labour laws consistent with International Labour Organisation Conventions that protect a range of workers' rights, from the right to freedom of association to the right to good working conditions and the right to work.

Many countries also have a dense web of laws in the social field that may protect a range of social rights in certain situations. For example, the Homelessness Act of Scotland grants a legal and justiciable right to the homeless to demand access to housing. The Water Services Act of South Africa protects and implements the right to water and sanitation.²⁶ Provincial legislation in Australia provides that the local government must develop plans for the improvement of institutions housing people with disabilities.²⁷

A range of other human rights and laws may be utilised to protect ESC rights. These would include civil and political rights, as well as laws prohibiting unfair competition.

2. JUSTICIABILITY OF ESC RIGHTS

2.1 Actionability

Defined in the strict sense, justiciability simply means the ability of a court to apply a certain law to a certain situation. If the law permits the relevant body to review the implementation of the right, then the right is justiciable. For example, the South African Constitution states that “[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”.²⁸ The Constitutional Court of South Africa commented in *South Africa v. Grootboom* that “[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only ..., and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.” [Para 20]. The legal basis for claims is considered in more detail in sections 3 and 4 below.

25 Such remedies are required under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. Australia, for example, has a Sex Discrimination Act and a Race Discrimination Act.

26 For a case relying on this legislation, see *Residents of Bon Vista Mansions v. SMLC* 2001 (High Court), App. No. 12312 (South Africa).

27 See *People with Disabilities (NSW) Inc. and the NSW Council on Intellectual Disability v. Minister for Disability Services*, Matter No. 067 and No. 194 of 1997 (17 Mar. 1998), Community Services Appeals Tribunal.

28 Section 38.

2.2 Conceptual issues

However, the judicial enforcement of ESC rights has traditionally been queried on the basis that these rights are not inherently justiciable.²⁹ Concerns are raised as to the vagueness of the rights, the intrusion of the courts into areas or functions traditionally reserved to the elected branches of government, and the capacity of courts to adjudicate complex social claims and make appropriate orders. While these claims may be useful in defining the outer limits of judicial involvement, they cloud the various issues surrounding the concept of justiciability.

Vagueness

ESC rights are often phrased in relatively sparse language. Article 9 of the ICESCR perhaps represents one extreme: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance”. On the other hand, Article 13(2) of the same treaty states specifically with regard to the right to education, “Primary education shall be compulsory and available free to all”.

However, the idea that ESC rights are too ‘vague’ for the purposes of judicial interpretation is difficult to reconcile with the fact that nearly all human rights are expressed in broad terms; two examples are the civil right to freedom of expression and the political right to vote. Yet, during the latter half of the 20th Century, a discourse emerged around the meaning of these civil and political rights, and was informed to a large extent by litigation. The same is now occurring with ESC rights. For instance, courts in India have been judging ESC rights since the early 1970s, handing down decisions on child labour, forced evictions, malfunctioning famine schemes, water pollution, lack of sanitation and education, sexual harassment - all under the rubric of social rights. A growing body of case law in many other countries and at the regional and international levels has given significant substance to the rights as indicated in this dossier. As Matthew Craven has noted: ‘justiciability depends not upon the generality of the norm concerned, but rather on the authority of the body making the decision.’³⁰

Does the court have the legitimacy to adjudicate the claim?

Another question frequently raised in litigation is whether it is appropriate for courts (irrespective of their capability) to intervene in the domain of social and economic policy. Legal counsel for a government in one case “contended that under the separation of powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy”.³¹

Courts are conscious of the doctrine of the separation of powers (or, at the international level, the sovereignty of the nation-State). At the same time, however, they have been willing to exercise power to enforce ESC rights on the premise that it is their legal and constitutional duty to enforce such rights. In other words, it is part of their function. The Constitutional Court of South Africa has stated:

29 For an in-depth discussion, see Craig Scott and Patrick Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees?’, *University of Pennsylvania Law Review*, Vol. 141 (1992), pp. 1-92.

30 Matthew Craven, ‘The Domestic Application of the International Covenant on Economic, Social and Cultural Rights’, *Netherlands International Law Review*, Vol. XL (1993), pp. 367-404, at 389.

31 See *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC).

This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice” [section 165(2) of the Constitution]. The Constitution requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights” [section 7(2)]. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. ... In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.³²

The CESCR has similarly stated:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.³³

Furthermore, it is increasingly accepted that courts are part of the system of checks and balances in a mature democracy. The judiciary provides a forum for minorities in democracies that favour simple majorities, and it is not surprising that the bulk of ESC rights jurisprudence stems from litigation instigated by minorities or groups lacking political power. The complementary mechanism of litigation ensures the participation of those citizens who are often otherwise excluded from representative political processes.

Do courts have institutional capacity?

Some commentators argue that courts lack the institutional and analytical capacity to adjudicate ESC rights since the undertaking involves a number of tasks unsuitable to the judicial function: for example, determining appropriate policy options, the allocation of budgetary resources, the supervision of government implementation of orders, or handling the volume of necessary evidence.

One court described the dilemma in addressing one obligation as follows: “[i]t should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second *amici* should be, nor for deciding how public revenues should most effectively be spent.”³⁴

³² See *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC). The footnotes in the original have been omitted in the quotation.

³³ See General Comment No. 9 (n. 8 above), para. 10.

³⁴ See *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC).

These concerns are often overstated. Many ESC rights claims are analogous to civil and political rights claims, for example, cases of forced evictions, unfair dismissals and disconnection from public services. At the same time, civil and political rights claims regularly raise positive obligations, and public policy choices and expenditure issues.

Moreover, as this chapter demonstrates, there are legal tools available to the judiciary to adjudicate whether governments have complied with the obligations progressively to realise ESC rights. In essence, courts are not concerned with balancing policy choices or resource allocations but determining whether the actions of government in coming to its decision are reasonable in the context of these various obligations concerning ESC rights. The CESCR has thus commented that:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. ... While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.³⁵

Indeed, the same court that described the institutional dilemma above went on to say:

(T)hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.³⁶

2.3 Standing to bring a claim

The other key element of justiciability is standing: the ability of an individual or other entity to be recognised by an adjudicative body to present a claim.

With ESC rights, it is sometimes thought that legal cases will need to be brought by a large group of victims or by a public interest organisation since such groups or organisations frequently raise issues with collective or group implications. Yet, since many judicial systems require claims to be presented by individual victims, the rights are therefore viewed as non-justiciable.³⁷

To a large extent, this is a misconception. First, most ESC rights claims may be easily litigated by individuals. This applies both to actions seeking enforcement of negative obligations (i.e., those centring on interferences with ESC rights), as well as to claims for positive action. Positive rights claims, in particular,

³⁵ See General Comment No. 9 (n. 8 above), para. 10.

³⁶ See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253), para. [78].

³⁷ See Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (2003), chap. 6. For an in-depth analysis of the way in which the Inter-American Court of Human Rights has hampered the application of ESC rights in Article 26 of the American Convention on Human Rights by conflating them with collective result-oriented claims in the context of an individual complaints mechanism, see Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

have made judges in some jurisdictions cautious about handing down orders due to concerns about the collective impact of the decision, particularly in common law countries where the decision may have legal effect beyond the parties to the case.³⁸ However, this concern may be dealt with in a number of ways. For example, public interest organisations may be permitted to intervene to ensure that the Court appreciates the broader context, and remedial orders may be adjusted to take account of any wider implications (by delaying the effect of a judicial order, for instance). On the other hand, in civil law systems, court orders do not have any effect beyond the parties before the court. Thus, individual applicants appear to be more successful at securing individual relief, while some political momentum or real threat of mass litigation is often needed to extend the remedy to all victims.³⁹

Some jurisdictions have also introduced flexible court procedures that allow class actions, whereby all victims may file a single claim together.⁴⁰ In some jurisdictions, a number of victims may file a claim on behalf of the entire group, and those not wishing to join may exercise their right to disassociate themselves from the action.

Other courts are empowered (by constitution, legislation, or practice) to hear complaints in the ‘public interest’. The applicant does not necessarily have to be a victim or represent all victims, but brings the case on the premise that s/he represents the collective or public interest in presenting violations of ESC rights. Article 43(1) of the Constitution of Argentina provides that “[a]ny person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognised by this Constitution, treaties or laws, with open arbitrariness or illegality. In such cases, the judge may declare that the act or omission is based on an unconstitutional rule.” Article 43(2) states that the action may be invoked by individuals, ombudsmen, or certain associations in more general situations involving discrimination against groups or rights affecting the environment. The Supreme Courts of India and the Islamic Republic of Pakistan⁴¹ have interpreted their constitutions to provide the right of any person to complain directly of a violation of human rights before them. In contrast, under the European Social Charter (original 1961, revised 1996), only accredited public interest organisations may bring complaints, termed ‘collective complaints’.

3. RIGHTS, OBLIGATIONS AND VIOLATIONS

3.1 Overview

The legal content of ESC rights (and the corresponding obligations of States) varies among jurisdictions, as well as among international and regional human rights instruments. This section approaches the substance of the rights from the perspective of the ICESCR and supplements the analysis with reference to other international instruments, in addition to national and international case law.

³⁸ See *South Africa v. Grootboom* 2001 (1) SA 46 (CC).

³⁹ See Carolina Fairstein, ‘Positive Remedies: The Argentinean Experience’ in John Squires, Malcolm Langford and Bret Thiele, *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: UNSW Press and Australian Human Rights Centre, 2005), pp. 139-151.

⁴⁰ See, for example, Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (2003), chap. 22. See also: section 43 of the Constitution of Argentina.

⁴¹ See *Akbar Ali v. State*, 1991 SCMR 2114 (Supreme Court of Pakistan); *Darshan Masih v. The States*, PLD 1990 SC 513.

Part II of the ICESCR⁴² covers a significant range of ESC rights, including: the right to work (Article 6), the right to just and favourable conditions of work (Article 7), the right to form trade unions and the right to strike (Article 8), the right to social security (Article 9), the obligation to provide assistance to family and children (Article 10), the right to an adequate standard of living (Article 11(1)), the right to adequate housing and food (Article 11(1)), the right to freedom from hunger (Article 11(2)), the right to the highest attainable standard of health (Article 12), the right of everyone to education (Article 13), the obligation to make plans of education to provide free primary education (Article 14), the right to take part in cultural life (Article 15(1)(a)), the right to enjoy the benefits of scientific progress (Article 15(1)(b)) and the right to the protection of scientific, literary and artistic creations (Article 15(1)(c)).

The corresponding obligations of States Parties are largely set out in the first part of the Covenant. States parties are obliged to take steps, within their maximum available resources, progressively to achieve the full realisation of the rights in the Covenant.⁴³ This formulation is repeated in a similar fashion in other instruments, but is notably absent from the European Social Charter or the African Charter on Human and Peoples' Rights.⁴⁴ While the article provides that time and resources will be taken into account in assessing the performance of States Parties in realising the rights, the CESCR has interpreted this article to include at least two immediate general obligations. The first is the undertaking in article 2(1) "to take steps", and the Committee note that this duty:

[I]n itself, is not qualified or limited by other considerations. ... Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.⁴⁵

The Committee has also broken down the obligation to take such steps into duties to respect, protect and fulfil, stating, for instance, that "[t]he right to adequate food, like any other human right, imposes three types or levels of obligations on States Parties: the obligations to *respect*, to *protect* and to *fulfil*."⁴⁶ For a discussion on progressive realisation and the limitation of the maximum availability of resources, see sub-sections 3.4 and 3.5 below.

The second immediate obligation is to guarantee the enjoyment of the rights in the Covenant without discrimination on a range of prohibited grounds: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Article 2(2)).⁴⁷ The phrase 'other status' has been the subject of a number of interpretations (see section 3.2 below). Article 3 reinforces this

42 The Covenant has currently been ratified by 115 countries as at 31 December 2006.

43 Article 2(1) states in full: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

44 States Parties to the European Social Charter or Revised European Social Charter must guarantee the rights in that instrument irrespective of their economic position. However, flexibility is built into the instrument by allowing States the option not to ratify the instrument in respect of all rights. Recent decisions, such as *Autism-Europe v. France* (Complaint No. 12/2002), indicate that the Committee is willing to be flexible with respect to the economic position of the State. In the African context, the African Commission has read in a qualification into States' ESC rights obligations under the African Charter. (See discussion of *Purohit v Moore*, Communication No.204/2001 in Chapters 5, 8 and 20.1)

45 See CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1991), para. 2.

46 CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 15. This approach has been explicitly adopted by the African Commission on Human and Peoples' Rights; see *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96. See, generally, Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social, and Cultural Right: A Textbook* (The Hague: Kluwer Law International, 1995), pp. 21-40.

47 Article 2(2) states in full: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

obligation by requiring States to ensure the equal enjoyment of the rights of men and women.⁴⁸ The Committee has commented that these obligations are of an immediate nature.⁴⁹

In addition to these general duties, many of the articles contain specific duties in relation to various rights. For example, in order to achieve the realisation of the right to work, States Parties are explicitly instructed that they must take steps to provide “technical and vocational guidance and training programmes, policies and techniques”.⁵⁰ In a similar vein, they are obliged to provide protection to the family and special assistance to mothers and children (Article 10), improve the methods of production, distribution and conservation of food (Article 11(2)), reduce infant mortality, improve environmental hygiene, prevent, control and treat diseases (Article 12) and ensure free and compulsory primary education within a fixed number of years (Article 14).

Rights or obligations?

Most human rights instruments do not distinguish, in effect, between rights and obligations. The existence of a right for a designated beneficiary means there is a duty that directly corresponds to the right. The ICCPR simply obliges States Parties, for example, to ensure and guarantee the rights.⁵¹ The right to a fair trial or respect for the home is thus an immediate entitlement. States can then invoke a number of exceptions, for example, public emergencies.⁵²

Some ESC rights are phrased differently (effectively fusing obligations with exceptions) by allowing States progressively to realise the rights within their maximum available resources.⁵³ This has led commentators and some interpretive authorities (for example, the CESCR) to separate the two legal principles and focus on the more nuanced obligations. For example, there is a right to food, but the corresponding obligations are graduated: some are immediate (for example, non-discrimination and the duty to take steps), while others are progressive and depend on the resources available.

While the ‘graduated obligations’ approach provides some rhetorical comfort for States, it has perhaps generated a diminution of the rights language, as well as a bifurcation of the legal principles surrounding rights and duties. An alternative approach is to view contingencies such as ‘progressive realisation’⁵⁴ and ‘maximum available resources’⁵⁵ as essentially defences that a State may rely upon when it claims it is unable to guarantee the rights. This would align ESC rights jurisprudence with non-discrimination and equality principles; for example, discrimination legislation and case law provide that governments must ensure that certain groups must be treated equally (for example, access ramps for people in wheelchairs) unless they are able to show the cost is unreasonable.⁵⁶ At the same time, it is also important to see the phrase ‘maximum available resources’ as part of the obligation, i.e. the duty to use the resources to their fullest possible extent in order to satisfy the rights claims.

48 Article 3 states in full: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

49 See General Comment No. 3 (n. 45 above), para. 1.

50 Article 6(2). Craven comments that these obligations might be interpreted as rights in themselves; see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995), p. 108.

51 See Article 2(1).

52 See Article 4(1).

53 See Article 2(1) ICESCR; Article 4, Convention on the Rights of the Child; Article 26, American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force: 18 July 1978.

54 See Malcolm Langford and Bret Thiele, ‘Introduction: The Road to a Remedy’ (n. 39 above), pp. 7-8.

55 See Craven, ‘The International Covenant’ (n. 50 above), p. 142; Sandra Liebenberg, ‘Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review’ in Squires, Langford and Thiele, *The Road to a Remedy* (n. 39 above), pp. 73-88, in the context of the obligation to provide a minimum essential level of each of the rights.

56 See, for example, *Ian Cooper v. Holiday Coast Cinema Centres Pty Ltd*, No. 96/157, Human Rights and Equal Opportunity Commission (Australia).

Violations

The CESCR has stated in the context of the right to water that, “[t]o demonstrate compliance with their general and specific obligations, States Parties must establish that they have taken the necessary and feasible steps towards the realisation of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State Party cannot justify its non-compliance with the core obligations set.” The Vienna Convention on the Law of Treaties (1969) states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.⁵⁷

Since ESC rights involve many positive obligations, scholars have sought to clarify the nature of violations of these rights. Violations may not only involve actions (acts of commission), but failures to act (acts of omission). These different types of violations have been set out in the Maastricht Guidelines (see Box 1). See also: Limburg Principles and General Comments No. 12 through No. 18 of the CESCR.

BOX 1. MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:
- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
 - (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
 - (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
 - (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups;
 - (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
 - (f) The calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
 - (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

⁵⁷ 1155 UNTS 331. Article 27 also states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Violations through acts of omission

15. Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:
- (a) The failure to take appropriate steps as required under the Covenant;
 - (b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
 - (c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
 - (d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
 - (e) The failure to utilise the maximum of available resources towards the full realisation of the Covenant;
 - (f) The failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
 - (g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
 - (h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;
 - (i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
 - (j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organisations, or multinational corporations.

3.2 Non-discrimination and equality

The relationship between the rights to equality and non-discrimination on the one hand and social and economic rights on the other is of central importance to the adjudication of ESC rights. Most violations of ESC rights are directly linked to systemic inequalities and may, in many cases, be challenged as such. Thus, in jurisdictions lacking explicit protections of social and economic rights, the right to equality may serve as a critical vehicle for disadvantaged groups seeking to enforce their social and economic rights. The CESCR has stated that “[g]uarantees 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.” Reference to social and economic rights may be important in moving courts beyond a narrow or formal notion of equality focused on comparative, rather than substantive equality. For instance, in General Comment No. 16 (para. 6), the CESCR Committee states that “The essence of article 3 of the ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of governments, Article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.”

Prohibitions on discrimination in the exercise of ESC rights are common in international and national standards, although they are certainly not universal. From the perspective of litigation, it is important to note that Article 26 of the ICCPR has been interpreted to cover discrimination beyond civil and political rights. In General Comment No. 18, the Human Rights Committee states [emphasis added]:

[A]rticle 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 [general guarantee against non-discrimination in the exercise of Covenant rights] but provides in itself an autonomous right. It prohibits discrimination in law or in fact in *any* field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.⁵⁸

The precise nature of the right to equality and non-discrimination will vary according to the provision and the manner in which it is interpreted in the relevant jurisdiction. The jurisprudence concerning discrimination and various ESC rights is discussed in Chapters 3 to 7 of this book, but an initial overview is given here.

Prohibited grounds

The most commonly prohibited grounds in the national and international arenas are race and gender, partly as a result of the specialist conventions in this area.⁵⁹ The two principal international human rights treaties (ICCPR and ICESCR) prohibit discrimination on the following grounds: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁶⁰ In *Toonen v. Australia*, the Human Rights Committee determined that ‘sex’ includes ‘sexual orientation’,⁶¹ while the CESCR has held that ‘other status’ includes “physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social status”.⁶² The ICESCR permits, however, non-discrimination in relation to the economic rights set out in the Covenant between nationals and non-nationals in ‘developing’ countries.⁶³ While the grounds of ‘poverty’ or ‘social and economic status’ potentially fall within the grounds of ‘other status’ set out in the ICCPR and the ICESCR, Craven notes that there may be some difficulties in including these grounds within the traditional conceptualisation of discrimination.⁶⁴

58 Human Rights Committee, *General Comment No. 18, Non-Discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994), para. 12. The Committee has also stated, in *General Comment No. 28, The Equality of Rights between Men and Women* (2000), that:

States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.

59 See the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46), 193, U.N. Doc. A/34/46, entered into force: 3 Sept. 1981; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14), 47, U.N. Doc. A/6014 (1966), 660 UNTS 195, entered into force: 4 Jan. 1969.

60 See Article 2(2) of ICCPR and ICESCR.

61 Communication No. 488/1992 (1994), para. 8.7.

62 See CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 18. See, generally, Craven, ‘The International Covenant’ (n. 50 above), pp. 167–181.

63 Article 2(3). The phrase ‘developing countries’ should be narrowly interpreted; see E. V. O. Dankwa, ‘Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9, No. 2 (1987), pp. 230–249.

64 Craven, ‘The International Covenant’ (n. 50 above), p. 175.

Not all distinctions on prohibited grounds are necessarily discriminatory: differentiations based on reasonable and objective criteria are ordinarily exempted.⁶⁵ However, the burden is usually cast upon the State to justify the distinction.

Direct discrimination

The proscription of direct discrimination (or provisions such as ‘all persons are equal before the law’) is a guarantee that legislation and other laws may not be expressly discriminatory.⁶⁶ For example, laws that discriminate between married men and married women in relation to their entitlement to receipt of an unemployment benefit violate the principle.⁶⁷ The jurisprudence in this area is vast, and there are numerous cases concerning direct discrimination and the rights to work,⁶⁸ social security,⁶⁹ family life,⁷⁰ adequate standard of living,⁷¹ housing,⁷² education,⁷³ and cultural life.⁷⁴

Indirect discrimination

Indirect discrimination ordinarily relates to government actions or omissions that are discriminatory in practice. The more expansive definition of discrimination in Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination is often used by judicial bodies in this regard:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

For example, in Canada the use by landlords of a minimum income criteria rule (rent was not to exceed 30 percent of income) was held unfairly to affect women, racial minorities and persons receiving social security.⁷⁵ Indirect discrimination has been found in cases concerning rights to work⁷⁶ and education.⁷⁷

65 See Part V (Article E) European Social Charter 1996; Human Rights Committee, *General Comment No. 18, Non-Discrimination*, para. 13; Case ‘Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’ (*Belgian Linguistic Case*), (Merits), Eur. Ct. HR, Series A, Vol. 6, Judgment of 23 July 1968 (1979-80), I EHRR 252.

66 See Article 26 ICCPR, for example.

67 See Human Rights Committee, *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984 (9 Apr. 1987).

68 See European Committee of Social Rights, *Syndicat national des professions du tourisme v. France*, Complaint No. 6/1999 (2000); *Hoffman v. South African Airways* 2000 (11) BCLR 1211 (CC) (South Africa); *A. Yilmaz/Yilmaz Dogman v. The Netherlands*, Communication No. 1/1984, Committee on the Elimination of Racial Discrimination (1988).

69 *Taylor v. United Kingdom*, European Court of Justice, Case-382/98, 16 Dec. 1999; *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern*, BGE/ATF 121 I 367, Swiss Federal Court, 27 Oct. 1995; *Gueye et al. v. France*, Communication No. 196/1983 (3 Apr. 1989); decision of the Constitutional Court of the Kingdom of Spain, Case No. 130/1995, (1995), 3 *Bulletin on Constitutional Case-Law* 366, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002).

70 *McBain v. Victoria* (2000), 99 FCR 116 (Australia).

71 *Miroslav Lacko v. Slovakia*, Committee on the Elimination of Racial Discrimination, Communication No. 11/1998.

72 *L. K. v. The Netherlands*, Committee on the Elimination of Racial Discrimination, Communication No. 4/1991; *Anna Koptova v. Slovakia*, Committee on the Elimination of Racial Discrimination, Communication No. 13/1998.

73 [Case] Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’ (*Belgian Linguistic Case*), (Merits), Eur. Ct. HR, Series A, Vol. 6, Judgment of 23 July 1968 (1979-80) I EHRR 252; *Numerus Clausus I Case*, German Constitutional Court (1972), 33 BverfGE 303; *Brown v. Board of Education*, *Brown I*, 347 US 483 (1954), *Brown II*, 349 US 294 (1955); *Kashif Ahmad v. Denmark*, Committee on the Elimination of Racial Discrimination, Communication No. 16/1999.

74 *B. J. v. Denmark*, Committee on the Elimination of Racial Discrimination, Communication No. 17/1999.

75 See *Kearney & Ors v. Bramlea Ltd & Ors*, Board of Inquiry, Ontario Human Rights Code (2001).

76 See *McBride v. State of Victoria* (No. 1) [2003] FMCA 285 (Australia).

77 *Clarke v. Catholic Education Office & Anor* [2003] FCA 1085 (8 Oct. 2003) (Australia).

Positive obligations and affirmative action

Some instruments and court decisions require that States take positive, but temporary steps to ensure the enjoyment of equal rights by disadvantaged groups.⁷⁸ Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women permits such measures:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

While such measures may potentially discriminate in favour of one group, they are usually expressly exempted from discrimination laws if the measures are temporary and if they expire once the objective of substantive equality has been achieved.⁷⁹

Such measures have come to be increasingly expected. The Supreme Court of Pakistan has found that the constitutional right to equality imposes a positive obligation on all State organs to take active measures to safeguard the interests of women and children.⁸⁰ The Human Rights Committee has declared:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.⁸¹

Indeed, the standard equality rights and discrimination language adopted in many legal instruments⁸² has been frequently interpreted - beginning with the Permanent Court of Justice in 1935⁸³ - to go beyond preventing mere *formal* or procedural non-discrimination in law to the duty to eliminate discrimination and inequality 'in fact'.⁸⁴

This move of courts and other decision-making bodies away from a formal towards a substantive conception of equality has major implications for the protection of ESC rights. Formal equality focuses exclusively on whether a law draws formal distinctions between groups, thereby ignoring laws that, despite

78 The Human Rights Committee has commented that the right to equality in Article 26 of the ICCPR requires that State Parties "take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant"; see *General Comment No. 18, Non-Discrimination* (1989).

79 See Article 1(4), International Convention on the Elimination of All Forms of Racial Discrimination, and Article 4(1), Convention on the Elimination of All Forms of Discrimination against Women. See also: *Regents of the University of California v. Bakke* 438 US 265 (1978); *Fazal Jan v. Roshua Din* PLD 1990 SC 661 (Supreme Court of Pakistan).

80 *Fazal Jan v. Roshua Din* PLD 1990 SC 661 (Supreme Court of Pakistan).

81 Human Rights Committee, *General Comment No. 18: Non-Discrimination* (1989), para. 10.

82 Article 26 of the ICCPR reads, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

83 *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No. 64: "[T]here may be no true equality between a majority and a minority if the latter were deprived of its institutions (schools in our case) and were consequently compelled to renounce what constitutes the very essence of it being a minority."

84 Donna Greschner has defined formal equality as follows:

[F]ormal equality may mean identical treatment for everyone. The simplest version of this conception forbids laws from excluding anyone or drawing any distinctions between people ... A slightly more complicated version of formal equality, which recognizes that in a complex world legislators must make innumerable distinctions, forbids laws that use arbitrary distinctions. This version instructs lawmakers to treat "like cases alike" and "unlike cases differently". ('Does Law Advance the Cause of Equality?' (2001) 27 Queen's L.J. 299, 302-303)

the appearance of equal applicability, may have unequal effects on particular groups, or maintain an unequal status quo.⁸⁵ Thus, formal equality will not recognise disparate impact and adverse effect discrimination or systemic discrimination.⁸⁶ In contrast, substantive equality recognises that “[t]here is a difference between treating people equally, with respect to one or another commodity or opportunity, and treating them as equals.”⁸⁷ Substantive equality aims for an equality of outcomes or results for different groups and individuals in society. Courts’ recognition that substantive equality can only be assured by remedying structural inequality means that judicial attempts to ensure that the needs of marginalised groups are not ignored by the legislature or executive necessarily result in reliance upon the positive, remedial component of equality rights⁸⁸ and the prescription of substantive measures.⁸⁹

When viewed in light of substantive, rather than formal equality, equality rights create significant positive obligations to address and remedy the social and economic disadvantages of marginalised and vulnerable groups, including in situations where the disadvantages are not themselves caused by discriminatory government action. In Canada, this position was clearly articulated in the *Eldridge* case, in which the Canadian Supreme Court rejected the British Columbian provincial government’s arguments that the right to non-discrimination did not require governments to allocate resources in health care to address pre-existing disadvantages of particular groups such as the deaf and hard of hearing.⁹⁰

3.3 Respect

The obligation to respect requires that governments abstain from interfering with an individual’s freedom to access a human right.⁹¹ It is essentially a negative obligation, requiring a government and its organs to refrain from impeding an individual’s access to a right. The African Commission on Human and Peoples’ Rights defined the obligation as follows:

At a primary level, the obligation to *respect* entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio-economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.⁹²

85 Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), p. 46.

86 C. Sheppard, ‘Equality Rights and Institutional Change: Insights from Canada and the United States’ (*Ariz. J. Int’l & Comp. Law*, Vol. 15 (1998), pp. 143, 156.

87 G. Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), p. 11.

88 B. Porter, ‘Beyond Andrews: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*’, *Constitutional Forum*, Vol. 9, no. 3 (1998), pp. 71, 73.

89 This paragraph is adapted from A. Nolan, ‘A Justification for the Courts’ Adoption of an Activist Approach to Children’s Socio-Economic Rights: Ensuring Substantive Equality’, paper presented at the European University Institute, Florence.

90 *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R., para. 87. Unfortunately, more recent judgments of the Supreme Court of Canada have suggested a retreat from the model of substantive equality affirmed in *Eldridge*. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* [2004] 3 S.C.R. 657, the Court overturned a decision of the British Columbia Supreme Court that had applied the principles affirmed in *Eldridge* to require the funding of a new treatment for autism (*Auton (Guardian ad idem of) v. British Columbia (Minister of Health)* (2000) 78 B.C.L.R. (3d) 55 (B.C.S.C.)). See Bruce Porter, ‘Twenty Years of Equality Rights: Reclaiming Expectations’ 23(1) *Windsor Yearbook on Access to Justice* (2005) 145, www.20years.ca

91 The CESCR stated in respect of the right to food: “The obligation to respect existing access to adequate food requires States Parties not to take any measures that result in preventing such access”; see CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 15. See, generally, Krzysztof Drzewicki, ‘Internationalization of Human Rights and Their Juridization’, in Rajja Hanski and Markku Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd ed. (Turku, Finland: Åbo Akademi University Institute for Human Rights, 1999), p. 31.

92 *SERAC v. Nigeria*, African Commission on Human and Peoples’ Rights, Case No. 155/96, para. 45 The emphasis is in the original.

The African Commission, in the above case, found that the following actions of the Government of the Federal Republic of Nigeria were inconsistent with the obligation to respect: the pollution of natural resources and the destruction of housing by government officials violated the right to environmental health, housing and food. Other ESC rights cases concerning restraint of government activity have involved unfair dismissals,⁹³ restrictions on trade union freedom,⁹⁴ forced evictions,⁹⁵ contamination of water supplies,⁹⁶ disconnection of water services,⁹⁷ restrictions on the provision of medicines by medical practitioners,⁹⁸ closure of schools⁹⁹ and the interference by police in the ability of the homeless to access food, shelter and medicines.¹⁰⁰ Cases concerning social security, housing (particularly forced evictions), health and education, and children are taken up in Chapters 3 to 7.

3.4 Protect

The duty to protect is a familiar concept in all human rights jurisprudence. The obligation of governments is to guarantee that third parties (non-State actors, other States, intergovernmental organisations) do not infringe on an individual's enjoyment of his rights.¹⁰¹ Increased privatisation and the deregulation of labour markets and social services have magnified the importance of this aspect of ESC rights.¹⁰²

Bringing about the direct application of ESC rights norms to private actors through litigation is difficult at the international and regional levels. One exception is the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises¹⁰³

It may, however, be possible at the national level under the constitution or legislation through the horizontal application of human rights. For example, in Ireland, in *Meskeil v CIE*,¹⁰⁴ the defendant employers agreed with trade unions to terminate the contracts of employment of all their employees and to offer each employee immediate re-employment upon the same general terms as prior to the termination

93 Most countries have legislation on unfair dismissals that provides for judicial review. International Labour Organisation Convention No. 158, the Termination of Employment Convention, 1982 sets out minimum standards. Article 4 provides that "[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." See Australian case of *Qantas Airways Limited v. Christie* [1998] HCA 18 (19 Mar. 1998) in relation to the application of the Convention in the domestic context.

94 The International Labour Organisation Committee on Freedom of Association has ruled on over 2 000 cases on trade union freedom of association (see www.ilo.org/ilolex/english/casframeE.htm). In relation to strikes, it has stated that "strikes are one of the essential means that workers and their organizations should have to further and defend their economic and social interests" (see *The International Confederation of Free Trade Unions v. China*, Case No. 1500, 270th Report of the Committee on Freedom of Association, 1989). With regard to other aspects of the freedom of association, such as collective bargaining, see European Court of Human Rights, *National Union of Belgian Police v. Belgium* (1974) 1 EHRR 578; *Attorney-General of Guyana v. Alli*, Court of Appeal of Guyana, [1989] LRC (Const) 474.

95 See Chapter 4 of this volume.

96 See *Defensoria de Menores Nro 3 v. Poder Ejecutivo Municipal*, Agreement 5, Superior Justice Court, Neuquen, 2 Mar. 1999; *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96.

97 Bill of Review 0208625-3, Special Jurisdiction Appellate Court, Paraná, Aug. 2002; *Residents of Bon Vista Mansions v. SMLC 2001* (High Court), App. No. 12312 (South Africa).

98 *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC).

99 See *World Organisation against Torture, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Témoins de Jéhovah/ Zaire*, African Commission on Human and Peoples' Rights, Communications 25/89, 47/90, 56/91, 100/93.

100 See *Pottinger v. City of Miami*, 810 F. Supp. 1551 (SD Fla. 1992).

101 See Human Rights Committee, *General Comment No. 18, Non-Discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994); European Court of Human Rights in *López Ostra v. Spain* (1994) Series A No 303-C; (1995) 20 EHRR 277, EctHR.

102 For an exposition of the argument for the derivation of the duty to protect from the ICESCR, see Craven, 'The International Covenant' (n. 50 above), p. 112. See also: Laurence Dubin, 'The Direct Application of Human Rights Standards to, and by, Transnational Corporations', *ICJ: The Review Quarterly*, Vol. 21 (1999), pp. 56-79.

103 One exception is the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises; see Part III of this book.

104 [1973] IR 121 (*Meskeil*). This paragraph is adapted from Aoife Nolan, 'Ireland': in Langford, *Social Rights Jurisprudence* (n. 37 above).

if he agreed, as a special and additional condition of his employment, to be 'at all times' a member of one of the four trade unions. Pursuant to that agreement, the plaintiff's contract of employment was terminated by the defendants. The plaintiff was not re-employed by the defendants as he refused to accept the special condition. The Supreme Court held that the right of citizens to form associations and unions, guaranteed by Article 40.6.1 of the Constitution, necessarily recognised a correlative right to abstain from joining associations and unions. In this case, the plaintiff was entitled to damages because, amongst other things, he had suffered loss caused by the (*non-state actor*) defendant employers' conduct in violating a right guaranteed to him by the Constitution. In South Africa, the Bill of Rights provides for the horizontal application of the Bill of Rights, and the Constitutional Court has examined the obligations of property owners vis-à-vis occupiers on the basis of the constitutional prohibition on forced evictions.¹⁰⁵

Advocates have also turned to courts in developed countries to sue parent companies for violations committed abroad by their subsidiaries. Transnational corporations have therefore been sued under national tort law and, in some cases, human rights provisions in legislation, such as the *Alien Torts Claims Act*.¹⁰⁶

The Inter-American Court of Human Rights, in a case concerning disappearances, defined the duty to protect in sweeping terms:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures.¹⁰⁷

In an ESC rights context, the responsible United Nations Committee has said that the relevant non-State actors include individuals, groups, corporations and other entities as well as agents acting under their authority. According to international tribunals, the measures to give effect to the duty to protect must include legislation,¹⁰⁸ the establishment of an effective regulatory regime,¹⁰⁹ providing access to

105 See *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC). For a discussion of this case and others, see Sandra Liebenberg, 'South Africa: Adjudicating Social Rights under a transformative Constitution', in Langford, *ibid*.

106 See generally, R. Meeran 'Multinational Litigation as a Weapon in Protecting Economic and Social Rights' in J. Squires, M. Langford and B. Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: Australian Human Rights Centre and University of NSW Press, 2006), pp. 183-211; C. Scott, 'Multinational Enterprises and Emergent Jurisdiction on Violations of Economic, Social and Cultural Rights' in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Cultural and Social Rights: A Textbook*, 2nd revised ed. (Dordrecht: Martinus Nijhoff Publishers, 2001), pp. 563-595; and Sarah Joseph, 'Liability of Multinational Corporations', in Langford, *Social Rights Jurisprudence*, *ibid*.

107 *Velázquez-Rodríguez v. Honduras*, Series C, No. 4 (29 July 1988), para. 174-5.

108 See *The International Commission of Jurists v. Portugal*, Complaint No. 1/1998, European Committee of Social Rights (Date of Report to Committee of Ministers: 9 Sept. 1999).

109 See *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96, decision taken at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001. See also: Case No. 2000-08-0109, Constitutional Court of Latvia, 2001.

legal remedies¹¹⁰ and imposing penalties for non-compliance.¹¹¹ The African Commission on Human and Peoples' Rights in *SERAC v. Nigeria* defined the duty thus:

At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.¹¹²

Instances of failure to comply with this duty have been found in cases concerning failure to prosecute an employer for racial discrimination,¹¹³ prevention of child labour,¹¹⁴ effective regulation of social insurance schemes for workers,¹¹⁵ regulation of unsafe foods,¹¹⁶ prevention of forced evictions and destruction of housing,¹¹⁷ inadequate steps to prevent environmental pollution or damage affecting food and water¹¹⁸ and human health,¹¹⁹ religious edicts that affect creative freedom,¹²⁰ the approval of licences for mining or logging if they deprive minorities of cultural rights¹²¹ and land and property rights.¹²² Cases concerning social security, housing (particularly forced evictions), health and education, and children are taken up in more detail in Chapters 3 to 7.

3.5. Fulfil

Since the full realisation of ESC rights is the ultimate goal of instruments dedicated to these rights, it is clear that there is a corresponding duty upon States to take all necessary steps to ensure that the rights are realised for all. The obligation to fulfil requires States to take steps to facilitate individuals and communities in enjoying the right and, when an individual or group is unable to realise the right themselves, to provide the means by which to enjoy that specific right.

The common objection of governments to the positive obligations that accompany the duty to fulfil is the absence of sufficient resources. However, the potential difficulties posed by this conundrum are

110 Committee on Economic, Social and Cultural Rights, *General Comment No. 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997).

111 Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003).

112 See *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96. See also: Case No. 2000-08-0109, Constitutional Court of Latvia, 2001.

113 *YilmazDogman v. The Netherlands*, Communication No. 1/1984 (1988), Committee on the Elimination of Racial Discrimination.

114 *The International Commission of Jurists v. Portugal*, Complaint No. 1/1998, European Committee of Social Rights (Date of Report to Committee of Ministers: 9 Sept. 1999).

115 Case No. 2000-08-0109, Constitutional Court of Latvia, 2001.

116 *Dr Mohiuddin Farooque v. Bangladesh & Ors* (No. 1), 48 DLR (1996) (HCD) 438; (1996) 2 CHRLD 107 (Supreme Court of the People's Republic of Bangladesh).

117 *Hajrizi Dzemajl et al. v. Yugoslavia Communication*, No. 161/2000 (2003), Committee against Torture; *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96.

118 *Defensoria de Menores Nro 3 v. Poder Ejecutivo Municipal*, Agreement 5, Superior Justice Court of Neuquen (1999) (Argentina); *F. K. Hussain v. Union of India* AIR (1990) Kerala 321 (India).

119 *López Ostra v. Spain* (1994) Series A No 303-C; (1995) 20 EHHR 277, EctHR; *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (DENR) 33 I.L.M. (1994) 173 (the Republic of the Philippines).

120 The CESCR observed in respect of the Islamic Republic of Iran that, "While appreciating that *fatwahas* are issued by the religious authorities and not by the State organizations *per se*, the question of State responsibility clearly arises in circumstances in which the State does not take whatever measures are available to it to remove clear threats to the rights applicable in Iran in consequence of its ratification of the Covenant". See *Concluding Observations on the Report of Iran* (1993), para. 7.

121 *Länsman et al. v. Finland*, Communication No. 511/1992, (1994), Human Rights Committee; *Jouni E. Länsman v. Finland*, Communication No. 671/1995, (1996), Human Rights Committee.

122 *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights, Series C, No. 79, 31 Aug. 2001.

taken into account in the articulation of the standards. For example, the ICESCR provides that the rights set out therein must be progressively - not necessarily immediately - and only achieved within maximum available resources. For example, in *International Association Autism-Europe (IAAE) v. France*,¹²³ the European Committee of Social Rights stated that States Parties are obliged to take legal and *practical* action to give full effect to Charter rights. When the achievement of a right is exceptionally complex and particularly expensive to resolve, State Parties must take measures that allow them to achieve the objectives of the Charter “within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources” [para 53]. Furthermore, other States also have a duty to cooperate in providing assistance, particularly to poorer States.¹²⁴ In some cases, a State has an option to select a fewer number of rights in the relevant instrument, such as the European Social Charter.

Taking steps and progressive realisation: legislation, policies, remedies and implementation

On one hand, the principle of ‘progressive realisation’ allows a government to claim some latitude in giving effect to its obligations to ensure that ESC rights are enjoyed by all. But the duty is also linked to a positive obligation of conduct: taking steps. The CESCR explains it in the following fashion:

[T]he undertaking in article 2(1) “to take steps”, which in itself, is not qualified or limited by other considerations. ... Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.¹²⁵

In relation to the types of steps to be taken, the Committee stated further that:

The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be “all appropriate means, including particularly the adoption of legislative measures”. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. ... Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. ... Other measures which may also be considered “appropriate” for the purposes of article 2(1) include, but are not limited to, administrative, financial, educational and social measures.¹²⁶

123 Complaint No. 13/2002 (7 Nov. 2003).

124 See Article 2(1), ICESCR.

125 CESCR, *General Comment No. 3, The Nature of States Parties’ Obligations* (1990), para. 2.

126 *Ibid.*, paras. 3, 5 and 7.

In the landmark judgment *Grootboom v. Republic of South Africa*, the Constitutional Court of South Africa expounded upon the obligation to put in place a comprehensive programme directed at progressively realising ESC rights. Here, the Court was primarily concerned with the Government's constitutional obligation to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing:¹²⁷

[42] ... Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.

[43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review.

[44] ... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Therefore, according to the South African Constitutional Court, in addition to legislation, policies and programmes must be undertaken that are appropriate, well directed and reasonable in conception, that address current circumstances, that are balanced and flexible, that do not exclude the most needy and that are implemented. In this case, the Court held that the failure of housing legislation and programmes to provide emergency housing relief violated the right to housing. In a later case, it faulted the national government's health policy finding and stated that it was not reasonable to restrict the use of nevirapine [which prevented the mother-to-child transmission of HIV] to the research and training sites. The Court ordered the Government to permit and facilitate the use of nevirapine, make provision if necessary for counsellors based at public hospitals and clinics, and take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine.

State failure to design appropriate programmes was also raised in *PUCL v. India*, where the Supreme Court of India found that midday lunch programmes were indispensable to the right to life and ordered the progressive expansion of such a scheme across the country.¹²⁸ Many Latin American courts have ordered that anti-retroviral medicines should be provided to those living with HIV/AIDS in order to give effect to, among other rights, their rights to health and life and access to the benefits of science and technology.¹²⁹ The Constitutional Court of the Republic of Colombia found that a quota system for local schools prevented a poor family from sending their child to a school farther away because of transport costs. The Court stated that quota assignments may not be made in a mechanistic way simply to fulfil 'theoretically' the obligation to provide education to the population, but must permit effective access

127 Article 26(2), Constitution of South Africa.

128 See *People's Union for Civil Liberties v. Union of India*, No. 196 of 2001, Interim Order of 2 May 2003, Supreme Court of India.

129 See, for example, *Cruz Bermudez et al. v. Ministerio de Sanidad y Asistencia Social*, Supreme Court of Justice of Venezuela, Case No. 15.789, decision No. 916, 15 July 1999.

to education. In this case, the system did not take into account the mother's lack of income - there were transport costs in sending the child to the school - and the time required to bring her daughter to the assigned school. The Court ordered that the girl be admitted to a school closer to her home.¹³⁰

Courts have been more willing to intervene in cases where a pre-existing policy has not been implemented than they have where no policy or programme exists at all. Courts have ordered the implementation of such policies and programmes for job-seekers,¹³¹ the provision of sanitation,¹³² the provision of grain as part of anti-famine schemes¹³³ and the provision of medicines to prevent an epidemic.¹³⁴

Non-retrogression

The CESCR has stated, in General Comment No. 3, that “the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content” and that “any deliberately retrogressive measures in that regard 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.”¹³⁵ Consequently, the prohibition on unjust retrogressive measures is of immediate effect.

Retrogressive measures might include the formal removal or suspension of the legislation necessary for the continued enjoyment of an ESC right that is currently enjoyed; the adoption of legislation or policies that are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of ESC rights for the most vulnerable groups; and the adoption of any other deliberately retrogressive measure that reduces the extent to which any such right is guaranteed.

While breaches of this principle can result from insufficient budgetary allocations in times of fiscal crisis, adjudication bodies have been critical of cutbacks that fall most harshly on the poorest and most disadvantaged. In its 1998 Concluding Observations on Canada's report, the CESCR strongly criticised Canada for reducing the coverage of unemployment benefits and cutting social assistance rates:¹³⁶ “The Committee is concerned that newly introduced successive restrictions on unemployment insurance benefits have resulted in a dramatic drop in the proportion of unemployed workers receiving benefits to approximately half of previous coverage, in the lowering of benefit rates, in reductions in the length of time for which benefits are paid and in increasingly restricted access to benefits for part-time workers”. Analogously, in *Ms. L. R. et al. v. Slovakia*,¹³⁷ the Committee on Racial Discrimination found that the a municipality's revocation of a resolution designed to provide housing for Roma was discriminatory.

In an interesting case concerning the role of international organisations, The World Bank Inspection Panel found that World Bank management had failed to ensure that certain nutrition and other programmes were protected in practice under a structural adjustment agreement with the Government of Argentina.¹³⁸

¹³⁰ *Mora v. Bogotá District Education Secretary & Ors*, Constitutional Court of Colombia, decision T-170/03, 28 Feb. 2003.

¹³¹ *Employment Act Case*, KKO 1997: 141, Yearbook of the Supreme Court 1997, No. 141, Supreme Court of Finland.

¹³² *Municipal Council Ratlam v. Vardhichand and Ors*, AIR 1980 SC 1622.

¹³³ See *People's Union for Civil Liberties v. Union of India* (n. 128 above).

¹³⁴ *Viceconti v. Ministry of Health and Social Welfare*, Poder Judicial de la Nación, Causa no. 31.777/96, 2 June 1998.

¹³⁵ See CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (1990), para. 9.

¹³⁶ *Concluding Observations on Canada* (1998), para. 20.

¹³⁷ *Communication No. 31/2003: Slovakia* CERD/C/66/D/31/2003. The following paragraph is adapted from A. Nolan, 'Litigating Housing Rights: Experiences and Issues' Vol. 28, (2006) Dublin University Law Journal pp.145-171.

¹³⁸ World Bank Inspection Panel, *Special Structural Adjustment Loan* (Loan No. 4405-AR), Panel Report and Recommendation sent to the Board (16 Dec. 1999).

Immediate and minimum entitlements

In some instances, human rights treaties or judicial interpretations provide that ESC rights give rise to an immediate entitlement. Individual beneficiaries may demand more than the implementation of a programme over the long term; in the short term, they are entitled to a specific benefit. This immediate (and often minimum) entitlement has often been implied in cases where social rights derive from civil and political rights or the right to non-discrimination and equality.

Other authorities have sought to imply a right to an immediate entitlement to the minimum essential level of each right. For example, the CESCR has stated that it is of the view that:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, 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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

This approach has been adopted in a number of cases at the domestic level, particularly in cases of social security (see Chapter 3). Courts in several jurisdictions have been prepared to identify the minimum core either explicitly or implied. In the case of *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern*, the Swiss Federal Court determined that there was an implied constitutional right to basic necessities that may be invoked by both Swiss citizens and foreigners. The Court held that it lacked the competence to determine resource allocation, but said that it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.¹³⁹ In Colombia, the Constitutional Court has recognised a fundamental right to the *minimo vital* (subsistence minimum) in a series of cases since 1992 that have covered a wide range of social and economic rights.¹⁴⁰ According to this jurisprudence, the Government is obliged to take all positive and negative measures required in order to prevent individuals from being deprived of the most basic conditions that will allow them to carry on a decorous existence.¹⁴¹ Even in the United Kingdom, a jurisdiction that has traditionally been hostile to social and economic rights, the House of Lords has been prepared to recognise that “it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery”.¹⁴²

139 *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern*, BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995. See also: Constitutional Court of the Republic of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133), Federal Constitutional Court of Germany.

140 For a comprehensive analysis, see Magdalena Sepulveda, ‘Colombia’ in Langford (n. 37 above).

141 Sentencia T 426, 24 June 1992, Sala Segunda de Revisi-n de la Corte Constitucional.

142 *Matthews v. Ministry of Defence* [2003] UKHL 4, para. 26.

However, the South African Constitutional Court has expressed strong doubts as to the practicality of the 'minimum core' obligation, stating that:

There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. ... the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by section 26 [the right to housing] are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context.¹⁴³

David Bilchitz has criticised this finding, noting that, if 'survival interests' are not taken into account, the exercise of all other human rights is unfeasible.¹⁴⁴ Sandra Liebenberg argues that the Court's reasonableness test, which it applies to the progressive realisation of the right, might be adapted to cover 'survival interests'. There might be a presumption that government programmes do not meet the test of reasonableness if certain minimums are not met.¹⁴⁵ Alternatively, the issue could have been dealt with procedurally, for instance, the Court could have requested the Government to come up with a formulation for the implementation of the minimum core in practice and then tested its reasonableness in the circumstances.

Right to legal remedies

Access to effective legal remedies (including legal aid; see Chapter 2) by victims of violations of ESC rights is often indispensable to guaranteeing the realisation of a particular right. Legal remedies provide immediate relief for victims and provide a concrete method of accountability for monitoring the progressive realisation of the rights by governments. However, international instruments protecting ESC rights, unlike their civil and political rights counterparts, display a tendency not to provide express instructions to governments to provide legal remedies. For example, Article 2(1) of the ICESCR allows States a degree of latitude in the measures by which they choose to implement the rights, merely stating that they should use "all appropriate means, including particularly the adoption of legislative measures".¹⁴⁶ The ICCPR provides that States should "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."¹⁴⁷ Nevertheless, the right to effective remedies for violations of ESC rights - clearly recognised in the Universal Declaration of Human Rights - has propelled greater recognition of the justiciability of ESC rights at the domestic level and, increasingly, the international level.

¹⁴³ *South Africa v. Grootboom* 2001 (1) SA 46 (CC), para. 33.

¹⁴⁴ See David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence', 19 *South African Journal on Human Rights*, 1 (2003).

¹⁴⁵ See Sandra Liebenberg, 'Enforcing Positive Social and Economic Rights Claims' (n. 65 above).

¹⁴⁶ For further commentary on this clause, see Philip Alston and Gerald Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9 (1987) 156-229.

¹⁴⁷ Article 2(3).

The CESCR has now placed the burden of proof on States to demonstrate why such remedies are not available:

[A] State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not “appropriate means” within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.¹⁴⁸

In the case of forced evictions, the Committee has stated that legal remedies should be provided as of right.¹⁴⁹ Other international bodies have made similar observations. The European Committee of Social Rights has criticised a State Party for failing to allow an independent right of appeal for certain social security applicants.¹⁵⁰

The right to a fair trial may also entail a right to legal remedies.¹⁵¹ This will often require that the economic, social, or cultural right be protected by existing legislation. The European Court of Human Rights, for example, has ruled that such legislative protection transforms the right in question into a ‘civil right’ for the purposes of triggering the application of the right to fair trial.¹⁵² In some cases involving the judicial application of procedural protections for ESC rights, courts have noted the fundamental nature of the entitlements in questions. For example, the Supreme Court of the United States noted the importance of the basic right to be heard in cases concerning the removal of benefits since “welfare provides the means to obtain essential food, clothing, housing, and medical care”.¹⁵³

At the national level, access to legal remedies may be available under constitutional law or legislation. See the discussion of constitutions in section 2.2 above.

3.6 Defences: limitations, derogations and maximum available resources

Most human rights instruments provide a series of ‘defences’ for governments. This sub-section will analyse typical clauses concerning limitations and non-derogations, as well as provisions relating to maximum available resources or progressively realisation.

Limitations

States may be permitted to place limitations on ESC rights in certain situations, for example, preventing a person with a severe and contagious disease having contact with other persons, such a restriction being otherwise in contravention of the right to health.

148 *General Comment No. 9* (n. 8 above). The Committee, however, has noted that ‘administrative’, as opposed to ‘judicial’, remedies may suffice in some circumstances: “The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making.”

149 See *General Comment No. 7, The Right to Adequate Housing: Forced Evictions* (1997), paras. 13 and 15.

150 See *Salesi v. Italy*, [1993] IIHRL 18 (26 Feb. 1993); *Schuler-Zgraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993). Conclusions XIII-1, p. 190 and XIII-2, p. 132.

151 See, for example, *Schuler-Zgraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993), European Court of Human Rights.

152 See *Salesi v. Italy*, [1993] IIHRL 18 (26 Feb. 1993); *Schuler-Zgraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993).

153 See *Goldberg v. Kelly* 397 US 254 (1970).

Article 4 of the ICESCR provides that “the State may subject such rights only to such 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”. However, the limitation must meet certain requirements. First, it must be ‘determined by law’. This has been interpreted in another context by the European Court of Human Rights to mean that the relevant law must be adequately accessible to individuals and sufficiently precise for them to regulate their conduct.¹⁵⁴ Second, the phrase ‘compatible with the nature of these rights’ suggests that some aspects of the rights may not be limited; otherwise, the right would be rendered meaningless. Alston and Quinn suggest that the right to freedom from hunger, presumably the core aspect of the right to food,¹⁵⁵ might not be subject to limitation.¹⁵⁶ Third, the limitation must promote the ‘general welfare of society’. Commentators note that States carry the burden of proof in this regard and must demonstrate objectively that the intended measure will promote the general welfare, and any limitation must be proportionate to this end.¹⁵⁷ For example, concentrating solely on *general* economic development at the expense of the right to health is unlikely to meet these criteria. Lastly, the limitation must take place in a ‘democratic’ society that presumably provides the government action with a measure of legitimacy. It should be noted, though, that other international instruments and constitutions might contain different wording.¹⁵⁸

Derogation

In some circumstances, States may be able to suspend or derogate ensuring the right in situations such as war or other public emergencies.¹⁵⁹ However, any derogation is ordinarily circumscribed by the requirement that it only be carried out to the extent strictly required by the exigencies of the situation.¹⁶⁰ Furthermore, the measures must not be inconsistent with the other obligations of a State under international law. They should also be reported to the relevant international body.

Maximum available resources

Cases concerning the obligation to use maximum available resources are less common. In many cases, the courts, for a variety of reasons, do not directly address the allocation of resources. The relevant human rights may be civil and political rights; for example, the European Court of Human Rights ordered Ireland to provide legal aid for judicial separation proceedings in order to ensure respect of the right to family life.¹⁶¹ However, as noted in section 3.5 above, even when not explicitly addressed, Courts seem motivated by a number of factors in their reasoning on resource question, regardless of the category of human rights. These include the seriousness of the claim, the government’s culpability, the strength of the legal claim or the magnitude of the resources. For example, in the *Eldridge* case, the Supreme Court of Canada considered the cost of a programme to provide interpreter services as a percentage of the overall health budget and found that it would not be reasonable, in light of these manageable costs, to

154 See the discussion of the *Sunday Times Case*, 30-2 Eur. Ct. HR. 30 (ser. A) (1979) in Alston and Quinn, ‘The Nature and Scope of State Parties’ Obligations’ (n. 146 above), p. 200.

155 See a similar conclusion in CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999).

156 Alston and Quinn, ‘The Nature and Scope of State Parties’ Obligations’ (n. 146 above), p. 201.

157 *Ibid.* p. 202.

158 For example, Article 29 of the Universal Declaration of Human Rights refers to ‘morality’ and ‘public order’ instead of general welfare. The European Social Charter provides that limitations must be “prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals” (Article G). Article 30 of the American Convention on Human Rights provides that “restrictions may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

159 See, for example, Article F, European Social Charter, and Article 27, American Convention on Human Rights. This restriction is not provided for in the ICESCR or the African Charter on Human and Peoples’ Rights.

160 See Article F, European Social Charter.

161 *Airey v. Ireland*, European Court of Human Rights, 32 Eur Ct HR Ser A (1979): [1979] 2 EHRR 305.

ignore the needs of the deaf and hard of hearing in the provision of health-care services.¹⁶² Moreover, the violation may concern the right to the minimum essential level of the right which is intended to be immediate and not resource-dependent.¹⁶³

In some cases, though, there are significant resource issues that may not be ignored, even where issues of life and death are involved. For example, in the *Soobramoney* case, Justice Chaskalson stated that “[t]he state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.”¹⁶⁴ In this case, the Court declined to order that the applicant was entitled to the medical treatment that he sought. These difficult cases might be dealt with in a variety of ways.¹⁶⁵ First, courts have examined whether the relevant government authority has internally allocated resources in a manner consistent with social rights.¹⁶⁶ Where the authority is able to demonstrate that they have sufficiently utilised available resources, a court might ask the government to demonstrate that the funds are not available elsewhere.¹⁶⁷ However, we are not aware of any cases where courts have adopted such an approach. Finally, the Court may allow for a delay in the case, through the procedure or remedy, so that the government may re-evaluate whether it might secure finances to meet the claim.¹⁶⁸

3.7 Remedies

It is often assumed that the remedies sought in cases concerning ESC rights will require the courts to make unorthodox or novel decisions affecting matters of policy and involving far-reaching judicial intervention into the social sphere. This premise is not necessarily borne out in practice. Due to the broad range of obligations associated with ESC rights, simple orders will frequently suffice where such rights have been violated. For example, successful cases regarding unfair dismissals or forced evictions are usually dispensed with through ordinary ‘mandatory’ injunctions to prevent the threatened violation or to compensate for the damage caused.

Moreover, the complexity of particular orders is largely dependent on the attitude taken by the violator, whether the defendant is a government or a private individual.¹⁶⁹ As also demonstrated in civil and political rights cases, courts will tend to show more deference or restraint where a defendant exhibits a willingness quickly to remedy the situation. In such cases, a mere declaration of violation or recommendation may be sufficient. However, in disputes where the defendant may be less *willing* or *able* to implement the decision, then greater supervision by the court may be necessary. (It is important to note a key issue that arises in relation to this last point. Courts, for fear of losing their authority, may be reluctant to make orders against the executive branch of governments if they believe their judgments will go unimplemented.)

¹⁶² *Eldridge v. British Columbia*, Supreme Court of Canada, (Attorney General) [1997] 2 S.C.R. 624. See also: *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC).

¹⁶³ See Constitutional Court of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany); Vv. *Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

¹⁶⁴ *Soobramoney v. Minister of Health (Kwazulu-Natal)* (CCT32/97) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696; [1997] ZACC 17 (27 Nov. 1997).

¹⁶⁵ For an in-depth hypothetical treatment of this question in light of comparative jurisprudence, see Malcolm Langford, ‘The Question of Resources’, *Housing & ESC Rights Law Quarterly*, Vol. 1, No. 3 (2004), pp. 1-4.

¹⁶⁶ See *Numerus Clausus I Case* (33 BverfGE 303).

¹⁶⁷ For a discussion on this topic, see Malcolm Langford, ‘The Question of Resources’, *Housing & ESC Rights Law Quarterly*, Vol. 1, No. 3 (2004), pp. 1-4.

¹⁶⁸ For a discussion of remedial innovations used by courts for positive social rights claims, see Kent Roach, ‘The Challenges of Crafting Remedies for Violations of Socio-Economic Rights’ in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming 2007), chap. 2.

¹⁶⁹ See Kent Roach and Geoff Budlender, ‘Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable’, *South African Law Journal*, Vol. 5 (2005), pp. 325-351.

ESC rights may be vindicated in a wide variety of ways.¹⁷⁰ Orders that have been employed by courts in rulings involving social and economic rights include damages, reparation in kind, declaratory orders, mandatory orders, the ‘reading in’ of additional protections in a legislative scheme through which a group has been unlawfully excluded, and supervisory jurisdiction, whereby a Court may retain jurisdiction over a matter in order to provide the legislature time to remedy a violation.

A mere declaration or declaratory order - “the decision of the court or judge on a question of law or rights”¹⁷¹ - that a violation of human rights has occurred is a common order. While a declaration carries no explicit order for the government to take an action or desist from an action, it may have immediate and resource implications. For example, if a court declares a law inconsistent with a social right, then the law, ordinarily, no longer applies.¹⁷² The South African Constitutional Court noted that:

Even simple declaratory orders ... may well have budgetary implications. ... Thus, in the *Mpumalanga* case, this Court set aside a provisional government’s policy decision to terminate the payment of subsidies to certain schools and ordered that the payments should continue for several months.

‘Reading in’ as a remedy for social and economic rights violations has been developed by a number of courts as a way of ensuring that the court need not unnecessarily strike down legislation that only needs to be altered. The South African Constitutional Court has employed this method on several occasions to, *inter alia*, ensure the right to have access to social security of permanent residents¹⁷³ and the right to have access to housing of debtors whose homes had been attached.¹⁷⁴ In Canada, this remedy has been used to extend the security of tenure and protections to public housing tenants.¹⁷⁵

Mandatory injunctive relief may be employed by the courts to order a government to either desist from a certain action or to take a particular action. Complex mandatory orders have been issued by the highest courts in Canada,¹⁷⁶ India,¹⁷⁷ South Africa¹⁷⁸ and the United States¹⁷⁹, for example. These courts have also made clear that the exercise of supervisory jurisdiction is also permissible where necessary to ensure that constitutional ESC rights are vindicated.¹⁸⁰ It is clear that the courts are also capable of successfully exercising supervisory jurisdiction. There have been numerous instances in which courts have performed this task very successfully. Careful phrasing and the inclusion of a good level of detail in an order may reduce the likelihood of non-implementation. Furthermore, introducing a reporting requirement, whereby the State must report back on what it has done to give effect to the court’s decision, allows for the possibility of ongoing dialogue between the court and the State and enables the State

170 The following four paragraphs are partially taken from A. Nolan, B. Porter and M. Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’, a paper prepared for the Human Rights Consortium, Belfast, Nov. 2005.

171 Roger Bird, *Concise Law Dictionary* (Sweet & Maxwell, 1983, 7th ed.).

172 In the extraordinary decision of the Constitutional Court of Germany in the *Second Abortion Case*, the Court actually wrote a detailed interim law after declaring invalid some portions of the Criminal Code; see *BverfGE* 88, 208.

173 *Khosa & Ors v. Minister of Social Development & Ors*, Case No. CCT12/03 and No. CCT13/03 4 Mar. 2004.

174 *Jaftha & Anor. v. Van Rooyen & Anor*, Case No. CCT74/03, 8 Oct. 2004.

175 *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] 101 D.L.R. (4th) 224 (N.S.C.A.).

176 See, for example, *Doucet-Boudreau v. Nova Scotia* [2003] 3 S.C.R. 3, 3.

177 See, for example, *M. C. Mehta v. State of Tamil Nadu and Others* [1996] 6 SCC 756.

178 See, for example, *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 10 BCLR 1033.

179 For example, see the US school desegregation cases of *Brown et al. v. Board of Education of Topeka et al.* 347 US 483 (1954).

180 Although the Constitutional Court in the *Treatment Action Campaign Case* did not ultimately decide to exercise supervisory jurisdiction, it stated that “the power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented” (n. 178 above, para. 104).

to seek clarification or explanation where it is uncertain about its constitutional obligations.¹⁸¹ It is also open to courts to structure an order so as to delegate the monitoring function to an appropriate body that may report back to the court.¹⁸²

Some orders may not be available to regional or international bodies. Some bodies may only provide recommendations as to an appropriate course of action to be taken by a government. In the case of quasi-judicial bodies, this is often the only remedial power. For example, in the *SERAC v. Nigeria* case, the African Commission on Human and Peoples' Rights appealed "to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by: Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations." However, regional courts such as the Inter-American Court of Human Rights have made extensive legally binding orders in relation to ESC rights-related cases.¹⁸³

Postscript

This dossier does not take into account the recent adoption of the UN Convention on the Rights of Persons with Disabilities. See <http://www.un.org/disabilities/convention/> for more information

¹⁸¹ Roach and Budlender, 'Mandatory Relief and Supervisory Jurisdiction' (n. 169 above). Ultimately, however, where a State agency is experiencing a budgetary or competence crisis, it seems unlikely that anything short of the courts' taking steps to address the systemic problem faced by the relevant agency will succeed in guaranteeing implementation.

¹⁸² This function was offered to the South African Human Rights Commission in the *Grootboom* decision.

¹⁸³ See Tara Melish, 'The Inter-American Court of Human Rights' (n. 37 above).

2 RIGHT TO LEGAL AID AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS LITIGATION



1. INTRODUCTION

by Paula Galowitz

The actual enjoyment of social and economic rights is diminished in the absence of mechanisms within the framework of the judicial system to facilitate the effective protection of the rights. One of the most fundamental and important human rights is the guarantee of effective access to justice. As Mauro Cappelletti has written, “effective access to justice can thus be seen as the most basic requirement - the most basic ‘human right’ - of a system that purports to guarantee legal rights.”¹

Various formulations of the right of access to justice will be examined in this chapter, including the right to equal justice, the right to fair and equal access to justice and the right to a fair hearing. There must be an ability to secure meaningful access to the appropriate forums to enforce economic, social and cultural rights (‘ESC rights’). As an integral part of this access, legal representation must be available for those unable to afford it.² The relevant forum must have the capacity to appoint legal aid if necessary to ensure access to justice and traditional fairness.

2. CURRENT LEGAL SOURCES OF THE RIGHT TO LEGAL AID

2.1 International and regional obligations

A right to legal aid³ emanates from the fundamental right of access to justice and from specific ESC rights, including the right to adequate housing.⁴ International treaties, such as the International

1 Mauro Cappelletti, quoted in Mario Gomez, *In the Public Interest: Essays on Public Interest Litigation and Participatory Justice* (Colombo, Sri Lanka: Legal Aid Centre, University of Colombo, 1993), p. 14. Access to justice is a central element of a philosophy based on the idea of equality. See Mauro Cappelletti, ‘Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform’, *South African Law Journal*, Vol. 109, (1992), pp. 22-39, at 27.

2 Additional rationales for a right to counsel include due process, equal protection, confidence in the judicial process, peaceful dispute resolution and social policy goals of poverty eradication. See Raven Lidman, ‘Civil Gideon as a Human Right: Is the US Going to Join Step with the Rest of the Developed World’, *Temple Political and Civil Rights Review* (forthcoming 2006) (a copy of the paper is on file with the author).

3 The definition of ‘legal aid’ varies from country to country. It has been defined as “the provision of legal advice or assistance to anyone in a particular jurisdiction who is deemed to be unable to afford it in a situation in which it is in the public interest to provide such advice or assistance from state resources”; see Peter Soar (ed.), *New International Directory of Legal Aid* (The Hague: Kluwer Law International, 2001). The Directorate-General for Justice, Freedom and Security of the European Commission interprets legal aid to include any of the following: “[P]rovision of legal advice with a view to reaching a settlement prior to bringing legal procedures; provision of free or low-cost advice or court representation by a lawyer; partial or total exemption from other costs, such as court fees; direct financial assistance to defray any of the costs associated with litigation (lawyer costs, court fees, witness expenses, etc.)”; see ‘Cross-Border Legal Aid in the European Union: New Minimum Standards’, http://ec.europa.eu/justice_home/fsj/civil/legal/fsj_civil_legalaid_en.htm

4 The importance of economic and social rights, particularly the right to housing, has been eloquently stated by Nelson Mandela: “The international world has gradually come to realise the critical importance of social and economic rights in building true democracies, which meet the basic needs of all people. The realisation of these needs is both an essential element of a genuine democracy, as well as essential for the maintenance of democracy. This is nowhere more evident than in the right to housing. Everyone needs a place where they can live in security, with dignity, and with effective protection against the elements. Everyone needs a place which is a home”; see Nelson Mandela, ‘Foreword’ in Scott Leckie (ed.), *National Perspectives on Housing Rights* (The Hague: Kluwer, 2003), p. xvii.

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and reports and comments of the committees that monitor the implementation of and compliance with the Covenants (such as the United Nations Committee on Economic, Social and Cultural Rights) are particularly relevant for this analysis.⁵ For example, the International Covenant on Civil and Political Rights requires each State Party to “ensure that any person whose rights and freedoms as herein recognized are violated shall have an effective remedy.”⁶ In appropriate cases, the ability to obtain an effective remedy requires the provision of legal representation. Since civil and political rights and ESC rights are interdependent and many of them substantively overlap, this legal obligation plays an important role in ensuring that legal aid is available in cases affecting socio-economic interests. The International Covenant on Civil and Political Rights also states that “[a]ll persons shall be equal before the courts.”⁷

The International Covenant on Economic, Social and Cultural Rights requires that State Parties use all appropriate means to promote the rights protected by the Covenant.⁸ The Committee on Economic, Social and Cultural Rights has made clear that States Parties should therefore provide legal remedies in regard to ESC rights by consistent interpretation of domestic law, particularly law relating to equality and non-discrimination, and by providing legal remedies for violations of these.⁹ Some of the sources of the right to legal aid also derive from general principles of equal access, such as the guarantee of the right to equality before the law that is found in the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁰ A right to legal aid likewise emanates from the principles of equality and non-discrimination. As stated by the Inter-American Court of Human Rights,¹¹ “the principle of equality before the law, equal protection before the law and non-discrimination belong to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”.¹²

The Charter of Fundamental Rights of the European Union provides that legal aid be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.¹³ The European Court of Human Rights has determined that the right to a fair hearing in Article 6 of the European Convention on Human Rights¹⁴ gives rise to an obligation to afford effective access to the courts by providing counsel to indigent litigants in civil cases in those situations in which an unrepre-

5 See also: the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, and Conventions of the International Labour Organisation.

6 Article 2(3)(a).

7 Article 14.

8 Article 2(1). Although the Committee indicates, in General Comment No. 3, that such measures are not indispensable for all the rights, the measures are implicitly indispensable for at least some of the rights. See Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1991).

9 According to General Comment No. 9, “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.” Moreover, “there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.” See Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

10 Articles 5 and 6.

11 Inter-American Court of Human Rights, Advisory Opinion OC-18/03 (17 Sep. 2003).

12 Ibid. para. 101. The sources of this are the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Charter of the Organisation of American States, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

13 Article 47(3) (2000/C 364/01).

14 Article 6(1) provides that, “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time”; see European Convention on Human Rights, 213 UNTS 222, E.T.S. No. 005, entered into force: 3 Sept. 1953.

sented litigant would be unable to present her case ‘properly and satisfactorily’.¹⁵ In a recent case, the European Court of Human Rights found that the United Kingdom violated Article 6, section 1, of the European Convention on Human Rights by denying legal aid to the applicants and thereby “depriv[ing] them of the opportunity to present their case effectively before the court and contribut[ing] to an unacceptable inequality of arms with [the plaintiffs]”.¹⁶

The Inter-American Court of Human Rights has recognised an obligation to provide migrant workers with due process and unrestricted access to effective judicial remedies for violations of workplace rights.¹⁷ As the Court stated, “[t]he right to judicial protection and guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question”.¹⁸

The African Commission on Human and Peoples’ Rights has determined that, in some situations, the State must provide legal aid. In *Purohit and Moore v. The Gambia*, the complainants alleged that the legislation governing mental health in the Republic of The Gambia is incompatible with the African Charter on Human and Peoples’ Rights.¹⁹ An issue was raised whether there had been compliance with the Charter provisions that require the exhaustion of local remedies. Although there are legal procedures with local remedies, the Commission found that there is “no legal assistance or aid ... availed to vulnerable groups to enable them to access the legal procedures in the country.”²⁰ The Commission determined that the local remedies available were not “realistic remedies for [the people being represented in the case] ... in the absence of legal aid services” (para. 37). The people being represented were “likely to be people picked up from the streets or people from poor backgrounds”.²¹ Legal aid would have to be provided by the State in order for the existing remedies to be available. Similarly, a right to legal aid must be provided to effectuate ESC rights.

An example of a specific ESC right is the obligation under international law to provide a right to adequate housing. This right encompasses a requirement to provide specific mechanisms to enforce the right and redress violations of the right. In light of these protections, evictions must be carried out in a manner warranted by law, and “all recourses and remedies ... [must be made] available to those affected”.²²

15 *Airey v. Ireland* (1979) 2 EHRR 305, para. 24. The Court discussed situations in which the procedures or substantive law are sufficiently complex that the availability of a lawyer may make a substantial difference to the chances of success. The provisions in the European Convention on Human Rights concerning the rights of access to justice and to a fair hearing were addressed by a resolution of the Committee of Ministers of the Council of Europe in 1978:

Considering that the right to access to justice and to a fair hearing, as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society; ... the provision of legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole. ... No one should be prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social or physical matters.

See Legal Affairs, Council of Europe, Legal Aid and Advice: Resolution 78(8), adopted by the Committee of Ministers of the Council of Europe on 2 Mar. 1978, and Explanatory Memorandum, 5-6.

16 European Court of Human Rights, fourth section, *Case of Steel and Morris v. The United Kingdom* (Application no. 68416/01) (15 Feb. 2005). In this case, in which the appellants were sued in a defamation proceeding by McDonalds, the government denied legal aid to the appellants on the ground that legal aid was not available in defamation proceedings.

17 Inter-American Court of Human Rights, Advisory Opinion OC-18/03 (n. 11 above), paras. 107-108, 121.

18 *Ibid.*, para. 126.

19 The Commission found that The Gambia was in violation of various articles of the African Charter and, *inter alia*, strongly urged the Government to repeal the governing legislation and replace it with a new legislative regime for mental health that comports with the African Charter on Human and Peoples’ Rights and international standards and norms for the protection of mentally ill or disabled persons; see *Purohit and Moore v. The Gambia*, 204/2001, African Commission (334th Ordinary Session, May 2003), <http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>

20 *Ibid.*, para. 34.

21 *Ibid.* The Commission determined that the communication was admissible, even in the absence of exhaustion of local remedies, because the available remedies were not realistic for the persons represented in the communication and therefore ineffective. *Ibid.*, para. 38.

22 Committee on Economic, Social and Cultural Rights, *General Comment No. 7, The Right to Adequate Housing: Forced Evictions* (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV, 113 (1997), para. 11.

In setting out these remedial requirements, the Committee on Economic, Social and Cultural Rights has indicated that, “legal remedies and ..., where possible, ... legal aid” must be afforded to “persons who are in need of it to seek redress from the courts”.²³ The Committee set out a similar requirement in General Comment No. 15 in relation to interferences with access to water.²⁴

2.2 Country provisions and court decisions

The necessity of access to legal aid has been recognised in many countries. Some of these countries extend this right to all who are indigent,²⁵ while other countries make it available to certain disadvantaged or marginalised groups.²⁶ In some countries, the right is based in the constitution;²⁷ in others, the source of the right is statutory²⁸ or court decisions.²⁹

For example, the English Parliament enacted a law in 1495 that guaranteed free counsel and the waiver of court fees for indigent civil litigants in common law courts, and this guarantee was extended by the judiciary to all courts of equity.³⁰ In 1937, the Supreme Court in Switzerland, based on the then current constitutional provision that “[a]ll Swiss are equal before the law,” ruled that the Government must provide free lawyers to indigent litigants in civil cases that require “knowledge of the law.”³¹ The current Constitution of Switzerland of 1999 provides that each person without means has the right to legal assistance without cost unless the case appears to be without any chance of success.³² Germany has a statutory right to counsel in civil cases.³³

In India, the judiciary has interpreted the Directive Principles of State Policy - which are included in the Constitution and many of which correspond to provisions of the International Covenant on Economic, Social and Cultural Rights - as an aid in interpreting the Constitution. It has creatively applied them to establish and define fundamental rights such as a right to work, housing, health and education.³⁴

23 Ibid. para. 15.

24 See Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water* (Twenty-ninth session, 2002), U.N. Doc. E/ C.12/2002/11 (2003), para. 56.

25 Examples include the Republic of Iceland, the Grand Duchy of Luxembourg, and Switzerland. See Lidman, ‘Civil Gideon’ (n. 2 above). For a summary of legal aid mechanisms for countries in the European Union, see http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm (website of the European Judicial Network in Civil and Commercial Matters) (accessed 3 Aug. 2006). The replies to questionnaires provided by 36 countries in the Council of Europe on its legal aid plan are a valuable source of information. See www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_justice/access_to_justice_and_legal_aid/List%20of%20replies.asp#TopOfPage (accessed 17 Aug. 2006). See also: International Legal Aid Conference Group, ‘Legal Aid in the Global Area (2005), which contains national reports on legal aid submitted by Australia, the Kingdom of Belgium, Brazil, Canada, Finland, Germany, Ireland, Hong Kong (China), the Netherlands, New Zealand, Scotland, South Africa and the United States. The papers are available at www.ptools.com/clientside/show/LLAG/pages/papers.htm (accessed 17 Aug. 2006).

26 For example, Belgium, Finland, the French Republic, the Hellenic Republic and the Republic of Poland provide for a right to counsel for those who are aged, blind, disabled, veterans, or on social security. See Lidman, ‘Civil Gideon’ (n. 2 above), pp. 18-19.

27 This is the case, for example, in the Italian Republic, the Netherlands, the Portuguese Republic and Spain. See Kamál Yuille, ‘No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe’, *Columbia Journal of Transnational Law* (Vol. 42), pp. 863-922, at pp. 879-880.

28 Ibid. pp. 880-882. Examples include the Republic of Austria, England and Wales, France, the Kingdom of Norway and the Kingdom of Sweden.

29 Examples include Germany and Switzerland. See Lidman, ‘Civil Gideon’ (n. 2 above), p. 11.

30 Hon. Earl Johnson, Jr., ‘Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies’, *Fordham International Law Journal*, Vol. 24 (2000), pp. S83-110, at S89. See also: Raven Lidman, ‘Civil Gideon: A Human Right Elsewhere in the World’, *Clearinghouse Review Journal of Poverty Law and Policy*, Vol. 39 (July-Aug. 2006), pp. 288-293, at 289-290.

31 Ibid.

32 Article 29(3) of the Federal Constitution of the Swiss Federation of 18 Apr. 1999 provides that “[e]very person lacking the necessary means has the right to free legal assistance, unless the case appears to be without any chance of success. The person has moreover the right to free legal representation to the extent that is necessary to protect the person’s rights”, <http://www.admin.ch/org/polit/00083/index.html?lang=en>

33 Ibid. In addition to the statute, the German Constitutional Court has stated that the constitutional guarantee of a fair hearing in civil cases may require the appointment of lawyers for poor people in situations in which the legal aid statute does not require appointment. Decision of 17 June 1953 (No. 26), cited in Hon. Earl Johnson, Jr., ‘Will Gideon’s Trumpet Sound a New Melody?: The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases’, *Seattle J. for Soc. Just.*, Vol. 2 (2003), pp. 201-232, at 210, n. 36.

34 Article 37 of the Constitution provides that the Directive Principles of State Policy are not enforceable by a court, but the principles are fundamental in the governance of the country.

In Canada, the Supreme Court has determined, based on the fair hearing requirement in Canada's Constitution, the Charter of Rights and Freedoms, that there is a right to counsel for indigent parents if the Government seeks to take or maintain custody of their children.³⁵ In South Africa, the Land Claims Court has determined that labour tenants and disadvantaged occupiers are entitled to legal representation at State expense in certain circumstances in which their security has been infringed or is threatened.³⁶

A salient feature of the legal systems of many countries is the fact that legal aid is a concrete and secure right rather than, as in the United States, merely a part of a "gratuitous social welfare system."³⁷ At least 40 countries in the Council of Europe,³⁸ as well as at least 16 non-European countries,³⁹ have some form of a right to legal aid in some types of civil cases.⁴⁰ For example, in the Philippines, "the Public Attorney's Office is mandated to represent free of charge, indigent person[s] or the immediate members of their family, in all civil, administrative and criminal cases where, after due investigation, it is determined that the interest of justice will be served thereby."⁴¹

35 *New Brunswick (Minister of Health and Community Service) v. G.J.*, 3 S.C.R. 46 (1999), (<http://scc.lexum.umontreal.ca/en/1999/1999rcs3-46/1999rcs3-46.html>). It has been argued persuasively that the right to government-funded counsel in civil matters, although not explicit in the Charter of Rights and Freedoms, should be inferred from the Charter's broad guarantees of, *inter alia*, a right to life, liberty and the security of the person, a right to a fair trial and the concept of fundamental justice. See Dorothy Nicole Giobbe, 'Legal Aid and the Right to Counsel under Canada's Charter of Rights and Freedoms', *Brook. J. Int'l L.*, Vol. 25 (1999), pp. 205-227. See also: Bruce Porter, 'Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights', *Journal of Law & Social Policy*, Vol. 15 (2000), pp. 117-162; "referencing *Charter* interpretation to social and economic rights and other substantive obligations under international law will assist the courts in identifying and protecting the values fundamental to a free and democratic society", *Ibid.* p. 162.

36 *Nkuzi Development Association v. Government of the Republic of South Africa and The Legal Aid Board*, LCC 10/01 (6 July 2001); 2002 (2) SA 733 (LCC). The Court determined that:

The persons who have a right to security of tenure ... and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources. The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it. The cases in which substantial injustice could result include, but are not limited to, cases where the potential consequences for the person concerned are severe, which will be so if the person concerned might be deprived of a home and will not readily obtain suitable alternative accommodation; and the person concerned is not likely to be able to effectively present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.

(<http://www.law.wits.ac.za/lcc/files/nkuzi/nkuzi.pdf>). For a discussion of the Court's decision, see Jeremy Perelman, 'The Way Ahead?, Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The Nkuzi Case', *Stanford Journal of International Law*, Vol. 41 (2005), pp. 357-400.

37 Yuille, 'No One's Perfect' (n. 27 above), p. 878.

38 The Republic of Armenia, Austria, the Republic of Azerbaijan, Belgium, the Republic of Bulgaria, the Czech Republic, the Republic of Cyprus, the Kingdom of Denmark, the Republic of Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, the Principality of Liechtenstein, the Republic of Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, the Republic of Malta, the Principality of Monaco, the Republic of Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, the Most Serene Republic of San Marino, the Republic of Serbia, the Slovak Republic, the Republic of Slovenia, Spain, Sweden, Switzerland, the Republic of Turkey, Ukraine and the United Kingdom. See Lidman 'Civil Gideon' (n. 2 above).

39 *Ibid.*; papers from the 2005 *International Forum on Legal Aid* (October 2005) (on file with the author). The countries and economies are Australia (provinces have different schemes), Brazil, Cambodia, Canada, Hong Kong (China), India, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, the Republic of Singapore, South Africa, the Socialist Republic of Vietnam and the Republic of Zambia.

40 In approximately two-thirds of the countries in the Council of Europe, the right to counsel "covers a wide spectrum of civil matters. These include family law, housing, consumer and debt cases, personal injury claims, public benefits, employment and labor law. ... Approximately fifteen countries use language suggesting coverage of all civil disputes." See Lidman, 'Civil Gideon' (n. 2 above).

41 Article II, section I of the Public Attorney's Office, MC No. 18, Series of 2002, quoted in 'Country Report: The Philippines', 2005 *International Forum on Legal Aid* (October 2005) (on file with the author).

2.3 Trends

There is an increasing recognition by governments and by commentators that there must be government-paid legal services in civil matters in order to achieve access to justice and to comport with concepts of fundamental fairness. A right to equal justice is a core value, and access to counsel is a concomitant part of effectuating that right.⁴² “Public policy, the fair administration of justice, constitutional and statutory law, and a growing international consensus on the human right to a fair hearing all support the proposition that there should be a right to counsel in the civil as well as criminal context.”⁴³

There is also growing awareness that the longstanding dichotomy between criminal and civil matters that has led to a recognition of a guarantee of counsel only in the former category of cases⁴⁴ is no longer justified. The consequences of civil matters, such as eviction from housing, termination of parental rights and deportation in immigration proceedings, may be as or even more significant than the consequences in some types of criminal proceedings.

In the United States, some practitioners and academics have been attempting to establish a ‘civil Gideon’ guarantee (a right to counsel for indigents in civil cases, as there is in criminal cases due to the United States Supreme Court’s decision in *Gideon v. Wainwright*⁴⁵), primarily relying on provisions in state constitutions or advocating for legislation.⁴⁶ The strategies are varied, allowing for different approaches in different jurisdictions. The primary approaches include litigation founded on state constitutional provisions and laws, legislative efforts, research and advocacy. Some of these efforts have focused on establishing a right to counsel for certain types of cases or constituencies, with the goal of thereafter expanding the right to other people and cases.⁴⁷ In August 2006, the American Bar Association unanimously passed a resolution urging federal, state and territorial governments to provide legal counsel as of right at public expense to low-income people in adversarial proceedings in which basic human needs are at stake.⁴⁸

42 As discussed by the Hon. Earl Johnson, Jr., ‘Will Gideon’s Trumpet Sound’ (n. 33 above), p. 229, there is: growing legal consensus among jurisdictions with written constitutions, that one of the core constitutional values is a right to equal justice. Moreover, it will be equally difficult to ignore the consequence this right to equal justice that embraces a right to counsel, at the very least in cases tried in the regular courts. The Swiss Supreme Court, German Supreme Court, European Court, Canadian Supreme Court, and South Africa’s Land Claims Court have all reached this same conclusion. These courts saw no alternative but to require government to provide free counsel to poor civil litigants, if the government were to satisfy the constitutional guarantee of a fair hearing or equality before the law for those too poor to afford their own lawyers — at least in those cases where the substantive or procedural law is sufficiently complex as to require a lawyer’s services for a fair and equal chance at justice.

43 Andrew Scherer, ‘Securing a Civil Right to Counsel: The Importance of Collaborating’, *New York University Review of Law and Social Change*, Vol. 30, (2006), pp. 675-684, at 676.

44 Article 14(3) of the International Covenant on Civil and Political Rights (G.A. resolution 2200A[XXI] of 16 Dec. 1966): the right to legal counsel at State expense in criminal cases if an accused individual does not have sufficient means to pay for a counsel and the interests of justice require it.

45 372 U. S. 335 (1963).

46 See John Nethercut, ‘“This Issue Will Not Go Away”: Continuing to Seek the Right to Counsel in Civil Cases’, *Clearinghouse Review: Journal of Poverty Law and Policy*, Vol. 38 (Nov.-Dec. 2004), pp. 481-490. The National Coalition for a Civil Right to Counsel is an association of individuals and organisations committed to ensuring meaningful access to the courts for all. The Coalition seeks to encourage, support and coordinate advocacy to expand recognition and implementation of a right to counsel in civil cases. The origins and purposes of the Coalition are described by Debra Gardner in ‘Pursuing a Right to Counsel in Civil Cases: Introduction and Overview’, *Clearinghouse Review Journal of Poverty Law and Policy*, Vol. 39 (July-Aug. 2006), pp. 167-169, at 168-169. This article appears in an issue of the journal that is devoted to the subject of Civil Gideon and contains 16 articles on the topic.

47 Nethercut, ‘This Issue Will Not Go Away’, *ibid.* p. 484. Such types of cases include the right to counsel in eviction cases and in child dependency and neglect proceedings.

48 The Resolution provides as follows: “[T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction” (www.abanet.org/media/docs/112ARevised.pdf). The report of the Task Force on Access to Civil Justice that led to the adoption of the Resolution is at www.abanet.org/leadership/2006/annual/onehundredtwelvea.doc

Litigation has also been initiated in Canada by the Canadian Bar Association to present a constitutional challenge to the country's systemic problems with legal aid.⁴⁹ A goal of the lawsuit is "broad recognition that civil legal interests can be fundamental to life, liberty, and security of the person, not just for one area of law or type of case."⁵⁰

3. CRITERIA AND STANDARDS FOR THE RIGHT TO LEGAL AID

The protection and enforcement of ESC rights require effective access to legal services.⁵¹ While there is no single, universally applicable model that should be used for providing a right to counsel, it is important to elaborate the relevant criteria and standards.

One of the key matters to be determined is the eligibility standard for the right to counsel and the scope of the right. As to the means test, financial eligibility should be assessed based on a threshold (e.g., earning less than 150 percent of the poverty level in that country) and should not involve an individualised determination.⁵² There might also be provisions for a sliding scale, with reduced fees up to a specified percent of income above the threshold.

Various criteria for non-financial eligibility standards have been used or suggested, including the meritoriousness of the case,⁵³ the likelihood of success,⁵⁴ the non-frivolousness of the claim(s), the rejection of the application for legal aid if the action is manifestly unfounded⁵⁵ or has manifestly insufficient prospects of success, or the existence of a *prima facie* case.⁵⁶ Some have suggested that eligibility should turn on the significance of the interests at stake, the complexity of the proceedings, or the capacities

49 Gaylene Schellenberg, 'Access to Justice in Canada: Canadian Bar Association Strategies to Make it Happen', *Clearinghouse Review Journal of Poverty Law and Policy*, Vol. 39 (July-Aug. 2006), pp. 281-286, at p. 283.

50 Ibid. The Chief Justice of the Supreme Court in British Columbia is the case management judge, and the preparation for the discovery of documents is currently under way.

51 "[A]dequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession", Basic Principles on the Role of Lawyers (ninth preambular paragraph), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), U.N. Doc. A/CONF. 144/28/Rev. 1, 189 (1990), which is discussed in Office of the High Commissioner for Human Rights (in cooperation with the International Bar Association), 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers', *Professional Training Series*, No. 9 (2003), chap. 4, para. 74, www.ohchr.org/english/about/publications/docs/train7_b.pdf

52 In some States, such as Iceland, the financial means test is eliminated if the case has substantial general significance. Council of Europe, 'Legal Aid, How to Benefit from It: Iceland', www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_justice/access_to_justice_and_legal_aid/Ireland%20-%20legal%20aid%20paper.asp#TopOfPage

53 A case is considered meritorious "if an assessment of the law and evidence on hand discloses that the legal services of the office will assist, or be in aid of or in furtherance of justice, taking into consideration the interests of the party and those of society", *Memorandum Circular*, No. 18, section 2 of the Public Attorney's Office, MC No. 18, Series of 2002, quoted in 'Country Report: The Philippines', 2005 *International Forum on Legal Aid* (October 2005) (on file with the author).

54 The likelihood of success test, which requires a weighing of the evidence, has been criticised. See Yuille "No One's Perfect" (n. 27 above), p. 919.

55 The European Union, in its minimum standards to ensure an adequate level of legal aid in cross-border cases, determined that: Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed. When taking a decision on the merits of an application, Member States may reject legal aid applications when the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or self-employed profession. Council Directive 2003/8/EC, para. 17, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0008:EN:HTML>

56 According to the India Legal Services Authorities Act of 1987, a person shall be entitled to legal services if the concerned authority is satisfied that the person has a *prima facie* case to prosecute or defend and the person meets one of the specified criteria (such as being a woman, child, or industrial workman, or having an income below a specified amount). Mehmood Pracha, 'Country Report Outline: China', 2005 *International Forum on Legal Aid* (October 2005) (on file with the author).

of the individual litigant.⁵⁷ Others have suggested that counsel be provided if the case implicates the applicant's fundamental rights or basic human needs.⁵⁸ Additional formulations are the effect of "failure to render the same upon the Rule of Law, the proper administration of justice, the public interest involved in given cases and the practice of law."⁵⁹

A critical issue is whether the right to counsel should be based on a functional 'access-based' analysis (whereby a right to counsel is conferred when necessary to ensure meaningful access to justice) or an 'interest-based' approach (whereby the interests at stake are analysed to determine whether counsel is needed to safeguard those particular interests).⁶⁰ Whichever approach is used, the system should not be implemented or determined on a case-by-case basis. It has been suggested that there should be a right to counsel where the unrepresented litigant would forfeit rights or suffer substantial injustice or hardship due to a lack of counsel.⁶¹

As to the scope of the right, it should include not only representation in litigation, but also advice and assistance in legal matters that do not entail litigation (or in which litigation is a possibility, but has not yet been initiated). A right to counsel should be provided for alternative dispute resolution forums, as well as for transactional matters.⁶² Access to justice requires a right to counsel for a wide range of services.⁶³

57 As stated by Chief Justice Lamer in the decision in the Canadian case requiring counsel for the parent in termination of parental rights proceedings:

the appellant's right to a fair hearing required that she be represented by counsel. I have reached this conclusion through a consideration of the following factors: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant. ... Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error. ... Whether it is necessary for the parent to be represented at counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

New Brunswick (Minister of Health and Community Service) v. G[1] (n. 35 above), paras. 75, 81 and 86.

58 "Such needs would include (but not necessarily be limited to) life-affecting matters such as child custody, the potential loss of housing, issues affecting access to health care, and employment matters that determine the applicant's ability to earn a living." Nethercut, 'This Issue Will Not Go Away' (n. 46 above), p. 487.

59 Section 22 of the Integrated Bar of the Philippines Guidelines to determine client qualification, 'Country Report: The Philippines', 2005 *International Forum on Legal Aid* (Oct. 2005) (on file with the author).

60 See Deborah Perluss, 'Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest', *Seattle J. for Soc. Just.*, Vol. 2 (2004), pp. 571-598, at 573-574

The trial court can ask itself whether the parties are sufficiently able to present their claims or defenses, whether they can coherently present the facts and address matters of evidence, and if the court has a sufficient command of the information available to render a fair and just ruling in the case. Factors related to the nature of the case that may affect these considerations are, among others, the complexity of the applicable law, the presence of any procedural issues that need to be addressed, and the potential existence of cross or counterclaims that could be lost if not asserted. The court might also weigh the need for expert testimony; the presence of complex evidentiary issues; the availability of other forums to resolve the dispute; and the extent or need for pre-trial proceedings, such as preliminary relief, complex discovery, or summary judgment motions.

Ibid. pp. 594-595. This type of analysis allows the court to make reasonable determinations about the ability of individual litigants to participate meaningfully in the proceedings (such as educational level, mental disability, or emotional impairment that affect the ability to understand proceedings or participate; physical disabilities). The court might also look at the balance of power between the parties (such as whether one party is the government, whether only one side is represented, etc.). Ibid. p. 598.

61 Russell Engler, 'Towards A Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives', *Clearinghouse Review Journal of Poverty Law and Policy*, Vol. 39 (July-Aug. 2006), pp. 196-209. Professor Engler posits that the right to counsel should be context based, and he proposes a three-pronged strategy for achieving a context-based civil right to counsel. The first prong entails revisiting the role of judges, mediators and clerks to require them to assist unrepresented litigants so as to ensure that these litigants do not forfeit rights due to the absence of counsel; the second prong is for programmes that assist litigants to supplement the expanded roles of the key players of the court system; and the third prong is establishing the right to appointed counsel in civil cases.

62 Advice about legal matters is provided by many countries, and some provide a right to counsel in alternative dispute resolution settings; only a few provide legal counsel for transactional issues. See Lidman, 'Civil Gideon: A Human Right' (n. 30 above), p. 291.

63 A model statute providing for a right to counsel in civil cases was drafted by a task force created by the Access to Justice Commission in California; the model statute covers legal needs, in addition to litigation, including representation in administrative forums, non-lawyer assistance, advice and counsel, and self-help assistance. The model statute was drafted "not as a right to counsel per se but as an equal justice act." Clare Pastore, 'The California Model Statute Task Force', *Clearinghouse Review Journal of Poverty Law and Policy*, Vol. 39 (July-Aug. 2006), pp. 176-179, at 178.

The State has an affirmative duty to secure a right of access to justice for individuals and there may be situations in which the nature of the forum may be modified to allow litigants to have a fair hearing and access to justice.⁶⁴ Standards need to be created for regulating such situations and ensuring that equal justice actually may be achieved without the provision of counsel although, admittedly, devising such standards will be difficult.⁶⁵ It has been suggested that a goal of equal access without counsel may be attained by loosening traditional rules for standing and relaxing the procedural rules.⁶⁶ However, Johnson notes:

Except where forums exist or are created which truly offer disputants effective access to justice without representation by counsel, the right to equal justice in civil cases, as is true in all criminal cases, requires the provision of counsel to those unable to afford their own. Indeed, only the declaration of a guaranteed right to equal justice, and little short of that step, appears likely to supply a powerful enough incentive for governments to get serious about developing innovative forums calculated to afford unrepresented disputants fair and equal access to justice.⁶⁷

As to the administration of the programme,⁶⁸ the models for providing a right to counsel have varied from *judicare* (compensation of private lawyers by the State) to publicly salaried lawyers with the responsibility for assisting, advising and representing the poor.⁶⁹

64 “The government can do so either by appointing legal counsel for indigent litigants or by simplifying the forums in which justice is administered to allow lay citizens a fair hearing without the assistance of counsel. In many cases, however such as for individuals who may have difficulties communicating with the justice system due to mental health or lack of ... language proficiency, direct legal assistance is essential to secure access to the courts. Again, as was the case with the common law requirement, it is the complexity of the law and procedure that provokes the right to counsel and not the quality or ‘fundamentalness’ of the rights or interests at issue in the proceeding.” See Perluss, ‘Washington’s Constitutional Right’ (n. 60 above), pp. 589-590.

65 As stated by Johnson, ‘Will Gideon’s Trumpet Sound’ (n. 33 above), pp. 219-221:

In some instances, justice might be achieved by providing less expensive, non-lawyer advocates and in others, by designing forums that truly operate fairly without trained advocates of any kind. In all likelihood, the latter would mean a shift from an adversarial model to an inquisitorial model of dispute resolution in those forums, in which the judge or other decision-maker rather than the parties bore the primary responsibility for uncovering and presenting the facts, as well as identifying the relevant legal principles ... legal assistance may be required for effective access to justice even in forums other than the courts. ... Another, perhaps more sound, approach would be to articulate an over-arching standard accompanied by a presumption and verified by empirical testing. The overarching test? What the European Court stated so artfully: all disputants are entitled to effective access to the court or other dispute-resolving forum. The presumption? ... a presumption that effective access requires the government to supply free representation by a lawyer, or a non-lawyer representative where sufficient, to those who are unable to afford their own representation in all non-criminal cases. This presumption could only be overcome where a court can legitimately certify the particular forum deciding the dispute can and does provide a fair and equal opportunity to justice to those who lack such representation. For obvious reasons, it would be virtually impossible to overcome this presumption in a dispute where the other side was represented. ... The more likely candidates for overcoming this presumption would be existing or future forums specifically designed to function without lawyers or other representation. In most instances, this would mean forums built around an inquisitorial rather than adversarial model of dispute resolution. The forum itself, rather than the disputants, would have to absorb the primary responsibility for uncovering the facts and legal principles critical to a proper decision. This might present a difficult, but certainly not impossible, transformation for a judicial system and legal profession historically committed to the adversarial model.

66 In India, the Supreme Court has treated a letter written by an individual as a writ to initiate legal proceedings and has, in appropriate cases, appointed expert bodies or appointed commissioners to initiate fact-finding investigations. See Geoff Budlender, ‘Access to Courts’, *South African Law Journal*, Vol. 121 (2004), pp. 338-358, at pp. 355-356.

67 Johnson, ‘Will Gideon’s Trumpet Sound’ (n. 33 above), p. 222.

68 Additional issues include whether the litigant has a choice of counsel, the number of hours covered, the payment rate for lawyers, what issues are covered, whether there is a limit on the number of hours, whether legal advice and representation are covered, whether all costs of litigation (i.e., court costs, interpreters, appeal fees) are covered; whether a private lawyer system and private lawyers are not required to accept *judicare* clients, and what happens when a client cannot find a private lawyer to take the case.

69 See Cappelletti, ‘Access to Justice’ (n. 1 above), pp. 22-39, for a discussion of the advantages and disadvantages of different models. For example, while the *judicare* model allows for the use of the private bar, this model has “serious difficulties in providing legal advice” (p. 30). The staff-attorney model is expensive. The access-to-justice movement concluded that the best solution is a mixed model of services primarily provided by private lawyers and a widely distributed network of publicly paid attorneys. The mixed model is used in many countries, including Canada, Sweden and the United Kingdom.

A dimension of the right to counsel that is critical, but beyond the scope of this chapter is funding.⁷⁰ Any consideration of this subject must take into account the concept of progressive realisation from the International Covenant on Economic, Social and Cultural Rights.⁷¹ Under the Covenant, the scarcity of resources does not relieve the State of its core minimum obligation.⁷² A failure to satisfy minimum levels must be regarded as a violation of ESC rights, except perhaps where the State is able to show that its resources are ‘demonstrably inadequate’⁷³ to fulfil the required duties. Even when resources are scarce, the State has an “obligation to show that it is striving to ensure the broadest possible enjoyment of the relevant rights.”⁷⁴

4. CONCLUSION

Respect for and protection and fulfilment of social and economic rights require adequate access to redress and remedies when these rights are withheld or breached.⁷⁵ Because access to appropriate forums of redress may not be adequate and effective without representation, legal aid must be provided to those who cannot afford counsel.⁷⁶

70 In Canada, the funding for the legal aid programmes of the provinces is based on federal funds, levies on lawyers, contributions from clients, grants and donations. The approach used in Ontario Province, which is recognised as one of the best systems in Canada, is a mixed model. The largest part is a certificate (or *judicare*) system, whereby clients are able to take the certificate (after being screened for financial eligibility) to any member of the private bar who is a member of the local legal aid system. The lawyer is reimbursed according to a fee scale. A smaller part is a network of local legal aid clinics comprised of staff lawyers. There is also a third part, consisting of lawyers for criminal intake, staffed by members of the private bar who are paid a per diem rate. There may be restrictions on the types of cases, the number of hours allowed for certain types of cases or per client and the opportunity to change private lawyers. See Giobbe, ‘Legal Aid’ (n. 35 above), pp. 210-218. In Cambodia, the financial and managerial support comes from donor countries and international organisations since Cambodia is unable to afford provision of a right to counsel. ‘Country Report: Cambodia’, 2005 *International Forum on Legal Aid* (Oct. 2005) (on file with the author).

71 Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that “[e]ach State Party to the present Covenant undertakes 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 with all appropriate means”. However, there are ‘minimum core’ obligations that should be applied to all countries, regardless of resources. See Porter, ‘Judging Poverty’ (n. 35 above), pp. 128-130. General Comment No. 3 provides that progressive realisation imposes obligations on the States to show steps that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations” (para. 2) and “to move as expeditiously and effectively as possible towards that goal” (para. 9). Committee on Economic and Social and Cultural Rights, *General Comment No. 3, The Nature of States Parties’ Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1990).

72 “[E]ven where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.” *Ibid.* para. 11.

73 *Ibid.*

74 Gerhard Erasmus, ‘Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments’, *Int’l J. Legal Info.*, Vol. 32 (2004), pp. 243-259, at 250-251.

75 Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

76 A research analysis of over 14 000 civil cases adjudicated in 14 different forums in the United Kingdom and the United States found that lawyer representation is positively related to case outcomes: “on average, parties with lawyers increase their odds of winning by 72 percent over parties who represent themselves”. See Rebecca L. Sandefur, ‘Effects of Representation on Trial and Hearing Outcomes in Two Common Law Countries’, 7 July 2005. The research is based on an analysis of selected studies previously completed. The paper was prepared for presentation at the meetings of the Research Committee on the Sociology of Law of the International Sociological Association in July 2005, www.reds.msh-paris.fr/colloque/sandefur.pdf

3 RIGHT TO SOCIAL SECURITY



1. INTRODUCTION

Effective participation in modern society by disadvantaged individuals and groups is not feasible without a fully functioning social security system. The right to social security provides protection to everyone in the event that private initiative and government policy fail to enable the enjoyment of economic, social and cultural rights. All governments have committed themselves in some form to the right, and an impressive array of instruments have been adopted under the aegis of the International Labour Organisation (ILO). Yet, the retraction of the welfare state over the last two decades and the increased privatisation of social security systems have raised new issues for judicial enforcement.¹ Courts are regularly confronted with cases that relate to the extent of coverage and the level of benefits, as well as the activities of the private sector. While such collective or ‘public interest’ questions were traditionally considered to be beyond the scope of the judiciary,² the availability of human rights norms has empowered adjudication authorities in some jurisdictions to play an active supervisory role.

Social security may be broadly defined as a body of arrangements that aims to provide protection, in the form of benefits or services, against specific contingencies or risks.³ Social security typically includes the methods of ‘social assistance’ and ‘social insurance’, but does not cover private or communal savings or resources.⁴ Social assistance denotes benefits received by those in a situation of need, for example, clothing grants for low-income families or fuel coupons for the elderly poor.⁵ It is non-contributory and provided from public funds.⁶ Social insurance covers those forms of social security commonly connected with an individual’s position or status and to which the individual makes a partial contribution, for example, through pension plans or contributory medical aid schemes. With respect to the extent to which a government may use the private sector to provide social security, both the Committee and the ILO Conference have indicated that private approaches may constitute social security if they form part of a ‘social security system’.

1 The level and coverage of benefits has declined significantly in developed and developing countries alike. Governments frequently cite fiscal constraints, but a preference for smaller government appears to be the dominating factor. See, for example, Katherine Duffy, *Opportunity and Risk: Trends of Social Exclusion in Europe* (Strasbourg: Council of Europe, 1998), chap. 4.

2 Most adjudication of social security claims has concerned the rights of individuals to benefits under pre-existing statutory schemes. Bradley notes in the context of the United Kingdom that “the justice that needy claimants now receive can be no more sympathetic than the regulations allow”; see John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: The Adjudication of Claims for Benefit in Britain* (Oxford: Clarendon Press, 1992), p. 2.

3 The Committee on Economic, Social and Cultural Rights (CESCR) has commented that ‘social security’ implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control; see *General Comment No. 6, The Economic, Social and Cultural Rights of Older Persons* (Thirteenth session, 1995), U.N. Doc. E/1996/22, 20 (1996), para. 26.

4 The Committee of Independent Experts that oversees the European Social Charter noted that the right to social security includes both social assistance and social insurance; see Conclusions VIII, p. 74, ‘France’. The right to social security set out in Article 9 of the International Covenant on Economic, Social and Cultural Rights specifically includes social insurance.

5 See Laurence Mashiva, *Introduction to the Right to Social Security in the South African Constitution* (Pretoria: Centre for Human Rights, 2000).

6 Social assistance is often referred to as ‘social welfare’.

The precise content of the *right to social security* has received scant attention in international and national law (the European Committee of Social Rights notwithstanding), but that situation is changing, as this chapter demonstrates.⁷ Recently, in the draft General Comment on the Right to Social Security, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) defined the right as follows:

The right to social security encompasses the right to access benefits, through a system of social security, in order to secure adequate (i) income security in times of economic or social distress; (ii) access to health care and (iii) family support, particularly for children and adult dependents. Economic and social distress includes the interruption of earnings through unemployment, sickness, maternity, employment injury, old age, invalidity or disability, death or other factor that is either beyond a person's control or would otherwise be inconsistent with the principle of human dignity.⁸

The remainder of this chapter examines the legal bases for the right to social security, the content of the right and the corresponding obligations of States, all in the context of judicial and quasi-judicial decisions.

BOX 1. COMMON VIOLATIONS OF THE RIGHT TO SOCIAL SECURITY

Common violations of the right to social security may be summarised under the three types or levels of obligations on States Parties under international human law: the obligations to respect, protect and fulfil.⁹

Duty to respect

- Elimination of a social security scheme without an adequate replacement programme¹⁰
- Exclusion of part-time, temporary and seasonal workers from unemployment insurance benefits in situations where they contribute significantly to the fund

Duty to protect

- Failure of the State to ensure that privately administered (i.e., non-State run) contributory insurance-type social security schemes provide benefits in accordance with the social security system
- Failure of the State to prevent unfair discrimination in the private insurance industry (medical aid schemes, life and disability insurance, etc.), for example, on the grounds of gender, HIV/AIDS status, or race¹¹

7 Attempts to define the right display a tendency to focus on the advantages of various benefit schemes rather than on the content of the right itself; see D. Pieters, 'Social Security: A Human Right in Search of a New Generation of International Legal Instruments' (on file with the author). For recent analyses of the right to social security, see Martin Scheinin, 'The Right to Social Security' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff Publishers, 2001), pp. 211-219; Lucie Lamarche, 'The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights' in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002), pp. 87-114.

8 CESCR, *General Comment No. 20, The Right to Social Security*, draft (Thirty-sixth session, 2006), U.N. Doc. E/Cc.12/GC/20/CRP.1, p. 1.

9 In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

10 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), para. 13.

11 Mashiva, 'Introduction to the Right to Social Security' (n. 5 above), p. 20.

Duty to fulfil

- Failure to establish a comprehensive social security scheme regulated by statute and supervised by an independent and participatory body
- Failure to ensure that groups excluded from social insurance schemes may access social security – the obligation may be immediate or progressive depending on the groups involved (it could be discriminatory exclusion and thus immediate), the level of equity in the current social security system, whether the minimum core is obtained and the level of resources available to the State and the social security system.
- Failure to make progress towards the coverage of all social security risks

2. KEY LEGAL STANDARDS

The right to social security is expressly recognised in a significant number of international human rights instruments and implicitly protected in ILO instruments and other human rights standards. These legal sources may be directly applied in adjudication if the legal authority is so empowered, or they may be used as interpretive principles in the progressive development and application of law (see Chapter 2 of this book). The express rights to social security, as contained in *international human rights treaties*, are set out in Box 2. The right to social security has also been expressly recognised within conventions concerning refugees and migrants,¹² a range of declarations including the Universal Declaration of Human Rights,¹³ and a significant number of national constitutions.¹⁴

2.1 Express right to social security in human rights treaties

International Covenant on Economic, Social and Cultural Rights, 1966

9. The States Parties ... recognize the right of everyone to social security, including social insurance.¹⁵

Convention on the Elimination of All Forms of Racial Discrimination

5. ... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights ... (e) ... (iv) The right to ... social security and social services.

¹² See Convention relating to the Status of Refugees, chap. IV; Article 27, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

¹³ Article 22 of the Universal Declaration of Human Rights provides that “[e]veryone, as a member of society, has the right to social security” and, in Article 25(1), “the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. The American Declaration of the Rights and Duties of Man, Article XVI, recognises that “[e]very person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living”.

¹⁴ See, for example, the Republic of Chile (Article 19[18]), the Republic of Colombia (Articles 46 and 48), the Commonwealth of Ghana (Article 36), Hungary (Article 70E), India (Article 21, together with Articles 38, 39 and 47), Iran (Article 29), Italy (Article 38), Japan (Article 25), the Netherlands (Article 20), Portugal (Article 63), South Africa (Article 27) and Spain (Articles 41 and 50).

¹⁵ Article 10 provides that specific protection should be given to family, women and children, including providing assistance to mothers during a reasonable period before and after childbirth and providing adequate benefits to working mothers during this period.

Convention on the Elimination of All Forms of Discrimination against Women, 1979¹⁶

11(1). States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure ... (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.¹⁷

12(2). ... States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Convention on the Rights of the Child, 1989¹⁸

26(1). States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)¹⁹

9(1) Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence.²⁰ In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

(2) In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²¹

13. [State Parties shall] ... (f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it; ... (i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors; ... (l) recognise and enforce the right of salaried women to the same allowance and entitlements as those granted to salaried men for their spouses and children.

Revised European Social Charter, 1996 (and European Social Charter, 1961)

12. With a view to ensuring the effective exercise of the right to social security, the Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;²² (3) to endeavour to raise progressively the system of social security to a higher level; ...²³

16 Article 13 prohibits discrimination in the area of family benefits, while Article 14(2) obliges States Parties to ensure that women in rural areas benefit directly from social security programmes.

17 This includes the introduction of maternity leave with pay or with comparable social benefits without loss of former employment, seniority, or social allowances (Article 11(2)).

18 Article 14(2) permits the State to take into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.

19 Article 17 also provides that everyone has the right to special protection in old age.

20 The Protocol further provides that protection must be provided to specified groups at risk: the family (Article 15), children (Article 16) and people with disabilities (Article 18). Similarly, the American Convention on Human Rights itself provides that children and the elderly should be protected.

21 States are also obliged to "provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training". See Article 22(a). The Protocol has not entered into force.

22 The European Social Charter 1961 refers to ILO Convention 102 and not the European Code of Social Security. The 1961 Charter is relevant for those European countries that have not ratified the revised Charter.

23 Article 12(4) obliges States Parties to ensure that nationals of other State Parties are accorded equal treatment with respect to social security legislation.

13. With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; ...²⁴

Charter of Fundamental Rights of the European Union²⁵

34(1) The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.²⁶

2.2 Implied rights

Judicial and quasi-judicial authorities have implied the right to social security from other human rights. This is not surprising since the right is largely derivative, facilitating directly the realisation of other economic, social and cultural rights. For example, the entitlement to social assistance is often listed under the right to an adequate standard of living,²⁷ and Scheinin notes that the right “relates to social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate resources”.²⁸ Other rights that have been held to include a governmental responsibility to provide social assistance or insurance include food,²⁹ housing,³⁰ health³¹ and water.³² Such an approach is important for the interpretation of those legal instruments that omit the right to social security in the list of economic, social and cultural rights.³³

In many cases, social security applicants invoke the right to non-discrimination along with other civil and political rights. In the South African case of *Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development*,³⁴ the Constitutional Court found that the right to equality and the right of access to social assistance had been breached through the exclusion of permanent residents from eligibility for particular social grants. In *Müller v. Austria*, the former European Commission of Human Rights held that social insurance constitutes ‘property’ (contingent upon the applicant showing a sufficient link between the contributions and the benefit and the existence of a right to an identifiable

24 Article 14 further provides the right to benefit from social welfare services. Contracting Parties are required to promote or provide services that, by using methods of social work, encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

25 The Charter is currently a ‘political’, rather than a formally legal document. The actual importance of the Charter will depend on the view that the European Court of Justice takes in relation to the extent to which the Charter (currently not incorporated into the Treaties providing for the existence of the European Union) does have legal effect, and if so, of what kind. The future ratification of the European Union Constitution, of which the Charter currently forms part, will also have implications for the legal status of the rights enshrined in the Charter.

26 The right is extended to “everyone residing and moving legally within the European Union” (Article 34(1)), and the Union “recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources” (Article 34(2)). Both sub-articles end with the phrase “in accordance with the rules laid down by Community law and national laws and practices”.

27 See, for example, Article 27, Convention on the Rights of the Child.

28 Scheinin, ‘The Right to Social Security’ (n. 7 above), p. 215.

29 See CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); *People’s Union for Civil Liberties v. Union of India*, No. 196 of 2001, Interim Order of 2 May 2003, Supreme Court of India.

30 See *South Africa v. Grootboom*, 2001 (1) SA 46 (CC); CESCR, *General Comment No. 4, The Right to Adequate Housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III, 114 (1991).

31 See CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000).

32 See CESCR, *General Comment No. 15, The Right to Water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003).

33 In particular, see the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child.

34 2004 (6) BCLR 569 (CC). For a discussion of this case, see Sandra Liebenberg, ‘The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor’, in Eibe Riedel (ed.), *The Human Right to Social Security* (Heidelberg: Springer Verlag, 2006).

payment) and is therefore protected by the right to the peaceful enjoyment of possessions.³⁵ In *Gaygusuz v. Austria*, the European Court of Human Rights widened the scope of this right to possessions by finding that social assistance entitlements under a statute-based scheme amounted to property for the purposes of applying the article on non-discrimination.³⁶ Similarly, the European Court of Human Rights has found that the right to a fair trial for determination of civil rights and obligations encompasses social security benefits set out in national legislation.³⁷ Constitutional rights to democracy and liberty³⁸ and life,³⁹ as well as fundamental principles of justice,⁴⁰ have also been interpreted to ground rights to social assistance.

2.3 Other international standards

Numerous ILO standards provide protection, interpretation and definition of the right to social security, in particular the Social Security (Minimum Standards) Convention of 1952 (No. 102)⁴¹ The Convention sets out the nine principle contingencies or situations by which an entitlement to social security may arise and the nine corresponding benefits: (a) medical care, (b) sickness benefits, (c) unemployment benefits, (d) old-age benefits, (e) employment injury benefits, (f) family benefits, (g) maternity benefits, (h) invalidity benefits, and (i) survivors benefits. While the Convention is remarkably detailed⁴² and well supervised⁴³ and has significantly influenced the elucidation of the components of the right to social security,⁴⁴ it suffers from a number of weaknesses. States are only required to select three of the above benefits and cover a certain proportion of their populations.⁴⁵ As a result, subsequent conventions have been adopted to strengthen protection in the areas of invalidity, old-age and survivors benefits,⁴⁶ medical care and sickness benefits,⁴⁷ unemployment benefits,⁴⁸ and benefits for part-time workers⁴⁹ and home workers.⁵⁰ However, these Conventions have a poor ratification record.

35 App. 5849/72, *Müller v. Austria*, 16 Dec. 1974, (1975) 1 Dr 46. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 262, entered into force: 18 May 1954, states in part that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions”. The German Federal Constitutional Court has also endorsed the link between property and social insurance; see T. Tomandl, ‘Constitutional Protection of Social Security Benefits in Austria, Germany and Italy’ in Asbjørn Kjønstad (ed.), *Trygderettighetenes Grunnlovsvern: Constitutional Protection of Social Security Benefits* (Oslo: Ad Notam Gyldendal, 1994), p. 144.

36 *Gaygusuz v. Austria*, ECHR, 16 Sept. 1996 (39/1995/545/631): “The Court considers that the right to emergency assistance – insofar as provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No. 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay taxes or other contributions” (para. 41). For an analysis of the judgment, see Martin Scheinin and Catarina Krause, ‘The Meaning of Article 1 of the First Protocol for Social Security Rights in the Light of the Gaygusuz Judgement’ in Stefaan Van den Bogaert (ed.), *Social Security, Non-discrimination and Property* (Antwerp: Apeldoorn, 1997), pp. 59–73. The right to non-discrimination may only be invoked in relation to rights in the Convention and Protocols.

37 See *Salesi v. Italy*, [1993] IIHRL 18 (26 Feb. 1993); *Schuler-Zgraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993).

38 *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

39 See *People’s Union for Civil Liberties v. Union of India* (n. 29 above); *M C Mehta v. State of Tamil Nadu* 1997 AIR 699 (Supreme Court of India) in relation to child payments. See also: Human Rights Committee, *General Comment No. 6, The Right to Life* (1982).

40 See *R v. Hammersmith and Fulham London Borough Council ex parte M. Lambeth London Borough Council ex parte P, Westminster City Council ex parte A, and Lambeth Borough Council ex parte Z*, Court of Appeal, Judgment of 8 Oct. 1996 (United Kingdom).

41 So far ratified by 41 countries (Nov. 2003). The convention was designed to overhaul the earlier and less technical Unemployment Provision Convention (ILO Convention No. 44).

42 The Convention specifies for each benefit the nature of the entitlement, the percentages and sectors of the population to be covered and the duration of the benefit.

43 See the reports of the Committee of Experts on the Application of Conventions and Recommendations with respect to ILO Convention 102.

44 See section 2.4.3 below.

45 See Article 2. See further, Lucie Lamarche, ‘Social Security as a Human Right’ in Daniel Brand and Sage Russell (eds.), *Exploring the Core Content of Socio-Economic Rights: South African and National Perspectives* (Pretoria: Protea Book House, 2002), p. 130.

46 Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No. 128).

47 Medical Care and Sickness Benefits Convention, 1969 (No. 130).

48 Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).

49 Part-Time Work Convention, 1994 (No. 175) and Recommendation 182 on Part-Time Work.

50 Home Work Convention, 1996 (No. 177) and Recommendation 184 on Home Work.

The ILO has also adopted two soft law documents that incorporate a more explicit human rights approach to social security. Nußberger has described both the Recommendation Concerning Income Security and the Medical Care Recommendation of 1944 in the following terms:

They embrace all the necessary elements of a sound and balanced concept of social protection in a very concise manner. ... The basic risks are enumerated and defined in an abstract manner that gives room for further developments in society. In contrast to later standards it is not the male-breadwinner-model that is underlying these recommendations; there are no discriminatory elements. The personal scope is not limited to dependent workers, but includes self-employed people as well. The amount of benefits is not entirely left to the discretion of the national States but defined in a forward-looking way.⁵¹

In addition, the Resolutions and Conclusions concerning social security of the 2001 International Labour Conference (composed of governments, employers and worker representatives) explicitly recognises the right to social security, emphasises that social security models should focus on providing access to the excluded and addresses discrimination against women.⁵²

Europe also has a well-developed regional system on social security.⁵³ The European Code of Social Security resembles ILO Convention 102, but provides a higher level of protection.⁵⁴ The European Union has also adopted a number of binding directives that require States progressively to ensure equal treatment between men and women in the field of social security.⁵⁵

3. CONTENT OF SOCIAL SECURITY

The content of the right to social security in practice has largely and traditionally been determined with reference to ILO standards. The different forms of social security set out in ILO Convention 102 are repeated, for example, in the reporting guidelines of the CESCR.⁵⁶ Similarly, the European Social Charter provides that contracting States must establish a social security system that conforms to ILO Convention 102, although parties are expected progressively to exceed these standards over time.⁵⁷ However, ILO Conventions do not require universal coverage of all contingencies, and it is therefore useful to set out the important elements of the right, drawing on the literature and jurisprudence. The draft General Comment by the CESCR also sets out the normative content of the right, hewing closely to the Committee's traditional categorisations of availability and accessibility,⁵⁸ but this section

51 See Angelika Nußberger, 'Evaluating the ILO's Approach to Standard-Setting and Monitoring in the Field of Social Security' in Riedel, 'The Right to Social Security' (n. 34 above).

52 ILO, *Social Security: A New Consensus* (Geneva, 2001).

53 For a useful overview of European social security law in the context of human rights, see Matti Mikola, *Common Denominators of European Social Security* (forthcoming 2006).

54 European Code of Social Security (ETS No. 48), entered into force: 17 Mar. 1968.

55 See Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, and Directive 86/378 on the implementation of the principles of equal treatment for men and women in occupational social security schemes.

56 Revised General Guidelines regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights. The Committee's General Comments also make reference to ILO Conventions. For instance, in outlining the obligation on States Parties to take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age to be prescribed by national law, the CESCR refers to ILO Convention 102 and Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967); see CESCR, *General Comment No. 5, Persons with Disabilities* (Eleventh session, 1994), U.N. Doc E/1995/22, 19 (1995), para. 27.

57 Article 12(2) and (3). The Committee found that Austria had failed to comply with Article 12(2) since it had only fulfilled two of the four parts of ILO Convention 102 that it had accepted (Conclusions IV, p. 81), quoted in Lenia Samuel, *Fundamental Social Rights: Case Law of the European Social Charter* (Strasbourg: Council of Europe, 1997).

58 Draft General Comment No. 20 (n. 8 above), para. 11.

will simply analyse the key elements irrespective of their categorisation, although the substance is not significantly different.

3.1 Adequacy

The level of social security benefits should be adequate in amount and duration, corresponding to the magnitude of the contingency, risk, or need⁵⁹ and, more generally, to the right to an adequate standard of living. The Committee overseeing the European Social Charter has noted that “it is of paramount importance that social security systems are adequate to protect the population, particularly as regards families, the disabled, the elderly and migrant workers”.⁶⁰ Human rights instruments do not set specific levels of benefits, but ILO Conventions adopt a mixture of universalism and localism by linking the level of benefits to a percentage of previous earnings or the average wage of specified workers.⁶¹

While some argue that courts are ill equipped to determine the adequacy of benefits, it should be noted that they are regularly called upon to determine a reasonable standard of living in the areas of debtor-creditor law, bankruptcy and family law.⁶² An Australian tribunal commented in a case involving social security benefits that “[t]here must be a level between mere subsistence and hedonistic indulgence that should be regarded by the community as tolerable ... that would ... comply with our international obligations ... [and] of which we would not be ashamed”.⁶³ While most human rights treaties grant a degree of flexibility to governments that experience resource or time constraints,⁶⁴ they do require that action be taken towards the achievement of the right and the guarantee of a minimum entitlement in the short term.

3.2 Coverage

Social security systems should aim to cover all those risks that impinge upon a person’s ability to generate income and maintain an adequate standard of living.⁶⁵ The risks encompassed should include the benefits enumerated in ILO Convention 102: medical care, sickness benefits, unemployment benefits, old-age benefits,⁶⁶ employment injury benefits, family benefits, maternity benefits, invalidity benefits⁶⁷ and survivors benefits.⁶⁸ However, other risks associated with the inability to realise economic, social and cultural rights must also be included.⁶⁹ In situations where resources are ‘demonstrably inadequate’,

59 The Constitutional Court of Ukraine has noted that the right to social security does not depend on age, but need (decision of the Constitutional Court of Ukraine, 1-20/99, 2 June 1999 (1999) 2 *Bulletin on Constitutional Case-Law* 289, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002), p. 867).

60 Conclusions XIII-1, General Introduction.

61 See Articles 65-67, ILO Convention 102.

62 See *Re Pearson* (1997), 46 C.B.R. (3d) (Alta. Q.B.), para. 24 (Canada). See also: Peter Bailey, ‘The Right to an Adequate Standard of Living: New Issues for Australian Law’ (1997), *Australian Journal of Human Rights*, 22, www.austlii.edu.au/au/journals/AJHR/1997/22.html and *Factum of the Charter Committee on Poverty Issues, Louise Gosselin v. Le Procureur General de Quebec*, Supreme Court of Canada, Court File No. 27418.

63 *R v. Ezekiel* (1984), Administrative Law Note, N235 per Senior Member McMahon of the Australian Administrative Tribunal.

64 See Article 3(1), ILO Convention 102 and Article 2(1), International Covenant on Economic, Social and Cultural Rights.

65 See Sandra Liebenberg, ‘Social Security as a Human Right’ in Human Rights Resource Centre, University of Minnesota, *Circle of Rights: Economic, Social and Cultural Rights Activism, a Training Resource* (Minneapolis, 2000), Module 11.

66 The CESCR, in General Comment No. 6 (n. 3 above), has stated that Article 9 implicitly recognises the right to old-age benefits and that States Parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons who are not entitled to an old-age pension or social security benefit or assistance under a contributory scheme and have no other source of income.

67 In General Comment No. 5 (n. 56 above), the CESCR states that social security and income-maintenance schemes are of particular importance for persons with disabilities. Support provided by States should “reflect the special needs for assistance and other expenses often associated with disability and, as far as possible, such support should also cover carers of people with disabilities” (para. 28).

68 In General Comment No. 6 (n.3 above), the CESCR directs that, in order to give effect to the provisions of Article 9 of the Covenant, States Parties must guarantee the provision of survivors and orphans benefits on the death of breadwinners who were covered by social security or who were receiving pensions.

69 See Scheinin, ‘The Right to Social Security’ (n. 7 above), p. 215.

the determination of the benefits receiving priority should be determined with reference to a State's commitments under ILO Convention 102 and the seriousness of the need of the various beneficiaries.⁷⁰

3.3 Accessibility

The benefits should be accessible and affordable to all those that require them. For example, the ILO Committee of Experts on the Application of Conventions and Recommendations criticised Peru for failing to ensure coverage of the sickness benefit in four provinces and providing only outpatient coverage in three other provinces.⁷¹ States should facilitate the physical accessibility of the benefits by providing the necessary information about the benefits.⁷² The Indian Supreme Court has, for example, ordered governments to publicise the right to grain among families living below the poverty line.⁷³ Where beneficiaries are expected to contribute to a social insurance system, the contribution should not exceed a reasonable percentage of available income. The amount should also be defined in advance.⁷⁴

3.4 Social security system

Social security should also be defined as some form of collective and not purely individual arrangement to guarantee protection against risks and contingencies; the right therefore entails that a system be in place to ensure that adequate social security benefits are effectively provided. This interpretation is largely consistent with ILO Convention 102 of 1952⁷⁵ and the resolution of the tripartite International Labour Conference in 2001⁷⁶ and notably places greater emphasis on the characteristics of the system rather than the system itself. Lucie Lamarche argues as follows:

[S]ocial security, as a human right and not a commodity, relies on collective funding. This can be of different types: public, professional community, private (if risks are assessed on the basis of a determined group and benefits paid to this group) or even mixed. In all cases, it is a basic and minimal requirement of the right that it be supervised by an independent, participatory and regulated body.⁷⁷

The draft General Comment on the Right to Social Security sets out the minimum requirements for the system:

The system should be established under national law, and public authorities must take responsibility for the effective administration or supervision of the system. The schemes should also be sustainable, particularly in relation to provision of pensions, in order to ensuring that the right can be realized for present and future generations.⁷⁸

70 For instance, CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1991), paras. 10-11.

71 Individual Observations concerning Convention No. 102, Social Security (Minimum Standards), 1952 Peru. See also: CESCR, *Concluding Observations on Canada* (1998), para. 40.

72 See CESCR, General Comment No. 14 (n. 31 above), para. 12, in relation to information accessibility.

73 *People's Union for Civil Liberties v. Union of India* (n. 29 above).

74 See Lamarche, 'Social Security as a Human Right' (n. 45 above), p. 130.

75 See Articles 71 and 72.

76 See Resolutions and Conclusions concerning social security, International Labour Conference, 89th Session, 2001, para. 4.

77 Lamarche, 'The Right to Social Security' (n. 7 above), p. 103.

78 Draft General Comment No. 20 (n. 8 above), para. 11(a)(i).

International quasi-judicial bodies have paid close attention to the characteristics of the social security system. In its 1998 Concluding Observations on Canada, the CESCR noted the need for Canada to establish national programmes that supply specific cash transfers for social assistance and social services that provide universal entitlements, national standards and enforceable legal rights to adequate assistance for all persons in need.⁷⁹ According to the European Committee of Social Rights, if the risks are primarily covered by social insurance, if there are substantial gaps in coverage and if the benefits are low, then there is serious doubt as to whether a social security system exists.⁸⁰

4. CASE LAW ON THE OBLIGATIONS OF STATES

The legal obligations that flow from the right to social security will obviously vary according to the relevant legal instruments protecting the right.⁸¹ For example, while both the European Social Charter and the International Covenant on Economic, Social and Cultural Rights require progressive realisation of the right to social security, the former is more specific on the minimum requirements to be immediately attained, through reference to commitments of States to cover certain contingencies in ILO and European legal standards. This section will provide a selective review of the jurisprudence on social security⁸² with respect to obligations in accordance with the framework set out in Chapter 2.

4.1 Non-discrimination and equality

The rights to non-discrimination and equality are of particular importance in the context of the right to social security since certain social risks only arise among certain groups (for example, pregnancy only among women), and marginalised groups are most likely to be the groups in need of social protection. Discrimination is ordinarily prohibited on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸³ (For expanded interpretations of 'other status', see Chapter 2, but in the context of social security, cases concerning discrimination on the basis of HIV/AIDS, disability and sexual orientation are common.) Distinctions on these grounds may only be justified if there are reasonable and objective criteria for the differentiation.⁸⁴ The onus is upon the government to demonstrate that this is so.

The explicit exclusion of individuals on the basis of proscribed grounds (direct discrimination) has been a subject of considerable litigation. The Human Rights Committee, for example, ruled that the right to equality in the International Covenant on Civil and Political Rights extends to legislation enacted in the field of social security.⁸⁵ Unemployment benefits legislation that excludes married women, on the assumption that their husbands would provide for their needs, was therefore found to discriminate on the basis of marital status and sex.⁸⁶ Pension benefits⁸⁷ and invalidity benefits⁸⁸ granted to widowers

79 CESCR, *Concluding Observations on Canada* (1998), para. 40.

80 Conclusions III, p. 62.

81 Draft General Comment No. 20 (n. 8 above) clarifies the general obligation as follows: "While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States Parties various obligations which are of immediate effect. States Parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (Article 2(2)) and the obligation to take steps (Article 2(1)) towards the full realization of Articles 11(1) and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security." (para. 30)

82 For a more comprehensive review of cases, see Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming 2007).

83 See Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights.

84 See Part V (Article E) European Social Charter 1996; Human Rights Committee, *General Comment No. 18, Non-Discrimination*, para. 13; case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' (*Belgian Linguistic Case*) (1979-80), I EHRR 252 (23 July 1968).

and widows on the same basis have also been impugned. A family income supplement that was only available to families with full-time male workers was found incompatible with the principle of equality under the European Social Charter.⁸⁹ Regulations that entitled receipt of a winter fuel payment for women over 60 (but 65 for men) were held to violate the European Union Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security.⁹⁰ In *Etcheverry v. Omint*,⁹¹ the Supreme Court of Argentina determined that the refusal by a private health fund to renew coverage of the complainant after he had been diagnosed as HIV-positive violated constitutional rights, although in this case it was the right to health.

The exclusion of non-nationals from social security systems has received particular attention.⁹² Courts and quasi-judicial bodies have condemned lower pensions for non-nationals who have served in the French Army,⁹³ the exclusion of foreign migrant workers from unemployment benefit schemes in Austria⁹⁴ and Spain,⁹⁵ the denial of basic welfare benefits to non-nationals in Austria⁹⁶ and the exclusion of permanent residents in South Africa from access to social assistance benefits.⁹⁷ In periodic reviews of country performance, the European Committee of Social Rights has determined numerous instances of failures by States to extend welfare benefits to citizens of other Contracting Parties to the European Social Charter.⁹⁸ In 2004, the European Committee of Social Rights also squarely addressed the situation of undocumented non-nationals and, in the collective complaint of *FIDH v. France*, held that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”⁹⁹

85 The Human Rights Committee stated that: “although article 26 [right to equality and non-discrimination] requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with article 26 of the Covenant.” *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984 (9 Apr. 1987), para. 12.4.

86 *Zwaan-de Vries v. The Netherlands*, *ibid.*, and *S. W. M. Brooks v. The Netherlands*, Communication No. 172/1984 (9 Apr. 1987).

87 Human Rights Committee, *Pauger v. Austria*, Communication No. 415/1990 (1995).

88 *Schuler-Zraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993). The European Court of Human Rights found a violation of the right to non-discrimination, taken together with the right to fair trial.

89 Committee of Independent Experts (European Social Charter), Conclusions V, III, ‘United Kingdom’.

90 *Taylor v. United Kingdom*, European Court of Justice, Case-382/98 (16 Dec. 1999). A similar conclusion was reached in the Barber case, where women were accorded a lower pensionable age than men, but, because of the judgment’s far-reaching effects, it declined to make the decision retroactive (Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889).

91 Supreme Court of Argentina, *Etcheverry, Roberto E. v. Omint Sociedad Anónima y Servicios*, General Attorney’s brief of 17 Dec. 1999, Court decision of 13 Mar. 2001. For a discussion of the case, see Christian Courtis, ‘Argentina’ in Langford, ‘Social Rights Jurisprudence’ (n. 82 above), chap. 7.

92 Specific reference to non-nationals is often made in international human rights documents; see Article 12(4) of the European Social Charter (original and revised), Article 2(3) of the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

93 See the decision of the Human Rights Committee in *Gueye et al. v. France*, Communication No. 196/1983 (3 Apr. 1989).

94 *Gaygusuz v. Austria*, European Court of Human Rights, 16 Sept. 1996.

95 Decision of the Constitutional Court of Spain, Case No. 130/1995, (1995) 3 *Bulletin on Constitutional Case-Law* 366, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002).

96 *V v. Einwohnergemeinde X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

97 Khosa (n. 34 above).

98 For example, France denied allowances for disabled adults to nationals of Austria, Cyprus, Finland, Iceland, Malta, and Norway, all parties to the European Social Charter, thereby violating Article 14(4). See a range of similar case studies in Samuel, ‘Fundamental Social Rights’ (n. 57 above), pp. 309-312 and pp. 323-329.

99 Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France*, Decision on the Merits, para. 32. While the Appendix to the European Social Charter (original and revised versions) provides that the Charter rights only extend to foreigners who are nationals of other Contracting Parties to the Charter and who are lawfully resident or work regularly within the State, the Committee stated that the Charter must be interpreted in a purposive manner and therefore be construed consistently with the principles of individual human dignity; any restrictions should be read narrowly. See also: General Comment No. 14 of the CESCR (n. 31 above) and the discussion on the topic of illegal migrants and social security in Malcolm Langford, ‘The Right to Social Security and Implications for Law, Policy and Practice’ in Riedel, ‘The Human Right to Social Security’ (n. 34 above), chap. 3.

Legislation and actions that discriminate in *practice* by diminishing the enjoyment of the right to social security for certain groups are also prohibited in many jurisdictions. The European Committee of Social Rights, for example, has questioned whether certain preconditions for social security indirectly discriminate on the grounds of nationality. For example, in Belgium, family allowances were conditional on a child being raised in the country or European Union,¹⁰⁰ and, in Finland, the legislation required that the child be resident in the country.¹⁰¹

The right to equality and non-discrimination also possesses positive dimensions: the obligation of States to ensure the equal enjoyment of the right to social security. In relation to social security benefits, the Canadian Supreme Court has held that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violated the right of the (deaf) plaintiffs to the equal protection and equal benefit of the law without discrimination.¹⁰² Similarly, in Latin America, many courts have required social and private health insurance plans to provide coverage for anti-retroviral medicines for members with HIV/AIDS. Sepulveda writes that, in Colombia, “[i]n such cases, if the patient cannot finance his own treatment, the Court orders the provision of the medicines and the necessary treatments notwithstanding that they were not provided for in the catalogue of available treatments (Compulsory Health Plan). According to the Court, the State has a special duty to protect HIV/AIDS patients so legal norms that exclude a necessary treatment or medicine denying them integral assistance are unconstitutional.”¹⁰³

4.2 Obligations to respect

The obligation to respect requires that social security benefits may not be interfered with unless there is just cause and due process.¹⁰⁴ For example, suspension of pension payments to a prisoner have been ruled an inadmissible restriction on the right to social security,¹⁰⁵ while the denial of basic welfare benefits to undocumented immigrants in Switzerland contravened the right to a minimum level of subsistence.¹⁰⁶ In many cases concerning the denial of benefits, civil and political rights have been relied upon. In *Goldberg v. Kelly*, the US Supreme Court struck down an administrative decision terminating benefits on the basis that due process had not been accorded to the recipients. The Court recalled that “[c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue”.¹⁰⁷ The European Court of Human Rights has provided similar protections under the right to fair trial and the right to property as discussed above in section 2.1.

100 Conclusions XIII-2, p. 340, with respect to Belgium.

101 Conclusions XIII-3, p. 358, with respect to Finland.

102 *Eldridge v. British Columbia* (Attorney General) [1997] 2 S.C.R. 624.

103 Sepulveda, ‘Colombia’ in Langford, ‘Social Rights Jurisprudence’ (n. 82 above), discussing cases T-505/92; T-271/95; SU-480/97; T-185/00 and T-376-03.

104 For instance, CESCR, *General Comment No. 15, The Right to Water* (2002), para. 21.

105 Decision of the Constitutional Court of Russia, 16 Oct. 1995, (1995), 3, *Bulletin on Constitutional Case-Law* 340, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002).

106 *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

107 See *Goldberg v. Kelly*, 397 US 254 (1970).

4.3 Obligation to protect

Adjudication bodies have rarely found that the right to social security requires only public and not private provision of social assistance and insurance, although one ILO committee noted that the spread of privatisation in the sector is unprecedented.¹⁰⁸ The general approach of adjudication bodies is that governments may harness market forces, provided that the end goal is satisfied and there is universal access to adequate social security.¹⁰⁹ Furthermore, judicial authorities have required close regulation of the private sector by introducing comprehensive standards, monitoring compliance, imposing penalties for violations and providing access to legal remedies for individuals.¹¹⁰ At the national level, a Latvian law that established an ineffective mechanism to ensure that employers paid their contributions was struck down by the Constitutional Court of Latvia for its failure to ensure the right to social security of the relevant employees.¹¹¹ In Argentina and Colombia, courts have closely monitored the exclusion of individuals from social security funds administered by private actors or trade union entities.¹¹²

4.4 Obligation to fulfil and progressive realisation

Taking steps towards realisation

The obligation progressively to realise the right of social security will ordinarily require steps that include preparation of a comprehensive plan to realise the right, as well as the implementation and monitoring of the strategy through a social security system.¹¹³ One recent prominent example concerns the failure of governments in India to provide effective social assistance in times of famine, whether officially declared or not. The Supreme Court of India held that there had been a systematic failure by central and state governments to design, implement and finance food security schemes. It made extensive orders concerning increased resources for the scheme, the opening times of ration shops, the provision of grain at the set price to families living below the poverty line, the publication of information concerning the rights of such families, the granting of a card for free grain to all individuals without means of support and the progressive introduction of midday meal schemes in schools.¹¹⁴ Similarly, in Colombia, the Constitutional Court was confronted with an elderly man who lived in absolute poverty, without contact with his family and who required an eye operation in order to recover his sight. He requested financial assistance so that he might undergo the necessary operation. While the Court recognised that the scope and content of the social benefits should be determined by law, it held that the Government had failed to legislate to address such a situation of persons in the plaintiff's condition and accordingly ordered the social security system to provide the treatment.¹¹⁵

¹⁰⁸ Committee of Experts on the Application of Conventions and Recommendations, Individual Observations concerning Convention No. 102, Social Security (Minimum Standards), 1952, the Netherlands.

¹⁰⁹ See CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (1990).

¹¹⁰ For example, the Committee of Experts on the Application of Conventions and Recommendations requested that the Netherlands inform it of "the regulatory and supervisory measures taken by the State in compliance with Articles 71(3) and 72(2) of the Convention [No. 102] to ensure the financial viability and proper functioning of the private insurance companies providing sickness and disability benefits" (Individual Observations concerning Convention No. 102, n. 108 above). See, for instance, CESCR, *General Comment No. 15, The Right to Water* (2002), paras. 23-24.

¹¹¹ See Case No. 2000-08-0109, Constitutional Court of Latvia, 2001. The right to social security and the International Covenant on Economic, Social and Cultural Rights are both enshrined and incorporated in the constitution.

¹¹² See Sepulveda, 'Colombia' (n. 103 above) and Courtis, 'Argentina' (n. 91 above).

¹¹³ Draft General Comment No. 20 (n. 8 above) states, "The obligation to fulfil requires States Parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security" (para. 36). It goes on to provide details on the nature of the steps to be taken. It is notable that a similar provision progressively to improve social security is included in the European Social Charter (Article 12(3)), but the review by the European Committee of Social Rights has been disappointing on this subject; it has been focused principally on compliance with the minimum requirements (Article 12(2)), and, according to one author, almost any improvement in the social security is praised without establishing a system for measuring achievement over time. See Samuel, 'Fundamental Social Rights' (n. 57 above), pp. 302-305.

¹¹⁴ *People's Union for Civil Liberties v. Union of India* (n. 33 above).

¹¹⁵ See Sepulveda, 'Colombia' (n. 103 above), section 4.2.

Non-retrogression

Progressive realisation implies that retrogressive actions that reduce access to social security are *prima facie* violations of the right.¹¹⁶ In the last two decades, the pressure on governments to reduce welfare spending, in both developed and developing countries, the latter often under pressure from international financial institutions, has given prominence to this aspect of obligations of States with respect to economic, social and cultural rights. For example, the Constitutional Court of Hungary was confronted with a law that removed overnight a range of family benefits. The Court ruled the law unconstitutional although this was largely on the basis of a constitutional principle of legal certainty. Families had made their plans in expectation of receiving the benefits.¹¹⁷ Similarly, the CESCR strongly criticised Canada for reducing coverage for unemployment benefits and cutting social assistance rates.¹¹⁸

The European Committee of Social Rights has consistently reviewed efforts by States to cut back social benefits, and Khalfan and Churchill¹¹⁹ have distilled the key areas of focus:

The Committee has made it clear that any modifications should not reduce the effective social protection of all members of society against social and economic risks and transform the social security system into a basic social assistance system.¹²⁰ The Committee has also been aware and careful to ensure that such reforms have not further marginalised the vulnerable.¹²¹ It has stated that it will keep a close eye on reforms as social security is vital in protecting the most vulnerable in society.¹²² The Committee has particularly identified the disabled, the elderly and migrant workers as groups which must not be further disadvantaged by reforms.¹²³

However, it is important to remember that cutbacks in social security spending are often justified by budgetary crises, and some courts are loath to question government or parliamentary priorities.¹²⁴

Minimum entitlement

The right to a minimum level of assistance has been made justiciable in some jurisdictions.¹²⁵ In Germany, Hungary and Switzerland, the highest Courts have ruled that all inhabitants of the country have a right to a minimum level of assistance (for example, shelter, food, clothing).¹²⁶ The Swiss Court

116 General Comment No. 20 (n. 8 above) provides details on the factors the CESCR will use in reviewing retrogressive measures: The Committee will look carefully at whether (1) alternatives were comprehensively examined; (2) there was genuine participation of affected groups in examining proposed measures and alternatives that threaten their existing human right to social security protections; (3) the measures were directly or indirectly discriminatory; (4) the measures will have a sustained impact on the realization of the right to social security; (5) the individual is deprived of access to the minimum essential level of social security unless all maximum available resources have been used, including domestic and international; (6) review procedures at the national level have examined the reforms. (para. 31)

117 (1994) Constitutional Court of Hungary, Decision No. 43/1995.

118 "The Committee is concerned that newly introduced successive restrictions on unemployment insurance benefits have resulted in a dramatic drop in the proportion of unemployed workers receiving benefits to approximately half of previous coverage, in the lowering of benefit rates, in reductions in the length of time for which benefits are paid and in increasingly restricted access to benefits for part-time workers." (Concluding Observations on Canada (1998), para. 20)

119 Urfan Khaliq and Robin Churchill, 'The European Committee of Social Rights' in Langford, 'Social Rights Jurisprudence' (n. 82 above).

120 *Digest of the Case Law*, p. 62.

121 See Conclusions XII-1, p. 33, and Conclusions XII-2, p. 29.

122 Conclusions XII-2, p. 29.

123 Conclusions XII-1, p. 34.

124 Alternative legal arguments may be necessary to challenge reductions in budgetary allocations. See strategic comments by Victor Abramovich on this issue in Malcolm Langford, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: Centre on Housing Rights and Evictions, 2003), chap. 5.

125 The approach was rejected by the South African Constitutional Court; see *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC). This decision is well critiqued in David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence', 19 *SAJHR* 1 (2003) 1-26.

126 See Constitutional Court of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany); Vv. *Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

has determined that there is an implied constitutional right to basic necessities that may be invoked by both Swiss citizens and foreigners. The Court has acknowledged its lack of legal competence to determine resource allocation, but has said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights. The Constitutional Court of Hungary has taken a more deferential approach, ruling that the State is only obliged to provide accommodation if human life is directly affected by the absence of the accommodation.¹²⁷

Access to legal remedies

Access to effective legal remedies (including legal aid) for violations of the right to social security is largely indispensable for guaranteeing that the right is accessible in practice. For example, the European Committee of Social Rights has criticised the United Kingdom for establishing a social fund to meet exceptional expenses, but not allowing any independent right of appeal.¹²⁸ The right to a fair trial may also provide a right to legal remedies.¹²⁹ The US Supreme Court noted the importance of the basic right to be heard in cases concerning the removal of benefits since “welfare provides the means to obtain essential food, clothing, housing, and medical care”.¹³⁰

127 Decision of the Constitutional Court of Hungary, 42/2000, 8 Nov. 2000.

128 Conclusions XIII-1, p. 190 and XIII-2, p. 132.

129 See, for example, *Schuler-Zgraggen v. Switzerland* [1993] IIHRL 48 (24 June 1993) (European Court of Human Rights).

130 See *Goldberg v. Kelly* 397 US 254 (1970).

4 RIGHT TO ADEQUATE HOUSING'



1. INTRODUCTION

To live in a place and to have established one's own personal habitat with peace, security and dignity should not be considered a luxury, a privilege, or purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of adequate housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity has led the international community to recognise adequate housing as a basic and fundamental human right. The legal character of this right provides an important correction against the tendency of many legal systems to favour property rights over access to an adequate or even a minimum standard of housing. The right not only places a duty on governments to take steps towards the fulfilment of the right, it provides a defence for individuals and groups against the loss of their homes.

The international recognition and promotion of the right began with the drafting of the Universal Declaration of Human Rights, which clearly provides, in Article 25(1), that “[e]veryone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services”. Since the adoption of the Universal Declaration in 1948, the human right to adequate housing has been reaffirmed and reinforced. Thus, the United Nations has paid considerable attention to various measures designed to promote and protect this critical and fundamental right.² The right is perhaps one of the most well-defined rights under international human rights law.

Despite the frequent reaffirmation of the importance of full respect for the right to adequate housing by the international community, there remains a disturbingly large gap between human rights standards related to housing and the situation prevailing in many parts of the world.³ While the problems are often particularly acute in some developing countries that are being confronted by major resource and other constraints, such as rapid urbanisation, significant problems of homelessness and inadequate housing, including unaffordable housing, they exist in many economically developed countries as well.

The judicial enforcement of certain aspects of the right to housing is a common feature in many jurisdictions, particularly in relation to tenancy law, bankruptcy law and the protection of homeowners. However, the extent to which poorer litigants may actually ensure that they receive a fair opportunity to litigate their housing concerns is doubtful in many legal systems since legal aid or assistance is rarely provided for housing matters. Furthermore, there are serious questions over whether the relevant domestic laws comply with international standards. For instance, various bodies of the United Nations have set out clear requirements that must be met before an eviction may proceed, and not all States

¹ Bret Thiele assisted with preparation of sections 1 and 2.

² David Hulchanski and Scott Leckie, *The Human Right to Adequate Housing 1945-1999* (Geneva: Centre on Housing Rights and Evictions, 2000).

³ See, for example, UN-Habitat, *The Challenge of Slums: Global Report on Human Settlements 2003* (Geneva, 2003); UN-Habitat, *Rental Housing: An Essential Option for the Urban Poor in Developing Countries* (Geneva, 2003).

have incorporated these criteria (*see* section 3). Moreover, the United Nations has determined that all persons should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats and that forced evictions constitute a gross violation of human rights, in particular the right to adequate housing.⁴ Indeed, the provision of adequate security of tenure and the prohibition on forced evictions entail an immediate legal obligation to respect and to protect the right to housing.

The positive obligations associated with the right to housing – most notably, the duty progressively to realise the right – are less likely to be justiciable at the national level. However, this duty to fulfil is justiciable under a number of constitutions and has been the subject of some groundbreaking jurisprudence. This chapter sets out the various international legal standards that provide support for the right to housing, as well as jurisprudence that indicates the normative content of the right and the corresponding governmental obligations.

2. KEY INTERNATIONAL LEGAL STANDARDS

The right to adequate housing is recognised in a significant number of the international human rights and humanitarian law instruments listed below, in particular the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights. These include the full-bodied right to housing, as well as inchoate housing rights such as the right to respect for the home⁵ and rights to non-discrimination. The right to housing or references to housing are contained in over 40 percent of national constitutions,⁶ while international treaties expressing the right to housing have been incorporated within the domestic legal order of many newer democracies (*see further* in Chapter 2).

2.1 Express rights in international instruments

International Covenant on Economic, Social and Cultural Rights, 1966

11. (1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁷

International Covenant on Civil and Political Rights, 1966

17.(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons

4 See Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4, The Right to Adequate Housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III, 114 (1991), and *General Comment No. 7, The Right to Adequate Housing: Forced Evictions* (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV, 113 (1997). Reinforcing the importance of the prohibition on forced eviction, the international community in 1993 and again in 2004 held that the practice of forced eviction constituted a gross violation of human rights and, in particular, the right to adequate housing. See United Nations Commission on Human Rights resolutions 1993/77, U.N. Doc. E/CN.4/RES/1993/77 and 2004/28, U.N. Doc. E/CN.4/RES/2004/28.

5 See, for example, Article 17, International Covenant on Civil and Political Rights.

6 See Centre on Housing Rights and Evictions, *Legal Resources for Housing Rights: International and National Standards*, (Geneva, 2000).

7 The right to housing was derived from this provision by the CESCR in General Comment No. 4 (n. 4 above).

equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Convention on the Elimination of All Forms of Racial Discrimination, 1965

5. States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (e) ... (iii) The right to housing.

Convention on the Elimination of All Forms of Discrimination against Women, 1979⁸

2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. ...

14(2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure... to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Convention on the Rights of the Child, 1989⁹

27.(3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

African Charter on Human and Peoples' Rights

[While not containing an explicit clause related to housing rights, the African Commission on Human and Peoples' Rights has held that the African Charter contains a right to adequate housing implicit in the following articles.]¹⁰

14. The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

16.(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

18.(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

European Social Charter, 1961

16. With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

8 Article 13 prohibits discrimination in the area of family benefits, while Article 14(2) obliges States Parties to ensure that women in rural areas benefit directly from social security programmes.

9 Article 14(2) permits the State to take into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.

10 See *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96.

Revised European Social Charter

31. With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- (1) to promote access to housing of an adequate standard;
- (2) to prevent and reduce homelessness with a view to its gradual elimination;
- (3) to make the price of housing accessible to those without adequate resources.

European Convention on Human Rights, 1950

8.(1) Everyone has the right to respect for his private and family life, his home and his correspondence.¹¹

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Charter of the Organisation of American States, 1948

34. The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: ... Adequate housing for all sectors of the population.

American Convention on Human Rights

11.(2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation. (3) Everyone has the right to the protection of the law against such interference or attacks.

21.(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

26. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.¹²

11 The former European Commission of Human Rights held that this provision does not provide a positive right to a home due to the wording of the article; see *X v. Federal Republic of Germany* (1956) 1YB 202; *Y v. Federal Republic of Germany*, App. No. 1340/63; *X v. Federal Republic of Germany* (1967) 23 CD 51; *Smith v. United Kingdom*, App. No. 14455/88. For a brief discussion, see Scott Leckie, 'The Justiciability of Housing Rights' in Fons Cooman and Fried van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht*, SIM Special No. 18, Utrecht, pp. 35-76. This position was affirmed more recently by the Court in *Chapman v. United Kingdom* (2001) 10 BHRC 48, para. 99, where it stated, "article 8 does not in terms give a right to be provided with a home". However, the Court, perhaps in a contradictory fashion, indicated in an earlier judgment that a positive right to a home under Article 8 will arise in some cases; see *Botta v. Italy* (1998) 26 EHHR 241.

12 For example, adequate housing in Article 34(k) of the Charter.

American Declaration of the Rights and Duties of Man, 1948

VIII: Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

XI: Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

XXIII: Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Convention relating to the Status of Refugees, 1951

21. As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

43(1). Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... (d) access to housing, including social housing schemes, and protection against exploitation in respect of rents.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949

49. [In the context of occupied territories:] Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

134. The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

147. Grave breaches ... shall be those involving *any* of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977

69.(1) In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and with-

out any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2.2 Implied right to housing

In the judicial context, the right to housing has been derived from traditional civil and political rights. For example the Supreme Court of India famously declared in the *Olga Tellis* case that “[t]he sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. ... [and in the current case] it is established that if the petitioners, are evicted from their dwellings, they will be deprived of their livelihood.”¹³ In later cases, this Court derived, more explicitly, the right to housing from the right to life,¹⁴ though the extent to which this right carries positive obligations has yet to be fully determined.¹⁵

The African Commission on Human and Peoples’ Rights has derived the right to housing from a range of human rights: “Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing”.¹⁶

3. CONTENT OF THE RIGHT TO ADEQUATE HOUSING

The terms ‘housing’ and ‘adequate housing’ have been the subject of judicial and quasi-judicial interpretation. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) lays the emphasis on the qualifying adjective ‘adequate’ in order to determine a number of universal attributes. It first defined adequate housing in general terms: a place to live in peace, security and dignity. This was followed by a number of specific criteria: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) adequate location; and (g) cultural adequacy.¹⁷ If one analyses these elements, it is clear that the right to ‘adequate housing’ refers to more than mere shelter and requires a certain level of quality (in terms of habitability, services and location), as well as more intangible aspects such as security of tenure, affordability and cultural appropriateness. The South African Constitutional Court came to a similar conclusion:

¹³ *Olga Tellis v. Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351.

¹⁴ *Shanti Star Builders v. Naryan Khimalal Totame & Ors* (JT 1990 (1) S.C. 106, Civil Appeal No. 2598 of 1989); *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors* (1997) 11 SCC 121; *Municipal Council Ratlam v. Vardhichand and others*, AIR 1980 SC 1622. For discussion, see Colin Gonsalves, ‘The Right to Housing: The Preserve of the Rich’, *Housing & ESC Rights Litigation Quarterly*, Vol. 1, Issue 2 (2005), pp. 1-3.

¹⁵ The Supreme Court stated in the earlier case that “[t]he State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21” (*Olga Tellis v. Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351).

¹⁶ Paragraph 60, *SERAC v. Nigeria*, African Commission on Human and Peoples’ Rights, Decision 155/96.

¹⁷ General Comment No. 4 (n. 4 above), para. 8. The CESCR also notes the importance of participatory rights.

The right delineated in s 26(1) [of the Constitution] is a right of ‘access to adequate housing’. ... It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.¹⁸

The CESCR also makes reference to the entitlement to a basic level of housing as a right that all persons possess immediately. (See the discussion below under minimum core obligations in section 4.) On first glance, a minimum level of housing might appear simply to mean a basic structure for protection from the elements, but the other criteria should not be disregarded in relation to minimum entitlements, in particular security of tenure.

These criteria may vary within the context of the relevant ‘housing groups’ or ‘tenure groupings’. For example, the right to *affordable* housing will have different implications for home and structure owners, tenants wishing to remain in the tenancy market, residents in public housing, traditionally nomadic groups and indigenous peoples living on ancestral lands. Other aspects of the right to housing may have different implications for marginalised and vulnerable groups; housing design will need to take account of people with disabilities, elderly persons, or people living with HIV/AIDS in order to ensure *physical accessibility*.

In some cases, it will be important to define the term ‘housing’ without reference to any normative qualification or criteria. This is particularly so in circumstances where a person’s existing home or house is subject to *interference* and a State’s obligations to respect and protect are brought under scrutiny (see section 4 below). The preliminary stage of inquiry in such an instance would address whether the object of the interference – a person’s building, structure, or place of abode – constitutes a home or house, albeit one that may not be adequate. This issue has frequently arisen under the European Convention on Human Rights; the Strasbourg Court has been confronted with claims that ‘planned’ houses, caravans, offices, informal settlements, and rented premises all constitute a ‘home’ that is protected under Article 8 of the Convention: “Everyone has the right to respect for his private and family life, his home and his correspondence”.

Initially, the former European Commission of Human Rights defined a home to be a place where a person lives on a settled basis, which implies a degree of stability and continuity.¹⁹ The Commission declined to give an exhaustive definition, but indicated that the concept depends on the circumstances of each case and the existence of sufficient links between the individual or family and the relevant property.²⁰ In decided cases, this has meant that occupation is more important than ownership. For example, in *Loizidou v. Turkey*, the mere intention of an applicant to build a home on his property in northern Cyprus – an objective frustrated by the Turkish occupation – was held insufficient for the purposes of designating the property a home.²¹ Yet, in *Khatun v. United Kingdom*, the right to non-interference with one’s home was held to cover all occupiers, including partners, children, relatives and lodgers.²² In *Gillow v.*

18 *Grootboom v. Oostenberg Municipality (South Africa)* 2001 (1) SA 46 (CC), pp. 66-67. Oddly, perhaps, they Court viewed this definition to be different from the CESCR definition.

19 *Wiggins v. United Kingdom* (1978) 13 DR 40.

20 See *Buckley v. United Kingdom* (1995) 19 EHRR CD20. See comments on this aspect in Christopher Baker, David Carter and Caroline Hunter, *Housing and Human Rights Law* (London: LAG Books, 2001), p. 20.

21 (1995) Series A No. 310; 20 EHRR 99. The Court stated “it would strain the meaning of the notion of ‘home’ in article 8 to extend it to comprise property on which it was proposed to build a property for residential purposes”.

22 (1998) 26 EHRR CD 212.

United Kingdom, the Court was prepared to endorse the applicant's claim that the applicant's house in Guernsey was a home, despite the applicant's absence for 18 years from the island, because the applicant had maintained 'sufficient continuing links' with the property: the applicant had retained ownership, left furniture and always intended to return.²³

Other cases have raised questions about traditional or conventional notions of home.²⁴ In a case concerning groups with a traditional nomadic lifestyle, the European Court of Human Rights, in *Chapman v. United Kingdom*, strongly affirmed that a caravan may constitute a home.²⁵ Whether this ruling would apply to all persons whose prime place of occupation was a moveable home is not yet clear. In *Khanthak v. Federal Republic of Germany*, the former European Commission of Human Rights left open the question of whether a camper van constituted a home. However, the more principled approach by the Court seems to indicate that the type of structure is irrelevant: it is the person's relationship to that structure and place that is important. Therefore, it would clearly be arguable that, for homeless persons, a regular place or regular places for 'sleeping rough' would constitute a home.²⁶ Furthermore, even the illegality of the home – on account of zoning laws, trespass laws – has been held irrelevant by the Court, although the basis for the illegality may influence the extent of a government's obligations.²⁷ The issue was raised in *Öneryildiz v. Turkey*; which involved the homes of slum-dwellers that had been razed by an avoidable gas explosion, but the Court decided to address the issue under the right to life and the property rights of the residents to their housing 'structures' and avoided the Article 8 issue.²⁸

3.1 The legal security of tenure

The first element of the right to adequate housing is security of tenure according to the CESCR. The precise definition of tenure is somewhat elusive, as the following attempt by Geoffrey Payne makes clear: "Tenure can refer to how land is held or owned, or the set of relationships among people concerning the use of the land, which can vary considerably between different cultural and economic contexts".²⁹ For the CESCR, it takes a variety of forms, including "rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property". By covering the full spectrum of tenure types, the universal importance of a sufficient degree of secure tenure for human dignity is highlighted. In seeking to define the nature of security of tenure, the CESCR focuses on harassment and other threats, as well as the most obvious threat to security of tenure — forced evictions.³⁰ A 'forced eviction' is defined as a permanent or temporary removal against the will of individuals, families, or communities from the homes or lands they occupy, without the provision of or access to appropriate forms of legal or other protection.³¹

23 (1986) Series A, No. 109; 11 EHRR 335.

24 The term home has sometimes been used to include an office; see *Niemetz v. Germany* (1992) Series A, No. 251-B; 16 EHRR 97. The French text of the Convention uses the word *domicile*, which has a broader meaning than home in English.

25 *Chapman v. United Kingdom* (2001), Judgment dated 18 Jan. 2001 (2001) 33 EHRR 18.

26 For instance, the US case of *Pottinger v. City of Miami*, 810 F. Supp. 1551 (1992), 16 Nov. 1992.

27 In *Chapman v. United Kingdom* (n. 25 above), the Court found that planning laws denying the right of the applicant to base her caravan on her property were a justified interference with her home. South African courts have come to more sympathetic conclusions in relation to illegal occupation; see *Port Elizabeth Municipality v. Various Occupiers* (1) 2005 SA 217 (CC).

28 *Öneryildiz v. Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002. See comment in Malcolm Langford, 'Slum-Dwellers Rights to Life and Property', *ESC & Housing Rights Case Law Update*, No. 1, May 2004.

29 Geoffrey Payne, 'Safe as Houses?: Securing Urban Land Tenure and Property Rights', *Insights Development Research*, Oct. 2003.

30 In *Krueger v. Cuomo*, No. 96-2906 (7th Cir. 3 June 1997), the US Seventh Circuit affirmed a US\$10 000 civil penalty against a landlord who sexually harassed a section 8 tenant. The arrests of homeless men in public places for offences such as 'sleeping in public' have been struck down as inconsistent with various civil rights; see *Pottinger v. City of Miami*, 810 F. Supp. 1551 (1992), 16 Nov. 1992.

31 See General Comment No. 7 (n. 4 above).

In litigation, most decisions have revolved around actual cases of threatened or past evictions (see the analysis of cases in section 4.2 below). Fewer cases have sought to challenge legislation or practice that leaves certain categories of occupiers more vulnerable to threats of evictions. One instance is the Canadian *Dartmouth* case, where the Nova Scotia Court of Appeal struck down a tenure law that discriminated between public and private tenants.³² The legislation provided security of tenure to tenants in private housing after five years of tenancy, but did not extend the same protection to public housing tenants. The applicant, a black woman relying on welfare benefits, successfully claimed that the law resulted in indirect discrimination on the basis of sex, race and income. The law was more likely to adversely affect those groups since they had less chance of accessing rental housing in the private market. In *Larkos v. Cyprus*, the European Court of Human Rights was confronted with a distinction between private tenants and civil servants who rented from the government: the latter were provided less security of tenure after the expiry of leases despite the private nature of the contract. The Court found that no legitimate aim for the distinction could be identified, and no reasonable and objective criteria for the distinction had been established.³³

3.2 Availability of services, materials, facilities and infrastructure

The CESCR definitively moves past the traditional ‘bricks and mortar’ characterisation of housing by noting that adequacy entails “certain facilities essential for health, security, comfort and nutrition.” More specific articulation is then offered in relation to a number of services and facilities: everyone has the right to sustainable access to “safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”³⁴ An opaque mention is also made to the right to “sustainable access to natural and common resources”. Presumably, this refers to the situation of rural or poor urban communities that rely on self-help measures or individual agreements with resource owners to secure access, for example, to water and timber resources to provide for basic water and energy needs, or the access by Indigenous peoples to land.

Many of these elements may be derived from a number of other social rights, particularly the right to adequate food,³⁵ the right to water³⁶ and the right to health,³⁷ and emergent rights to sanitation³⁸ and energy.³⁹ For example, an Argentine court applied CESCR General Comment No. 15 on the Right to Water and ordered that:

The municipality of Córdoba adopt all of the measures necessary relative to the functioning of the [faulty sewer treatment facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94.⁴⁰

32 *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).

33 (2000) 30 EHRR 597.

34 See General Comment No. 4 (n. 4 above), para. 8.

35 See CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999).

36 See CESCR, *General Comment No. 15, The Right to Water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003). For discussion of the case law on the right to water, see Malcolm Langford, Ashfaq Khalifan, Carolina Fairstein and Hayley Jones, *The Right to Water: National and International Standards* (Geneva: Centre on Housing Rights and Evictions, 2004), chap. 5, www.cohre.org/water

37 CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000).

38 See *Final report of the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation*, 14 July 2004, E/CN.4/Sub.2/2004/20.

39 See Adrian Bradbrook, and Judith Gail, ‘Placing Access to Energy Services within a Human Rights Framework’, *Human Rights Quarterly*, Vol. 28, No. 2 (2006), pp. 389–415.

40 See Romina Picolotti, ‘The Right to Safe Drinking Water as a Human Right’, *Housing and ESC Rights Quarterly* Vol. 1, No. 4 (2005), p. 1.

The Supreme Court of the Philippines has recognised “the right of our people to electricity and to be reasonably charged for their consumption”, noting the “right to electricity” as an “economic right to a basic necessity of life”. They further held that “[w]hen private property is used for public purposes and is affected with public interest, it ceases to be *juris privati* only and becomes subject to regulation.”⁴¹ The Indian Supreme Court has upheld claims for access to sanitation services and site drainage. In *Municipal Council Ratlam v. Vardhichand*, the Court approved a lower court order directing a municipality to take immediate action within its statutory powers to construct a sufficient number of public latrines, provide water supply and scavenging services, construct drains and cesspools and supply basic amenities to the public.⁴²

3.3 Affordability

Affordability has been defined by the CESCR to denote a level of “personal or household financial costs associated with housing” that does not compromise the attainment of other basic needs.⁴³ Determining such a ‘housing poverty line’ is not a simple task, given that affordability is variable and dependent on income, the price of housing and related services and the price of the basket of goods necessary to satisfy all social rights. High housing prices may be affordable if incomes are high or the prices of other basic goods are low. Despite the conceptual difficulties, courts are frequently called upon to calculate the affordability of goods such as housing, food and water, particularly in cases of bankruptcy and applications for bail and debtor relief. Judicial bodies that have some awareness of local factors are able to make such determinations.

Others have recommended a more objective or standardised approach to calculating affordability, for example, housing costs should not exceed a third of total income. Such indicators might be useful as a *prima facie* measurement of housing affordability, but should never be used in a definitive or absolutist manner. Paradoxically, such indicators have been used by landlords to deny poorer tenant-applicants access to rental housing, and, in Canada, a human rights commission struck down this practice, noting that there was no evidence showing that poorer tenants, in practice, were more likely to default on rental payments.⁴⁴

3.4 Habitability

Poor quality housing is commonly associated with higher mortality and morbidity rates.⁴⁵ According to the CESCR, adequate housing must be habitable in terms of adequate space, as well as protection from the cold, damp, heat, rain, wind, or other threats to health, structural hazards, and disease vectors.⁴⁶ The internal quality of housing is commonly a subject of dispute between tenants and landlords, though it has been raised in the context of informal settlements and emergency accommodation.⁴⁷ Environmental and external health threats concern all categories of occupiers (see discussions below under 3.6 Location).

41 The Court ordered the electric company to refund to all its customers the excess amounts it had collected from them since Feb. 1994. See *Republic of the Philippines, represented by Energy Regulatory Board v. Manila Electric Company*, G. R. No. 141369 (15 Nov. 2002); *Resolution on Motion for Reconsideration* (9 Apr. 2003).

42 AIR 1980 SC 1622.

43 See General Comment No. 4 (n. 4 above), para. 8.

44 See *Kearney & Ors v. Bramlea Ltd & Ors*, Board of Inquiry, Ontario Human Rights Code, Canada.

45 See General Comment No. 4 (n. 4 above), para. 8, quoting the World Health Organisation.

46 Ibid.

47 See *Grootboom v. Oostenberg Municipality (South Africa)* 2001 (1) SA 46 (CC); *A.F.A.P.S. v. Regulations and Permits Administration*, 740 F Supp 95 (D Puerto Rico, 1990).

The ability of tenants to challenge poor quality housing conditions has largely been dependent on legislative and contractual provisions. The issue was raised before the US Supreme Court in *Lindsey v. Normet*,⁴⁸ where the appellants, month-to-month tenants, refused to pay their monthly rent unless certain substandard conditions were remedied. Although the tenants were successful on a number of procedural issues, the Court held that there was no right to adequate housing in the United States Constitution, nor, more accurately, a right to a certain quality of housing, and this prevented the applicants from raising the issue.

3.5 Accessibility

The use of the phrase ‘everyone’ in international human rights instruments, as well as the more specific right to non-discrimination for certain groups, requires that adequate attention be given to disadvantaged groups that may have difficulty in securing sustainable access to adequate housing resources or may simply have different requirements. Thus, the CESCR has emphasised that groups such as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere.⁴⁹ In many cases, this will require access to adequate land for the right to housing.⁵⁰

Judicial experience with anti-discrimination law has meant that courts are perhaps more open to claims regarding different physical accessibility requirements, particularly in the area of disability. Landlords have been ordered to accommodate a tenant’s mental disability before proceeding with an eviction.⁵¹ In *Botta v. Italy*, the European Court of Human Rights held that the right to private life implies a positive obligation on States to take account of a person’s housing conditions with regard to their “physical and psychological integrity”.⁵² A serious disability or handicap may create a positive right to a home according to the Court. However, in that case, the demand for sanitation facilities and ramps at a seaside location for the purposes of a holiday purportedly stretched the link between access to necessary services and respect for private life. In *Henrietta D*, the Supreme Court of the State of New York ruled in favour of seven homeless persons with HIV/AIDS who were provided housing that fell below the standards of local laws.⁵³

3.6 Location

The location of housing affects access to essential services, as well as employment options, health-care services, schools, child-care centres and other social facilities. The CESCR has emphasised that the site of housing must not inhibit access to such services and facilities and that the temporal and financial costs of getting to and from the place of work should not place excessive demands upon the budgets of poor households.⁵⁴ The issue frequently arises in disputes over the adequacy of resettlement facilities following mass evictions. The analogous issue of the location of schools and the corresponding transport costs has been dealt with by the Colombian Supreme Court in the context of the right to education.⁵⁵

48 405 US 56 (1972).

49 See General Comment No. 4 (n. 4 above), para. 8.

50 In relation to indigenous people, see *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights Series C, No. 79, 31 Aug. 2001. In relation to those living in informal settlements, see *Grootboom v. Oostenberg Municipality (South Africa)*, 2001 (1) SA 46 (CC).

51 *City of Phoenix v. Roberts*, No. CV 98-15151 (Arizona Supreme Court, Maricopa County, 14 Dec. 1998).

52 *Botta v. Italy* (1998) 26 EHHR 241.

53 11 Sept. 2002. See the comment in Benjamin Ryan, ‘A Housing Works Win: Major Court Victory for Homeless New Yorkers with AIDS’, *Health/AIDS & Housing*, Vol. 1, No. 17, 20-26 Sept. 2002.

54 See General Comment No. 4 (n. 4 above), para. 8.

55 *Decision T-170/03 [Mora v. Bogotá District Education Secretary & Ors]*, Colombia Constitutional Court, Decision T-170/03, 28 Feb. 2003. The Court found that the right to education was violated since the education system did not take into account the mother’s lack of income – there were transport costs in sending the child to school – and the time taken to bring her daughter to the assigned school.

The CESCR has also stated that housing should not be built on polluted sites nor in immediate proximity to sources of pollution that threaten the right to health of the inhabitants. Environmental threats to housing and residents have frequently been held to violate various human rights norms, which is not surprising since the threat is more public and identifiable and often affects wealthier and poor residents alike. This has included protection from air pollution,⁵⁶ water pollution,⁵⁷ and noise pollution⁵⁸ and more specific threats such as potentially explosive methane gas in garbage dumps.⁵⁹

3.7 Cultural adequacy

It is perhaps trite to acknowledge that housing design varies widely across nations and States, but that housing policies rarely take account of traditions or diversity. The CESCR has noted that the way housing is constructed, the building materials used and the supporting policies must appropriately enable the expression and support of cultural identity as well as diversity of housing.⁶⁰ The CESCR does not address the requirements of non-sedentary housing, though it notes the issues in General Comments in relation to access to water.⁶¹ The European Court of Human Rights, in contrast, has dealt with the issues in relation to Gypsies and other traditionally nomadic groups:

[T]he vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases. ... To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life. ... It is important to appreciate that, in principle, Gypsies are at liberty to camp on any caravan site which has planning permission; there has been no suggestion that permissions exclude Gypsies as a group. They are not treated worse than any non-Gypsy who wants to live in a caravan and finds it disagreeable to live in a house. However, it appears from the material placed before the Court, including judgments of the English courts, that the provision of an adequate number of sites which the Gypsies find acceptable and on which they can lawfully place their caravans at a price which they can afford is something which has not been achieved.⁶²

56 *López Ostra v. Spain* (1994) Series A, No 303-C (1995), 20 EHRR 277 (European Court of Human Rights); *Guerra v. Italy* (1998), 26 EHRR 357 (European Court of Human Rights); *M. C. Mehta v. Union of India & Ors (Shiram Case)* 1986 (1) SCALE 30 (Writ Petition, No. 12739 of 1985 Supreme Court of India); *M. C. Mehta v. Union of India & Ors (Vehicular Pollution Case)* 1999 (3) SCALE 166 (Supreme Court of India); *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96. A number of cases have been unsuccessful in relation to evidence: *Khatun v. United Kingdom* (1998), 26 EHRR CD 212 (European Court of Human Rights); *Moe v. Norway*, App. No. 32549/96 (European Court of Human Rights).

57 *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96; *Menores Comunidad Paynemils/accion de amparo*, Expte. 311-CA-1997. Sala II. Camara de Apelaciones en lo Civil, Neuquen, 19 May 1997.

58 *Aronelle v. United Kingdom* (1982), 26 DR 5 (European Commission of Human Rights).

59 *Öneryıldız v. Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002.

60 See General Comment No. 4 (n. 4 above), para. 8. In relation to State obligations, it notes that "[a]ctivities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured."

61 General Comment No. 15 (n. 36 above).

62 *Chapman v. United Kingdom* (n. 25 above), paras. 96-97.

4. STATE OBLIGATIONS

4.1 Non-discrimination and equality

Many housing rights violations may be traced to discriminatory conduct and effect. Various treaties oblige States Parties to ensure that all groups enjoy access to and enjoyment of the treaties regardless of race, colour, sex,⁶³ language, religion, political or other opinion, national or social origin, property, birth or other status (see *above* in Chapter 1). In some jurisdictions, ‘source of income’⁶⁴ or ‘receipt of public assistance’ is a prohibited ground for differentiation. This represents an important right for tenants and prospective homeowners who are often discriminated against on this basis.

While direct discrimination – whether *de jure* or through express orders – is commonly found in the tenancy and loan markets, zoning regulations and provisions for housing subsidies, the enactment or latent application of discrimination laws at the national level has increasingly allowed tenants and public regulatory agencies to challenge the activities of private actors in the housing market. The range of possible applications may be seen in US jurisprudence, for example. A property owner who required that property managers not rent to prospective black tenants was ordered to pay punitive damages.⁶⁵ A court order on the closing of a home for an elderly disabled person – after an application was made by neighbours – was struck down on appeal for discriminating on the basis of disability.⁶⁶ Homeless shelters for women in New York were ordered to provide the same standard for women as men.⁶⁷ Landlords were prevented from refusing to rent to ‘unmarried cohabitants’.⁶⁸

Elsewhere, Greek regulations permitting the eviction and settlement of itinerant groups were amended to exclude the specific targeting of Roma after a legal challenge was brought to the European Committee of Social Rights.⁶⁹ The explicit exclusion of aliens – particularly migrant workers and asylum seekers – from social services, including housing, has been a subject of significant litigation and international quasi-judicial comment. The European Committee has extensively reprimanded States for exclusion actions in the field of housing, including access to public housing and the purchase of real estate, particularly since Contracting States have an express duty to provide equal access to such services to migrants from other Contracting Parties under the European Social Charter.⁷⁰

The right to non-discrimination often requires States not only to abstain from discriminatory practices and legislation, but to eliminate practices and policies that have a discriminatory effect or impact. It thus includes the duty to prevent indirect discrimination and to take affirmative action or steps towards equality to ensure that vulnerable and marginalised groups may enjoy the right to adequate housing. In some cases, this prohibition on indirect discrimination is expressly prohibited, for example, the International Convention on the Elimination of Racial Discrimination (ICERD), while, in other treaties, it

63 See also Chapters 1 and 3.

64 The Chicago Fair Housing Ordinance, for example, prevents landlords from refusing to receive section 8 vouchers (a form of social security assistance) from tenants. For an application of the provision, see *Smith v. Willmette Real Estate and Mtg. Co.*, No. 95-H-159, No. 98-H-44/63 (City of Chicago Commission on Human Relations, 13 Apr. 1999).

65 *United States v. Big D Enters.*, 184 F.3d 924 (8th Cir. 1999).

66 *Casa Marie, Inc v. Superior Court of Puerto Rico*, 752 F Supp 1152 (D Puerto Rico, 1990).

67 *Eldredge v. Koch* (New York, 1983). The judgment therefore applied the substance of the *Callahan v. Carey* consent decree to women. The consent decree was a settlement of a claim brought by homeless men for the right to shelter; see *Callahan v. Carey*, N.Y. 2d (New York, 1979).

68 *McCready v. Hoffius*, 586 N.W. 2d 723 (Mich. 1998). Unmarried couples are protected under the Michigan Civil Rights Act.

69 See *European Roma Rights Centre v. Greece*, Complaint No. 15.

70 For an overview of concluding observations on migrants and housing, see Scott Leckie, ‘The Justiciability of Housing Rights’ in Fons Cooman and Fried van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht*, SIM Special No. 18, Utrecht, pp. 35-76.

has been implied. It is notable that ICERD, in Article 3, also requires States Parties to “particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” Segregation is a common result of forced eviction of ethnic minorities from their housing.

In one of the most notable cases concerning indirect discrimination, a Canadian human rights commission in *Kearney v. Bramlea* examined whether the use of a 30 percent rent-to-income ratio to screen prospective tenants had a discriminatory impact on groups with lower incomes: namely, women, single people, racial minorities and those receiving public assistance.⁷¹ The applicants first demonstrated that the rule could not be objectively justified: there was no evidence to show that poorer tenants were more likely to default if they paid higher relative rents, even though such rents were ‘unaffordable’. The application of the rule in the tenancy market was found to discriminate indirectly on the basis of sex, marital status, race and income.

The exclusion by landlords of applicants receiving certain social security benefits has similarly been held discriminatory in the United States. In *Green v. Sunpoint Assocs.*, the landlord’s policy was held to have a disparate impact on African-Americans, women and children.⁷² In the *Mt. Laurel* case, zoning regulations and building codes that prevented the development of low- and middle-income housing were also held to violate equal protection laws for similar reasons.⁷³ However, not all such cases of indirect discrimination have been successful. The US Supreme Court has ruled that there must be racially discriminatory intent – and not merely effect – before a finding of indirect discrimination has been made. In *Arlington Heights*, the Court declined to order the local housing authority to change its zoning laws to allow multi-family residences that would have enabled the construction of apartments for a racially diverse group of tenants.⁷⁴

The duty to take positive steps towards ensuring equality – including the policy of affirmative action – has been made justiciable in a number of cases. At the national level, however, this has sometimes required that there be specific legislation, specific reference to equality in the formulation of the right, the obligation to take positive steps for ESR (see below), or evidence of historical disadvantage. A number of international treaties are nonetheless quite specific on the duty to take positive action (see Chapter 3). In *Jaimes v. Toledo Metropolitan Housing Authority*, a class action suit by low-income minorities successfully obtained orders providing that the public housing agency was responsible to redress its past racially discriminatory practices.⁷⁵ The agency had decreased access to public housing through segregation policies. The agency was ordered to prepare an affirmative action plan.

4.2 Obligations to respect

The CESCR has reiterated, in General Comment No. 4, that “[R]egardless of the state of development of any country, there are certain steps which must be taken immediately. ... many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices”.⁷⁶ Indeed, principles of international human rights law require that the obligation to respect and protect persons from forced eviction have *immediate* effect. In such a context, the obligation to respect is readily justiciable.

71 *Kearney & Ors v. Bramlea Ltd & Ors*, Board of Inquiry, Ontario Human Rights Code, Canada.

72 *Green v. Sunpoint Assocs., Ltd.*, No. C96-1542C (W.D. Wash. 12 May 1997).

73 *Southern Burlington County NAACP v. Township of Mount Laurel (Mt. Laurel I)*, 67 N.J. 151(N.J. 1975).

74 *Arlington Heights v. Metropolitan Housing Corp.*, 429 US 252 (US 1977).

75 758 F.2d 1086 (1985).

76 CESCR, General Comment No. 4 (n. 4 above).

One such practice that governments are obligated to abstain from is forced eviction. In General Comment No. 7, the CESCR has elaborated on the various criteria that must be satisfied in order for an eviction to comply with the right to housing. The stipulations essentially fall into a three-fold typology: substantive justification, due process and the right to alternative accommodation.

In the first category, the CESCR has offered only a broad indication of the principles that should guide States Parties in determining the conditions under which an eviction might proceed. In General Comment No. 4 (para 18) they stated that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”, and later that, “some evictions may be justifiable, such as in the case of the persistent non-payment of rent or of damage to rented property without any reasonable cause” (General Comment No. 7: para. 12). On one hand, this opacity is certainly unsatisfactory, particularly since States do look for guidance regarding the circumstances in which evictions may be carried out. The two examples offered above are nevertheless consistent with the jurisprudence on the interpretation of the European Convention on Human Rights, and, interestingly, British courts have noted that national legislation may have to be reviewed more strictly, for example, strict liability that is imposed on tenants for anti-social behaviour for the conduct of others on the rented property.⁷⁷ However, the CESCR appears to avoid some of the other issues that frequently arise. For example, under what conditions might an informal settlement illegally occupying land be evicted? May tenants and property owners avoid eviction if they are unable to afford the rent or mortgage payments? What rights do owner-occupiers have against the expropriation of land and housing for ‘development’ purposes? The European Court of Human Rights, while concerned with a more emasculated right to housing, at least queries whether the interference has a legitimate aim and whether it is proportionate to that aim. In fairness to the CESCR, these issues are occasionally dealt with in their Concluding Observations,⁷⁸ and the CESCR does not yet have the benefit of an individual complaints mechanism.

On the other hand, the CESCR, to a large extent, addresses these concerns through its procedural categories, which provide a series of protections to reduce the chances that residents are deprived of their existing housing or are rendered homeless by the evictions. This is largely the approach that has been adopted by South African courts. It allows them to acknowledge, at a general level, the illegitimacy of some of the actions of residents, while including in the judicial equation countervailing factors to ensure that the housing rights aspects of the situation are acknowledged. In *Modderklip*, the South African Supreme Court of Appeal stated, in relation to the eviction of an informal settlement of 40 000 people, as follows:

[T]he Constitutional Court had said in *Grootboom* “...People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated ... [but] ... [u]nless they [the residents in the informal settlement] can be relocated sensibly ... the simple expedient of executing the court order [for eviction] simply does not exist.”⁷⁹

However, one clear omission in the General Comment is the question of indirect evictions, including ‘market’ and constructive evictions. For example, many evictions result from cuts to social security benefits, a matter over which governments have a large degree of control. Furthermore, the failure of

77 See *Portsmouth CC v. Bryant* (2000) 32 HLR 906.

78 See www.cohre.org/litigation for a list of all Concluding Observations on housing by the CESCR.

79 *Modderklip v. South Africa & Ors* (Supreme Court of Appeal of South Africa, Decision of 27 May 2004), paras. 16-17. But see discussion on the appeal Court’s finding in section 4.3 below.

governments to regulate broad market forces, for example, gentrification or even a slum-upgrading programme, may lead to evictions as formal and informal owners use the improved conditions to evict tenants in order to secure higher rents. Constructive evictions may occur when governments force tenants to move, for example, by cutting off water supplies.

In relation to due process, the CESCR has been more specific, stating:

14. States parties shall ensure, prior to carrying out evictions, and particularly those involving large groups of people, that all feasible alternatives are explored in consultation with affected persons ... 15. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. ... 16. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

Lastly, with respect to the right to alternative accommodation, the CESCR strongly states that no person should be rendered homeless as a result of an eviction. States are accordingly obliged to provide alternative accommodation to the maximum of their available resources. Such an obligation may appear onerous for developing countries, for instance, but the duty is tempered by an acknowledgement of resource constraints, and, in any case, solutions have been developed to ensure that other housing may be provided.⁸⁰

Regional human rights tribunals have reached similar conclusions to CESCR. The case of *SERAC v. Nigeria*⁸¹ provides a good example. The African Commission on Human and Peoples' Rights was confronted with a range of complaints, including the forced eviction and destruction of housing in several Ogoni villages by State security forces working in concert with the State-owned Nigerian National Petroleum Company.⁸² The Commission implied the right to housing from other provisions in the African Charter and continued by finding that "the particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions" [para 63]. In doing so, the Commission drew "inspiration from the definition of the term 'forced evictions' by the Committee on Economic, Social and Cultural Rights" in General Comment No. 7 on the prohibition of forced evictions [para 63].

⁸⁰ See, for example, sections 5 and 6, Homelessness (Scotland) Act 2003; *ASK v. Government of Bangladesh* (Supreme Court of Bangladesh, 1999).

⁸¹ *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96; European Court of Human Rights, *Akdivar and Others v. Turkey*, App. No. 00021893/93, Judgment, 16 Sept. 1996.

⁸² The case also involved forced evictions and other human rights violations by Royal Dutch Shell Corporation and thus a violation by the Government of Nigeria of its obligation to protect the Ogoni people from human rights violations at the hands of a non-State actor.

The European Court of Human Rights has also been faced with a series of cases concerning eviction. Cases of destruction or confiscation of personal property – immovable and movable – by State officials and agents have usually been successful.⁸³ The protection of possessions under Article 1 of Protocol 1 to the European Convention makes such decisions straightforward. However, the Court looks carefully at whether there is a legitimate aim for the action that may be objectively justified (see Chapter 20). However, decisions concerning other types of tenure tend to provide mixed results. This is because the relevant provision – the right to respect for the home, privacy and family life – is not as strong, perhaps, without the explicit recognition of the right to adequate housing.⁸⁴ On the one hand, where the eviction will result in the strong likelihood of homelessness, the Court appears to examine closely the justification for the action. In *Marzari v. Italy*, considerable weight seems to have been attached to the efforts by the public authorities to finding a disabled tenant alternative accommodation.⁸⁵ On the other hand, the Court was only partly moved by the plight of Gypsy families in England that were denied planning permission on environmental grounds to locate their caravans on their own property, and refrained from interfering with the decision of local authorities.

In jurisdictions where the right to housing has been constitutionally entrenched, it is clear from the case law that the prohibition on forced eviction tends to be more compelling. In South Africa, it has been held that, even in cases of mortgage default, creditors must obtain a court order for eviction, and the vulnerability of the residents must be taken into account.⁸⁶ In India, however, where the right to housing is derived from a civil and political right, courts have been less willing to impose the right to alternative accommodation, although that may soon change.⁸⁷

The situation is even more mixed in countries such as the United States where victims of forced eviction may only resort to due process provisions. Federal legislation in the United States permitting the eviction of tenants on account of a drug offence committed on the premises – with or without the knowledge of the tenant – was upheld by the Supreme Court,⁸⁸ despite contrary decisions by state courts on similar legislation.⁸⁹ Compensation was awarded though to a tenant whose water was shut off in order to evict her.⁹⁰

Evictions are not the only examples of violations of the duty to respect. Denial of access to public housing schemes has been struck down when the criteria have been arbitrary, for example, the mere existence of a criminal record.⁹¹

83 See, for example, *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96; European Court of Human Rights, *Akdivar and Others v. Turkey*, App. No. 00021893/93, Judgment, 16 Sept. 1996.

84 For a similar conclusion, see Christopher Baker, David Carter and Caroline Hunter, *Housing and Human Rights Law* (London: LAG Books, 2001), 34. 85 (1999) 28 EHRR CD 175.

86 See *Ndlovu v. Ngcobo, Bekker & Bosch v. Jika*, South Africa, Supreme Court of Appeal, Cases No. 240/2001 and No. 136/2002, 30 Aug. 2002 (unreported).

87 The Supreme Court of India in *SAHAJ v. Vadora Municipal Corporation* (19 Dec 2003) accepted that the petitioners had made a *prima facie* case that demolition of 'hutments' without the provision of alternative accommodation violated the right to housing and shelter in the Constitution.

88 *Rucker v. Davis*, No. 00-1770, 00-1781 (US 26 Mar. 2002).

89 See *Housing Authority of the City of Pittsburgh v. Fields* (No. 79 C.D. 2000); *Housing Authority v. Thomas*, 723 A.2d 119 (New Jersey Supreme Court, Appeal Division, 1999); *Woodland Manor Apartments v. Flowers*, No. 96-C-0201 (Pa. CP, Lehigh County 4 Nov. 1998); *Owner's Management v. Moore*, No. L-95-259 (Ohio Ct. Appeal, 21 June 1996); *Village West Apartments v. Miles*, No. 95-XX-0001 (Ky. Cir Ct. Jefferson County, 10 July 1995); *Syracuse Housing Authority v. Boule*, No. 96/2160LT (N.Y. City Court, Onondaga County, 23 Dec. 1996).

90 See *Runyon v. Irwin*, No. 94 CVF200 (Washington, Ohio, House Mun. Ct., 17 July 1995).

91 *Bonner v. Housing Authority of Atlanta*, Ga. No. 1:94-CV-376-MHS (N.D. Ga., 11 Oct. 1995).

4.3 Obligation to protect

Like the obligation to respect, the obligation to protect is one of immediate effect and thus readily justiciable, though if the positive steps required were resource-intensive the obligation would be qualified by the maximum available resources of the State. This obligation not only entails protecting individuals and communities from violations of housing rights by non-State actors, but also requires the investigation and prosecution of perpetrators of such violations and the provision of legal and other remedies to victims.⁹² Furthermore, governments are obliged to ensure that persons do not suffer on account of discrimination in the area of housing and must regulate the practices of private actors in order to ensure that they do not have a discriminatory intent or effect.

The case of *Hajrizi Dzemajl et al. v. Yugoslavia*,⁹³ decided by the Committee against Torture, provides one example. This case involved the failure of Government authorities to protect the residents of a Roma settlement from forced eviction and the destruction of housing at the hands of non-Roma members of the community. The complainants were residents of the Romani settlement (known as Bozova Glavica) in the city of Danilovgrad. The community received threats that they would be forcibly evicted if they did not leave. These threats were reported to the local police, who advised the Roma residents to evacuate the settlement immediately as they could not guarantee their protection. Soon after, the settlement was burned to the ground by a non-Roma mob. Using an analysis similar to that of the European Court of Human Rights,⁹⁴ the Committee held that the failure to protect the residents amounted to cruel, inhuman and degrading treatment in violation of Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee took into account the presence of older residents within the buildings and the racial motivation of the acts. According to the Committee, the failure of the police to take steps to protect the residents, although the police were fully aware of the potential risk to them, amounted to ‘acquiescence’ under Article 16 of the Convention. This article obliges States Parties to prevent acts of cruel, inhuman or degrading treatment that do not amount to torture. This duty only extends to acts committed at the instigation or with the consent or acquiescence of a person acting in an official capacity. The Committee also found the resulting investigation and failure to prosecute those responsible inadequate under Articles 12 and 13.

At the national level, the obligation to protect was indirectly addressed in the South African case of *Modderklip*. A private landowner sought to evict 40 000 persons from an informal settlement that had grown on his property. Invoking the right to property and other human rights, he argued that the Government had an obligation to carry out a court-ordered eviction of the settlers. The sheriff had refused to execute the order without payment of a deposit of 1.8 million Rands, an amount the landowner could not afford. The Supreme Court of Appeal of South Africa emphasised that, while the landowner had the right to the use of his property, the “occupiers have a right of access to housing under section 26(1) [of the Constitution].” They concluded that, in these difficult circumstances, the only solution was the provision of land for the occupiers either through State expropriation (with compensation) of the land or provision of alternative land. The Court was willing to place this burden upon the Government for a number of reasons despite concerns about ‘queue-jumping’: i.e., illegal occupation of land in order to gain priority in housing plans. First, the Court noted that the authorities (local, provincial and national) had been failed in their obligations towards the occupiers; the community had not been

92 The African Commission, in *SERAC v. Nigeria*, offered the following definition: At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and the provision of effective remedies. This obligation requires that the State take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework through an effective interplay of laws and regulations so that individuals will be able freely to realise their rights and freedoms. Decision 155/96, para.46.

93 *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2 Dec. 2002).

94 See, for example, *Selçuk & Asker v. Turkey*, 12/1997/796/998-999, paras. 74-78.

not included in housing plans in accordance with the *Grootboom* judgment (*see further below*). Second, the local authority had not intervened at an earlier stage to prevent the occupation when it might have done so (in fact, it resulted from an earlier eviction by the local authority of occupiers on public land).

However, on appeal, the Constitutional Court took a different approach and did not examine the issues from the perspective of conflicting property rights and housing rights.⁹⁵ It invoked the principle of the rule of law and the right of access to courts in the Constitution, and determined that the State had failed to take reasonable steps to assist the landowner to secure his property rights and simultaneously avoid the large-scale social disruption caused by the eviction of a large community who would otherwise be made homeless. The Court did say that “The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected.”⁹⁶ The State was constitutionally obliged to take reasonable steps to ensure that Modderklip was provided with effective relief. It could have done so by expropriating the property in question or by providing other land. It had not done so and thus violated Modderklip’s right to an effective remedy. The Court upheld the award of compensation to Modderklip made by the Supreme Court of Appeal (who had held that the State had violated the landowner’s rights to equality and property) as “*appropriate relief*” for violation of its constitutional rights. Such compensation would be offset against any compensation to be given were the State to expropriate the land.

The duty to take positive measures to protect the right to housing extends beyond forced evictions. The European Court of Human Rights has regularly found that governments have failed to protect residents from environmental threats, thereby violating the right to respect for home, family and private life. In the *López Ostra* case, the Court concluded, in relation to air pollution from a waste-treatment plant, that:

46 ... [t]he applicant had complained of a situation which had been prolonged by the municipality’s and the relevant authorities’ failure to act.... 47. Mrs López Ostra maintained that, despite its partial shutdown on 9 September 1988, the plant continued to emit fumes, repetitive noise and strong smells, which made her family’s living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed. ...

58. [D]espite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.⁹⁷

95 See *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC).

96 *Ibid.* para. 49.

97 *López Ostra v. Spain*, (1994) Series A No 303-C; (1995) 20 EHHR 277, para. 58.

Governments would also have the duty to ensure that rent levels are affordable. The CESCR has stated:

States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.⁹⁸

4.4 Obligation to fulfil

Progressive realisation

States have an obligation progressively to realise the right of adequate housing by taking steps towards that goal. The CESCR has interpreted this obligation to require States to satisfy a number of criteria before they claim to have undertaken the obligation in good faith:

While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, “defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures”.

However, the obligation to fulfil housing rights without discrimination and to take steps is one of immediate effect. Steps should be taken to ensure that all aspects of the right to housing are fully realised. It would not be sufficient, for example, simply to provide access to the rental market without guaranteeing an adequate degree of tenure security.⁹⁹

While the obligation to fulfil the right to adequate housing is, for the most part, to be progressively realised, it may still lend itself to judicial enforcement and scrutiny. In the *Grootboom* case, the Constitutional Court laid down principles for the interpretation of the obligation to fulfil housing and other social and economic rights. The Grootboom community, evicted from private property and living on the edge of a sports field in appalling conditions, launched a legal action for immediate relief when winter rains made their temporary shelter unsustainable. While the Court found that there was no immediate entitlement to housing, it did hold that the local, provincial and national governments had violated the right to housing for failing progressively to provide for emergency housing relief. Additionally, the Court held that the obligation progressively to provide housing included the immediate obligation to draft and adopt a plan of action and to devote reasonable resources towards the implementation of that plan:

⁹⁸ General Comment No. 4 (n. 4 above), para. 8(c).

⁹⁹ The CESCR has stated that States Parties should take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups (General Comment No. 4 (n. 4 above), para. 8).

The measures [by the State] must establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The program must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.¹⁰⁰

Australia provides an example of a similar decision made under the cover of legislation and not human rights directly. Disability legislation provides that the Government must develop plans for the improvement of institutions housing persons with disabilities. A number of organisations argued that the plans did not meet the progressive policies and principles in the legislation, namely, the right to live in a single family dwelling in the community and participate fully in the life of the community. The Community Services Appeals Tribunal held that the plan was inadequate. Noting that the legislation reflected the principles of the Convention on the Rights of the Child, the Tribunal found numerous deficiencies, for example, the use of cottages to house six children at a time. They rejected as irrelevant the arguments that the minister had not been allocated sufficient resources by Parliament.

Non-retrogression

Progressive realisation implies that retrogressive actions that reduce access to adequate housing are *prima facie* violations of the right (see Chapter 3). The CESCR has stated, in General Comment No. 3, that “the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content” and that “any deliberately retrogressive measures in that regard 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”.¹⁰¹

Retrogressive measures might include the formal removal or suspension of the legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed; the adoption of legislation or policies that are manifestly incompatible with existing legal obligations relating to these rights, unless this is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups; and the adoption of any other deliberately retrogressive measure that reduces the extent to which any such right is guaranteed.

One such instance of litigation centring on retrogressive measures on the part of a State is *Ms. L. R. et al v. Slovakia*,¹⁰² which was recently dealt with by the Committee on the Elimination of Racial Discrimination.¹⁰³ The case involved a resolution adopted by the Dobšiná municipal council, under pressure from right-wing anti-Roma groups, to cancel a previous resolution in which the council had approved a plan to construct low-cost social housing for Roma inhabitants living in very poor conditions. The petitioners contended, amongst other things, that Slovakia had failed to safeguard their right to adequate housing, thereby violating Article 5(e)(iii) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The Committee ruled that, taken together, the council

¹⁰⁰ *Grootboom* at para. 41.

¹⁰¹ CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Article 2(1) of the Covenant) (Fifth session, 1990), para. 9, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 45 (1994).

¹⁰² *Communication No. 31/2003: Slovakia* CERD/C/66/D/31/2003.

¹⁰³ The following paragraph is adapted from A. Nolan, 'Litigating Housing Rights: Experiences and Issues' Vol. 28, (2006) *Dublin University Law Journal* pp.145-171

resolutions in question – which consisted of an important practical and policy step towards realisation of the right to adequate housing, followed by its revocation and replacement with a weaker measure – amounted to an impairment of the recognition, or exercise on an equal basis, of the human right to housing. The second resolution reversing the initially positive step towards the realisation of the right to housing of the Roma can be regarded as constituting a retrogressive measure, even though it was not directly referred to as such by the Committee.

Minimum entitlement

Violations of the right to adequate housing occur when a State fails to satisfy the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. Thus, for example, a State Party in which any significant number of individuals is deprived of basic shelter and housing is, *prima facie*, violating the International Covenant on Economic, Social and Cultural Rights.¹⁰⁴ Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors or difficulties.

The right to a minimum level of shelter has been made justiciable. In Germany, Hungary and Switzerland, the highest Courts have ruled that all inhabitants of the country have a right to a minimum level of assistance for shelter.¹⁰⁵ The Constitutional Court of Hungary ruled, though, that the State is only obliged to provide accommodation if human life is directly affected by the lack of accommodation.¹⁰⁶ In *A.F.A.P.S. v. Regulations and Permits Administration*,¹⁰⁷ the Federal District Court in Puerto Rico ordered that emergency housing must conform to basic minimum standards of sanitation, health and safety under the Fair Housing Act.

¹⁰⁴ *Ibid.* para. 10.

¹⁰⁵ See Constitutional Court of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany); *Vv. Einwohnergemeinde X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995).

¹⁰⁶ Decision of the Constitutional Court of Hungary, 42/2000, 8 Nov. 2000 (2000), 3 *Bulletin on Constitutional Case-Law*, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002), p. 867.

¹⁰⁷ *A.F.A.P.S. v. Regulations and Permits Administration*, 740 F Supp 95 (D Puerto Rico, 1990).

5 RIGHT TO HEALTH



1. INTRODUCTION

The term ‘right to health’ was first employed in 1946, in the Constitution of the World Health Organisation. The right to health is generally used in international human rights instruments as shorthand for the right to ‘the highest attainable standard of health’.¹ The substantive aspects of the right to health may be broken down into two main categories: the right to health care or health services (which is generally understood as the provision of preventative, curative and rehabilitative medical services)² and the right to the underlying preconditions for health (see Box 1). The right to health is closely related to and dependent upon the realisation of other human rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These, as well as other rights and freedoms, address integral components of the right to health.³ In this chapter, the main focus will be on the right to health care or health services but the related rights and underlying preconditions outlined below for the right to health will be dealt with where relevant, as well as in other chapters in this manual.

BOX 1. UNDERLYING PRECONDITIONS FOR HEALTH

The right to health is an inclusive right that includes not only health care and health services, but also the underlying determinants of health such as:

- access to safe and potable water
- adequate sanitation
- adequate supplies of safe food
- adequate supplies of nutrition and housing
- healthy occupational and environmental conditions
- access to health-related education and information
- participation of the population in all health-related decision-making at the community, national and international levels⁴

While these preconditions are vital to the realisation of the right to health, they will not be the focus of this chapter, which concentrates on the right to health care and health services as part of the general right to health.

1 C. Heyns, ‘Introduction to the Rights Concerning Health Care in the South African Constitution’ in Gina Bekker (ed.), *A Compilation of Essential Documents on the Right to Health* (Pretoria: Centre for Human Rights, University of Pretoria, 2000), p. 1.

2 Ibid.

3 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14, The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 3.

4 Ibid. para 11.

The right to health care includes the following elements: medical care, preventative and primary health care, child health care, pre- and post-natal health services, reproductive health care (including family planning services) and mental health-care services. These elements are contained in the international treaty provisions set out in the next section.

BOX 2. COMMON VIOLATIONS OF THE RIGHT TO HEALTH CARE SERVICES

Below are some examples of violations of the different obligations imposed by the right to health.

Violations of the obligation to respect

- Exposing communities to pollution, which will impact detrimentally on their health
- Marketing of unsafe drugs by the State
- Limiting access to contraceptives and other means of maintaining sexual and reproductive health

Violations of the obligation to protect

- Failure of the State to ensure that employers adhere to legislation setting out regulations on healthy working conditions
- Failure of the State to ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services
- Failure of the State to prevent third parties from coercing women to undergo traditional practices (e.g., female genital mutilation)

Violations of the obligation to fulfil

- Failure of the State to provide essential primary health care to those in need
- Failure of the State to ensure equal access for all to the underlying determinants of health, (e.g., nutritiously safe food, potable drinking water, basic sanitation and adequate housing and living conditions)
- Failure by the State to ensure that health-care staff are trained to recognise and respond to the specific needs of vulnerable or marginalised groups

For additional examples of violations of the right to health, *see* General Comment No. 14 on the Right to the Highest Attainable Standard of Health, paragraphs 34-37.

2. INTERNATIONAL STANDARDS AND JURISPRUDENCE

A right to health is set out in Article 25(1) of the Universal Declaration of Human Rights:

Everyone has the right to a standard of living adequate for the *health* and well-being of himself and of his family, including food, clothing, housing and *medical care* and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control [*emphasis added*].

As stated in the previous chapter, while the Universal Declaration of Human Rights is not strictly legally binding by itself, it is arguable that many of its provisions constitute international customary law. Alternatively it has been suggested that the Declaration represents an authoritative interpretation of human rights in the UN Charter or that the rights in the Declaration are general principles of international law.⁵ Furthermore, its provisions may be the subject of a communication made to the United Nations Human Rights Council under the 1503 procedure (*see* Chapter 16).

Probably the most important instrument relating to the right to health is the International Covenant on Economic, Social and Cultural Rights. Article 12(1) of the Covenant states:

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States parties to the present Covenant to achieve the full realisation of these rights shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions that would assure to all medical services and medical attention in the event of sickness.

While the nature of the obligations placed on the States by social, economic and cultural rights are largely dealt with in General Comment No. 3 on the Nature of States Parties' Obligations,⁶ the specific substantive content of the right to health is dealt with in detail by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 14 on the Right to the Highest Attainable Standard of Health. In this document, the CESCR declares that:

The right to health contains both freedoms and entitlements. Freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.⁷

⁵ See generally B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Year Book of International Law*, Vol. 12 (1992), pp. 82–108.

⁶ CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1991).

⁷ General Comment No. 14 (n. 3 above), para. 8.

Thus, equality is a vital aspect of the right to health. In addition, the CESCR has interpreted the right to health as “an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health” (see Box 1 above).⁸

The following are the aspects of health that, according to the CESCR, are present in the right to health in all its forms and levels: (a) the *availability* of health care and facilities;⁹ (b) *accessibility*; which includes *non-discrimination* in relation to access to health facilities, goods and services; *physical accessibility*, *economic accessibility* (affordability) and *information accessibility* (consisting of the right to seek, receive and impart information and ideas involving health issues);¹⁰ (c) *acceptability*, whereby all health facilities, goods and services must be respectful of medical ethics and culturally sensitive; and (d) *quality* such that health facilities goods and services must be scientifically and medically appropriate and of high standards.

Article 12(2) also sets out steps to be taken by the States Parties to achieve the full realisation of the right to the highest attainable standard of health. Among other steps, States Parties are to take those measures necessary to ensure the right to environmental and industrial hygiene, the right to prevention, treatment and control of diseases, the right to maternal, child and reproductive health and the right to health facilities, goods and services.¹¹

The CESCR sets the minimum core obligations of the right to health at paragraphs 43-44 of General Comment No.14. It requires that States Parties:

- Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable marginalised groups
- Ensure access to the minimum essential food that is sufficient, nutritionally adequate and safe so as to ensure freedom from hunger to everyone
- Ensure access to basic shelter, housing and sanitation and an adequate supply of safe and potable water
- Provide essential drugs as defined from time to time by the World Health Organisation’s Action Programme on Essential Drugs
- Ensure the equitable distribution of all health facilities, goods and services
- Adopt, implement and periodically review a national public health strategy and plan of action addressing the health concerns of the whole population
- Ensure reproductive, maternal and child health care
- Provide immunisation against the community’s major infectious diseases
- Take measures to prevent, treat and control epidemic and endemic diseases
- Provide education and access to health information
- Provide appropriate training for health personnel

The obligations of non-State Party actors such as the World Health Organisation and other UN agencies are also discussed.¹²

8 Ibid. para. 11.

9 Ibid. para. 12(1)(a).

10 Ibid. para. 12(1)(b).

11 Ibid. paras. 14-17.

12 Ibid. paras. 63-65.

The International Covenant on Economic, Social and Cultural Rights expressly recognises the link between the rights to health and employment. Article 7(b) of that instrument states that States Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work that ensure, in particular, safe and healthy working conditions. In addition, Article 10(3) makes provision for the punishment by law for the employment of children in work that is harmful to their health, dangerous to life or likely to hamper their normal development.¹³

Although the International Covenant on Civil and Political Rights does not explicitly mention the right to health, Article 6(1) of the Covenant states that every human being has the inherent right to life. In General Comment No. 6, the Human Rights Committee has stated that this right must not be understood in a restrictive manner and requires that States adopt positive measures, including “all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate ... epidemics”.¹⁴ In the case of *C v. Australia*,¹⁵ the Committee found that failure to attend to a prisoner’s deteriorating mental health constitutes cruel, inhuman and degrading treatment. In *Lantsova v. The Russian Federation*,¹⁶ the Committee held that failure to take steps to, *inter alia*, ascertain a prisoner’s health condition and provide adequate medical assistance violated his right to life.

One of the most serious obstacles to the realisation of the right to health for marginalised groups is discrimination. General Comment No. 14 refers to the right to non-discrimination and equality of access to health care and health services by vulnerable members of society, including women, children and adolescents, persons with disabilities and indigenous peoples. Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women states that:

1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

States Parties are obliged to take all appropriate measures to eliminate both direct and indirect discrimination. The use of the word ‘ensure’ in the second section of Article 12 implies that this paragraph has immediate effect.

Furthermore, according to the Committee on the Elimination of Discrimination against Women, “the duty to fulfil rights places an obligation on States Parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care”.¹⁷ In General Comment No. 24 on Women and Health, the Committee opined that State duties include ensuring the removal of all barriers to women’s access to health services, education and information, including in the area of sexual and reproductive health, and, in particular, allocate resources for

¹³ Article 32(1).

¹⁴ Human Rights Committee, *General Comment No. 6, The Right to Life* (Sixteenth session, 1982), para. 5.

¹⁵ Communication No. 900/1999, CCPR/C/76/D/900/1999.

¹⁶ Communication No. 763, CCPR/C/74/D/763/1997 (15 Apr. 2002).

¹⁷ Committee on the Elimination of Discrimination against Women, *General Comment No. 24, Women and Health*, para. 17. (The General Comments of the Committee are known as General Recommendations.)

programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS.¹⁸ Furthermore, the Committee has made clear that the State's obligation to protect the rights relating to women's health is not limited to public action. Paragraph 15 of the General Comment explains that States Parties are required to take action to prevent and impose sanctions for violations of rights by private persons and organisations.

Women's right to the highest attainable standard of health is also considered by the CESCR in General Comment No. 16 on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights.¹⁹ Here, the CESCR has stated that the implementation of Article 3 of the International Covenant on Economic, Social and Cultural Rights (which provides that States Parties undertake to ensure the equal right of men and women to the enjoyment of all Covenant rights), in relation to Article 12, requires "at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality".²⁰ Among other steps, this requires that States address the ways in which gender roles affect access to determinants of health (for example, water and food) so as to remove legal restrictions on reproductive health provisions, on the prohibition of female genital mutilation and on the provision of adequate training for health care workers to deal with women's health issues.²¹

Article 12 of CEDAW was relied on by the author of a complaint brought against Hungary under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. In the case of *Ms. Andrea Szijjarto v. Hungary*,²² the complainant was a Roma woman who, while on the operating table awaiting a Caesarean to be performed to remove her dead foetus, was asked to sign a form consenting to the Caesarean section. She also signed a barely legible note that had been handwritten by the doctor and added to the bottom of the form. The note was an agreement to sterilisation, which was referred to by a Latin term that the complainant did not understand. She alleged a violation of Article 12 and, referring to paragraphs 20 and 22 of General Comment No. 24 of the Committee on the Elimination of Discrimination against Women, she submitted that she was unable to make an informed choice before signing the consent form for the sterilisation procedure.²³ She argued that her inability to give informed consent on account of the incomplete information provided constituted a violation of the right to appropriate health care services. Referring to its previous statements in General Comment No. 24, the Committee concluded that the State Party had not ensured that the complainant had given her fully informed consent to be sterilised and that consequently her rights under Article 12 had been violated.

The Convention on the Elimination of All Forms of Discrimination against Women also deals with the health of women in employment. Article 11(1)(f) obliges States Parties to take all appropriate measures to eliminate discrimination against women in employment in order to ensure, on the basis of the equality of men and women, the same rights, in particular the right to the protection of health and to safety

18 Ibid. para. 31(b).

19 CESCR, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (Thirty-fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005).

20 Ibid. para. 29.

21 Ibid.

22 Communication No. 4/2004.

23 Paragraph 20 of CEDAW General Comment No. 24 (n. 17 above) states that, "Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives". Paragraph 22 provides that, "States parties should also report on measures taken to ensure access to quality health-care services, for example, by making them acceptable to women. Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity".

in working conditions, including the safeguarding of the function of reproduction. States Parties are also obliged to provide special protection to women during pregnancy in types of work that have been shown to be harmful to them.²⁴

Article 14 of the same instrument provides that States Parties shall take all appropriate measures to ensure to rural women the right to have access to adequate health-care facilities, including information, counselling and services in family planning. Finally, the Convention deals with the issue of choices with regard to reproductive health. Article 16(1) explains that States Parties shall ensure, on the basis of the equality of men and women, “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

Discrimination in the enjoyment of the right to health on the basis of race is likewise prohibited under international law. Under Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of right to public health, medical care, social security and social services. The prohibition on racial discrimination is also set out in the International Covenant on Economic, Social and Cultural Rights, in Article 2, which prohibits discrimination on the grounds of race.

Numerous aspects of the right to health are dealt with in the Convention on the Rights of the Child both implicitly in the obligation imposed on States Parties by Article 6 to ensure, to the maximum extent, possible the survival and development of the child and expressly in Articles 24 and 25.²⁵ Article 24 explains that States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties are obliged to strive to ensure that no child is deprived of his or her right of access to health-care services. The obligation to ensure full implementation of this right includes taking measures to diminish infant and child mortality; to ensure the provision of the necessary medical assistance and health care to all children, with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care;²⁶ to ensure appropriate pre-natal and post-natal health care to mothers; and to develop preventive health care, guidance for parents and family planning education and services.

The Convention also provides that State Parties also recognise the right of the child to be protected from performing any work that is likely to be hazardous or harmful to the child’s health or physical or mental development (Article 32(1)).

Under Article 23(2) of the Convention, disabled children are entitled to special care. Assistance shall be provided with the aim of ensuring that the disabled child has effective access to health-care services and rehabilitation services.²⁷

24 Article 12(2)(d).

25 The CESCR has also dealt expressly with children’s right to the highest attainable standard of health; see General Comment No. 14 (n. 3 above), paras. 22-23.

26 Such steps include dealing with the underlying conditions for proper health care such as the application of readily available technology, the provision of adequate nutritious foods and clean drinking water and taking into consideration the dangers and risks of environmental pollution. States are also obliged to ensure access to education and support in the use of basic knowledge on child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents. (Articles 24(2)(c) and (e).)

27 Article 23(3).

In General Comment No. 3, the Committee on the Rights of the Child focuses on HIV/AIDS and the rights of the child. In relation to prevention, care, treatment and support, the Committee states that steps taken by States must include the provision of information for HIV prevention and raising awareness,²⁸ the provision of child- and adolescent-sensitive health services,²⁹ the provision of HIV counselling and testing,³⁰ and the prevention of mother-to-child transmission of HIV.³¹ The General Comment states specifically that the obligations of States Parties under the Convention extend to ensuring that children have sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs, goods and services on the basis of non-discrimination.³² Elsewhere, the Committee has made clear that States Parties are required to take all necessary steps to prevent the infection of parents and young children, especially by intervening in chains of transmission, particularly between father and mother and between mother and baby.³³

The right to health and development of adolescents has been dealt with in detail in the Committee's General Comment No. 4 on Adolescent Health and Development. In the General Comment, the Committee expresses its concern that States Parties have not given sufficient attention to the specific concerns of adolescents as rights-holders and to promoting their health and development.³⁴ It urges States to fulfil their obligations to ensure that adolescents have access to the information that is essential for their health and development. States must also ensure that adolescents have opportunities to participate in decisions affecting their health (notably through informed consent and the right of confidentiality) and to make appropriate health behaviour choices. They should ensure that health facilities, goods and services, including counselling and health services for mental and sexual and reproductive health, of appropriate quality and sensitive to the concerns of adolescents, are available to all adolescents. They must likewise ensure that adolescent girls and boys have the opportunity to participate actively in planning and programming for their own health and development. They must protect adolescents from all forms of labour that may jeopardise the enjoyment of their rights, notably by abolishing all forms of child labour and by regulating the working environment and conditions in accordance with international standards. They must protect adolescents from all harmful traditional practices, ensure that adolescents belonging to especially vulnerable groups (e.g., adolescents with disabilities) are fully taken into account in the fulfilment of all these obligations, and implement measures for the prevention of mental disorders and the promotion of mental health among adolescents.³⁵

The Committee has identified various factors that are essential for the health of children, including younger children. Among these are access to clean drinking water, adequate sanitation, appropriate immunisation, good nutrition and medical services, and a stress-free environment.³⁶ In addition to highlighting the negative impact of malnutrition and disease on children's physical health and development, the Committee has raised the issue of the effects of obesity and unhealthy lifestyles.³⁷

28 Committee on the Rights of the Child, *General Comment No. 3, HIV/AIDS and the Rights of the Child* (2003), paras. 13-14.

29 *Ibid.* para. 17.

30 *Ibid.* paras. 19-21.

31 *Ibid.* paras. 22-24.

32 *Ibid.* para. 25.

33 Committee on the Rights of the Child, *General Comment No. 7, Implementing Child Rights in Early Childhood* (Fortieth session, 2005), U.N. Doc. CRC/C/GC/7/Rev.1, para. 27(c).

34 Committee on the Rights of the Child, *General Comment No. 4, Adolescent Health and Development* (Thirty-third session, 2003), U.N. Doc. CRC/C/GC/2003/4, Introduction.

35 *Ibid.* para. 35.

36 Committee on the Rights of the Child, *General Comment No. 7* (n. 33 above), para. 27(a).

37 *Ibid.*

In General Comment No. 9 on the Rights of Children with Disabilities,³⁸ the Committee directly addresses the issue of the right to health of children with disabilities, stating that health policies should be comprehensive and must provide for the early detection of disabilities, early intervention, including psychological and physical treatment, and rehabilitation, including physical aids (for example prostheses, mobility devices, hearing aids and visual aids).³⁹ The Committee has emphasised that health services should be provided within the same public health system that provides for children without disabilities, free of charge, whenever possible, and that these services be as up to date and modern as possible.⁴⁰

The principle of the ‘best interests’ of the child set out in Article 3 of the Convention on the Rights of the Child also has a role in relation to the right to health. The Committee has emphasised that all decision-making concerning a child’s health must take account of the best interests principle — including decisions by parents, professionals and others responsible for children. Furthermore, actions undertaken in relation to health services must also take account of the principle.⁴¹

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families sets out provisions relating to the right to health. Article 28 states that all migrant workers and members of their families – whether or not they are in a documented or regularised employment or residential situation – shall have the right to receive any medical care that is urgently required for the preservation of life or the avoidance of irreparable harm to health on the basis of equality of treatment with respect to the nationals of the State in which they are located. Migrant workers enjoy a non-derogable right to treatment that is not less favourable than the treatment provided for nationals in terms of working conditions, including health.⁴² Workers in a documented or regularised situation and their family members enjoy the right to equality of treatment with respect to nationals of the State in access to health services, provided that the requirements for participation in the service scheme have been met.⁴³ Finally, States Parties are obliged to take measures not less favourable than those applied to nationals to ensure that the working and living conditions of migrant workers and members of their families who are in a regularised situation are in keeping with the standards of fitness, safety and health and the principles of human dignity.⁴⁴ Although the Convention on Migrant Workers appears to grant a broad right to health care and services to migrant workers and their families, the complaints procedure provided for under the Convention is not yet in force.

Other international instruments

The right to health care and health services is dealt with in a number of other international instruments. The Constitution of the World Health Organisation and the Geneva Conventions are binding instruments containing references to the right to health. Several Conventions of the International Labour Organisation deal with the right to health within the context of employment and the workplace.⁴⁵

38 U.N. Doc. CRC/C/GC/9.

39 *Ibid.* para. 51.

40 *Ibid.* para. 52.

41 Committee on the Rights of the Child, General Comment No.7 (n. 33 above), para. 13(b).

42 Article 25 of the Convention on Migrant Workers, U.N. Doc. A/45/49 (1990).

43 Article 43(e).

44 Article 70.

45 Occupational Safety and Health (Dock Work) Convention (1979), Convention concerning Occupational Safety and Health and the Working Environment (1981), Protocol of 2002 to the Occupational Safety and Health Convention (2002, not yet in force), Convention concerning Occupational Health Services (1985), Convention concerning Health Protection and Medical Care for Seafarers (1987), Convention concerning Safety and Health in Agriculture (2001, not yet in force).

Relevant non-binding instruments and other documents include:

- Convention relating to the Status of Refugees (1954)
- Standard Minimum Rules for the Treatment of Prisoners (1957)
- Declaration on the Rights of the Child (1959)
- Declaration on Social Progress and Development (1969)
- Declaration on the Rights of Mentally Retarded Persons (1971)
- Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)
- Declaration on the Rights of Disabled Persons (1975)
- Declaration on the Human Rights of Non-Nationals (1985)
- Ottawa Charter for Health Promotion (1986)
- Declaration on the Right to Development (1986)
- World Declaration on the Survival, Protection and Development of Children (1990)
- Plan of Action of the World Summit for Children (1990)
- Basic Principles for the Treatment of Prisoners (1990)
- Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- UN Principles for Older Persons (1991)
- Beijing Declaration and Platform for Action (1994)
- Vienna Declaration and Programme of Action (1993)
- Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)

There are various International Labour Organisation Recommendations on the subject of worker's rights in the context of health.⁴⁶ There have also been numerous World Health Organisation declarations, such as the Declaration of Alma Ata (1978), that have been instrumental in clarifying the concept of the right to health.⁴⁷

3. REGIONAL STANDARDS AND JURISPRUDENCE

The right to health care and health services is dealt with in numerous regional instruments.

3.1 Americas

Article XI of the American Declaration of the Rights and Duties of Man establishes the right to the preservation of health through sanitation and social measures (food, clothing, housing and medical care), though the article conditions its implementation on the availability of public and community resources.⁴⁸ The article was addressed in Case No. 7615 of the Inter-American Commission on Human Rights,⁴⁹ in which, as a result of the Brazilian Government's sanctioning of the exploitation of the Amazon by means of a road-building programme, the Yanomami Indians were displaced from their ancestral lands and were exposed to epidemics, including influenza, tuberculosis and measles. However, the substan-

⁴⁶ These recommendations are listed on the ILOLEX database, <http://www.ilo.org/public/english/standards/index.htm>.

⁴⁷ For a more extensive list of international instruments addressing the right to health, see the Preliminary Report of the UN Special Rapporteur on the right to health, pp. 30-31, <http://daccessdds.un.org/doc/UNDOC/GEN/Go3/109/79/PDF/Go310979.pdf?OpenElement>.

⁴⁸ <http://www.umn.edu/humanrts/edumat/IHRIP/circle/modules/module14.htm>

⁴⁹ Yanomami Tribe Case, Case No. 7615 (Brazil), *Annual Report, 1984-1985*, 24-34, www.cidh.oas.org/Indigenas/Annex1.htm

tive content of Article XI was not discussed in any great detail other than a directive by the Commission that the Government of Brazil continue to take preventive and curative health measures to protect the lives and the health of Indians exposed to infectious or contagious diseases. In the *Ache Tribe Case*,⁵⁰ the Commission did not undertake any significant analysis of right, but it did state that the Paraguayan Government's conduct, which was highlighted through the case and which included acts such as withholding medical treatment and medicines during epidemics, constituted a violation of Article XI.

The Commission has dealt in numerous cases with Article XI and the right to health in the context of prisons, focusing both on the issue of the denial of adequate medical treatment and on that of prison conditions generally.⁵¹ Commission sessions do not address in detail the substantive content of the right to the preservation of health. Poor health conditions that have resulted in a finding of a violation of Article XI include malnutrition, lack of adequate medical care and lack of adequate dental care.

Article 4 of the American Convention on Human Rights guarantees the right to life, and the right to health may be extrapolated from this. The same is true of the right to freedom from torture and from cruel, inhuman and degrading punishment or treatment set out in Article 5.

According to Tara Melish, rather than recognise the autonomous rights of individuals to health, education, or adequate housing under article 26 of the Convention, the Inter-American Court of Human Rights has preferred to use an umbrella approach, subsuming these basic rights, all of which are necessary for the development of a dignified life, into a broadly understood concept of the 'right to life' and, more specifically, the "right to harbor a project of life".⁵² Essential aspects of the right to health have thus been addressed under Articles 4 and 5 of the Convention, protecting respectively the rights to life and personal integrity.⁵³ The Court has dealt with issues related to the right to health in a number of decisions, particularly in the context of children. These will be discussed below in the chapter on Children's Rights.

The right to physical and mental health, particularly for persons with disabilities, has most recently been recognised as a function of the right to a 'dignified life' under Convention Articles 4 and 5 in *Ximenes Lopes v. Brazil*.⁵⁴ This case concerned the death of a 30-year-old man with a mental illness. The man had been at a rest home, where he was receiving medical treatment. According to the complaint, the deceased suffered abuse and torture and was otherwise treated in an inexpert and negligent manner by the physicians and nurses at the rest home, which caused his premature death. The Court affirmed

50 Case 1802, Paraguay in *Annual Report of the Inter-American Commission on Human Rights 1984-5*, 5 Mar. 1985, OEA/Ser.L/V/II.66.

51 Relevant cases include *Victor Miguel Canton Gomez v. Cuba*, Case 7899, Inter-Am. C.H.R. 70, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1982) (Annual Report 1981-1982); *Roger Reyes Fernandez v. Cuba*, Case 6093, Inter-Am. C.H.R. 77, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1982) (Annual Report 1981-1982); *Armando F. Valladares v. Cuba*, Case 2300, Inter-Am. C.H.R. 65, OEA/ser. L/V/II.57, doc. 6 rev. 1 (1982) (Annual Report 1981-1982); *Jorge Alemany Pelaez et al. v. Cuba*, Case 4677, Inter-Am. C.H.R. 98, OEA/ser. L/V/II.54, doc. 9 rev. 1 (1981) (Annual Report 1980-1981); *Eduardo Capote Rodriguez et al. v. Cuba*, Case 4429, Inter-Am. C.H.R. 96, OEA/ser. L/V/II.54, doc. 9 rev. 1 (1981) (Annual Report 1980-1981); *Political Prisoners of Combinado del Este Prison*, Case 4402, Inter-Am. C.H.R. 94, OEA/ser. L/V/II.54, doc. 9 rev. 1 (1981) (Annual Report 1980-1981); *Paul Lallion v. Grenada*, Case 11.765, Report No. 55/02, Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003); *Benedict Jacob v. Grenada*, Case 12.158, Report No. 56/02, Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003); *Victor Rosario Congo v. Ecuador*, Report No. 63/99, Case 11.427, Inter-Am. C.H.R., OEA/Ser.L/V/II.102, doc. 6 rev. (1999); *Juan Hernández v. Guatemala*, Case 11.297, Report No. 28/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. (1997).

52 Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming). Melish attributes this not to the nature of either article 26 or the autonomous social rights protected therein, but rather to the tendency of advocates to apply different obligations to article 26 rights than to rights protected under articles 3-25 for purposes of establishing state responsibility. Because the latter set of obligations are cognisable under the Court's contentious jurisdiction, while the former are not, the Court's ESC rights jurisprudence to date has necessarily centred on expansive interpretations of articles 3-25 rather than direct application of article 26.

53 Ibid.

54 *Ximenes Lopes v. Brazil*, Judgment of 4 July 2006, Inter-Am. C.H.R. (Ser. C) No. 149.

the special obligations States Parties hold as guarantor of the right to health of persons subject to the State's general health system, duties that extend to regulating, monitoring and investigating health standards, conditions, practices and complaints of abuse in private, as well as public health institutions.⁵⁵

The Court underscored the special duties of care that are the responsibility of States with respect to persons with intellectual and psychiatric disabilities who are subject to the State's custody or care.⁵⁶

Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) sets forth a right to health for all individuals. The Protocol expresses this as “the enjoyment of the highest level of physical, mental and social well-being” and sets out the measures to be adopted by Member States to ensure this right. The measures include: the provision of primary health care; the extension of the benefits of health services to all individuals subject to the State's jurisdiction; universal immunisation against the principal infectious diseases; prevention and treatment of endemic, occupational and other diseases; education of the population on the prevention and treatment of health problems; and satisfaction of the health needs of the highest-risk groups and of those whose poverty makes them the most vulnerable.

Unfortunately, while Article 10 is a clear articulation of the duty imposed on States by the right to health, it does not provide for individual petition to the Inter-American Commission on Human Rights. However, in its admissibility decision in *Jorge Odir Miranda Cortez et al. v. El Salvador*,⁵⁷ the Commission held that, while it was not competent to determine violations of Article 10, it would “take into account the provisions related to the right to health in its analysis of the merits of the case, pursuant to the provisions of Articles 26 and 29 of the American Convention”.⁵⁸ In this case, 27 people living with HIV/AIDS complained that, by failing to provide the combination anti-retroviral therapy necessary to prevent death and improve the quality of life, the Government of the Republic of El Salvador had violated their rights, under the American Convention, to life, humane treatment, equal protection before the law, and judicial protection and other economic, social and cultural rights. They also claimed that there had been a violation of their rights under Article 10 of the San Salvador Protocol and the American Declaration of the Rights and Duties of Man. The Commission issued an interim order directing the Salvadoran Government to “provide medical attention necessary to protect the life and health” of the petitioners, including providing “anti-retroviral medications ... as well as hospital attention, other medications and nutritional support” in order to prevent the deaths and strengthen the immune systems of the petitioners so as to impede the development of illnesses and infections.⁵⁹

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999) has implications for the right to health of the disabled. States Parties to the Convention undertake to work, on a priority basis, in the area of the prevention of preventable disabilities; early detection, intervention, treatment and rehabilitation; and the provision of comprehensive services to ensure the optimal level of independence and quality of life for persons with disabilities.

55 Melish, 'The Inter-American Court of Human Rights' (n. 53 above).

56 Ibid.

57 *Jorge Odir Miranda Cortez et al. v. El Salvador*, IACHR, 2001.

58 Ibid. para. 47. The case was rendered moot prior to the scheduled hearing by the Commission on its merits.

59 According to Tara Melish, the Commission has approved a final report on the merits in this case, but the report remains confidential while the State is given an opportunity to comply with the recommendations set forth in that report. See Tara Melish, 'The Inter-American Commission on Human Rights: Defending social rights through case-based petitions' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming). Another case involving access to anti-retroviral therapies for people living with HIV/AIDS is *Pivaral v. Guatemala*.

3.2 Africa

Article 16 of the African Charter on Human and Peoples' Rights declares that every individual shall have the right to enjoy the best attainable state of physical and mental health. States Parties are obliged to take the necessary measures to protect the health of their peoples and to ensure that they receive medical attention when they are sick. Article 18 provides that the State will be responsible for the protection of the physical health of the family.

The first case relating to health that was considered by the African Commission on Human and Peoples' Rights was *World Organisation against Torture, Lawyers' Committee for Human Rights and others v. Zaire*.⁶⁰ These were joined communications brought by a number of different groups. The communications alleged that the Government of Zaire (now the Democratic Republic of the Congo) had carried out arbitrary arrests, arbitrary detentions, torture, extra-judicial executions and unfair trials; had placed severe restrictions on the right to association and peaceful assembly; and had suppressed the freedom of the press. It was also alleged that public finances were mismanaged (due to corruption), that the failure of the Government to provide basic services such as safe drinking water and electricity was degrading, that there was a shortage of medicines and that the universities and secondary schools had been closed for two years. Pointing out that Article 16 of the African Charter declares that every individual shall have the right to enjoy the best attainable state of physical and mental health and that States Parties should take the necessary measures to protect the health of their peoples, the Commission found that the failure of the Government to provide basic services and the shortage of medicine constituted a violation of Article 16. The Commission made clear that the right to the best attainable state of physical and mental health under the Charter requires that governments take positive steps to provide basic services and medicines.

More light was shed on the substantive content of the right to the best attainable state of physical and mental health in the *Mauritania Cases*.⁶¹ In these cases, five joined communications alleged the existence of slavery and analogous practices in the Islamic Republic of Mauritania and of institutionalised racial discrimination perpetrated by the ruling Moor community and Beidanes against the more populous black community. It was alleged, among other complaints, that detainees who were members of the black community had been starved to death, left to die in severe weather without blankets or clothing, and deprived of medical attention. The Commission found that the starvation of prisoners and the deprivation of blankets, clothing and health care violated Article 16. In addition, the Commission made clear that the responsibility of the State in relation to the right to health is heightened in cases in which the individual is incarcerated. The Commission found that, "[t]he State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities".⁶²

Subsequently, in *SERAC v. Nigeria*,⁶³ the Commission held that the Nigerian Government violated the right to health and the right to clean environment as recognised under Articles 16 and 24 of the African Charter both by directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population and by failing to protect the Ogoni population from the harm caused by private actors. This case is dealt with in more detail in the chapter on the Right to Housing.

60 Communication 25/89; 47/90; 56/92; 100/93 (joined).

61 African Commission on Human and Peoples' Rights, Communications 54/91, 61/91, 98/93, 164/97, 196/97, and 210/98.

62 Ibid. para. 122.

63 Communication No. 155/96, African Commission on Human and Peoples' Rights, Done at the 30th Ordinary Session, held in Banjul, The Gambia, 13-27 Oct. 2001.

The decision in *Purohit and Moore v. The Gambia*⁶⁴ was the first decision in which the Commission made a serious effort to flesh out the substantive content of the health rights provisions in the African Charter. Here, the applicants alleged, *inter alia*, that the legislative regime in The Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health (Article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs (Article 18(4)). Holding that The Gambia fell short of satisfying the requirements of Articles 16 and 18(4) of the African Charter, the Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. The Commission reiterated that mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance. This is consistent with Article 18(4) and the standards outlined in the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care. The Commission used the Principles to flesh out what ‘mental health care’ constituted and stated that the scheme of the Lunatics Detention Act was lacking in therapeutic objectives, as well as in the provision of matching resources and programmes of treatment of persons with mental disabilities — a situation that fell short of satisfying the requirements of Articles 16 and 18(4) of the African Charter.

Recognising the prevailing poverty that renders African countries incapable of providing the necessary amenities, infrastructure and resources to facilitate the enjoyment of the right to health, the Commission read into Article 16 the obligation on States Parties “to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind”. This seems to be a ‘watering down’ of the obligation imposed on States by Article 16. Among other steps, the Commission urged the Government to repeal and replace the impugned legislative regime and provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.

The African Charter on the Rights and Welfare of the Child reiterates that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health and outlines steps that States Parties must undertake in order to ensure full implementation of this right. These measures include steps to reduce the infant and child mortality rate, to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care, to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology, to ensure appropriate health care for expectant and nursing mothers, to ensure the provision of adequate nutrition and safe drinking water, to develop preventive health care and family life education and the provision of relevant services, to integrate basic health services programmes in national development plans, and to ensure that all sectors of society are informed and supported in the use of basic knowledge on child health and nutrition.⁶⁵ The Charter also goes further than the Convention on the Rights of the Child by obliging States Parties to ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of basic service programmes for children and to support, through technical and financial means, the mobilisation of local community resources in the development of primary health care for children.⁶⁶ Furthermore, States Parties are obliged to ensure that children are protected from performing any work that is likely to be hazardous or to interfere with their physical or mental development.⁶⁷

64 African Commission on Human and Peoples’ Rights, Communication 241/200, decided at the 33rd Ordinary Session, 15-29 May 2003.

65 Article 14.

66 Article 14(i) and (j).

67 Article 15.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa deals with the right to health.⁶⁸ Article 2 obliges States to enact and implement appropriate national legislative measures effectively so as to prohibit all forms of harmful practices that endanger the health and general well-being of women and girls. Article 14 declares that States Parties shall ensure that the right to health of women is respected and promoted, including the right to reproductive health. States Parties are required to provide adequate, affordable and accessible health services to women, especially those in rural areas, establish pre- and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding, and protect the reproductive rights of women, particularly by allowing access to medical abortion in cases of rape and incest.

3.3 Europe

Article 11 of the European Social Charter refers to the right to the protection of health, for the attainment of which it stipulates health promotion, education and disease prevention activities.⁶⁹ In addition, Article 3 of the Charter states that all workers have the right to safe and healthy working conditions. Article 13 of the Charter is significant in terms of access to health care and services as it guarantees access to social and medical assistance and care to those without adequate resources. Article 17, which provides for the right of children and young persons to social, legal and economic protection, also requires the State to take measures to ensure children's right to health. Article 19 obliges States to adopt appropriate measures to provide, within their own jurisdictions, appropriate services for health, medical attention and good hygienic conditions during the cross-border journeys by migrant workers and their families.

Articles 13 and 17 of Charter were the subject of a 2004 decision of the European Committee of Social Rights. In *International Federation of Human Rights Leagues (FIDH) v. France*,⁷⁰ the Federation claimed that France had violated the right to medical assistance (Article 13) by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. It also submitted that a 2002 legislative reform restricting access to medical services for children of illegal immigrants violated Article 17. The European Committee found no violation of Article 13, however, since illegal immigrants were able to access some forms of medical assistance after three months of residence, while all foreign nationals might at any time obtain treatment for "*emergencies and life threatening conditions*". This finding was reached despite evidence of significant problems with the implementation of the legislation. The Committee noted that Article 17 was inspired by the Convention on the Rights of the Child and that it protects, in a general manner, the right of children and young persons to care and assistance.⁷¹ The Committee found a violation of Article 17, even though children had similar access to health care as adults, because (a) medical assistance to the above target group in France is limited to situations that involve an immediate threat to life and (b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time. For more on this case, see the chapter on the Right to Social Security.

68 This Protocol has not yet entered into force, but has received a number of ratifications.

69 Human Rights Resource Centre, University of Minnesota, *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource* (Minneapolis, 2000), www.umn.edu/humanrts/edumat/IHRIP/circle/modules/module14.htm

70 Complaint No. 14/2003 (2003).

71 Author's note: Article 13 is more restrictive in its wording. On 4 May 2005, the Committee of Ministers took note of the Committee's decision and noted information received from the Government. This included a circular, issued on 16 Mar. 2005, providing that "all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement".

The European Convention on Human Rights and its protocols do not explicitly recognise the right to health, but offer indirect protection through other, health-related rights. These include the right to life (Article 2), the prohibition on torture, inhuman, or degrading treatment or punishment (Article 3) and the prohibition on discrimination (Article 14).⁷² The European Court of Human Rights has dealt with the right to health within the context of the right to respect for privacy and family life (Article 8). In the *López Ostra Case*⁷³ the damage done to the health of the applicant and her family by the pollution caused by a non-State-owned tannery plant formed the basis of a finding of a violation by the State of Article 8.

In the context of Article 3, the European Court held that deporting a man in the late stages of AIDS from the United Kingdom back to his home country, where he would face poor general public health conditions and lack of access to treatment for AIDS, qualified as ‘inhuman treatment’.⁷⁴ However, the application of the prohibition on torture, inhuman and degrading treatment and punishment is unlikely to apply to many of the fundamental components of the right to the highest attainable standard of health or to all aspects of other economic, social and cultural rights. Indeed, the European Court regarded *D. v. St. Kitts* as ‘exceptional’.⁷⁵

The European Court has dealt with the right to health in the context of the right to education in the *Danish Sex Education Case*.⁷⁶ In this case, the Court held that a sex education programme that was integrated with the teaching of other subjects might not be regarded as not respecting the religious or philosophical convictions of parents. Taking into account that the programme was introduced in response to a growing number of pregnancies among teenagers, the Court held that, as long as, among other factors, information was presented in “an objective, critical and pluralistic manner”, sex education programmes such as the one in this case were “within the bounds of what a democratic State may regard as the public interest”.

Under the (European) Convention on Human Rights and Biomedicine, States Parties must take appropriate measures with a view to providing equitable access to health care of appropriate quality.⁷⁷

The Charter of Fundamental Rights of the European Union contains provisions relating to the right to health. Article 35 declares that everyone has the right of access to preventative health care and the right to benefit from medical treatment under the conditions established by national laws and practices. Furthermore, every worker has the right to working conditions that respect their health.⁷⁸ However, the precise legal status of the rights contained in the Charter is undetermined, and they are not currently justiciable.

72 For example, in *Mouiel v. France* (application no. 67263/01, [2002] ECHR 740), the European Court of Human Rights found that Article 3 required States to protect the physical integrity of persons who had been deprived of their liberty, notably by providing them with any necessary medical assistance.

73 *López Ostra v. Spain*, Judgment of 9 Dec. 1994, Series A, No. 303-C.

74 *D v. St Kitts* (1997), 24 EHRR 423.

75 G. Van Bueren, ‘Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act’, *Public Law*, Autumn (2002), pp. 456-472, at p. 468. Indeed, it has been argued that the usefulness of Article 3 in the context of health (particularly in relation to standards of treatment in health care) is limited as Article 3 only prohibits treatment that *deliberately* causes severe mental or physical suffering. (Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, United Kingdom: Ashgate/Dartmouth, 1999), p. 153.

76 *Kjeldsen, Busk Madsen & Pedersen v. Denmark* (1976) 1 EHRR 711.

77 Article 3.

78 Article 31.

4. NATIONAL JURISPRUDENCE

This section provides an overview of national jurisprudence involving the right to health. The cases discussed are merely a sample of the ever-increasing number of judicial decisions focused on the right to health.

The tripartite obligations to respect, protect and fulfil the right to health have been the subject of extensive litigation and adjudication. While many domestic courts have traditionally been more comfortable dealing with addressing violations of the negative duties imposed by economic, social and cultural rights, there is a growing body of case law on the positive duties associated with the right to health.

The duty to respect the right to health has been the subject of a number of court decisions. For example, in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,⁷⁹ the Indian Supreme Court stated that denial of the timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of the right to health.

There have also been domestic right-to-health cases involving the duty to protect, that is, the obligation of States to ensure that non-State actors do not infringe on an individual's enjoyment of their rights. In *Dr Mohiuddin Farooque v. Bangladesh & Ors*,⁸⁰ the Supreme Court of Bangladesh, upon finding that a consignment of powdered milk imported by a company exhibited a radiation level above the acceptable limit in some (but not all) of the examinations conducted by various Government testing bodies, upheld the claim that the actions of Government officers in not compelling the importer to send the consignment back to the exporter had violated the constitutional right to life of people who were potential consumers.⁸¹ The Supreme Court considered Indian Supreme Court decisions and held that the right to life is not limited to the protection of life and limb, but also includes, among other rights, the protection of the health and normal life longevity of an ordinary human being. Even though the Directive Principle (Article 18 of the Constitution) of raising the level of nutrition and improving public health might not be directly enforceable, the State may be compelled by the courts to remove any threat to public health unless such a threat is justified by law. The Court provided specific directions for the better implementation of radiation standards and ordered the Government properly to contest the suit filed by the exporter challenging the return of the consignment so that the matter might be properly adjudicated.⁸²

Another duty to protect case is *Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*⁸³ The applicants, several minors represented by their parents, requested the Supreme Court of the Philippines to order the Department of Environment and Natural Resources to cancel existing timber licence agreements in the country and to halt the issuance of new ones. Among other complaints, the applicants claimed that the resultant deforestation and damage to the environment violated their constitutional rights to a balanced and healthful ecology and to health (sections 16 and 15, Article II of Constitution of the Philippines). Deciding for the petitioners, the Court stated that, even though the right to a balanced and healthful ecology is found under the Declaration of Principles and State Policies of the Constitution and not under the Bill of Rights, it does not follow that the right is less important than any of the rights enu-

79 (1996) 4 SCC 37.

80 48 DLR (1996) HCD 438.

81 Iain Byrne, 'Making the Right to Health a Reality: Legal Strategies for Effective Implementation', Conference paper presented at the Commonwealth Law Conference, London (Sep. 2005), p. 18.

82 Malcolm Langford, 'Litigating Economic, Social and Cultural Rights: Achievements, Challenges, Strategies' (Geneva: Centre on Housing Rights and Evictions, 2003), p. 46, <http://www.cohre.org/litigation>

83 G.R. No. 101083.)

merated in the latter: “[the right] concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions”. The right is linked to the constitutional right to health, is ‘fundamental’, ‘constitutionalised’, ‘self-executing’ and ‘judicially enforceable’. It imposes the correlative duty to refrain from impairing the environment.

A large number of cases concerning the right to health have involved the duty to fulfil. A Finnish example is Case No. 3118 (*Medical Aids Case*),⁸⁴ wherein the Supreme Administrative Court held that, consistent with the right to medical rehabilitation, the municipality had a duty to provide the aid necessary to meet an individual’s needs.

Many of the ‘duty to fulfil’ cases have involved litigants seeking the direct provision of medical care or appropriate medication. In *Treatment Action Campaign v. Ministers for Health*,⁸⁵ the South African Constitutional Court held that the State’s policy not to make anti-retroviral treatments available at hospitals and clinics other than the research and training hospitals was unreasonable. The policy therefore fell short of meeting the constitutional obligation of the State to devise and implement, within its available resources, a comprehensive and co-coordinated programme to realise progressively the rights of pregnant women and their newborn children to access health services to combat the mother-to-child transmission of HIV. The Court ordered that the Government act without delay to provide nevirapine in public hospitals and clinics and to take reasonable measures to provide testing and counselling facilities at hospitals and clinics. In the Venezuelan case of *Cruz Bermudez, et al. v. Ministerio de Sanidad y Asistencia Social*,⁸⁶ the Venezuelan Supreme Court held that the Government’s failure to provide people living with HIV/AIDS with access to anti-retroviral therapies violated their right to health.⁸⁷

Another celebrated case focusing on the obligation to fulfil the right to health is *Viceconti v. Ministry of Health and Social Welfare*.⁸⁸ Here, the plaintiff and the national ombudsman filed an action seeking the protection of the right to health of people living in areas affected by haemorrhagic fever. They requested the Court to order that the Argentine Government take protective measures against the fever, including producing the Candid 1 vaccine and improving the ecological system that was facilitating the spread of the disease. The Federal Court of Appeals held that the Government was legally obliged to intervene to provide health care when the health of individuals could not be guaranteed either by the individuals themselves or the private sector. It ordered the State to manufacture the vaccine and to comply strictly and without delay with the schedule that had already been designed for such purposes by the Ministry of Health.⁸⁹

In the Ecuadorean case of *Mendoza & Ors v. Minister of Public Health and the Director of the National AIDS-HIV-STI Programme*,⁹⁰ the public hospital where the applicants (persons living with HIV/AIDS) were receiving treatment stopped providing them with all three drugs of the required triple anti-retroviral therapy. They filed a constitutional *amparo* demanding the immediate restitution of such provision and the performance of the medical tests necessary to update their medical prescriptions. Their writ alleged violations of, *inter alia*, their constitutional right to health and the constitutional guarantee that public services for medical attention shall be free of charge for those persons who need them. Among other

84 Supreme Administrative Court, 27 Nov. 2000, No. 3118.

85 Case CCT 8/02, Constitutional Court of South Africa, 5 July 2002.

86 Expediente Numero: 15.789 (1999), www.csj.gov.ve/sentencias/SPA/spa15071999-15789.html

87 For more on this, see Mary Ann Torres, ‘The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela’, *Chicago Journal of International Law*, Vol. 3 (2002), pp. 105-114, at p. 105.

88 Poder Judicial de la Nación, Causa no. 31.777/96, 2 June 1998.

89 The Court subsequently made further orders for execution of the judgment.

90 Tribunal Constitucional, 3ra. Sala, Ecuador, Resolución No. 0749-2003-RA, 28 Jan. 2004.

considerations, the Constitutional Tribunal of Ecuador dealt with the positive steps required of the State to give effect to the right to health. The Tribunal ruled that the State must take precautions to safeguard the right of Ecuadorians to health and that the right to health, without prejudice to its autonomy, forms part of the right to life. The Tribunal found that the right to health grants citizens the power to demand that the State adopt policies, plans and programmes with regard to general health, but also obliges the State to draft regulations, carry out research and establish public policies by setting up appropriate bodies and making them available to the population.

In addition to adjudicating provisions expressly providing for the right to health, courts in several jurisdictions have been prepared to employ civil and political rights protections so as to give effect to the right to health. One example is the Irish case *The State (C) v. Frawley*.⁹¹ In this case, the High Court held that the implied constitutional right to physical integrity operated to prevent an act or omission on the part of the Government that, without justification or necessity, would expose the health of a person to risk or danger.⁹² In other instances, national courts have implied the right to health and related rights from civil and political and other legal provisions. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (discussed above),⁹³ the Supreme Court of India declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person and that the preservation of human life is of paramount importance.

Equality rights and non-discrimination guarantees have also been relied on extensively by those seeking the protection of interests related to the right to health. In the case of *Eldridge v. British Columbia (Attorney General)*,⁹⁴ the appellants sought a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violated their right to the equal protection and equal benefit of the law without discrimination (section 15(1) of the Canadian Charter of Rights and Freedoms). The Supreme Court of Canada found that the failure to provide sign language interpretation for deaf patients in medical institutions deprived them of their ability to “benefit equally from services offered to the general public.

91 [1976] IR 365.

92 *Ibid.* p. 372.

93 (1996) 4 SCC 37.

94 Supreme Court of Canada [1997] 2 S.C.R. 624.

6 RIGHT TO EDUCATION



1. INTRODUCTION

[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights.¹

Education is a means to an end and an end in itself. It is an end in itself because education is indispensable to the preservation and enhancement of the inherent dignity of the human person.² However, it is also a means to an end due to the fact that it is strongly linked to the realisation of other economic, social and cultural rights. This is because education provides individuals (and, on a broader level, societies) with the skills and capabilities necessary to bring about improvements in living conditions that will impact positively on the access of individuals to and the enjoyment of other socio-economic rights.

The right to education has two dimensions. First, it has a *social* dimension because it affords individuals a claim against the State in respect of receiving education and implies positive State obligations. Second, it has a *freedom* dimension because it allows individuals the freedom to choose between State-organised and private education and implies negative obligations.³ Both these aspects are referred to in the provisions on health contained in international, regional and national instruments; however, it is the first dimension that will be the main focus of our analysis of the right to education in this chapter.

2. INTERNATIONAL STANDARDS AND JURISPRUDENCE

2.1 Universal Declaration of Human Rights

The right to education is set out in the Universal Declaration of Human Rights. Article 26 of the instrument states that:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

1 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13, The Right to Education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), para. 2.

2 Human Rights Resource Centre, University of Minnesota, *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource* (Minneapolis, 2000), p. 2, www.umn.edu/humanrts/edumat/IHRIP/circle/modules/module16.htm.

3 Fons Coomans, *Identifying Violations of the Right to Education* (on file with the Centre on Housing Rights and Evictions, Geneva).

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

This provision captures both the social and the freedom dimensions of the right to education because it sets out a positive obligation on the State to provide free, compulsory elementary education and stipulates that parents have the liberty to choose the education they wish their children to receive. As stated in the previous chapter, while the Universal Declaration of Human Rights is not strictly legally binding by itself, it is arguable that many of its provisions constitute international customary law. Alternatively it has been suggested that the Declaration represents an authoritative interpretation of human rights in the UN Charter or that the rights in the Declaration are general principles of international law.⁴ Furthermore, its provisions may be the subject of a communication made to the United Nations Commission on Human Rights under the 1503 procedure.

BOX 1. COMMON VIOLATIONS OF THE RIGHT TO EDUCATION⁵

Violations of the obligation to respect

- Closure of private schools by the State⁶
- Passing a law providing that all persons who are unable to pay school fees will be denied the right to basic education⁷
- Failure to provide the funding necessary to maintain State schools that have already been established

Violations of the obligation to protect

- Failure of the State to prevent parents, employers and other third parties from stopping girls attending school
- Failure of the State to protect individuals from discrimination in private educational institutions
- Failure of the State to regulate recognition of private educational institutions and diplomas⁸

4 See generally B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Year Book of International Law*, Vol. 12 (1992), pp. 82–108.

5 In General Comment No. 13 (n. 1 above), the CESCR discusses the obligations imposed by the right to education in more detail. The CESCR states that, the obligation to respect requires States Parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States Parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States Parties have an obligation to fulfil (provide) the right to education. As a general rule, States Parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant. (para. 47)

6 Private education refers to educational institutions (schools, colleges, etc.) established and run by private individuals or organisations. These institutions may or may not receive funding from the State.

7 Gina Bekker, *The Right to Education in the South African Constitution: An Introduction* (Pretoria; Centre for Human Rights, 2000), p. 14.

8 Fons Coomans, 'In Search of the Core Content of the Right to Education' in D. Brand and S. Russell (eds.), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Pretoria: Protea Book House, 2002), pp. 159–182, at p. 162.

Violations of the obligation to fulfil

- Failure to take appropriate steps to ensure that education is culturally appropriate for minorities
- Failure to develop a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying teachers domestically competitive salaries
- Failure to secure free compulsory primary education for all children

For other examples of violations of the right to education, see General Comment No. 13 on the Right to Education, paragraphs 58 and 59.

2.2 International Covenant on Economic, Social and Cultural Rights

The most detailed account of the right to education has been provided by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 13 on the Right to Education. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights provides that:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

The article also sets out the steps that States Parties must undertake in order to achieve the full realisation of the right to education. These include making primary education compulsory, free and available to all; ensuring that secondary education in its different forms, including technical and vocational secondary education, is made generally available and accessible to all by every appropriate means and, in particular, by the progressive introduction of free education; making higher education equally accessible to all, on the basis of capacity, by every appropriate means and, in particular, by the progressive introduction of free education; encouraging or intensifying, as far as possible, fundamental education for those persons who have not received or completed the whole course of primary education; and actively pursuing the development of a system of schools at all levels, establishing an adequate fellowship system and continuously improving the material conditions of teaching staff.⁹

Article 13 of the Covenant embraces the liberty aspect of the right to education. It provides that States Parties are obliged to have respect for the liberty of parents and legal guardians to choose, for their children, schools other than those established by the public authorities and to ensure the religious and moral education of their children in line with their own convictions, provided that such schools conform to minimum educational standards as may be laid down or approved by the State.¹⁰ Furthermore, the article recognises the liberty of individuals and bodies to establish and direct educational institutions, provided that such institutions conform to minimum State-stipulated standards and to the principles set out in paragraph 1 of the article.

⁹ Article 13(2)(a)-(e).

¹⁰ Article 13(3).

General Comment No. 13 states that education in all forms and at all levels must exhibit the following features: *availability*,¹¹ meaning that there must be functioning educational institutions and that programmes must be available in sufficient quantity within the jurisdiction of the State Party;¹² *accessibility*, which has three overlapping dimensions: *non-discrimination*, *physical accessibility* and *economic accessibility*;¹³ and *acceptability* and *adaptability*, whereby education must be flexible so that it may adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. Furthermore, when one is weighing the appropriate application of these ‘interrelated and essential features’, the best interests of the student shall be a primary consideration.

The CESCR has stated that States Parties are obliged to respect, protect and fulfil each of the ‘essential features’ of the right to education, i.e., availability, accessibility, acceptability and adaptability.¹⁴ General Comment No. 13 also goes into great detail on the normative content of Article 13 and elaborates on the substantive content and the varying strengths of the obligations imposed on States Parties by the right to education. (It is important to note that the obligations of States Parties in relation to primary, secondary, higher and fundamental education are not identical.)¹⁵ The different levels of education dealt with in the article and the General Comment are primary education (see paragraphs 8-10 of the General Comment), secondary education (paragraphs 11-14), technical and vocational training (15-16), higher education (17-20) and fundamental education (21-24). The strongest obligation imposed on States is the obligation of making primary education compulsory and free for all. However, the notion of the ‘progressive introduction of free education’ means that, while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education.¹⁶

The minimum core obligation of the right to education is mentioned in General Comment No. 13, in which (in para. 57) the CESCR states that:

[T]his core [of the right to education] includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art. 13 (3) and (4) [of the Covenant]).

In addition, Article 14 of the Covenant requires that States Parties that have not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt detailed plans of action for the progressive implementation, within a reasonable number of years to be fixed in the plan, of the principle of compulsory primary education free of charge for all. General Comment No. 11 on Plans of Action for Primary Education elaborates on a number of the terms used in

11 General Comment No. 13 (n. 1 above), para. 6.

12 What educational institutions and programmes require to function depends upon numerous factors, including the developmental context within which they operate. For example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

13 General Comment No. 13 (n. 1 above), para. 6(b).

14 *Ibid.* para. 50.

15 *Ibid.* para. 51.

16 *Ibid.* para. 14.

Article 14 that are also useful for an understanding of the right to primary education set out in Article 13. With regard to primary education being ‘free of charge’, the CESCR states that this involves the elimination of both direct *and* indirect costs. This means that indirect costs such as compulsory levies on parents (sometimes portrayed as voluntary though they are not) or the obligation to wear a relatively expensive school uniform may prevent primary education from qualifying as ‘free of charge’.¹⁷ General Comment No. 13 also makes clear that the ‘compulsory’ element of primary education underlines the prohibition on gender discrimination in access to education and highlights that parents, guardians and the State are not entitled to treat as optional the decision on whether the child should have access to primary education.¹⁸

2.3 Convention on the Rights of the Child

In any discussion on the right to education, one group for which the right is particularly meaningful leaps to mind: children. The most important international instrument in the context of the right of the child to education is the Convention on the Rights of the Child, in which the right to education of children is detailed in Articles 28 and 29. Article 28 states that States Parties recognise the right of the child to education. The provision contains measures that must be taken by States with a view to achieving the right progressively and on the basis of equal opportunity. The measures include making primary education compulsory, free and available to all; encouraging the development of different forms of secondary education, including general and vocational education, making them available and accessible to every child and taking appropriate steps, such as the introduction of free education and offering financial assistance in case of need; making higher education accessible to all on the basis of capacity by every appropriate means; making educational and vocational information and guidance available and accessible to all children; and taking steps to encourage regular attendance at schools and the reduction of drop-out rates. Many of these measures are similar to those prescribed in Article 13(2)(a)-(c) of the International Covenant on Economic, Social and Cultural Rights; however, it is important to note that Article 28’s emphasis on the ‘progressive realisation’ of the different aspects of the right to education means that the right to free, compulsory primary education under the Convention on the Rights of the Child is weaker than the right set out in the Covenant, which is mandatory and more strict.¹⁹

In General Comment No. 7 on Implementing Child Rights in Early Childhood,²⁰ the Committee on the Rights of the Child states that the right to education during early childhood begins at birth and is closely related to the right of young children to maximum development (Article 6(2) of the Convention on the Rights of the Child).²¹ This linkage between education and development is also elaborated in Article 29(1)²² and in the Committee’s General Comment No. 1 on the Aims of Education. Education for young children is to be understood in the broadest sense. The Committee calls on States Parties to provide education that acknowledges a key role for parents and the wider family and community, as well as the contribution of organised programmes of early childhood education provided by the State, community, or civil society institutions.²³

17 CESCR, *General Comment No. 11, Plans of Action for Primary Education* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999), para. 7.

18 *Ibid.* para. 6.

19 Coomans, ‘In Search of the Core Content’ (n. 8 above), p. 165.

20 Committee on the Rights of the Child, *General Comment No. 7, Implementing Child Rights in Early Childhood* (Fortieth session, 2005), U.N. Doc. CRC/C/GC/7/Rev.1.

21 *Ibid.* para. 28.

22 *Ibid.* para. 28.

23 *Ibid.* para. 30.

The ‘best interests’ principle set out in Article 3 of the Convention on the Rights of the Child also has a part to play in relation to the right to education. The Committee on the Rights of the Child has emphasised that all decision-making concerning a child’s education must take account of the best interests principle — including decisions by parents, professionals and others responsible for children. Furthermore, actions undertaken in relation to schools must take account of the principle.²⁴

The Convention makes specific provision for the special needs of children with disabilities. States Parties are obliged to encourage and ensure the extension (subject to available resources) to disabled children and their carers of assistance that is appropriate to the child’s condition and to the circumstances of their carers. Whenever possible, such assistance must be provided free of charge and shall be designed to ensure that the disabled child enjoys, among other rights, effective access to education.²⁵ Article 32(1) provides that States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education. States are obliged to take legislative, administrative, social and educational measures to ensure that this does not occur.

Article 28 of the Convention contains two other aspects of the right to education not expressly dealt with in Article 13 of the International Covenant on Economic, Social and Cultural Rights. According to the Convention, States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the Convention.²⁶ Furthermore, under the Convention, States Parties are obliged to promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.

While Article 28 is concerned with *access* to education, Article 29 focuses on the *content* of education. The article lists the aims of education,²⁷ which include the development of the child’s personality, talents and mental and physical abilities to their fullest potential and the development of respect for family, human rights, the natural environment, the child’s and others’ cultural and national identities and preparation of the child for responsible life in a free society.

These aims of education are discussed in greater detail in the Committee’s General Comment No. 1 on the Aims of Education. The Committee makes clear that ‘education’ in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes that enable children, individually and collectively, to develop their personalities, talents and abilities and to live full and satisfying lives within society.²⁸ This is emphasised in paragraph 9, where the Committee states that:

Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.

24 Ibid. para. 13(b).

25 Article 23.

26 Article 13(2).

27 Article 29(1)(a)-(e).

28 Committee on the Rights of the Child, *General Comment No. 1, Aims of Education*, U.N. Doc. CRC/GC/2001/1, para. 2.

The Committee gives instructions on how States Parties should implement Article 29. The Article requires the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies. Teacher training must be focused on promoting these values,²⁹ and the values must be embodied and reflected in the school environment. The Committee calls upon States Parties to develop comprehensive national plans of action to promote and monitor the realisation of the objectives listed in Article 29(1).³⁰

The Committee also points out that, although denying a child access to educational opportunities is primarily a matter that relates to Article 28 of the Convention, there are many ways in which failure to comply with the principles contained in Article 29(1) may have a similar effect. For example, gender discrimination may be reinforced by practices or curricula that are inconsistent with the principles of gender equality, by arrangements that limit the benefits girls may obtain from the educational opportunities offered, and by unsafe or unfriendly environments that discourage girls' participation. Similarly, discrimination against children with disabilities is pervasive in many formal educational systems and in a great many informal educational settings, including in the home. Children with HIV/AIDS are also heavily discriminated against in both educational settings.³¹

2.4 Treaties concerning discrimination in education

Clearly, one of the most crucial issues that arises in relation to education is discrimination. The following international instruments contain provisions pertaining to non-discrimination and equal treatment in the context of education: the International Covenant on Economic, Social and Cultural Rights, the Convention against Discrimination in Education, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child. The CESCR has expressly recognised that the principles of non-discrimination extend to all persons of school age residing in the territory of a State Party³² (including non-nationals), irrespective of their legal status, gender, age, possession of a disability, and ethnic or racial origin. The CESCR has pointed out that sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographical locations may constitute discrimination under the Covenant.³³ Furthermore, the State has an obligation to ensure that the liberty to establish and direct educational institutions set out in Article 13(4) does not lead to extreme disparities in educational opportunity for some groups in society.³⁴

With regard to gender discrimination, Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women obliges States Parties to eliminate discrimination against women in order to ensure women equal educational rights with men. To realise this goal, States Parties must ensure, on the basis of equality of men and women, access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality.³⁵ States Parties are also required to take steps to ensure the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education and other types of education that will help achieve this aim. This must be done by, among other means, the revision of textbooks and school programmes and the adaptation of teaching

29 Ibid. para. 18.

30 Ibid. para. 23.

31 Ibid. para. 10.

32 General Comment No. 13 (n. 1 above), para. 31.

33 Ibid. para. 35.

34 Ibid. para. 50.

35 Coomans, 'In Search of the Core Content' (n. 8 above), p. 164.

methods so as to ensure that women and men have the same opportunities to benefit from scholarships and other study grants and have equal opportunities for access to programmes of continuing education, particularly those aimed at reducing, as soon as possible, gaps in education existing between men and women.³⁶

In the case of *Andrea Szijarto v. Hungary*,³⁷ the Committee on the Elimination of Discrimination against Women considered the obligation of States Parties under Article 10(h) the Convention on the Elimination of All Forms of Discrimination against Women to ensure equal access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning. (For more on this topic, see the section on international standards and jurisprudence in the chapter on the Right to Health.) The Committee stated that the complainant had a right protected by Article 10(h) of the Convention to specific information on sterilisation and alternative procedures for family planning in order to protect herself against such an intervention without her having made a fully informed choice.

States are obliged to take steps to meet the special educational needs of girls and women. These include measures to bring about the reduction of drop-out rates among girls and women and the organisation of programmes for girls and women who have left school prematurely, as well as the provision of access to specific educational information relating to women's health and family planning.³⁸ The Convention on the Elimination of All Forms of Discrimination against Women also includes special protections for rural women. Article 14 of the Convention declares that States Parties must ensure that rural women enjoy the right to obtain all types of training and education, formal and non-formal, including training and education relating to functional literacy, as well as, among other benefits, the benefit of all community and extension services, in order to increase their technical proficiency.

Women's right to education was discussed by the CESCR in General Comment No. 16 on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights.³⁹ According to the CESCR, implementing the guarantee of the equal enjoyment of all Covenant rights by men and women set out in Article 2(l) of the Covenant in relation to Article 13 requires, among other steps, the adoption of legislation and policies to ensure the same admission criteria for boys and girls at all levels of education.⁴⁰ States Parties are to ensure that families desist from giving preferential treatment to boys when sending their children to school and that curricula promote equality and non-discrimination, particularly through information and awareness-raising campaigns.⁴¹ Implicitly acknowledging the particular vulnerability of girl children to sexual and physical violence, the CESCR explains that States Parties must create favourable conditions to ensure the safety of children – especially girls – on their way to and from school.⁴²

The Convention against Discrimination in Education (United Nations Educational, Scientific and Cultural Organisation) prohibits discrimination that has the effect of depriving any person or group of persons of access to education of any type or at any level or of restricting any person or group of persons to education of an inferior standard.⁴³ The Convention stipulates that States Parties must undertake to

³⁶ Article 10(c)-(e).

³⁷ Communication No. 4/2004.

³⁸ Article 10(f)-(h).

³⁹ CESCR, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (Thirty-fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005).

⁴⁰ *Ibid.* para. 30.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Article 1.

formulate, develop and apply a national policy that will tend to promote equality of opportunity and treatment, and, in particular, to make primary education free and compulsory.⁴⁴ In addition, it recognises parents' rights to freely choose their children's educational institutions and to ensure the religious and moral education of their children in conformity with their own convictions.⁴⁵

The Convention obliges States Parties to abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices that involve discrimination in education. It also requires States Parties to ensure (by legislation if necessary) that there is no discrimination in the admission of pupils to educational institutions. States Parties are obliged to prohibit any differences of treatment by public authorities among nationals, except on the basis of merit or need, in the matter of school fees, the grant of scholarships or other forms of assistance to pupils and the issuance of permits and other facilities for the pursuit of studies in foreign countries. They must also prohibit any kind of special assistance granted or restriction imposed on educational institutions by public authorities based only on the ground that pupils belong to a particular group. Finally, States Parties are under a duty to give foreign nationals resident within their territories the same access to education as is given to their own nationals.⁴⁶

Discrimination is also prohibited under the terms of the International Convention on the Elimination of All Forms of Racial Discrimination. Article 5(e)(v) of the Convention obliges States Parties to undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee to everyone, without distinction, the enjoyment of the right to education and training.

2.5 Migrant workers, refugees & education

The issue of the right to education of non-nationals has been dealt with in several international instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('Convention on Migrant Workers'), the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.

The Convention on Migrant Workers provides that each child shall have the basic right to access to education on the basis of equality of treatment with nationals of the State of employment.⁴⁷

Additional rights are guaranteed to migrant workers and members of their families who possess proper documents or who are otherwise in a regular situation. Migrant workers in a documented situation are to enjoy equality of treatment with nationals in the State where employment occurs in relation to, among other issues, access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned, access to vocational guidance and placement services and access to vocational training and retraining facilities and institutions.⁴⁸

44 Article 4.

45 Article 5. See 'Circle of Rights' (n. 2 above).

46 Article 3.

47 Article 30.

48 Article 43(1)(a)-(c).

While residing in the State where their employment occurs, family members of migrant workers in a documented or regularised situation are entitled to enjoy equality of treatment with nationals of that State in relation to access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned. They are also entitled to equality of treatment with nationals with regard to access to vocational guidance and training institutions and services, provided that requirements for participation are met.⁴⁹ Furthermore, States of employment are obliged to pursue a policy aimed at facilitating the integration of the children of migrant workers in local school systems, particularly in respect of teaching the local language.⁵⁰ States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and may provide special schemes of education in the mother tongue of the children of migrant workers.⁵¹

The right to education also arises in the context of freedom of thought, conscience and religion. Article 12(4) of the Convention on Migrant Workers declares that States Parties shall undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, or legal guardians so as to ensure the religious and moral education of the children in conformity with the convictions of the parents or guardians.

The right to education of non-nationals is also provided for in the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons. Both of these instruments oblige States Parties to accord the same treatment to refugees and stateless persons as is accorded to nationals with respect to elementary education.⁵² Furthermore, with respect to education other than elementary education, States Parties must accord to both categories of persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.⁵³

2.6 Other international instruments

Other binding international instruments that deal with education are:

- International Labour Organisation Convention No. 169, the Indigenous and Tribal Peoples Convention (1989), on the promotion of the instruction of indigenous children in their own language
- Convention on Technical and Vocational Training (1989)

Relevant non-binding instruments include:

- Basic Principles for the Treatment of Prisoners (1990)
- Beijing Declaration and Platform for Action (1994)
- Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development (1995)
- Declaration on Social Progress and Development (1969)
- Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1985)
- Declaration on the Right to Development (1986)

49 Article 45(1)(a)-(b).

50 Article 45(2).

51 Article 45(3)-(4).

52 Article 22(1) of the Convention relating to the Status of Refugees; Article 22(1) of the Convention relating to the Status of Stateless Persons.

53 Article 22(2) of both Conventions.

- Declaration on the Rights of Disabled Persons (1975)
- Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992)
- Istanbul Declaration and the Habitat Agenda of the Second United Nations Conference on Human Settlements (Habitat II) (1996)
- Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)
- Proclamation of Tehran (1968)
- Standard Minimum Rules for the Treatment of Prisoners (1957)
- UN Principles for Older Persons (1991)
- UN Rules for the Protection of Juveniles Deprived of Their Liberty (1990);
- World Declaration on Education for All (1990)

3. REGIONAL STANDARDS AND JURISPRUDENCE

3.1 Inter-American system

Article 12 of the American Declaration of the Rights and Duties of Man provides that:

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.⁵⁴

One of the few cases in which the Inter-American Commission on Human Rights has dealt with Article 12 was *Jehovah's Witnesses v. Argentina*.⁵⁵ The complaint related to an order by the President of Argentina that the office and all worship centres of the Jehovah's Witnesses be closed. As part of a campaign of persecution against Jehovah's Witnesses, more than 300 children of school age were denied primary education by being dismissed from the schools they had been attending or simply by being prevented from enrolling on the sole basis of their religious beliefs. When some students continued their studies at home, they were not permitted to sit end-of-year examinations. The Commission held that the President's action amounted to a violation of the right to education (specifically, the right to equality of opportunity in education), but did not analyse or discuss the content of the right in any depth.

The Inter-American Court of Human Rights has also dealt with the issue of the right to education. A recent case with implications for the right to education is *Yean & Bosico v. Dominican Republic*.⁵⁶ This case concerned two Dominican-born children of Haitian descent who were denied birth certificates by the Dominican authorities. The refusal of the authorities to provide the children with birth certificates had clear implications for the enjoyment of that right because, without a birth certificate, it is not possible to attend school in the Dominican Republic. The Court found that the Dominican Republic had violated a wide range of rights enshrined in the American Convention on Human Rights, including the right to special protection of minor children (Article 19), the right of individuals as persons before the law (Article 3), the right to nationality (Article 2) and the right to equal protection before the law (Article 24). The Court continued as follows: "It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the

⁵⁴ OAS Res. XXX, adopted by the Ninth International Conference of American States (1948).

⁵⁵ Case No. 2137, Inter-Am. C.H.R. 43, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979) (Annual Report 1978).

⁵⁶ Case No. 12.189, 8 Sept. 2005. For a full Spanish text of the decision, see http://www.corteidh.or.cr/seriec/seriec_130_esp.doc

Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [also known as the Protocol of San Salvador], in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development”.⁵⁷ For more on this case, see Chapter 20.1.

Article 13 of the Protocol of San Salvador describes the right to education in much more detail. By and large, it follows Article 13 of the International Covenant on Economic, Social and Cultural Rights; however, it is weaker in one vital respect: in Article 13, the Protocol merely states that “primary education *should* be compulsory and accessible to all without cost” [emphasis added], whereas the Covenant uses the stricter term ‘shall’ in the equivalent provision.⁵⁸ Significantly, a violation of Article 13 may be the subject of an individual petition to the Commission.

For more right to education cases under the Inter-American system, see the Chapter 7.

3.2 African system

The right to education is dealt with in detail in the African regional human rights system. Article 17(1) of the African Charter on Human and Peoples’ Rights provides that every individual shall have the right to education. Neither the African Commission on Human and Peoples’ Rights nor the African Court on Human and Peoples’ Rights has ever addressed the substantive content of the right provided for in Article 17 in detail, but in *World Organisation against Torture, Lawyers’ Committee for Human Rights and others v. Zaire*,⁵⁹ the Commission held that the two-year closure of universities and secondary schools constituted a violation of Article 17. Thus, denial of access to existing places of learning violated the right to education. However, the Commission did not make any effort to analyse the right.⁶⁰

The African Charter on the Rights and Welfare of the Child sets out a much broader and more comprehensive right to education than that provided for in the African Charter on Human and Peoples’ Rights. Article 11 of the former provides that every child shall have the right to an education.⁶¹ The provision incorporates aspects of Articles 28 and 29 of the Convention on the Rights of the Child in its outline of the aims of education,⁶² and it prescribes measures that the State must take as part of the State’s efforts to achieve the full realisation of this right. Such measures include the provision of free and compulsory basic education; the encouragement of the development of secondary education in different forms and of the progressive provision of access to free education for all; the provision, by every appropriate means, of higher education to all on the basis of capacity and ability; and the implementation of steps to encourage regular attendance at school and the reduction of drop-out rates.⁶³

⁵⁷ Ibid. para. 185.

⁵⁸ Matthew Craven, ‘The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights’ in David J. Harris and Stephen Livingstone (eds.), *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998), pp. 289–321, at p. 309.

⁵⁹ Communication 25/89; 47/90; 56/92; 100/93 (joined).

⁶⁰ A more recent attempt to allege a violation of Article 17 arose in the case of the *Law Offices of Ghazi Suleiman v. Sudan* (Communication 220/98, decided at the 31st Ordinary Session, May 2002). In this case, the Minister of Education in the Republic of the Sudan announced that all the universities in Sudan would be closed for one month. The complainant alleged that the closure of universities was being undertaken to assist the military mobilisation for the civil war in southern Sudan and that this amounted to a violation of Article 17. However, the merits of the case – including the claim with regard to the right to education – were not dealt with because it was declared inadmissible by the Commission due to non-exhaustion of local remedies.

⁶¹ Article 11(1).

⁶² Article 11(2).

⁶³ Article 11(3)(a)-(d).

It should be noted that, unlike the International Covenant on Economic, Social and Cultural Rights, the Charter does not oblige States Parties progressively to introduce free higher education, pursue the development of a system of schools at all levels, or continuously to improve the material conditions of teaching staff. Furthermore, the African Charter makes no mention of technical or vocational education, as occurs in Article 28(1)(d) of the Covenant.⁶⁴

Article 11 also requires States Parties to implement special measures in respect of girl children and gifted or disadvantaged children so as to ensure equal access to education for all sections of the community.⁶⁵ The Charter deals with another problem particular to girl children as well: pregnancy. It provides that States are obliged to take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual abilities.⁶⁶

Article 11 embraces the freedom dimension of the right to education. It declares that States Parties shall respect the rights and duties of parents and legal guardians to choose for their children schools other than those established by public authorities and ensure the religious and moral education of children in a manner consistent with the evolving capacities of the children.⁶⁷ It provides that no part of the article may be construed to interfere with the liberty of individuals and bodies to establish and direct educational institutions.⁶⁸ (Similar to the approach of the International Covenant on Economic, Social and Cultural Rights and Article 28(2) of the Convention on the Rights of the Child, both the right to establish and the right to choose educational institutions are conditional on the conformity of the education provided in such institutions to such minimum standards as may be laid down by the State.)

Parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child and shall have the duty to secure, within their abilities and financial capacities, living conditions necessary for the child's proper development, including education.⁶⁹ However, States Parties are obliged to take all appropriate measures (in accordance with their means and national conditions) to assist parents and other persons responsible for the child and, in case of need, provide material assistance and support programmes with regard to education.

Furthermore, the Charter provides that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. Presumably, this implicitly includes any work that may interfere with the right to education, given that education is key to the development of the child.

It should be noted that, although the African Committee on the Rights and Welfare of the Child is operational, it has yet to receive any communications.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa deals with the right to education. Article 12 provides that States must take all appropriate measures to eliminate all forms of discrimination against women and girls in education and training and eliminate

64 D. Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child', *International Journal of Children's Rights*, Vol. 10, No. 2 (2002), pp. 157-177, at 162-163.

65 Article 11(3)(e).

66 Article 11(6).

67 Article 11(4).

68 Article 11(7).

69 Article 20(1)(b).

all references in textbooks and syllabuses to the stereotypes that perpetuate such discrimination.⁷⁰ Furthermore, States are obliged to take specific steps to increase literacy among women, promote education and training for women and girls at all levels and in all disciplines and promote the retention of girls in schools and other training institutions.

The Charter deals with the issue of human rights education as an empowerment. Article 9 obliges States Parties to put in place adequate structures, including appropriate education programmes, to inform women and make them aware of their rights.

3.3 European system

The original text of the European Convention on Human Rights contained no reference to the right to education. However, Article 2 of Protocol 1 to the ECHR⁷¹ states that,

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The fact that the right is phrased negatively means that it is the right to freedom of education that is covered by the provision. However, in the *Costello-Roberts Case*,⁷² the European Court of Human Rights held that Article 2 does set out a right to education that must be secured to all children. Any positive obligations imposed on the State are nonetheless limited because the Court has held that Article 2 merely guarantees a right of access to educational institutions existing at a given time and does not require States to establish at their own expense or to subsidise education of any particular type or level.⁷³

In its 2005 judgment in the case of *Timishev v. Russia*,⁷⁴ the Court provided an analysis of Article 2 of the Protocol. In this case, the applicant was an ethnic Chechen living in the town of Nalchik. He had been refused registration for permanent residence due to his Chechen origins. To receive compensation for the property he had lost in the Chechen Republic, he had had to surrender his migrants card (a local document confirming his residence in Nalchik and his status as a forced migrant from Chechnyain Nalchi). Among other issues, the applicant complained about the refusal of the Nalchik Education and Science Department to admit his children to school after the summer break because he had no registered residence and no migrants card.

Citing its previous jurisprudence,⁷⁵ the Court reiterated that, because, under Article 2 of the Protocol, they may not deny the right to education, Contracting States must guarantee to anyone within their jurisdictions the right of access to educational institutions. The Court pointed out that Article 2 of the Protocol contains no stated exceptions. It emphasised that, in a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a

⁷⁰ Article 12

⁷¹ 213 UNTS 262, entered into force: 18 May 1954.

⁷² *Costello-Roberts v. United Kingdom*, Judgment of 25 Mar. 1993, Series A, Vol. 247-C.

⁷³ *Belgian Linguistics Case* (No. 1) (1967), Series A, No. 5 (1979-80) 1 EHRR 241; *Belgian Linguistics Case* (No. 2) (1968), Series A, No. 6 (1979-80) 1 EHRR 252.

⁷⁴ Applications no. 55762/00 and no. 55974/00, 13 Dec. 2005.

⁷⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgment of 7 Dec. 1976, Series A No. 23, para. 52; *Belgian Linguistic Case* (Merits), Judgment of 23 July 1968, Series A No. 6, pp. 30-32, paras. 3-5.

restrictive interpretation of the first sentence of Article 2 of the Protocol would not be consistent with the aim or purpose of that provision. The Court pointed out that the right to education is also covered in similar terms in other international instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child, and that there is no doubt that the right to education guarantees access to elementary education, which is of primordial importance for a child's development. The Court observed that the applicant's children were refused admission to the school they had attended for the previous two years because their father had surrendered his migrants card and had thereby forfeited his registration as a resident in the town of Nalchik. This was in violation of both Russian domestic law and Article 2 of the Protocol.

The European Social Charter likewise contains provisions relating to education. Article 10 provides that everyone has the right to appropriate facilities for vocational training, while Article 9 states that everyone has the right to public facilities for vocational guidance.

In *International Association Autism-Europe (IAAE) v. France*,⁷⁶ the complainant alleged that the French Government had made insufficient educational provision for autistic persons, thereby violating several provisions of the revised European Social Charter, including Article 17(1) (the obligation of States Parties to secure the right to education of all children and young persons) and Article 15(1) (the obligation of States Parties to ensure the effective exercise by persons with disabilities of their right to independence, social integration and participation in the life of the community by, inter alia, taking the necessary measures to provide such persons with education). The complainant also claimed that France had violated the non-discrimination principle in the enjoyment of Charter rights (Article E).⁷⁷ The European Committee of Social Rights stated that Article E prohibits both direct discrimination and all forms of indirect discrimination. Referring to its own case law, the Committee emphasised that States Parties are obliged to take legal and *practical* action to give full effect to Charter rights. When the achievement of a right is exceptionally complex and particularly expensive to resolve, State Parties must take measures that allow them to achieve the objectives of the Charter "within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources". The Committee found that the numbers of autistic children being educated in either general or specialist schools were disproportionately low in comparison to other children and that there was a chronic shortage of care and support facilities for autistic adults. This constituted a violation of Articles 15(1) and 17(1), whether read alone or in conjunction with Article E.⁷⁸

The Charter of Fundamental Rights of the European Union also contains provisions relating to the right to education. Article 14 states that everyone has the right to education and to access to vocational and continuing training.⁷⁹ This right includes the possibility to receive free compulsory education.⁸⁰ The provision also guarantees the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogic convictions.⁸¹ Article 32 also provides protection for the right to education by stating that the minimum age of admission to employment

76 No. 13/2002, *Autisme-Europe v. France*.

77 For more on this case, see Chapter 21.

78 The Committee of Ministers (to which the Committee of Social Rights reports) subsequently adopted a resolution, ResChs(2004)1 Collective Complaint No. 13/2002, *Autisme-Europe v. France*, stating that it noted France's undertaking to bring the situation into conformity with the Charter and that it looked forward to France reporting that the situation had improved in its next report under the Charter.

79 Article 14(1).

80 Article 14(2).

81 Article 14(3). This right and freedom must be exercised in accordance with the national laws governing the exercise of such right and freedom.

may not be lower than the minimum school-leaving age (except for limited derogations). Furthermore, young people admitted to work must enjoy working conditions appropriate to their age and be protected against economic exploitation and any work likely to interfere with their education. While the Charter provides quite a broad statement of the right to education, the precise legal status of the rights contained in the instrument is undetermined, and they are not currently justiciable.

The European Convention on the Legal Status of Migrant Workers (1977) contains provisions on education (Articles 14 and 15). However, these rights apply to a far more limited group than those provided for in the Convention on Migrant Workers. This is due to the fact that a 'migrant worker' is defined as a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory to take up paid employment (i.e., who is a national of a Member State of the Council of Europe and who is in a regularised or documented position in another Member State).

4. NATIONAL JURISPRUDENCE

This has been the case even in countries, such as the Australia, New Zealand, Ireland, the United Kingdom and United States, where there has traditionally been considerable opposition to the notion of justiciable economic, social and cultural rights. This section will concentrate primarily on the rights of those entitled to benefit from the right to education, rather than on the rights of parents or care-givers in relation to the education provided to the children in their care.

Domestic courts have also identified implicit rights to education through interpreting and applying civil and political rights standards enshrined in national law. In the Indian case of *Unni Krishnan, J. P. v. State of A.P. and Others*,⁸² the Indian Supreme Court held that the word 'life' must be interpreted broadly and expansively and that the "right to education is implicit in the right to life" because education is basic to the dignified enjoyment of life. The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including one stating that the "State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years" (section 45). The Court held that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 to one enforceable under the law.⁸³

The positive obligations imposed by the right to education have regularly come before the courts. In the Colombian decision *Mora v. Bogotá District Education Secretary & Ors*,⁸⁴ a 5-year-old child in a low-income family was placed in a public school located in neighbourhood that was not the neighbourhood in which her family lived. The Constitutional Court of Colombia found a violation of the right to education due to the lack of effective access to education. The Constitutional Court held that, if the right to education of the child is affected because of quota restrictions within the schools near her home, the guarantee of this right is not effective. The quota system must take account of socio-economic factors (in this case, the transport costs involved in sending the child to the assigned school).

⁸² [1993] 4 *Law Reports of the Commonwealth* 234.

⁸³ It should be noted that this decision limits the scope of the decision in *Mohini Jain v. State of Karnak* (1992) 3 SCC 666, which appeared to make the right to education of everyone justiciable — not only that of children under 14. This is an adaptation of the summary of the case at www.escri-net.org

Several cases involving the duty of the State to fulfil the right to education have focused on State obligations to give effect to minority language rights. In the Canadian case *Mahe v. Alberta*,⁸⁵ the Supreme Court found that section 23 of the Canadian Charter of Rights and Freedoms, which enshrines minority language educational rights, places positive obligations on provincial governments to mobilise resources and enact legislation for the development of major institutional structures.⁸⁶ In the later case of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,⁸⁷ Francophone parents in five school districts applied for an order that French-language facilities and programmes be provided at the secondary school level as required by section 23. The trial judge found a section 23 violation because the province had failed to prioritise these obligations and ordered 'best efforts' to provide school facilities and programmes by particular dates. The trial judge retained jurisdiction to hear reports on the status of the efforts over time. The province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. This remedial order was ultimately upheld by the Supreme Court of Canada.

The freedom dimension of the right to education has also come to the fore in many cases involving the right to education of minorities. For instance, the right to receive education in an official language of one's choice was the subject of the South African Supreme Court of Appeal decision in *Governing Body of Mikro Primary School & Anor. v. Western Cape Minister of Education & Ors.*⁸⁸ In this case, the head of the Western Cape Education Department had issued a directive instructing the governing body of Mikro primary school, an Afrikaans language public school, to admit certain learners and teach them in English. Prior to the directive, the governing body had refused a request by the Provincial Department of Education that they change the language policy of the school so as to convert it into a parallel-medium school (e.g., a school in which instruction was given in both Afrikaans and English). The governing body sought an order setting aside the directive and the decision on appeal, as well as for ancillary relief. This was granted by the High Court.⁸⁹ The case centred on the interpretation of section 29(2) of the Constitution, which provides that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. The minister and head of department submitted, *inter alia*, that section 29(2) of the Constitution should be interpreted to mean that everyone had the right to receive education in the official language of her or his choice at each and every public educational institution where this was reasonably practicable.

The Supreme Court of Appeal held that, in order to ensure effective access to and implementation of this right, the State must, under the terms of section 29(2), consider all reasonable educational alternatives, including single-medium institutions. Section 29(2) therefore empowers the State to ensure the effective implementation of this right by providing single-medium educational institutions. The Court held that this was a clear indication that the constitutional right to receive education in an official language at a public educational institution was not a right to receive such education at each and every public educational institution, subject only to it being reasonably practicable to do so. Even if it were reasonably practicable to provide such education at Mikro primary school, the children did not have a constitutional right to receive education in English at that school.

84 Decision T-170/03, 28 Feb. 2003.

85 [1990] 1 S.C.R. 342.

86 Adapted from 'Case Note: *Doucet-Boudreau v. Nova Scotia*', ESCR-Net Case Law Database, http://www.escr-net.org/EngGeneral/Case_law.asp

87 [2003] 3 S.C.R. 3.

88 South African Supreme Court of Appeal, Case No. 140/05 (27 June 2005).

89 *Governing Body of Mikro Primary School v. Western Cape Minister of Education* [2005] 2 All SA 37 (C).

There have been a large number of cases in relation to discrimination in education. In *European Roma Rights Centre v. Ministry of Education, Sofia Municipality and 103rd Secondary School of Sofia*.⁹⁰ the European Roma Rights Centre brought an action challenging the failure of the Bulgarian authorities to terminate the racially segregated education of the Romani children attending a ghetto school. The action sought to ensure that the Romani children would have equal access to education and equal treatment in education. The Centre claimed that the fact that 100 percent of the student body of School 103 was Romani constituted segregation on racial or ethnic grounds in educational institutions. This was in contravention of Article 29 of the Protection against Discrimination Act 2003, which imposes a positive obligation on the authorities to take measures to prevent and eliminate discrimination. The Centre also claimed that action and inaction on the part of the Bulgarian authorities, including substandard material conditions in the school, lower expectations on the students' performance, the lack of training for teachers working with bilingual children, and the lack of controls on school attendance, were in violation of the right to equal treatment regarding education and to the right to an integrated educational environment. The Sofia District Court found in favour of the Centre on both aspects of the claim and ruled that the Bulgarian Ministry of Education, the Sofia municipality and the particular ghetto school had violated the prohibition on racial segregation and unequal treatment set out in Bulgarian and international law.⁹¹

There have also been challenges to indirect discrimination in relation to the right to education. In *Catholic Education Office v. Clarke*,⁹² the Full Federal Court of Australia upheld the decision of a single judge of the Federal Court that the appellant educational authorities had indirectly discriminated against a deaf student in respect of the terms and conditions upon which they were prepared to admit him as a high school student to Mackillop Catholic College. The school insisted that the student accept a 'model of learning support' that did not include the provision of Australian Sign Language (Auslan) interpreting services, without which the plaintiff could not meaningfully receive classroom education. The Court held that this constituted discrimination in violation of section 6 of the Disability Discrimination Act 1992 because it required the plaintiff to comply with a requirement (to participate in and receive classroom instruction without an interpreter) with which a substantially higher proportion of persons without the disability were able to comply. The requirement was not reasonable having regard to the circumstances of the case, and, moreover, the plaintiff, by reason of his dependence on Auslan, was not able to comply.

Another famous case that involved the employment of equality protections to forward the right to education is *Brown v. Board of Education*,⁹³ which is discussed below in the chapter on Children's ESC Rights. In the years since *Brown*, much education litigation in the United States has focused on the issue of funding for public schools.⁹⁴ The case of *Edgewood Independent School District v. Kirby*⁹⁵ centred on the Texas Constitution, which declares that "a general diffusion of knowledge" is "essential to the preservation of the liberties and rights of the people".⁹⁶ Furthermore, the legislature and state have a duty "to establish and make suitable provision for the support and maintenance of an efficient system of free schools".⁹⁷ The petitioners sought a review of an appeal court's order that reversed a trial court find-

90 Case 11630/2004, decided on 25 Oct. 2005.

91 Case note adapted from European Roma Rights Centre, 'Desegregation Court Victory: ERRC Prevails in Court against Bulgarian Ministry of Education on School Segregation of Roma', 26 Oct. 2005, www.errc.org (accessed 1 Jan. 2006).

92 [2004] FCAFC 197, 6 Aug. 2004, <http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/197.html>

93 347 US 483.

94 *San Antonio Independent School District v. Demetrio P. Rodriguez et al.*, 411 US 1 (1973).

95 777 S.W. 2d 391 (Tex. 1989). For more on this case, see 'Case Note: *Edgewood Independent School District v. Kirby*', ESCR-Net Case Law Database, http://www.escr-net.org/EngGeneral/Case_law.asp

96 Article VII(1).

97 *Ibid.*

ing that the Texas school financing system violated the Texas Constitution. This system relied on local property taxes to fund schools. The wealthiest districts had 700 times more property wealth per student than the poorest, with the consequence that the poorest schools lacked sufficient funds to provide necessary services. The Texas Supreme Court affirmed the trial court's decision that the system violated the state constitution. The system did not address disparities in the ability of different districts to raise revenue and did not ensure that every student receives an 'efficient', that is, 'productive' or 'effective' education. The system was not financially efficient, nor did it provide for a "general diffusion of knowledge statewide", but a "limited and unbalanced" diffusion. The Court did not suggest a specific remedy and noted that efficiency does not require a per capita distribution. However, the Court did set a time limit, until September 1991, for the legislature to develop a new financing system.

A more recent case is *Campaign for Fiscal Equity v. State of New York et al.*⁹⁸ In 1995, the Court of Appeals decided that the education article of the New York Constitution requires that the state offer all children the opportunity for a 'sound basic education'. The Court stated that the exact meaning of this standard could only be evaluated and resolved after the case went to trial. In January 2001, the challenge came before Justice Leland DeGrasse. He found that the defendants' method for funding education in New York State violated the Constitution because the education provided to New York City students was so deficient that it fell below the 'constitutional floor' set by the education article. He held that the state's actions were a substantial cause of this violation. Instead of prescribing a remedy, he ordered the state to devise and implement the reform of the state's public school financing system. The decision in relation to the education article was subsequently upheld by the Court of Appeals in *Campaign for Fiscal Equity et al. v. State of New York et al.*⁹⁹ The Court concluded that "the Education Article requires the opportunity for a sound high school education that should prepare students for higher education, or to compete in the employment market of high school graduates" and to enable them to function productively as participants in society. The Court of Appeals modified the lower court's holding, stating that "in the course of reforming the school finance system, a threshold task that must be performed by defendants is ascertaining, to the extent possible, the actual costs of providing a sound basic education in districts around the State". Instead, the Court of Appeals held that the state need only ascertain the actual cost of providing a sound basic education in New York City.¹⁰⁰

The issue of resources arises frequently in cases on the right to education. One example of a decision in which the courts adopted a strict approach to a State body's attempt to invoke resources as a justification for limiting access to the right to education is the English case of *R v. East Sussex County Council ex parte Tandy*.¹⁰¹ According to section 298 of the Education Act 1993,¹⁰² each local education authority was required to make arrangements for the provision of suitable education for those children of compulsory school age who, by reason of illness, among other factors, might not otherwise receive it. According to

98 719 N.Y. 2d 475.

99 100 N.Y. 2d 893.

100 The state failed to devise and implement the necessary reform of the public school financing system and, on 14 February 2005, DeGrasse proposed his own solution after receiving a report from a panel of special referees. He ordered that an additional US\$ 5.6 billion in annual operating expenses be provided within four years to ensure that the city's public school children would be given the opportunity to obtain a sound basic education. He also ordered that US\$ 9.2 billion in added funding for capital projects be provided over five years. The state appealed. On appeal, the Appellate Division, First Department upheld the decision, ordering the legislature to provide New York City schools US\$ 4.7 billion to US\$ 5.63 billion in operating aid and US\$9.2 billion in capital funding by 1 April 2006. The New York State Court of Appeals subsequently ruled that the state must spend at least \$1.93 billion more each year on New York City's public schools, far less than \$4.7 billion set by the lower courts. In doing so, it endorsed figure set by 2004 Governor-appointed commission. The majority of the Court justified their deference to the Legislature's education financing plans in terms of respect for the separation of powers and the fact that the elected branches of government are in a better position to determine funding needs throughout the state and priorities for the allocation of the State's resources.

101 [1998] 2 All ER 769. For more on this case, see 'Case Note: *R v. East Sussex County Council ex parte Tandy*', ESCR-Net Case Law Database, http://www.escr-net.org/EngGeneral/Case_law.asp

102 This provision has since been re-enacted in section 19 of the Education Act 1996.

section 298, “‘suitable education’, in relation to a child ... means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have”. In October 1996, the education authority advised parents of the appellant, a sick child, that, for financial reasons, the maximum number of hours per week of home tuition provided to her would be reduced. The appellant applied for judicial review of that decision, claiming, *inter alia*, that, in reaching its decision to cut the number of hours, the local authority took into account an irrelevant consideration. The House of Lords held that on a true construction of section 298, the question of what was ‘suitable education’ was to be determined purely with reference to educational considerations and that there was nothing in section 298 to indicate that the resources available were relevant to that determination. Accordingly, there was no reason to treat the resources of a local education authority as a relevant factor in determining what constituted ‘suitable education’ for the purposes of section 298. However, if there were more than one way of providing ‘suitable education’, the local education authority would be entitled to have regard to its resources in choosing between different ways of making such provision.

A German case, the *Numerus Clausus I Case*,¹⁰³ centred on the question of whether the State had internally allocated resources in a manner consistent with the right to education. A numerical limit on admission to university had been imposed by several universities. A complaint was made by students who failed to gain entry to medical school. It was claimed that the criteria used to select students were arbitrary and that there had been a violation of their right to choose where they were to be educated and to choose their occupation (Article 12(1)), as well as their right to equality. The German Constitutional Court held that the State was required to prove that the number of spaces available was the maximum possible and must cease using arbitrary criteria for selection. The Court stated that absolute restrictions on admission are permissible only when entirely necessary, when available educational and training capacity has been exhausted and where the choice and distribution of candidates takes place fairly in accordance with objective criteria.

¹⁰³ 33 BverfGE 303.

7 SPECIAL FOCUS: THE ECONOMIC AND SOCIAL RIGHTS OF CHILDREN



1. INTRODUCTION

The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) in November 1989.¹ The first binding international instrument specifically devoted to the rights of the child, the CRC is significant because it contains express recognition that children² possess particular needs as right-holders both in relation to the substantive content of rights and the way in which such rights are protected and promoted.

The position of children in relation to economic and social rights ('ESR') differs from that of other groups for several reasons. The most obvious of these is the fact that children may be more vulnerable to violations of their rights and less able to protect themselves or capable of taking advantage of protections that are available. Because of their nature and condition, children have a reduced capacity to meet their social and economic needs by either obtaining or creating sustenance from the resources of their environment.³ Furthermore, they are less likely to have the skills necessary to gain a stake in the resources of the community by negotiating special rights for themselves (i.e., rights that arise from transactions or relationships).⁴

In addition, children are often affected in a different way from adults by violations of a similar nature.⁵ The physical and psychological effects that children suffer as a result of violations of their ESR will nearly always be greater than those experienced by adults due to their age and lower level of physical and mental development.⁶ This is true both in relation to (a) the immediate impact that social and economic rights violations may have on a child's physical and psychological state and (b) the long-term detrimental effects on the child's development and future prospects resulting from such violations.

1 20 Nov. 1989, 1577 UNTS 3. The following four paragraphs are adapted from, Aoife Nolan, 'A Role for the Courts in Ensuring the Enforcement of the Socio-Economic Rights of the Child: Overcoming the "Counter-majoritarian Objection"' in *An appraisal of the Children's Rights Convention: Theory meets Practice* (Intersentia: forthcoming 2007)

2 Article 1 of the CRC defines 'child' as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". For the purposes of the African Charter on the Rights and Welfare of the Child, a child means every human being below the age of 18. The Inter-American Court of Human Rights has also defined 18 as the age at which childhood ceases.

3 Colin Wrings, *Children's Rights: A Philosophical Study* (London: Routledge and Kegan Paul, 1981), pp. 135-136.

4 *Ibid.* p. 137.

5 'Children's Rights' in Office of the United Nations High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (Geneva: Office of the United Nations High Commissioner for Human Rights, 2001).

6 While we are aware that there are groups of adults within society that are at least as vulnerable as children (due to disability, pregnancy age, or disadvantages such as being illiterate in a developed country, etc.), we wish to compare the relative situations of an adult of reasonably good health and education by the standards of the society of which she forms part with that of an average child in the same society.

A final point is that the rights granted to children may be different from those accorded to others,⁷ and those rights that are shared may need to be implemented and enforced in a different way than they would be in the case of adult members of society.

There has traditionally been very limited consideration of children as a discrete group of ESR-bearers. The primary reason for this is that, until relatively recently, children were regarded as objects of parents' rights and duties rather than as individual rights-holders themselves. Historically, children's socio-economic status was considered to be dependent upon, indeed, inextricable from that of their family.⁸ As a consequence, children did not warrant separate consideration. There has thus been public neglect of children as a group, justified by the theory that children are the responsibility solely of their parents. Effectively, children's family status has served to locate them outside the polity. The CRC and other human rights instruments may be employed as tools to challenge the failure of governments and other actors to take account of and accord the correct priority to children's ESR.

Treaties prior to the enactment of the CRC did not cover several important aspects of the ESR of the child. The CRC has remedied this to a large extent by providing a near-exhaustive list of social and economic rights. However, while the CRC is undoubtedly the most important instrument for bringing about the enforcement and protection of children's ESR through litigation, such rights are also provided for, implicitly or explicitly, in many international, regional and national instruments.

Note: The primary focus of this chapter is the economic and social rights of the child. However, where relevant, the cultural rights of the child will also be discussed. In such situations, the 'ESC' rights – as opposed to the 'ESR' – of the child will be referred to.

BOX 1. ASPECTS OF CHILDREN'S ESR

Right to housing and shelter

- Right to be provided with alternative accommodation when taken into State care
- Right of families with children to be given priority in housing programmes

Right to health

- Right to be inoculated against infectious diseases (e.g., measles, mumps and rubella)
- Right of adolescents to receive information and education on sexually transmitted disease
- Right of newborn infants to clean cord care

Right to education

- Right to be provided with primary education
- Right of children removed from forms of child labour to free basic education

Right to water

- Right to have clean drinking water in schools
- Right of children in deprived rural areas to have access to properly maintained water facilities

⁷ 'Children's Rights' (n. 5 above).

⁸ A contemporary example of this is the US health-care system, under which children's health care follows their family's private insurance.

Right to food

- Right to be provided with school lunches if parents are too poor to provide them
- Right to be breastfed
- Right to receive vitamin supplements, etc., where the food available is lacking in nutritional value

Cultural rights

- Right of children of minorities to be educated in their own language
- Right of children to participate in cultural activities within their own communities
- Right of children deprived of their family background to State care that is consistent with their cultural background

2. INTERNATIONAL STANDARDS AND JURISPRUDENCE

This section deals with international instruments that expressly refer to children's rights. Currently, children, their representatives and non-governmental organisations may make use of the complaints mechanisms and reporting systems outlined in the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in order to ensure the enforcement of the general rights set out in those instruments. They may also employ the rights and the mechanisms provided for under the regional systems outlined elsewhere in this manual. The CRC does not itself include an individual complaints mechanism in relation to the rights set out in it. However, in many cases, courts and regional and international bodies have referred to and relied upon CRC provisions in order to define the substantive content of and the extent of the obligations imposed by rights contained in national constitutions and international and regional treaties in relation to children. The regular use of the CRC before judicial and quasi-judicial bodies is a reflection of the fact that it is the most ratified international instrument in the history of the United Nations.

2.1 Universal Declaration of Human Rights

While children are entitled to all the rights set out under the Universal Declaration of Human Rights, there are some provisions that pertain particularly to the situation of the child. Article 25 provides that children are entitled to special care and assistance and that the same social protection should apply to children regardless of whether they have been born in or out of wedlock. The obligation to provide free elementary and fundamental education set out in Article 26 may be regarded as largely oriented towards the child as well.

2.2 Convention on the Rights of the Child

While the civil and political rights contained in the CRC appear to impose an immediate obligation of enforcement upon States Parties, this would not seem to be the case in relation to ESC rights. Article 4 of the CRC states that, with regard to the ESC rights contained in the instrument, States Parties shall undertake such measures ‘to the maximum extent of their available resources’ and, where needed, within the framework of international co-operation. This is reflected in the language used in the provisions themselves. In addition, Articles 24 and 28 on the rights to health and education, respectively, refer to the obligations of States progressively to realise these rights. In General Comment No. 5 (2003) on General Measures of Implementation for the Convention on the Rights of the Child, the Committee on the Rights of the Child states that “[t]he second sentence of Article 4 reflects a realistic acceptance that lack of resources – financial and other resources – may hamper the full implementation of economic, social and cultural rights in some States” and that this introduces the concept of the ‘progressive implementation’ of such rights.⁹

However, in General Comment No. 5,¹⁰ the Committee states that there is no simple or authoritative division of CRC rights into ESC rights on the one hand and civil and political rights on the other and that the enjoyment of the latter rights is inextricably entwined with enjoyment of the former ones.¹¹ The Committee states that ESC rights, as well as civil and political rights, must be regarded as justiciable.¹² Hence, State Parties are obliged to ensure that their domestic laws set out entitlements in sufficient detail so that remedies for non-compliance are effective.

The Committee has also made clear that the obligation on States to implement protection ‘to the maximum extent of their available resources’ requires States to demonstrate that they have done so and, where necessary, have sought international cooperation.¹³ Whatever their economic circumstances, States are required to take all possible measures towards the realisation of the rights of the child, paying particular attention to the most disadvantaged groups.¹⁴ The available resources in question may be economic, human, or organisational.¹⁵ The approach of the Committee on Economic, Social and Cultural Rights to the issue of maximum available resources is applicable to the interpretation of Article 4 of the CRC.¹⁶

The CRC outlines in detail the obligations imposed on States Parties by the need to ensure children’s health and welfare. Children have a right to health and health services,¹⁷ which imposes a duty on States Parties to “take all effective and appropriate measures with a view to abolishing traditional practices

9 Para. 7.

10 Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation for the Convention on the Rights of the Child* (2003), U.N. Doc. CRC/GC/2003/3.

11 Ibid. para. 6.

12 Ibid. paras. 6 and 25.

13 Ibid. para. 7.

14 Ibid. para. 8.

15 D. Parker, ‘Resources and Child Rights: An Economic Perspective’ in J. R. Himes (ed.), *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries* (The Hague: Martinus Nijhoff, 1995), pp. 35-37, cited in R. Hodgkins and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York: United Nation Children’s Fund, 1998), p. 56. Human resources include skills, professionalism, knowledge, experience and commitment. Organisational resources include administrative structures, norms, procedures, laws and regulations, professional organisation, political power, leadership, control, political organisation, local organisations and committees, service organisations, families and clans. See also R. E. Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 16 (1994), pp. 695-697. The Committee on Economic, Social and Cultural Rights has noted that the phrase ‘to the maximum of its available resources’ was intended by the drafters of the International Covenant on Economic, Social and Cultural Rights to refer to “both the resources existing within a State and those available from the international community through international cooperation and assistance”. (See Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The Nature of States Parties’ Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1991), para. 13.)

16 Hodgkins and Newell (n. 15 above), p. 56.

17 Article 24.

prejudicial to the health of children”.¹⁸ All children have the right to benefit from social security¹⁹ and the right to benefit from child-care services and facilities.²⁰

Children have a right to a standard of living adequate for their physical, mental, spiritual, moral and social development²¹ and a right to alternative care when they are temporarily or permanently deprived of their family environment or may not, in their own best interests, be allowed to remain in that environment.²² States Parties are obliged to ensure to the maximum extent possible the survival and development of the child²³ and, in case of need, must provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing (Article 27(3)).

The Committee on the Rights of the Child has strongly emphasised the linkage between the right to survival and development set out in Article 6 of the CRC and the (other) ESR rights set out in that instrument. In General Comment No. 7 on Implementing Child Rights in Early Childhood, the Committee states that the right to survival and development may only be implemented in a holistic manner through the enforcement of all other provisions of the CRC, including the rights to health, adequate nutrition, social security, an adequate standard of living, education and play, as well as through the provision of assistance and quality services.²⁴

The Committee has handed down two General Comments relating to children’s health: General Comment No. 4 on Adolescent Health and Development and General Comment No. 3 on HIV/AIDS and the Rights of the Child. These General Comments are discussed in detail in the chapter on the Right to Health.

Children with disabilities are entitled to special care, and States Parties are to encourage and ensure the extension of assistance to the eligible child and those responsible for the child’s care.²⁵ Although the provision of special care and assistance is subject to available resources, the Committee on the Rights of the Child urges States Parties, in General Comment No. 9 on the Rights of Children with Disabilities,²⁶ to make the special care and assistance to children with disabilities a matter of high priority and to invest, to the maximum extent of available resources, in the elimination of discrimination against children with disabilities and the maximum inclusion of these children in society.²⁷ The Committee has also made clear that the care and assistance shall be designed to ensure that children with disabilities have effective access to and receive education, training, health-care services, recovery services, proper preparation for employment and recreation opportunities.²⁸ The issue of children with disabilities who are living in poverty should be addressed by allocating adequate budgetary resources, as well as by ensuring access by children with disabilities to social protection and poverty reduction programmes.²⁹

18 Article 24(3).

19 Article 26.

20 Article 18(3).

21 Article 27(1).

22 Article 20.

23 Article 6(2). The term ‘development’ should not be construed in a narrow sense. Not only physical health is intended, but also mental, emotional, cognitive, social and cultural development. In General Comment No. 5, the Committee on the Rights of the Child states that it “expects States to interpret ‘development’ in its broadest sense as an holistic concept, embracing the child’s physical, mental, spiritual, moral and psychological and social development” (para. 12).

24 Committee on the Rights of the Child, *General Comment No. 7, Implementing Child Rights in Early Childhood* (Fortieth session, 2005), U.N. Doc. CRC/C/GC/7/Rev.1, para. 10.

25 Article 23(2).

26 U.N. Doc. CRC/C/GC/9.

27 *Ibid.*, para. 14(a).

28 *Ibid.*, para. 14(b).

29 *Ibid.*, para. 3.

With regard to budgetary allocation, the Committee has emphasised that it is the State Party's ultimate responsibility to see that adequate funds are allocated for children with disabilities, along with strict guidelines for service delivery.³⁰ Resources allocated for children with disabilities should not be used for other purposes and should be sufficient to cover all the needs of these children, including a wide range of ESR-related needs, through, among other initiatives, programmes established to train professionals working with children with disabilities, financial support for families, income maintenance, social security, help aids and devices and the related services and programmes necessary to include children with disabilities in mainstream education.³¹

Other rights in the Convention relate to education and leisure and cultural activities. Article 28 guarantees the right to education. This is dealt with in more detail in the chapter on the Right to Education, which also covers Article 29 and General Comment No. 1 on the Aims of Education. Children also have a right to enjoy their own culture³² and a right to rest and leisure and to participate in cultural activities.³³

Other CRC provisions that are not expressly social or economic in nature, but might be used as grounds for an action seeking to enforce ESR are the right of freedom from torture or other cruel, inhuman, or degrading treatment or punishment.³⁴

The umbrella provisions of the CRC have implications for children's ESC rights. Article 2 provides that States Parties shall respect and ensure the rights set forth in the CRC to each child within their jurisdictions without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The CRC is notable as the first international human rights instrument to include an explicit reference to disability as a ground for discrimination. In General Comment No. 5 on General Measures of Implementation of the CRC, the Committee states that the non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realisation of whose rights may demand special measures (for example, through disaggregated data collection).³⁵ It also indicates that addressing discrimination may require modifications in legislation, administration and resource allocation, as well as educational measures to change attitudes.³⁶ The Committee expressly rejects the idea that Article 2 merely requires formal (as opposed to substantive) equality, emphasising that the application of the non-discrimination principle of equal access to rights does not mean identical treatment and referring to the Human Rights Committee's General Comment No. 18 on Non-Discrimination,³⁷ which underlines the importance of taking special measures to diminish or eliminate conditions that cause discrimination.³⁸ Elsewhere, the Committee on the Rights of the Child has highlighted the impact that discrimination may have on children's enjoyment of ESC rights.³⁹

30 Ibid. para. 20.

31 Ibid.

32 Article 30.

33 Article 31.

34 Article 37.

35 Para. 12.

36 Ibid.

37 Human Rights Committee, *General Comment No. 18, Non-Discrimination* (1989), HRI/GEN/1/Rev.6, pp. 147 et seq.

38 Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation for the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para. 12.

39 See, for example, Committee on the Rights of the Child, *General Comment No. 7, Implementing Child Rights in Early Childhood* (Fortieth session, 2005), CRC/C/GC/7/Rev.1 para. 11(b).

Article 3(1) of the CRC states that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.⁴⁰ The Committee on the Rights of the Child has stated that this provision requires every legislative, administrative and judicial body or institution to apply this ‘best interests principle’ by systematically considering how children’s rights and interests are or will be affected by the decisions and actions of these bodies (by, for example, a proposed or existing law or policy or administrative action or court decision), including those that are not directly concerned with children, but indirectly affect them.⁴¹ The reference to ‘all actions’ is sufficiently broad to encompass all State agencies and includes both action and inaction.⁴² Of particular importance for a consideration of the best interests principle in an ESR context is the Committee’s statement that governments are required to ensure that economic and social planning, decision-making and budgetary decisions are made with the best interests of children as a primary consideration and that children are protected from the adverse effects of economic policies or financial downturns.⁴³

The best interests standard set out in Article 3 is weaker than the standard set out in some domestic legal systems in that it makes the child’s best interests a ‘primary’ rather than a ‘paramount’ consideration. It seems likely that Article 3(1) does not establish an *absolute* priority with regard to children.⁴⁴ However, the formulation adopted would appear to impose a burden of proof on those seeking to achieve such a non child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.⁴⁵ Furthermore, the principle acts as a residual standard in areas unaffected by express rights and will thus ensure that, even if situations arise involving children’s social and economic interests that are not covered by the express rights in the CRC, these interests will be taken into account.

According to Article 3(2), the State is obliged to guarantee the child such protection and care as are necessary for his or her well-being. This article serves to fill the gaps in the subsequent provisions of the CRC — including those pertaining to ESC rights. This represents an unqualified duty on the States to provide for the child in the last resort and includes both passive and active obligations.⁴⁶

States are also under a duty to ensure that the institutions, services and facilities responsible for the care or protection of children conform to the standards established by competent authorities, particularly in the areas of safety and health and in the number and suitability of their staff, as well as in competent supervision.

40 There are numerous formulations of the ‘best interests’ principle. Archard points out that, in different versions of the principle, the distinct terms ‘paramount’ and ‘primary’ have been employed, along with either the definite or indefinite article to qualify the consideration that should be given a child’s best interests. “There are therefore at least four possible weightings: (a) the paramount; (b) a paramount; (c) the primary; (d) a primary.” (D. Archard, *Children, Family and the State* (Aldershot, United Kingdom: Ashgate, 2003), pp. 38-39.)

41 Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation for the Convention on the Rights of the Child* (2003), U.N. Doc. CRC/GC/2003/3, para. 12.

42 Geraldine Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff, 1998), p.46. For more on the meaning of the phrase ‘all actions concerning children’, see Philip Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ in id. (ed.), *In the Best Interests of the Child: Reconciling Human Rights and Culture* (Oxford: Clarendon Press, 1994), at pp. 13-15.

43 See Hodgkins and Newell, (n. 15 above), pp. 41-42 for a consideration of how the Committee on the Rights of the Child has dealt with the best interests principle in the context of budgets and economic policies.

44 See Philip Alston and Craig Scott, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’ (2000) *SAJHR*, Vol. 16 (2000) pp. 206-268, p. 259.

45 See Alston, ‘The Best Interests Principle’ (n. 42 above), p. 13.

46 Philip Alston, ‘The Legal Framework of the Convention on the Rights of the Child’, *Bulletin of Human Rights Law*, Vol. 91, No. 2 (1992), 1, 9.

There are two Optional Protocols to the Convention: the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Both Protocols contain provisions that have implications for children's ESR. In particular, under the first instrument, States Parties are obliged to give persons within their jurisdiction who have been recruited or used in hostilities contrary to the Protocol "all appropriate assistance for their physical and psychological recovery and their social reintegration".⁴⁷ At the very least, this will involve enacting measures to vindicate the rights to health and education of former child combatants.

Under the second Optional Protocol, States are obliged to take measures to prevent the offences described in the instrument. In doing so, "[p]articular attention shall be given to protect children who are especially vulnerable to such practices."⁴⁸ This may be interpreted to mean that children must be protected from violations of their ESR that would make them vulnerable to such exploitation. Furthermore, States are required to ensure all appropriate assistance to children who have been the victims of such offences "including their full social reintegration and their full physical and psychological recovery".⁴⁹ Finally, child victims are to be given access to adequate procedures to seek compensation for damages from those legally responsible.⁵⁰

Both Optional Protocols have entered into force, but they have only been ratified by 66 and 67 States Parties, respectively, and are subject to numerous declarations and reservations. Thus, their provisions do not enjoy the same support as those set out in the CRC itself.

2.3 International Covenant on Economic, Social and Cultural Rights

This Covenant contains numerous provisions that are of importance to children. In some cases, the rights are implied, while, in others, the text expressly states that the child is the subject of the provision. Under the Covenant, each State Party is obliged to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights by all appropriate means.

State Parties must undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination. This also precludes discrimination on the grounds of age. Therefore, children are entitled to the progressive realisation of the rights guaranteed to them by the Covenant. In addition to the general guarantees, which are dealt with in more detail in Chapter 1, the Covenant sets out provisions that are specifically concerned with children's rights. Thus, Article 10(3) sets out that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination based on parentage or other conditions; children and young persons should be protected from economic and social exploitation; their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law; States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

47 Article 6(3).

48 Article 9(i).

49 Article 9(3).

50 Article 9(4).

Article 11 provides that everyone, including children, has a right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The right to housing is discussed by the Committee on Economic, Social and Cultural Rights in detail in General Comment No. 7 on the Right to Adequate Housing: Forced Evictions. In this General Comment, the Committee points out that children and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction.

The right to health is recognised in Article 12. This article requires States to seek to reduce the stillbirth rate and infant mortality and to promote the healthy development of the child. In General Comment No.14 on the Right to the Highest Attainable Standard of Health, the Committee declares that the duty to reduce the stillbirth rate and infant mortality and to promote healthy development of the child requires measures to improve maternal and child health and sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and information, as well as to resources necessary to act on the information (para 14). The Committee declares that this provision means that States Parties “should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services” (para 23). It also declares that, in all policies and programmes aimed at guaranteeing the right to health of children and adolescents, their best interests shall be a primary consideration (para 24).

Article 13 of the Covenant provides that primary education should be compulsory and available to all. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, in particular by the progressive introduction of free education. The precise meaning of this provision is dealt with at some length by the Committee in paragraphs 11-14 of General Comment No. 13 on the Right to Education (see Chapter 6).

2.4 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights outlines civil and political rights. Some of these rights overlap with ESR. Several of the ‘overlapping’ rights are of concern to children. For instance, Article 24 states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”. In General Comment No.17 on the Rights of the Child, the Human Rights Committee noted “that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural. For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means.”

However, the protection outlined in this article only extends to minors, and the Covenant does not indicate the age of majority. The Committee states that this is to be determined by each State Party in the light of the relevant social and cultural conditions. Nonetheless, it also notes that the age of majority

should not be set unreasonably low. Therefore, the issue of whether the guarantees set out in this article may be relied on to apply to everyone under the age of 18 is dependent on State Party discretion.

Several rights that are commonly regarded as civil and political have clear implications for ESR. Such rights include the right in the context of a criminal trial to have the benefit of assigned legal assistance in any case in which the interests of justice so require and without payment in any case in which the individual does not have sufficient means to pay (Article 14(3)). Another such right is the right to freedom from torture or to cruel, inhuman, or degrading treatment or punishment (Article 7) might also be interpreted as having implications for ESR.

2.5 Convention on the Elimination of All Forms of Discrimination against Women

In addition to dealing with the rights of women in general, the Convention on the Elimination of All Forms of Discrimination against Women focuses on discrimination against girls in relation to education. Article 10(f) obliges States Parties to ensure the reduction of student drop-out rates among women and girls and the organisation of programmes for girls and women who have left school prematurely. The Convention also contains provisions that are aimed at protecting the woman as mother during and after pregnancy.⁵¹

2.6 Convention on the Elimination of Racial Discrimination

While the general protections set out in the Convention on the Elimination of Racial Discrimination extend to all children, there are no child-specific provisions. Article 5 makes clear that discrimination against children based on race, colour, or national or ethnic origin is prohibited in relation to ESC rights, including the right to just and favourable conditions of work, the right to housing, the right to public health, medical care, social security and social services, the right to education and training and the right to equal participation in cultural activities.

2.7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁵²

The Migrant Workers Convention expressly accords several rights to children.

According to this Convention, each child of a migrant worker shall have the right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools is not to be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment (Article 30). States of employment shall pursue policies, where appropriate, in collaboration with the States of origin that are aimed at facilitating the integration of the children of migrant workers in local school systems, particularly in respect of teaching the local languages. They shall also endeavour to facilitate for the children of migrant workers the teaching of their mother tongues and cultures (Article 45(2) and (3)).

⁵¹ Articles 11 and 12.

⁵² G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A), 262, U.N. Doc. A/45/49 (1990), entered into force: 1 July 2003.

3. REGIONAL STANDARDS AND JURISPRUDENCE

3.1 Africa

There is no mention of children’s rights in the African Charter on Human and Peoples’ Rights other than a rather general statement that the State shall ensure the protection of the rights of the child as stipulated in international declarations and conventions.⁵³ However, the African Charter on the Rights and Welfare of the Child deals with such rights in detail.

Important ESR provisions contained in the African Children’s Charter include the obligation to view the best interests of the child as the primary consideration in all actions concerning the child undertaken by any person or authority;⁵⁴ the right to survival and development;⁵⁵ the right to education, including an obligation on States Parties to take special measures in respect of the girl child and disadvantaged children, to ensure equal access to education for all sections of the community;⁵⁶ the right to leisure, recreation and cultural activities;⁵⁷ the right of handicapped children to special measures of protection;⁵⁸ the right to health and health services;⁵⁹ the duty of States Parties to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, in particular those prejudicial to the health or life of the child;⁶⁰ the right to freedom from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development;⁶¹ and the obligation of the State to assist parents and other persons responsible for the child and, in case of need, provide material assistance and support programmes, especially with regard to nutrition, health, education, clothing and housing.⁶² States Parties to the Charter “undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter”. This applies equally to ESR and to civil and political rights. Thus, many of the ESR in the Charter are expressed in stronger, less qualified terms than corresponding provisions in the CRC as they are not subject to ‘progressive realisation’⁶³ or the availability of resources. Furthermore, the Charter defines a child as “every human being under the age of eighteen years”. Thus, while the CRC allows States Parties discretion in this regard, the ESR covered in the African Charter apply to *everyone* under the age of 18, regardless of national laws on majority.

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa recognises certain rights that pertain to girls. Article 12 imposes a duty on States to promote education and training for women and girls at all levels and in all disciplines and to promote the retention of girls in schools and other training institutions. In addition to their obligation to introduce a minimum age of work, States have the additional duty to prohibit the exploitation of girl children.⁶⁴ Articles 2 and 6

53 Article 18(3).

54 Article 4. It should be noted that this provides children with stronger protection than the analogous provision in the CRC, which merely states that “the best interests of the child are to be given a primary consideration”.

55 Article 6.

56 Article 11. The substantive content of this right is dealt with in more detail in the section on health.

57 Article 12.

58 Article 13.

59 Article 14. This is reinforced by the obligation of States Parties to take steps to prevent the use of children in all forms of begging.

60 Article 21.

61 Article 15.

62 Article 18.

63 See, e.g., the difference in phrasing of Article 11 of the Charter and Article 28 CRC, both of which concern the right to education. The latter includes an explicit reference to the obligation of States Parties to achieve this right progressively.

64 Article 13(vii).

require States to enact and effectively implement appropriate national legislative measures to prohibit all forms of harmful practices that endanger the health and general well-being of girls. Finally, Article 21 declares that women and girls shall have the same rights as men and boys to inherit, in equal shares, the property of parents.

The African system is probably the regional system that provides the most comprehensive protection to children – on paper at least.

3.2 Americas

Article XII of the American Declaration of the Rights and Duties of Man states that “[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.”⁶⁵

The American Convention on Human Rights covers specific rights of children. Article 19 states that every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State. The Inter-American Court of Human Rights has interpreted ‘child’ in the light of the CRC, that is, “as every human being who has not attained 18 years of age unless under the law applicable to the child majority is attained earlier.”⁶⁶ In the celebrated *Street Children Case*⁶⁷ the Court stated that both the American Convention and the CRC form part of a comprehensive international *corpus juris* for the protection of the child that should help establish the content and scope of the general provision established in Article 19. Indeed, the Court has repeatedly turned to the Protocol of San Salvador and the CRC to determine the content and scope of Article 19.⁶⁸ With regard to the protection of the ESR of the child, the Court has declared that “[t]hese provisions allow us to define the scope of the ‘measures of protection’ referred to in Article 19 of the American Convention, from different angles. Among them, we should emphasise those that refer to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living and the social rehabilitation of all children who are abandoned and exploited”.⁶⁹ Clearly, the Court regards Article 19 as imposing obligations in terms of ESR. It has been observed that the Court has tended to view Article 19 in terms of what it adds to other Convention rights rather than as an isolated provision.⁷⁰

The San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights also covers rights pertaining to children. In the context of the protection of the family, States Parties undertake to guarantee adequate nutrition for children at the nursing stage and during school attendance⁷¹ and to adopt special measures for the protection of adolescents to ensure the full development of their physical, intellectual and moral capacities. The rights of children are dealt with expressly in Article 16, which states that every child has the right to protection that his status as

65 Article XXX of the American Declaration states that “it is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.” However, this section has never been the subject of litigation.

66 Inter-Am. C.H.R., *Villagrán Morale et al. (Street Children Case)*, Judgment of 19 Nov. 1999 (Series C) No. 63, para. 188.

67 *Ibid.*

68 Tara Melish, ‘The Inter-American Court of Human Rights: Beyond Progressivity’ in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

69 n. 66 above, para. 196

70 Israel de Jesús Butler, ‘The Rights of the Child in the Case Law of the Inter-American Court of Human Rights: Recent Cases’, *Human Rights Law Review*, Vol. 5, No. 1 (2005), pp. 151-167, at p. 152.

71 Article 15(3)(b).

a minor requires from his family, society and the State. This section also provides specifically for the right of every child to free and compulsory education, at least at the elementary level, and to continue his training at higher levels of the educational system. While Article 16 might serve as the basis for the protection of a broad range of ESR, it is unfortunately not one of the articles that may be the subject of a communication to the Inter-American Commission on Human Rights, though it has been referred to in the context of decisions involving children's rights under Article 19 of the American Convention on Human Rights.⁷²

The 2001 decision of the Inter-American Court of Human Rights in the *Street Children Case* centred on the abduction, torture and murder of street children by policemen. The Court stated that, when States violate the rights of at-risk children, such as street children, "it makes them victims of a double aggression".⁷³ First, such States do not prevent children from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the "full and harmonious development of their personality [Preamble, para. 6, CRC]",⁷⁴ even though every child has the right to harbour "a project of life that should be tended and encouraged by the public authorities so that [the child] may develop this project for its personal benefit and that of the society to which it belongs".⁷⁵ Second, those States violate children's physical, mental and moral integrity and even their lives.⁷⁶ In defining the scope of the 'measures of protection' referred to in Article 19, the Court relied heavily on a number of provisions of the CRC. The Court particularly emphasised those provisions referring to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living, and the social rehabilitation of all children who are abandoned or exploited.⁷⁷

In August 2002, the Court, responding to a request for an advisory opinion from the Inter-American Commission on Human Rights, handed down an Advisory Opinion on the Legal Status and Human Rights of the Child.⁷⁸ The opinion defines a 'child' as a person who has not yet reached his or her 18th birthday and states that children are rights-holders themselves and not merely objects of the law, although different treatment of minors and adults is not *per se* discriminatory. The opinion elaborates upon the meaning of the phrase 'best interests of the child', stating that "[t]his regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child."⁷⁹ The Court also emphasised that children's rights give rise to positive obligations, stating that "children's rights require that the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take *positive steps* to ensure the exercise and full enjoyment of those rights. This requires, among others, *economic, social and cultural measures*" [italics added].⁸⁰

72 For example, El Salvador, Case 10.772 Report No. 6/94, 1 Feb. 1994.

73 *Street Children Case* (n. 66 above), para. 191.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.* para. 196.

78 *Legal Status and Human Rights of the Child*, Advisory Opinion OC-17/02, 28 Aug. 2002, Inter-Am. C.H.R. (Ser. A) No. 17.

79 *Ibid.* para. 56.

80 *Ibid.* para. 88.

In discussing the living conditions of the child, the Court stated that the right to life set out in Article 4 of the American Convention not only involves the prohibitions set forth in that article, but also “the obligation to provide the measures required for life to develop under decent conditions”.⁸¹ Borrowing language from the CRC, the Court continued by declaring that, under Article 4 of the CRC, States Parties must make their best effort, in a constant and deliberate manner, to ensure the access of children to these rights and their enjoyment of such rights, avoiding regressions and unjustifiable delays and allocating as many available resources as possible to compliance.⁸²

Referring to statements of the Committee on the Rights of the Child in General Comment No. 1 on the Aims of Education, the Court emphasised the ‘major importance’ of the right to education and noted that it is mainly through education that the vulnerability of children is gradually overcome.⁸³ Elsewhere in the Advisory Opinion, it highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to preventing unfavourable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognised for them in Article 19 of the American Convention.⁸⁴ The Court noted that education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by children, who, in view of their immaturity and vulnerability, often lack the adequate means effectively to defend their rights.⁸⁵

In its decision in the *Children’s Rehabilitation v. Paraguay Case*,⁸⁶ which focused on the conditions experienced by children in a detention centre, the Court reiterated the linkage between the right to life and other civil rights and the rights to health and education. It found that the State, as part of its obligations to secure the rights to life and physical integrity, is obliged to provide for the health and education of minors so as to secure their physical, mental, spiritual, moral, psychological and social development.⁸⁷ No special measures had been undertaken to ensure the adequate health care and education of the detainees in the case.⁸⁸ The detainees suffered from overcrowding, inadequate sanitation, medical, psychological, and dental care and malnourishment. Among other things, the Court concluded that, owing to the State’s failure to take necessary and sufficient positive measures to guarantee the adequate conditions for a dignified life to the detainees (measures such as the provision of adequate health and educational programmes), Paraguay had violated the right to life and the right to personal integrity of all the prison inmates.⁸⁹ The Court did not deal with claims based on Article 26 of the American Convention on Human Rights.

3.3 Europe

A complaint may be brought under both the European Social Charter and the revised European Social Charter in relation to violations of children’s rights. This has occurred in two main areas. Article 7 of both the Charter and the revised Charter sets out limitations on child labour, including minimum ages of admission to employment, regulation of working hours and work conditions, holiday leave, wages and protection from ‘physical and moral danger’. The article formed the basis of an International Commission of Jurists complaint against Portugal.⁹⁰ The International Commission of Jurists claimed that Portugal

81 *ibid.* para. 80.

82 *ibid.* para. 81.

83 *ibid.*

84 *ibid.* para. 88.

85 *ibid.* para. 86.

86 Judgment of 2 Sept. 2004, Inter-Am. C.H.R. (Ser. C) No. 112 (2004).

87 Butler, ‘The Rights of the Child’ (n. 70 above), p. 153.

88 *ibid.* p. 155.

89 Melish, ‘The Inter-American Court of Human Rights’ (n. 68 above).

was violating Article 7(1) by failing properly to supervise child labour. The European Committee of Social Rights interpreted the Charter's prohibition on child labour to refer to all work by children in all economic sectors and types of enterprises, including family businesses, whether paid or not. The only exception to this is 'prescribed light work', which States are obligated to define or, at least, draw up on a checklist. The Committee held that it was clear that thousands of children performed work in breach of both the Charter and Portuguese law, that a significant amount of work was in sectors that naturally give rise to heavy types of work and that the duration of the work was frequently excessive. Furthermore, the number of inspections made by Portugal's Labour Inspectorate to detect the exploitation of children in the workforce was insufficient. Consequently, Portugal was in violation of Article 7(1).

Second, Article 17 of the European Social Charter enjoins the Contracting Parties to take all appropriate and necessary measures to ensure the effective exercise of the right of mothers and children to social and economic protection, including the establishment or maintenance of appropriate institutions or services. Article 17 of the revised Charter enshrines the right to children and young persons to social, legal and economic protection. This latter article has been the subject of two ESR-related complaints dealt with by the Committee. These are discussed in the chapters on the Right to Health and the Right to Education.

The Charter of Fundamental Rights of the European Union (which is not currently binding) provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Clearly, a child's best interests include the child's ESR-related interests. Therefore, this article might be used to strengthen a claim for the protection of children's ESR even if it may not form the basis of a direct claim itself.⁹¹

4. NATIONAL JURISPRUDENCE

There is a vast amount of national jurisprudence that deals with the various ESR of the child. This section is merely mentions briefly some of the most significant of these cases. The previous four chapters contain a number of additional domestic judicial decisions focusing on children's rights to social security, housing, health and education, respectively.

An example of a decision dealing with an alleged interference with a child's right to education is that of the Uganda Human Rights Commission in *Emmanuel Mpondi v The Chairman, Board of Governors, Ngwana High School & Ors.* (Complaint No.210 of 1998). The case concerned a student at the respondent's school who had been severely punished by two teachers, having recovered and left hospital, he returned to school but was sent back home to collect fees. His sponsors refused to pay the fees until the school administration had (a) punished the teachers, or (b) clearly indicated the specific action that would be taken against them. The student ended up having to leave the school permanently. With regard to the right to education, the Commission held that the claimant's education had been interfered with and, on a balance of probabilities, his right to education had been violated by the respondents.⁹²

90 *International Commission of Jurists v. Portugal*, Complaint No. 1/1998 (European Committee of Social Rights) (Date of Report to Committee of Ministers: 9 Sept. 1999).

91 If the European Union Constitution, of which the Charter currently is part, is ratified, then its provisions will become fully enforceable by the European Court of Justice.

92 This casenote is adapted from John Cantius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' *African Journal of Legal Studies*, Vol.2 (2006), pp.1-19, at14-15.

One example of a national court addressing the State's duty to protect children's ESR is the Philippines case of *Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*⁹³ For more on this, see the chapter on the Right to Health. The Supreme Court of the Philippines recognised the constitutional right of 'generations yet unborn' to a balanced and healthful ecology. Such rights were being impaired by the deforestation and damage to the environment caused by the activities of companies licensed by the State. The court granted the order sought, compelling the Department of Environment and Natural Resources to cancel existing timber licence agreements in the country and to halt the issuance of new ones.

The duty to fulfil children's ESR has also frequently come before courts. There have been instances in which courts have been prepared to hold that children's rights give rise to an immediate, direct entitlement enforceable against the State. For examples of these, see chapters 3, 4, 5 and 6.

However, other domestic tribunals have not been prepared to recognise that children's rights impose immediate obligations on the State. The child rights provision of the South African Constitution, section 28(1)(c), has received much attention. Section 28(1)(c) provides that every child has the right to basic nutrition, shelter, basic health-care services and social services. The lack of qualification in terms of any reference to 'progressive realisation' or 'maximum available resources' in section 28(1)(c) (in contrast to other ESR provisions under the Constitution) meant that many commentators initially concluded that these rights imposed an immediate obligation on the State to protect and fulfil, thereby providing children with a direct, immediate entitlement against the State. This is not, however, the interpretation that has been adopted by the Constitutional Court. The substantive content of section 28(1)(c) has been fleshed out in the cases of *Republic of South Africa v. Grootboom*⁹⁴ and *Minister of Health and Others v. Treatment Action Campaign and Others*.⁹⁵ For the facts of the *Grootboom Case* and the *Treatment Action Campaign Case*, see the chapters on the Right to Housing and the Right to Health, respectively. In *Grootboom*, the Constitutional Court held, *inter alia*, that section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families. According to the Court, it follows from section 28(1)(b) – which enshrines the right of the child to family care or parental care or to appropriate alternative care if the child is removed from the family environment – that the Constitution contemplates that a child has the right to parental or family care in the first place and the right to appropriate alternative care only where the former is lacking.

The Court used the subsequent *Treatment Action Campaign Case* to clarify⁹⁶ its previous stance on section 28(1). It made clear that the State's duty to provide for children's ESR under section 28 are not limited to instances in which children lack a family environment or are physically separated from their families. The Court emphasised that the Constitutional Court in *Grootboom* had made it clear that its construal of s.28 did not mean that the state incurs no obligation in relation to children who are being cared for by their parents or families.

The *Treatment Action Campaign Case* concerned children born in public institutions to mothers who "were for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health-care services available to them".⁹⁷ However, the Court adhered to its reasoning in *Grootboom* and did not conclude that the children had a direct individual entitlement to health-care services in circumstances where their parents could not afford those services.⁹⁸ Ultimately, in *Grootboom* and the *Treatment*

93 (G.R. No. 101083).

94 2001 (1) SA 46 (CC).

95 2002 (5) SA 721 (CC).

96 See G. Budlender, 'A Paper Dog with Real Teeth', *Mail & Guardian*, 12 July 2002.

97 *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 10 BCLR 1033, para. 79

98 Sandra Liebenberg, 'Taking Stock: The Jurisprudence on Children's Socio-Economic Rights and Its Implications for Government Policy' *ESR Review* (2004) 5:4, http://www.communitylawcentre.org.za/ser/esr2004/2004sept_stock.php#stock

Action Campaign Case, the Constitutional Court premised its decision on the ‘qualified’ social rights and economic rights of ‘everyone’ set out in sections 26 and 27 of the Constitution, respectively. These decisions are an example of a court displaying reluctance to require the State to do more than to achieve the progressive realisation of children’s ESR within that State’s maximum resources.

Equality rights and non-discrimination provisions have also been employed by litigants seeking to forward children’s ESR through the courts. Possibly the most celebrated case involving children’s right to equality and ESR is *Brown v. Board of Education*.⁹⁹ In this case, US state laws permitted or required the segregation of white and black children in public schools. A number of black children’s representatives argued that the legislation violated the constitutional requirement of equal protection under the laws even where schools for black children provided equal facilities and other ‘tangible factors’. The US Supreme Court held, among other decisions, that, since education is critical for success in life, the state, where it has undertaken to provide education, must make it available on equal terms. The Court found that “separate educational facilities are inherently unequal”. Even where physical facilities and other objective factors are equal, a segregated school system denies equal educational opportunities to one group.

Another South African case that centred on the issue of children’s equality of enjoyment of ESR rights is *Khosa & Ors v. Minister of Social Development & Ors*.¹⁰⁰ The applicants in this case were citizens of the Republic of Mozambique with permanent resident status in South Africa. They brought an action challenging legislative provisions that, among other effects, would prevent children of non-South African citizens in the same position as the applicants from claiming any of the child-care grants available to South African children (regardless of the citizenship status of the children). The Court found, *inter alia*, that the exclusion of children from access to these grants amounted to unfair discrimination on the basis of their parents’ nationality and that “the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c)”, which guarantees the right of the child to social services.

As well as ruling on those ESR of children that are expressly set out in domestic law, courts have implied children’s ESR from civil and political protections and other legal provisions. For instance, in the Irish case *G v. An Bord Uchtála*,¹⁰¹ Chief Justice O’Higgins of the Supreme Court stated that children had unenumerated (i.e., implied) rights under Article 40.3.1 of the Irish Constitution, which provides that “[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen”.¹⁰² He observed that “[t]he child also has natural rights. ... the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his/her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State”.¹⁰³ For another example of the courts implying the right to education from a civil or political right, see the Indian case of *Unni Krishnan v. State of A.P.*¹⁰⁴ discussed in the chapter on the Right to Education.

99 347 US 483.

100 *Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development* 2004 (6) BCLR 569 (CC).

101 [1980] IR 32.

102 In *Ryan v. The Attorney General* [1965] IR 294, Justice Kenny, in the High Court, held that the ‘personal rights’ mentioned in Article 40(3)(1) are not exhausted by the rights to “life, person, good name and property rights” expressly enumerated in the following section 40.3.2. This was confirmed by the Supreme Court in the same case. Chief Justice O’Higgins’s comments have since been called into question by two members of the Supreme Court in the later case of *TD v. Minister for Education* [2001] 4 IR 259 (Murphy J., paras. 173-176, and Keane CJ, paras. 63-67).

103 *Ibid.* 55-56.

104 [1993] 4 Law Reports of the Commonwealth 234

PART II

**REGIONAL
PROCEDURES**

8 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. INTRODUCTION

The African Charter on Human and Peoples' Rights' ('the Charter') was adopted in 1981 by the Organisation of African Unity, the forerunner of the African Union. It entered into force on 21 October 1986. The Charter contains a number of provisions on economic, social and cultural rights, together with an over-arching prohibition on discrimination based on, among others, race, ethnic group, colour, sex, language, religion, or political or any other opinion, national and social origin, fortune, birth or other status.² The instrument is strongly African in focus, aiming to forward African values and the virtues of African historical traditions, while alleviating human rights violations, which are of growing concern to Africans today.

2. BACKGROUND

The African Commission on Human and Peoples' Rights (ACHPR) is composed of 11 members who serve in their personal capacity for renewable six-year terms.³ In the discharge of its functions, the ACHPR is supported by a Secretariat in Banjul, The Gambia. The tasks of the ACHPR include:

- Promotion of human and peoples' rights through research and education activities, articulation of rules on legal questions and cooperation with other African and international institutions concerned with human and peoples' rights⁴
- Interpreting provisions of the Charter at the request of a State Party, an institution of the African Union, or an African organisation recognised by the Union⁵
- Hearing inter-State communications about violations of the rights set out in the Charter⁶
- Hearing communications brought by individuals and specified non-State actors, e.g., non-governmental organisations (NGOs), concerning violations of the rights in the Charter

In 1999, the African Committee of Experts on the Rights and the Welfare of the Child was empowered to hear individual communications alleging violations of the African Charter on the Rights and Welfare of the Child.⁷ However, the Committee has not yet made any recommendations in relation to any communication submitted to it. Therefore, that communications procedure will not be discussed in this

1 I.L.M. 58 (1982).

2 Article 2 of the Charter.

3 They are elected by the Assembly of Heads of State and Government of the African Union.

4 Article 45(1), the Charter

5 Article 45(3), the Charter.

6 Article 49, the Charter.

7 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Nov. 29 1999.

chapter. (For a discussion of the economic, social and cultural rights provisions of the African Charter on the Rights and Welfare of the Child, see Chapter 5.3, 6.3 and 7.3).

A second instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa came into force in November 2005.⁸ The implementation of the Protocol was to be supervised by the ACHPR until the effective establishment of the African Court on Human and Peoples' Rights.⁹ The Protocol contains a wide range of economic, social and cultural rights protections.¹⁰

The African Court on Human and Peoples' Rights has also recently been established. The mandate of the Court is broad; Article 3 of the Protocol establishing the Court provides that the Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol establishing the Court and *any other relevant human rights instrument ratified by the States concerned* (Article 3).¹¹ This would include, for example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹² Depending on the Court's interpretation of 'any other relevant human rights instruments', it may apply any other universal, regional or sub-regional treaties that the State in question has ratified.¹³

The Court will consider cases referred to it by the ACHPR and States Parties to the Protocol and, wherever a State Party has accepted its jurisdiction, by individuals and NGOs.¹⁴ Unlike the decisions of the ACHPR and the Committee on the Rights and the Welfare of the Child, the rulings of the Court will be binding.¹⁵ As the Court has yet to adopt its Rules of Procedure, this Chapter will focus solely on bringing communications before the ACHPR.

3. THE RIGHTS COVERED

The African Charter on Human and Peoples' Rights

- The right to freedom from discrimination in the enjoyment of the rights set out in the Charter (Article 2)
- The right to equality before the law and equal protection under the law (Article 3)
- The right to life (Article 4)
- Freedom from exploitation and torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited (Article 5)

8 Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 11 July 2003...

9 Amnesty International, 'Africa: Entry into Force of Protocol on the Rights of Women in Africa Positive Steps Towards Ending Discrimination [sic.]', <http://web.amnesty.org/library/index/engafro10042005>. Article 27 provides that, '[t]he African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

10 Economic, social and cultural rights set out in the Protocol include the right to education and training (Article 12), economic and social welfare rights (Article 13), health and reproductive rights (Article 14), the right to food security (Article 15), the right to adequate housing (Article 16), the right to a positive cultural context (article 17) and the right to inheritance (Article 21). Elderly women, women with disabilities and women in distress are also entitled to special protection (Articles 22, 23 and 24).

11 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), adopted June 9 1998.

12 Scott Lyons, 'The African Court on Human and Peoples' Rights' *ASIL Insight*, Sept. 2006, <http://www.asil.org/insights/2006/09/insightso60919.html>

13 For further discussion of the extent of the Court's mandate under Article 3, see Anne Pieter Van Der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' *Leiden Journal of International Law*, Vol. 18 (2005), pp. 113–129, at pp.119–120.

14 Ibid. Articles 5(3) and 34(6).

15 The Court had its first meeting in July 2006. Eventually, it is to be integrated within the African Court of Justice. For more information on the relationship between the Court and the ACHPR, see Amnesty International, 'African Court on Human and Peoples' Rights: An Opportunity to Strengthen Human Rights Protection in Africa' (AI Index: IOR 63/001/2002), <http://web.amnesty.org/library/index/engior630012002>

- The right of an individual to have their cause heard, including the right to an appeal to competent national organs against violations of fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force (Article 7)
- The right to property (Article 14)
- The right to work under equitable and satisfactory conditions and right to receive equal pay for equal work (Article 15)
- The right to health (Article 16)
- The right to education and the freedom to take part in cultural activities in one's community (Article 17)
- The right of the family to protection and assistance from the State, the right to special measures of protection for the aged and disabled and the right to freedom from discrimination of women and children (Article 18)
- The right to equality (Article 19)

The ACHPR has also recognised that the Charter contains implied additional economic, social and cultural rights. In *SERAC v. Nigeria*,¹⁶ the ACHPR found that the right to food is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22). In the same case, the ACHPR stated that that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing. The Commission recently found the complaint of *Communication 296/05 – Centre on Housing Rights and Evictions (COHRE)/The Sudan* to be admissible. Amongst other things, the complainant relies on the Commission's analysis in *SERAC* to argue that the right to water, which was recognised in General Comment No. 15 of the Committee on Economic, Social and Cultural Rights subsequent to the *SERAC* case, should also be regarded as implicitly included in the Charter.

The Charter also confers rights on 'peoples'. Article 20 specifies that "All peoples shall have the right to existence and self-determination." Amongst other things, peoples "shall pursue their economic and social development according to the policy they have freely chosen". The right of people's to economic, social and cultural development is set out in Article 22, while Article 21 provides that "All peoples shall freely dispose of their wealth and natural resources." Finally, Article 24 states that peoples shall have the "right to a general satisfactory environment favourable to their development". These are often referred to as third generation rights (in contrast to ESC rights which are frequently described as 'second generation' rights). However, they are linked to and have clear implications for the enjoyment of socio-economic rights. They will not, however, be discussed in detail in this chapter.

Note: The Charter also imposes social and economic duties on individuals, but the complaints mechanisms under the Charter only apply to violations of Charter provisions by States Parties.

4. MAKING A COMPLAINT

Much of the information in this section and the next section is taken from 'Information Sheet, No. 2, 'Guidelines on the Submission of Communications', see http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.2.doc

¹⁶ African Commission on Human and Peoples' Rights, Case No. 155/96.

Who may one make a complaint against?

The complaint must be made against a State Party to the Charter.

Who may make a complaint?

Anyone, either on her own behalf or on behalf of someone else, may bring a complaint to the attention of the ACHPR alleging that a State Party to the Charter has violated one or more of the rights contained therein. Authors of communications have so far included individuals and NGOs.

Who may represent an individual making a complaint?

It is not necessary that the complainant or author of the communication be related to the victim of the abuse in any way, but the victim must be mentioned in the complaint.¹⁷

What may be complained about?

According to Article 58(1) of the Charter, it would appear that the ACHPR may only consider a communication that reveals a series of serious violations of human and peoples' rights and only after the Assembly of Heads of State and Government of the African Union has requested it to do so.¹⁸ However, the practice of the ACHPR has been to consider every communication that refers even only to a single violation of the Charter. The rationale behind this practice is that a single violation is an affront to the dignity of the victim and international human rights norms.¹⁹

Admissibility requirements

There are seven conditions that the communication must satisfy in order to be deemed admissible by the ACHPR. The communication must:

- Include the author's name even if the author wishes to remain anonymous
- Be compatible with the Charter
- Not be written in insulting language directed against the African Union or the State the action of which is the subject of the complaint
- Not be exclusively founded on reports from the media
- Demonstrate that all available domestic legal remedies have been exhausted
- Submitted within a reasonable time from the date of exhaustion of domestic remedies
- Not deal with a matter that has already been settled by some other international human rights body²⁰

Note: The ACHPR will disregard the requirement of exhaustion of all available domestic remedies if the procedure for achieving these remedies would be unduly prolonged.²¹

17 *Information Sheet*, No. 2, 'Guidelines on the Submission of Communications', p. 5.

18 *Ibid.* p. 6.

19 *Ibid.*

20 *Ibid.*

21 *Information Sheet*, No. 3, 'Communication Procedure', p. 10. This occurred in the case of *SERAC and CESR v. Nigeria*, ACHPR, Case No. 155/96, decision taken at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001), where ACHPR declared that, "local remedies do not bar the communication because of the futility of legal action in Nigeria resulting from the operation of ouster clauses contained in military decrees removing jurisdiction of the courts from entertaining human rights cases". (See Jurisprudence section below.)

5. LODGING A COMPLAINT

Format and content of the communication

The communication must be in writing and addressed to the secretary or chairman of the ACHPR. A copy of a model complaint may be found in Annex 8.1. There is no form or special format, but a communication should contain all the relevant information, as follows:

- If submitted by an individual or group of individuals, it should include the name(s) of the complainant or complainants, their nationalities, occupations or professions, addresses and signatures.
- If submitted by an NGO, it should include the address of the institution and the names and signatures of the legal representatives of the institution.
- Identify the State concerned.
- Describe the violation of human or peoples' rights that took place, indicating the date, time (if possible), and place where the violation occurred.
- Include the victim(s) names (even if the victim(s) wish to remain anonymous, in which case, this should be stated) and, if possible, the names of any authority familiar with the facts of the case.
- Information indicating that all domestic legal remedies have been exhausted and, if not, the reasons this was not possible.
- Whether the communication has been or is being considered before any other international human rights body, for instance, the Human Rights Committee.

As a general rule, "the communication should state only the facts ... The complaints should be drafted in a clear, simple and straightforward manner, free from unnecessary rhetoric."²² If these requirements are not met, the ACHPR will notify the complainant and, if necessary, ask for additional information.

Cost of the complaint, free legal aid

There is no charge or fee for submitting a communication. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the ACHPR and following up on any decision the ACHPR makes. This should be borne in mind. The Institute for Human Rights and Development in Africa, with the support of the Open Society Initiative for West Africa, is currently operating a fund for individuals/groups litigating cases before ACHPR to enable them to participate in the ordinary session of the ACHPR.²³ The fund covers travel, accommodation and other related expenses.²⁴

Where to send a communication

The African Commission on Human and Peoples' Rights
PO Box 673,
Banjul, The Gambia
Tel: 220 392962/Fax: 220 390764
Web: www.achpr.org/index.html

²² *Information Sheet*, No. 2 (n. 17 above), p. 6-7. Note that the leading case of *SERAC v. Nigeria* also contained significant legal argument.

²³ 'Legal Defence Fund', http://www.achpr.org/english/news/legal%20defence%20fund_en.htm

²⁴ *Ibid.*

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Step 1. Registration

Upon receipt of the communication, it is registered in the ACHPR's Official Register of Communications. The Secretariat will acknowledge receipt of the author's letter of complaint. If more information is required, the author will be informed accordingly. No letter is sent to the State Party at this point.

Step 2. Seizure

As soon as the communication is registered, a summary is made by the Secretariat and relevant material is distributed to all the commissioners. The Secretariat must wait for a response from at least seven of the eleven members of the ACHPR to indicate that they have received the communication and approved seizure. If the Secretariat does not receive minimum of seven responses, the communication is presented to all the commissioners at the ACHPR's next session.

At this session, the ACHPR decides whether to be seized of the communication by determining whether it alleges any *prima facie* violation of the Charter and whether it has been properly submitted according to the provisions of Article 55 of the Charter.²⁵ This requires a simple majority of the commissioners. The Secretariat will then be requested to inform the parties (the complainant and the State concerned) that the communication will be considered on admissibility at its next session, and that they should submit any relevant comments within three months from the date of the letter.

Step 3. Admissibility

The ACHPR will then make a decision on admissibility based on the requirements set out in Article 56 of the Charter, including principles of international human rights law, essentially aimed at protecting the individuals from a State's encroachment on their rights. The decision on admissibility will be transmitted to both the complainant and the State concerned. In principle, it is final.²⁶ However, a communication declared inadmissible may be reviewed at a later date if the complainant is able to provide information to the effect that the grounds for inadmissibility no longer exist.²⁷

Step 4. Amicable resolution

If a communication is declared admissible, the parties will be asked to submit their observations on the merits. The ACHPR also puts itself at the disposal of the parties in a bid to secure a *friendly settlement* of the dispute. If both parties express willingness to settle the matter amicably, the ACHPR will appoint a rapporteur (ordinarily the commissioner who has been handling the petition), a commissioner responsible for promotional activities in the State concerned, or a group of commissioners.²⁸ If a friendly settlement is reached, a report containing the terms of the settlement is presented to the ACHPR at its next session. If no agreement is reached, the ACHPR will then proceed to take a decision on the merits of the case.

²⁵ *Information Sheet*, No. 3, (n. 21 above), p.4.

²⁶ *Ibid.*, p.7.

²⁷ *Ibid.*

²⁸ *Ibid.*

Step 5. Consideration on the merits

During the ACHPR's consideration of the communication, the parties are free to make written or oral presentations to the ACHPR. NGOs and individuals are also granted an audience to make oral presentations before the ACHPR. The ACHPR puts complainants and the States that are the subject of the communication on an equal footing throughout the proceedings.²⁹ In many instances, a State fails to respond to the petition of the complainants. In such cases, the ACHPR proceeds according to the facts at its disposal. The ACHPR may also rely on its investigative powers under Article 46 of the Charter to examine claims *'ex officio'*, obtaining information from alternative sources and third parties. After considering the facts and arguments put forward before it, the ACHPR will decide whether or not there has been a violation of any of the provisions of the Charter.

Step 6. Recommendations (or decisions of the ACHPR)

The ACHPR makes recommendations after consideration of the facts submitted by the complainant, the complaint, the State Party's observations (if any) and the issues and proceedings before the ACHPR. The mandate of the ACHPR is quasi-judicial. Its final recommendations are therefore not in themselves legally binding on the States concerned. However, these recommendations are included in the Commission's Annual Activity Reports, which are submitted to the Assembly of Heads of State and Government of the African Union in conformity with Article 54 of the Charter. If they are adopted, they become binding on the States Parties and are published.

Step 7. Follow-up

The ACHPR has no procedure for supervising the implementation of its recommendations. However, the Secretariat does send letters of reminders to violating States calling upon them to honour their obligations under the Charter. There is no real mechanism by which States may be compelled to conform to ACHPR recommendations.³⁰ This greatly diminishes the potential for ACHPR decisions to lead to concrete improvements in human rights standards.

Emergency and interim measures

Every communication should indicate if the victim's life, personal integrity or health is in imminent danger.³¹ In emergency situations, the ACHPR has the power, under Rule 111 of its Rules of Procedure, to adopt provisional measures, urging the State concerned not to take any action that will cause irreparable damage to the victim until the case has been heard by the ACHPR. The ACHPR may also adopt other urgent measures as it sees fit.³²

²⁹ Ibid.

³⁰ Ibid.

³¹ *Information Sheet*, No. 2 (n. 17 above), p. 7.

³² Ibid.

7. JURISPRUDENCE

The leading decisions on ESC rights decided by the ACHPR are summarised in Chapter 20.2 and are analysed in all the chapters in Part I of the book. For a list of ACHPR decisions, see www1.umn.edu/humanrts/africa/comcases/comcases.html. The most celebrated ESC rights decision of the ACHPR is that of *SERAC v. Nigeria* in which, amongst other things, the Commission outlined the various levels of obligations imposed on States by the ESC rights under the Charter (see Chapters 1.3.3, 1.3.7, 4.4.2, 5.3.2, 4.4.2 and 20.2). Another key decision on ESC rights was made in *Purohit and Moore v. The Gambia*.³³ Here, the ACHPR read the obligation on States Parties, “to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind” into Article 16 of the Charter. It is reasonable to assume that this qualification will apply to States parties’ obligations in relation to the other economic and social rights in the Charter.

8. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

Neither the Charter nor the ACHPR provides for enforceable remedies or a mechanism for encouraging and tracking compliance by States with ACHPR decisions.³⁴ ACHPR decisions are non-binding, and there has been a lack of respect for and attention to them by States. Furthermore, in the past, there have frequently been long delays between a communication being declared admissible and the ACHPR’s decision in relation to it.

9. USEFUL RESOURCES

ACHPR homepage: www.achpr.org

Rules of Procedure of the African Commission on Human and Peoples’ Rights (1995):
www1.umn.edu/humanrts/africa/rules.htm

Information Sheet, No. 2, ‘Guidelines on the Submission of Communications’,
http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.2.doc

Information Sheet, No. 3, ‘Communication Procedure’,
http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.3.doc

Amnesty International, ‘African Court on Human and Peoples’ Rights: An Opportunity to Strengthen Human Rights Protection in Africa’, <http://web.amnesty.org/library/index/engior630012002>

Anne Pieter Van Der Mei, ‘The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?’, *Leiden Journal of International Law*, Vol. 18 (2005), pp. 113–129.

Danwood Chirwa, ‘The African regional human rights system: the promise of recent jurisprudence’, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

³³ 204/2001, African Commission (334th Ordinary Session, May 2003).

³⁴ Amnesty International, ‘African Court’ (n. 8 above), p. 1.

Annex 8.1 Model Complaint for Submission to the ACHPR

1. Complainant(s) (Please indicate whether you are acting on your behalf or on behalf of someone else. Also indicate in your communication whether you are an NGO and whether you wish to remain anonymous.)

Name

Age

Nationality.....

Occupation or Profession

Address

Telephone and Fax no

- 2. Government accused of the violation (Please make sure it is a State Party to the Charter.)
- 3. Facts constituting alleged violation (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation.)
- 4. Urgency of the case (Is this a case that might result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the ACHPR.)
- 5. Provisions of the Charter alleged to have been violated (If you are unsure of the specific articles, please do not mention any.)
- 6. Names and titles of government authorities who committed the violation (If this is a government institution, please give the name of the institution, as well as that of the head of the institution.)
- 7. Witness to the violation (Include addresses and, if possible, telephone numbers of witnesses.)
- 8. Documentary proof of the violation (Attach, for example, letters, legal documents, photos, autopsies, tape recordings, etc., to show proof of the violation.)
- 9. Domestic legal remedies pursued (Also indicate, for example, the courts you have been to and attach copies of court judgments, writs of habeas corpus, etc.)
- 10. Other international avenue (Please state whether the case has already been decided or is being heard by some other international human rights body; specify this body, and indicate the stage the case has reached.)

9 INTER-AMERICAN COURT OF HUMAN RIGHTS AND COMMISSION ON HUMAN RIGHTS

1. INTRODUCTION

In 1948, the participants in the Ninth International Conference of American States signed the Charter establishing the Organisation of American States (OAS). At the same meeting, the new body approved the American Declaration of the Rights and Duties of Man, laying the foundation for the Inter-American human rights system.

This section outlines the basic documents of the Inter-American human rights system and the rights recognised therein that are either expressly social and economic or are civil and political, but have social and economic aspects. The chapter explains how to make a complaint to the Inter-American Commission on Human Rights (IACHR) and identifies useful resources.

The two main organs of the Inter-American human rights system are the IACHR and the Inter-American Court of Human Rights. The IACHR was set up in 1959. Its initial work concerned the general human rights situation in specific OAS Member States. Upon the entry into force of the American Convention on Human Rights in 1969 and the establishment of the Inter-American Court of Human Rights in 1978, the individual complaints procedure began to acquire greater importance. The extensiveness of the complaints procedure increased with the introduction of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) in 1988.

2. BACKGROUND: THE IACHR AND THE COURT

The IACHR consists of seven members of high moral character and recognised competence in the field of human rights who serve in their personal capacity. The IACHR's principal function is to promote the observance and the defence of human rights. It applies the American Convention and its Protocols to State Parties that have ratified the Convention and the American Declaration of the Rights and Duties of Man to States that are not parties to the Convention.

In carrying out its mandate, the IACHR:

- Investigates individual petitions that allege human rights violations under the Convention (*see further below*)
- Submits cases to the Inter-American Court and appears before the Court in the litigation of cases
- Requests that States adopt specific ‘precautionary measures’ to avoid serious and irreparable harm to human rights in urgent cases¹
- Requests advisory opinions from the Court regarding questions of interpretation of the Convention
- Monitors the general human rights situation in States Parties to the Convention
- Carries out on-site country visits that ordinarily result in the submission of reports to the General Assembly of the OAS
- Publishes studies and carries out workshops to stimulate public awareness of human rights
- Recommends to the Member States of the OAS the adoption of measures that would contribute to human rights protection

The Court is composed of seven judges elected in an individual capacity. It has both adjudicatory and advisory jurisdiction.² In relation to its adjudicatory jurisdiction, it is entitled to consider cases submitted to it by the IACHR or State Parties. Therefore, petitions brought to the IACHR may be taken up before the Court. However, the State Party involved must recognise the jurisdiction of the Court.

3. THE RIGHTS COVERED

American Declaration of the Rights and Duties of Man

Chapter 1 of the Declaration sets out an extensive list of human rights, including ESC rights:

- The right to life, liberty and personal security (Article I)
- The right to equality before the law and to enjoy the rights and undertake the duties established in the Declaration, without discrimination (Article II)
- The right to a family and protection thereof (Article VI)
- The right to protection for mothers and children (Article VII)
- The right to inviolability of the home (Article IX)
- The right to the preservation of health and to well-being (Article XI)
- The right to education (Article XII)
- The right to the benefits of culture (Article XIII)
- The right to work and to fair remuneration (Article XIV)
- The right to leisure time and to the use thereof (Article XV)
- The right to social security (Article XVI)
- The right to property (Article XXIII)³
- The right of petition to competent authorities (Article XXIV)

1 The IACHR may also request that the Court order ‘provisional measures’ in urgent cases that involve danger to persons, even where a case has not yet been submitted to the Court.

2 The advisory function of the Court is not relevant to bringing a complaint on behalf of an individual or a disadvantaged group. It is therefore not dealt with in this section.

3 Note that the right to property is framed by the right to an adequate standard of living. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.

Article XXVIII of the Declaration sets out factors that limit the rights, namely, the rights of others, the security of all and the just demands of the general welfare and the advancement of democracy. Chapter 2 sets out the duties of individuals. (These are not considered here because they are unlikely to be the subject of a case before the IACHR or the Court.)

The legal status of the Declaration was once the subject of some debate as the Declaration was originally intended to be merely a statement of moral or political principle and to have no binding force. However, the IACHR has received and considered a number of communications concerning putative violations of its provisions whether civil and political or social, cultural and economic. Furthermore, in its Advisory Opinion OC-10/89, the Court concluded that the Declaration covers and defines the fundamental rights referred to in the OAS Charter and thus is legally binding on all OAS Member States.

The Convention

The Preamble states that the ideal of free men enjoying freedom from fear and want may be achieved only if conditions are created whereby everyone may enjoy his ESC rights, as well as their civil and political rights. Chapter I sets out the general obligations of the States Parties, which include respecting the rights and freedoms covered in the Convention and ensuring to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without discrimination (Article 1). States are also obliged to adopt such legislative or other measures as may be necessary to give effect to the rights and freedoms covered in the convention (Article 2).

Chapter II sets out a largely exhaustive list of civil and political rights that includes some rights relevant to ESC rights:

- The right to life (Article 4)
- The right to humane treatment (Article 5)
- Freedom from ex post facto laws (Article 9)
- The right to compensation (Article 10)
- Freedom of association (Article 16)
- The rights of the family (Article 17) and child (Article 19)
- The right to property (Article 21)⁴
- The right to equal protection (Article 24)
- The right to judicial protection (Article 25)

Chapter III specifically concerns ESC rights. Article 26 states that:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

4 Property is conservatively defined, unlike in the Declaration. The article reads, "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

The obligation is not significantly different from the corresponding one in the International Covenant on Economic, Social and Cultural Rights (see Chapter 1), and the Court has determined that the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter, as amended by the Protocol of Buenos Aires, may be taken to be the ESC rights covered in the Declaration due to its status as an authoritative interpretation of the references to human rights in the OAS Charter.⁵ Furthermore, if the Convention and another international treaty are applicable to the same situation, the rule most favourable to the individual prevails.⁶ Thus far, the Inter-American Court has failed to engage properly with Article 26, preferring to base its decisions on other, civil and political rights, set out in the Convention. (For more on this, see chapters 3 to 6).

Chapter IV deals with the suspension of guarantees (Article 27), interpretation (Article 29) and application (Article 30), and Chapter V discusses the interaction of rights and duties and provides that the rights of each person are *limited* by the rights of others, by the security of all and by the just demands of the general welfare in a democratic society (Article 32).

Protocol of San Salvador

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights supplements the Convention by addressing the following rights:

- The right to work (Article 6)
- The right to just, equitable and satisfactory conditions of work (Article 7)
- Trade union rights (Article 8)
- The right to social security (Article 9)
- The right to health (Article 10)
- The right to a healthy environment (Article 11)
- The right to food (Article 12)
- The right to education (Article 13)
- The right to the benefits of culture (Article 14)
- The right to the formation and protection of families (Article 15)
- The rights of children (Article 16)
- The protection of the elderly (Article 17)
- The protection of the handicapped (Article 18)

States Parties to the Protocol are required to adopt the necessary measures, to the extent allowed by their available resources, to achieving progressively these rights,⁷ including enact domestic legislation and other measures (Article 2) and guaranteeing the exercise of the rights without discrimination (Article 3). *However*, the individual petition system outlined below only be used in relation to Articles 8(a) (the right to join and form trade unions) and 13 (right to education).

⁵ Advisory Opinion OC-5/85.

⁶ Human Rights Resource Centre, University of Minnesota, *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource* (Minneapolis, 2000), <http://www.umn.edu/humanrts/edumat/IHRIP/circle/modules/module30.htm>

⁷ The full text of Article 1 reads:

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Rules for making a complaint to the IACHR

Who may you make a complaint against?

States that are parties to the Convention, Declaration, or Protocol of San Salvador.⁸

Who may make a complaint?

Not everyone may submit a petition. People entitled to do so are described in Article 23 of the Rules of Procedure of the IACHR.⁹ People may submit petitions concerning alleged violations. The submissions may be on their own behalf or on behalf of third persons. Thus, the petitioner does not have to be the victim of the violation of the right in question.

Declaration: Any person or group of persons or non-governmental entity legally recognised in one or more of the Member States of the OAS may submit a petition concerning a violation of the Declaration.

Convention: Any person or group of persons or non-governmental entity legally recognised in one or more of the Member States of the OAS may submit a petition as long as the State that is the subject of the complaint has ratified the Convention. The Statute of the Inter-American Commission indicates that a complainant cannot also rely on the Declaration if the State concerned has ratified the Convention, but the Declaration may be relevant in interpreting the provisions of the Convention.

Protocol of San Salvador: Any person or group of persons or non-governmental entity legally recognised in one or more of the Member States of the OAS may submit a petition as long as the State that is the subject of the complaint has ratified the Protocol.

Who may represent an individual making a complaint?

The petitioner may designate a lawyer or another person to represent him or her before the IACHR. This may be done in the petition itself or in another writing.

What may be complained about?

The petition must allege a violation of a human right recognised in the Declaration, the Convention or Article 8(a) or Article 13 of the Protocol of San Salvador.

Petitioners should state on their petitions whether they wish their identity to be withheld from the State. The identity of a petitioner shall not be revealed without his express authorisation.

The information in this section is largely taken from the 'Rules of Procedure of the Inter-American Commission on Human Rights', see <http://www.iachr.org/Basicos/basic16.htm>

⁸ To check whether a State is a party to the Convention (all OAS Member States are automatically parties to the Declaration), go to the IACHR website (www.iachr.org), click on *Basic Documents*, followed by *Signatures and current status of ratifications* of the instrument that you are checking.

⁹ This may be found at www.iachr.org/Basicos/basic16.htm

4. ADMISSIBILITY REQUIREMENTS

Exhaustion of domestic remedies

The IACHR will not consider a petition if the remedies under domestic law have not been pursued and exhausted in accordance with generally recognised principles of international law. This rule only requires the exhaustion of such domestic remedies that are 'adequate' and 'effective'. It does not apply where one of the following has occurred:

- The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated
- The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them
- There has been unwarranted delay in rendering a final judgment under the aforementioned remedies

The burden is on the State to prove that local remedies have not been exhausted. In cases where the life or physical integrity of a person or group of persons is in imminent danger despite having approached domestic authorities, one may submit the pertinent information to the IACHR even if information concerning the exhaustion of domestic remedies is not currently available.

No international procedure

The IACHR will not consider a petition if its subject matter:

- Is pending settlement pursuant to another procedure before an international governmental organisation of which the State concerned is already a member
- Essentially duplicates a petition pending or already examined and settled by the IACHR or by another international governmental organisation of which the State concerned is a member

This prohibition does not apply if the procedure through the other organisation does not involve a decision on the specific facts that are the subject of the petition. Furthermore, if the applicant before the IACHR is not the victim or his representative, the victim may not be precluded from seeking access to another international procedure, or if the other procedure will not lead to an effective settlement.

Time limit

The petition must be lodged within a period of six months following the date on which the alleged victim is notified of the decision that exhausted the domestic remedies. This will not apply where one of the following has occurred:

- The domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated
- The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.
- There has been unwarranted delay in rendering a final judgment under the aforementioned remedies

In cases where the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time. (The IACHR has defined ‘a reasonable period of time’ in this context.)

Other requirements

The IACHR will not consider a petition:

- Without the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition
- If it contains statements of the petitioner or of the State indicating that the petition or communication is manifestly groundless or obviously out of order
- That does not state facts that tend to establish a violation of the rights guaranteed by the Convention or Declaration

5. LODGING A COMPLAINT

Format and content of the communication

Petitions addressed to the IACHR must be in writing and must contain the following information:

- The name, nationality and signature of the person or persons making the denunciation or, in cases where the petitioner is a non-governmental entity, the name and signature of its legal representative(s)
- Whether the petitioner wishes that his or her identity be withheld from the State
- The address for receiving correspondence from the IACHR and, if available, a telephone number, facsimile number, and e-mail address
- An account of the act or situation that is denounced, specifying the place and date of the alleged violations
- If possible, the name of the victim and of any public authority who has taken cognisance of the fact or situation alleged
- The State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognised in the Convention and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated
- Compliance with the time period as outlined above
- Any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided outlined above
- An indication of whether the complaint has been submitted to another international settlement proceeding (as provided in Article 33 of the Rules of Procedure of the IACHR)

For a model petition, see

https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E

Although the submission should be written, the IACHR has previously admitted complaints presented by other means (e.g., by telephone).

Cost of the complaint, free legal aid

There is no charge or fee for submitting a communication. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the IACHR and monitoring and following up on any decision the IACHR makes. Furthermore, the party that proposes the production of evidence at a hearing shall cover all of the attendant expenses.

There is no free legal aid available from the OAS for petitioners bringing claims under the Convention, the Declaration, or the Protocol. However, NGOs and lawyers may be able to assist. See chapter 21.

Where to send a complaint

Executive Secretariat
Inter-American Commission on Human Rights
1889 F Street NW
Washington, DC 20006
UNITED STATES
Fax: 1-202-458-3992
e-mail: cidhoea@oas.org

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

The information in this section is largely taken from the 'Rules of Procedure of the Inter-American Commission on Human Rights', see <http://www.iachr.org/Basicos/basic16.htm>

The IACHR

Registration of complaint

If the communication contains the essential elements set out above, the IACHR will register the petition and advise the petitioner of registration. Where a petition does not meet all the requirements, the IACHR may ask the petitioner to complete them.

Admissibility proceedings

The Commission then determines whether a petition is admissible, having regard to the admissibility criteria set out above.

Procedure on the merits

If the IACHR considers the communication admissible, it will open the case and set a period of two months for the petitioners to submit additional written observations on the merits. The pertinent parts of these observations are then transmitted to the State in question so that it may submit its observations within two months.

On the basis of the information received, the IACHR will determine whether the grounds for the petition or communication still exist. If they do not, the IACHR will order the record to be closed. The IACHR may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

If the record has not been closed, the IACHR will, with the parties' knowledge, examine the matter set forth in the petition or communication to verify the facts. If necessary and advisable, the IACHR will carry out an investigation, for the effective conduct of which it shall request, and the States concerned shall provide it with, all necessary facilities.

The IACHR may request the States concerned to furnish any pertinent information. If the IACHR does so, it will hear oral statements or receive written statements from the parties concerned. There is a presumption that the facts alleged in the petition are true if the respondent State fails to provide the IACHR with the information required by it before the end of the time limit set by the IACHR.

Note: In serious and urgent cases, only the presentation of a petition or communication that fulfils all the formal requirements of admissibility will be necessary for the IACHR to conduct an investigation with the prior consent of the State in whose territory a violation has allegedly been committed.

Friendly settlement

The IACHR shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in the Declaration, Convention, or Protocol.

If a friendly settlement is reached, the IACHR will draw up a report, which is transmitted to the petitioner, to the States Parties to the Convention and to the secretary general of the OAS for publication. The report will contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Report of the decision on the merits

If a settlement is not reached, the IACHR shall, within the time limit established by its statutes, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the IACHR, the dissenting members may attach separate opinions. The written and oral statements made by the parties shall also be attached to the report.

The report is then transmitted to the States concerned, which may not publish it. In transmitting the report, the IACHR may make such proposals and recommendations as it sees fit.

Final report

If, within three months of the date of the transmittal of the report of the IACHR to the States concerned, the matter has not been settled or submitted to the Court by the IACHR or by the State concerned (and the jurisdiction of the Court has been accepted) the IACHR may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration. The IACHR may make recommendations and will set out a period within which the State is to take

the measures that are necessary in order to remedy the situation examined. When the set period has expired, the IACHR decides by the vote of an absolute majority of its members whether the State has taken adequate measures and whether to publish its report. While the recommendations made as part of the preliminary report are not obligatory, the conclusions and recommendations contained in the final report do carry legal obligations.

Note: The petitioner may at any time desist from his or her petition or case by stating, in writing to the IACHR, his or her desire to do so. The statement by the petitioner will be analysed by the IACHR, which may archive the petition or case if it deems this appropriate or continue to process it in the interest of protecting a particular right.

Interim measures

In serious and urgent cases and whenever necessary according to the information available, the IACHR may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons. If the IACHR is not in session and it is not possible for the members to consult together within a reasonable time, a decision may be taken by the president or one of the vice-presidents on the IACHR's behalf.

The Court

Much of the information in this section is taken from 'Rules of Procedure of the Inter-American Court of Human Rights', see <http://www.corteidh.or.cr/reglamento.cfm>

Grounds for submission of a case to court

A case may be submitted to the Court in three situations:

First, if the petitioner is interested in the case being submitted to the Court (for instance, where the IACHR finds there has been no violation or no violation of a particular right), they should present his position to the IACHR, detailing:

- The position of the victim or the victim's family members (if different from that of the petitioner)
- The personal data relative to the victim and the victim's family members
- The reason they feel that the case should be submitted to the Court
- The documentary, testimonial and expert evidence available
- The claims concerning the reparations and costs

The IACHR will then decide whether to submit the case to the Court.

Second, if the IACHR concludes that there has been a violation and the State fails to meet the recommendations set out by the IACHR in its preliminary report, the IACHR will submit the case to the Court unless there is a reasoned decision by an absolute majority of its members not to do so.

Third, a *State* may also submit a case to the Court (though a State is unlikely to submit itself voluntarily to the Court's jurisdiction, given the implications).

To check if a State has accepted the jurisdiction of the Court, go to: www.iachr.org/Basicos/basic4.htm

Note: The role of victims and individual petitioners is much reduced in proceedings before the Court because they are not a party to the case. When the application has been admitted, the alleged victims, their next of kin, or their duly accredited representatives may submit their requests, arguments and evidence, autonomously, throughout the proceedings. (When there are several alleged victims, next of kin, or duly accredited representatives, they shall designate a common intervener who shall carry out such functions.)

Written proceedings

Upon the filing of an application, the Court carries out a preliminary review of the application to check if the essential requirements have been met. The secretary of the Court will notify the original claimant, if known, and the alleged victim, his next of kin, or his duly accredited representatives, if applicable. When the application has been notified to the alleged victim, his next of kin, or his duly accredited representatives, they will have 30 days in which to present freely to the Court their requests, arguments and evidence.

The respondent has two months to answer the application. The applicant may make preliminary objections at this point.

Oral proceedings

The judges may ask all persons appearing before the Court (including alleged victims, their next of kin or their duly accredited representatives) any questions they deem proper. Furthermore, the witnesses, expert witnesses and any other persons the Court decides to hear may, subject to the control of the president of the Court, be examined not only by the representatives of the State and the IACHR, but also by alleged victims, their next of kin or their duly accredited representatives. The president is empowered to rule on the relevance of the questions posed and to excuse the person to whom the questions are addressed from replying, unless the Court decides otherwise. Leading questions are not permitted.

Decision

If the Court finds that there has been a violation of a right or freedom protected by the Convention or the Protocol, it will rule that the injured party must be ensured the enjoyment of the right or freedom that was violated. It will also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of the right or freedom be remedied and that fair compensation be paid to the injured party.

The Court's main judgment will contain a description of the proceedings, the facts of the case, the conclusions of the parties, the legal arguments, the ruling on the case and the decision, if any, on reparations and costs.

Any judge who has taken part in the consideration of a case is entitled to append a separate opinion, concurring or dissenting, to the judgment. The judgment of the Court is final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court will interpret it at the request of any of the parties, provided the request is made within 90 days of the date of notification of the judgment.

Discontinuance of the case

A case may be discontinued in three situations:

- If the party that has brought the case notifies the Court of its intention not to proceed, the Court may, after hearing the opinions of the other parties, decide to discontinue the hearing and strike the case from its list
- If the respondent informs the Court of respondent's acquiescence to the claims of the party that has brought the case, the Court, after hearing the opinions of the other parties to the case whether such acquiescence and its juridical effects are acceptable, may determine the appropriate reparations and indemnities
- If the parties to a case before the Court inform the Court of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute, the Court may strike the case from its list.

However, bearing in mind its responsibility to protect human rights, the Court may, notwithstanding the existence of the conditions indicated in the preceding paragraphs, decide to continue the consideration of a case.

Provisional measures

At any stage of the proceedings involving cases of extreme gravity and urgency, if necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.

With respect to matters not yet submitted to it, the Court may act at the request of the IACHR. If the Court is not in session, the president, in consultation with the IACHR may order such measures.

7. JURISPRUDENCE OF THE IACHR AND THE COURT

There are three possible approaches to presenting petitions involving ESC rights before the IACHR. (These approaches take into account that both the IACHR and the Court have focused on the enforcement of civil and political rights and have virtually ignored ESC rights.) The approaches are as follows:

- Claims of violations of ESC rights can focus on situations that overlap with civil and political rights or breach the duty of non-discrimination
- The right to judicial protection and the due process clause can be pursued as an alternative means of protection for ESC rights
- Pursuant to Article 26 of the Convention (progressive realisation of ESC rights), the obligation of non-retrogression might be invoked and interpreted in light of the General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.

Some of the IACHR and the Court are summarised in Chapter 20.1 and analysed in Chapters 6.3, 5.3, 7.3 and other Chapters in Part I of this book.

8. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

The limitations of the IACHR procedures include the non-availability of legal aid, reservations made by States to the Convention and long delays due to the infrequency of IACHR sessions. The Court is not directly accessible by individuals and NGOs; cases must only relate to the American Convention and its Protocols; and States must accept the Court's jurisdiction before the Court may hear a case.

Useful resources

- The homepage of the IACHR: www.iachr.org
- The homepage of the Court: <http://www.corteidh.or.cr/>

The following important references are available at the IACHR website in the *Basic Documents* section:

- Petition form
- Rules of Procedure of the Inter-American Commission on Human Rights
- Statute of the Inter-American Court of Human Rights
- Rules of Procedure of the Inter-American Court of Human Rights
- Annual Reports of the Inter-American Commission on Human Rights
- Special Reports of the Inter-American Commission on Human Rights
- Jurisprudence of the Inter-American Court of Human Rights
- Annual Reports of the Inter-American Court of Human Rights

Scott Davidson, *The Inter-American Human Rights System* (Brookfield, VT: Dartmouth Publishing, 1997).

David Harris and Stephen Livingstone, *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998).

Human Rights Resource Centre, University of Minnesota, *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource* (Minneapolis, 2000).

Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (New Haven, CT: Orville H. Schell Jr. Center for International Human Rights, Yale Law School, 2002).

Richard J. Wilson, 'The Index of Individual Case Reports of the Inter-American Commission on Human Rights: 1994-1999' 16 *Am. U. Int'l L. Rev.* 353.

Richard J. Wilson and Jan Perlin 'Inter-American Human Rights System: Activities from Late 2000 through October 2002' 18 *Am. U. Int'l L. Rev.* 651.

Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Tara Melish, 'The Inter-American Commission on Human Rights: Confronting the Region's "Foremost Challenge"' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

10 EUROPEAN COMMITTEE OF SOCIAL RIGHTS

1. INTRODUCTION

Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights), which protects mainly civil and political rights, the European Social Charter¹ was adopted to safeguard basic social standards. It recognised a wide array of economic, social and cultural rights. The rights articulated in the original Charter (1961) included provisions on matters such as the right to work and to professional training, to fair working conditions and pay, to union membership, to social and medical assistance, social security and family assistance.

The revised Charter (1996) expands on the rights articulated in the original Charter. It also strengthens the principle of women's equality and recognises additional substantive rights, including the right to adequate housing. Furthermore, in 1995, a collective complaints system was added to the regular reporting procedure. To date, 39 complaints have been lodged, and decisions on the merits have been made in cases ranging from the protection of children to labour and housing and health rights.

2. BACKGROUND

The European Committee of Social Rights (ECSR) judges the conformity of national law and practice with the Charter.² The ECSR is currently comprised of 13 independent experts.³ It examines national reports on a regular basis and adopts conclusions on them.⁴ It also issues conclusions in respect of national reports and adopts issues decisions on collective complaints brought under the Additional Protocol for Collective Complaints, 1995.⁵

3. THE RIGHTS COVERED

The original and revised Charters cover an extensive range of economic, social and cultural rights. (The exact text of each article differs in some cases between the original and revised Charters. Before bringing a complaint, one should check the text of the Charter that the State Party has ratified.)

1 Adopted at Turin, 18 Oct. 1961.

2 See Article 25 of the Charter of 1961 and Part IV (Article c) of the revised Charter of 1996.

3 For an overview of the current ECSR, see www.coe.int/T/E/Human_Rights/Esc/

4 To access the ECSR's conclusions, see www.coe.int/T/E/Human_Rights/Esc/4_Reporting_procedure/Index.asp#TopOfPage

5 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995, (ETS No. 158), entered into force: 1 July 1998.

The original and revised Charters oblige States Parties to accept as an aim of policy – to be pursued by all appropriate means both national and international in character – the attainment of conditions in which the following rights and principles may be effectively realised.⁶ The obligation ‘to be pursued by all appropriate means’ is one of conduct, similar to the case of the International Covenant on Economic, Social and Cultural Rights (see section 2.3). However, the requirement is more onerous because it does not explicitly allow for progressive realisation or a lack of resources.⁷ However, the European Committee of Social Rights stated in *International Association Autism-Europe (IAAE) v. France*⁸ that:

The Committee recalls, as stated in its decision relative to Complaint No.1/1998 (*International Commission of Jurist v. Portugal*, § 32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

States are given flexibility through a system that allows them to select a minimum number of articles (effectively, 10 for the original Charter⁹ and 16 for the revised Charter¹⁰). One should inspect the articles selected by States before making any complaint.¹¹

Common articles

- Everyone shall have the opportunity to earn his living in an occupation freely entered upon (Article 1)
- All workers have the right to just conditions of work (Article 2)
- All workers have the right to safe and healthy working conditions (Article 3)
- All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families (Article 4)
- All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests (Article 5)
- All workers and employers have the right to bargain collectively (Article 6)
- Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed (Article 7)
- Employed women, in case of maternity, and other employed women, as appropriate, have the right to a special protection in their work (Article 8)
- Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests (Article 9)
- Everyone has the right to appropriate facilities for vocational training (Article 10)

6 Part I, para. 1

7 Cf. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, 1966.

8 Complaint No. 13/2002 (7 Nov. 2003), para. 53.

9 See Article 20.

10 See Article Part III (Article A).

11 See ‘General Presentation’, www.coe.int/T/E/Human%5FRights/Esc/

- Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable (Article 11)
- All workers and their dependents have the right to social security (Article 12)
- Anyone without adequate resources has the right to social and medical assistance (Article 13)
- Everyone has the right to benefit from social welfare services (Article 14)
- Disabled persons have the right to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability (Article 15)
- The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development (Article 16)
- Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection (Article 17)
- The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the other Contracting Parties on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons (Article 18)
- Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party (Article 19)
- All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20)

New articles in the Social Charter, 1996

- Workers have the right to be informed and to be consulted within the undertaking employing them (Article 21)
- Workers have the right to take part in the determination and improvement of the working conditions and working environment in the undertaking employing them (Article 22)
- Every elderly person has the right to social protection (Article 23)
- All workers have the right to protection in cases of termination of employment (Article 24)
- All workers have the right to protection of their claims in the event of the insolvency of their employer (Article 25)
- All workers have the right to dignity at work (Article 26)
- All persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and, as far as possible, without conflict between their employment and family responsibilities (Article 27)
- Worker representatives involved in undertakings have the right to protection against acts prejudicial to them and should be afforded appropriate facilities to carry out their functions (Article 28)
- All workers have the right to be informed and consulted in collective redundancy procedures (Article 29)
- Everyone has the right to protection against poverty and social exclusion (Article 30)
- Everyone has the right to housing (Article 31)

4. RULES FOR MAKING A COMPLAINT

Who may you make a complaint against?

A communication may only be made against a State that has ratified the European Social Charter or the revised European Social Charter.¹²

Who may make a complaint?

The complaints procedure is restricted to organisations. Individuals may not make complaints.

The following organisations may bring complaints:¹³

- The European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe and the International Organisation of Employers
- Non-governmental organisations that have consultative status with the Council of Europe, that are on a list drawn up for this purpose by the Governmental Committee¹⁴ and that have recognised *competence* in the matters relating to the subject of the complaint¹⁵
- Employers' organisations and trade unions in the country concerned
- National non-governmental organisations selected expressly by Contracting Parties¹⁶

The organisations are to be represented by a person appointed by the organisation and may have the 'assistance of advisers'.¹⁷

What may be complained about?

The communication must allege or show a violation of a right contained in the Charter, and the right must have been *expressly* selected by the relevant State Party (*see* the section above).¹⁸

Admissibility requirements

The ECSR will only consider communications that satisfy certain procedural requirements. Some of the admissibility requirements are mentioned in the preceding two sections. It is further required that the communication must be in *writing*.¹⁹

¹² Ibid.

¹³ See, generally, Article 1, Additional Protocol for Collective Complaints.

¹⁴ See Collective Complaints (www.coe.int/T/E/Human%5FRights/Esc/). The Governmental Committee is comprised of representatives of the governments of the States Parties to the Charter.

¹⁵ Article 3, Additional Protocol for Collective Complaints.

¹⁶ Article 2, Additional Protocol for Collective Complaints.

¹⁷ Rule 22, 'Rules of Procedures of the European Committee of Social Rights'.

¹⁸ Article 4 of the Additional Protocol for Collective Complaints states that "[t]he complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision".

¹⁹ Article 4, Additional Protocol for Collective Complaints.

Implied admissibility requirements

- The complaint should be sufficiently *substantiated*. If the ECSR considers that the facts or arguments concerning the alleged violation are not sufficiently substantiated, the complaint may be ruled inadmissible. This is analogous to the requirement in other procedures where a claim is rejected for being ‘manifestly ill founded’.
- There is no indication that the complaint must not relate to events that occurred *before* the entry into force of the Additional Protocol for Collective Complaints. However, all complaints must relate to events that occurred after the entry into force of the Charter (or revised Charter) with respect to the concerned State.
- The communication should not be an *abuse of rights of submission*. In other words, an author of a communication must not make claims where there is nothing in fact or law to support them. This is designed to avoid vexatious or frivolous claims.
- There is *NO* time limit for making a communication. Therefore, old violations may be the subjects of complaint. However, older complaints may be difficult to substantiate, and the ECSR may view the inaction as an abuse of the right of petition or may otherwise consider the delay as a factor in determining the claims admissibility or merits.
- There is *NO* requirement that an individual must have exhausted *domestic remedies*.
- If a matter or case has been previously considered by the ECSR, that is *NOT* a barrier to bringing the claim.²⁰
- There is *NO* requirement that the matter must not be under present consideration by *another international procedure*.

5. LODGING A COMPLAINT

Format of the communication

The communication must be in writing and addressed to the secretary of the ECSR acting on behalf of the secretary general of the Council of Europe (*see* the address below). International organisations of trade unions and employees and international non-governmental organisations must submit the complaint in one of the working languages of the ECSR.²¹ National organisations may use a language other than one of the official languages of the Council of Europe.

²⁰ *See International Commission of Jurists v. Portugal*, Complaint No. 1, ECSR, 9 Sept. 1999, paras. 10 and 11:

The object of this [collective complaints] procedure, which is different in nature from the procedure of examining national reports, is to allow the Committee to make a legal assessment of the situation of a state in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise. Neither the fact that the Committee has already examined this situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent supervision cycles do not in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party. ... Furthermore, in the present case the Committee observes that Article 7 is only examined every four years. It is not part of the ‘hard core’ provisions of the Charter, i.e., provisions that, in accordance with the system of submission of reports decided by the Contracting Parties, are examined every two years. As the Portuguese Government has rightly observed, there will be a considerable time-lapse between the Committee’s assessment of Portugal’s application of Article 7 para. 1 in Conclusions XIII-5, published in December 1997, and its subsequent assessment of this provision in Conclusions XV-2, which will be adopted and published in December 2000.

²¹ Rule 21, ‘Rules of Procedures of the European Committee of Social Rights’.

Content of communication

The communication must contain the following information:

- The name of the organisation
- The signature of the “person(s) with the competence to represent the complainant organisation”²²
- The name of the State Party concerned
- The articles of the Charter allegedly violated
- A detailed description of the facts concerning the alleged violation or violations; the communication should set out all facts and circumstances giving rise to the violation

The following information should also be included:

- A chronology of events (i.e., relevant dates)
- A description of the role of the relevant governmental body, governmental agency, or law that has allegedly violated Charter rights
- A description of the circumstances surrounding the alleged violation(s)
- Copies of other relevant material, for example, newspaper reports, commentaries, statements of witnesses; do not provide too much information because this may slow the process
- Request for interim measures to prevent actions that may not be undone at a later stage; reasons should be provided as to why interim measures are necessary (*see further below*)
- Request for recommendations to be made to the State

Cost of the complaint

There is no charge or fee for submitting a communication. However, costs will usually be incurred in communicating with the ECSR and monitoring and following up on any decision the ECSR makes. This should be borne in mind. There is no international provision for legal assistance to lodge a complaint. Non-governmental organisations and lawyers may be able to assist (*see Chapter 6*).

Where to send a communication

Secretariat of the European Social Charter
Directorate General of Human Rights, DGII
F-67075 Strasbourg Cedex
France
Tel. 33 (0)3 88 41 32 58
Fax. 33 (0)3 88 41 37 00
e-mail: social.charter@coe.int
Web: www.coe.int

²² Rule 20, ‘Rules of Procedures of the European Committee of Social Rights’. This rule is regularly invoked by States in the admissibility stage. In *ERRC v. Greece*, the ECSR stated that:
Regarding the first argument submitted by the Greek Government, the Committee notes that the complaint submitted on behalf of the ERRC is signed by its Programmes Director, Mr Claude CAHN. He is competent to act in the name of the organisation and represent it in all matters relating to this collective complaint, as duly authorised by a letter signed by Ms Dimitrina Petrova, Executive Director of ERRC, herself entitled to act, as duly authorised by two members of the board in accordance with Article 6 of the deed of foundation. The Committee considers therefore that the condition set out in Rule 20 of its Rules of Procedure is fulfilled.

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Step 1. Initial stage

The Secretary General will acknowledge receipt of the complaint and transmit it to the ECSR. The communication is also transmitted to the State Party concerned. For each complaint, a member of the ECSR is appointed as rapporteur to oversee the procedure.

Step 2. Admissibility stage

Before the ECSR decides on admissibility, it may ask the State for written observations on the admissibility of the complaint to be submitted within a time limit.²³ This is normal practice. The president of the ECSR will ordinarily ask the complainant organisation to respond to the State's observations on admissibility. The ECSR will then make a decision on admissibility.

Step 3. Merits stage

If the complaint is declared admissible, copies of the complaint will go to the parties, all contracting parties to the Additional Protocol on Collective Complaints and the international organisations of trade unions and employers. The ECSR will ask the State Party, the complainant organisation and other contracting parties²⁴ to submit observations on the merits. Both the parties may submit additional observations on the merits after this process, in accordance with time limits set by the president.

If the complaint is not submitted by an international organisation of trade unions or employers, then the ECSR must invite such organisations to make comments. There is no formal procedure for other trade unions or employer and non-governmental organisations to make comments, but information may be submitted to the ECSR.

The ECSR may hold a public hearing at the request of one of the parties or on the ECSR's initiative.²⁵ This occurred in the case of Complaint No. 13/2002, *Autisme-Europe v. France*. The ECSR will decide whether to act upon any request for a public hearing.

Decision

The ECSR will make a decision on the merits. The decision is to be accompanied by reasons²⁶ that "present its conclusions as to whether or not the contracting party concerned has ensured the satisfactory application of the provision of the Charter referred to it in the complaint".

Publication of the decision and the Committee of Ministers

The decision is not automatically made public. The decision is first sent to the parties in the complaint and the Committee of Ministers. It may only be made public after four months or when the Committee on Ministers adopts its own resolution on the complaint (whichever is earlier). If the ECSR finds that a

²³ Rule 26, 'Rules of Procedures of the European Committee of Social Rights'.

²⁴ Those States that have ratified the Additional Protocol on Collective Complaints.

²⁵ See Article 7(4), Additional Protocol on Collective Complaints; Rule 29, 'Rules of Procedures of the European Committee of Social Rights'.

²⁶ Rule 30(1), 'Rules of Procedures of the European Committee of Social Rights'.

State Party has not complied with the Charter, the Committee of Ministers shall, by a two-thirds majority, make a recommendation to the State Party concerned.²⁷ In most instances, however, the Committee of Ministers notes or quotes the findings of the ECSR and information provided in response by the State Party.

Appeal and follow-up

There is no right of appeal available to the parties to a complaint, but the Committee of Ministers may, at the request of the State concerned, by a two-thirds majority, refer the matter to the Governmental Committee if the report of the ECSR ‘raises new issues’.²⁸

The State Party is required to provide information on the steps it has taken to give effect to the Committee of Minister’s recommendations in its next report under the regular supervisory cycle.

7. JURISPRUDENCE OF THE ECSR

The ECSR has developed a weighty jurisprudence during its periodic reporting procedures. The Committee of Ministers frequently makes pointed recommendations to States based on the ECSR’s observations, for example: “There continues to be anomalies in the [laws] of Austria and Italy, which in effect do not protect, in every case, domestic employees against dismissal for reasons of pregnancies”.²⁹ The jurisprudence of the ECSR and the Committee of Ministers may be found in documents listed in the Useful Resources section below. Furthermore, the collective complaints procedure is gradually yielding more specific and concrete jurisprudence; cases are summarised in Chapter 20.2 and analysed in chapters 1.3.5, 3.3.1, 3.3.4, 3.4.1, 3.4.4, 4.4.4, 5.3.3, 6.3.3, and 7.3.3 of this book.³⁰

8. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

The complaints procedure suffers from a number of weaknesses. First, only a limited number of States (14 so far) have ratified the additional protocol for complaints procedures. Second, only organisations not individuals can file complaints. Third, similar to other international mechanisms, the decisions are not binding and in the case of this particular mechanism, only a Committee of Ministers has the power to make recommendations.

27 Voting is limited to States that have ratified the Additional Protocol on Collective Complaints.

28 Article 9(1), Additional Protocol on Collective Complaints.

29 Opinion No. 149 (1990), para. 10.2.

30 In addition to the cases analysed, reference should also be made to *Syndicat National des Professions du Tourisme v. France*, Complaint, No. 6/1999, wherein the ECSR found that differences in the treatment between museum and other guides based on the place of education constituted discrimination; *STTK ry [Finnish Confederation of Salaried Employees] and Tehy ry [Union of Health and Social Care Services] v. Finland*, Complaint, No. 10/2000, wherein it was decided that exposure to radiation in the health sector justified additional paid holidays or reduced working hours so as to limit the exposure.

9. USEFUL RESOURCES

Rules of Procedure of the European Committee of Social Rights, (2004), http://www.coe.int/t/e/human_rights/esc/2_ecsr_european_committee_of_social_rights/Rules_%202004.pdf

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995, (ETS No. 158), entered into force: 1 July 1998, <http://conventions.coe.int/Treaty/en/Treaties/Word/158.doc>

Lenia Samuel, *Fundamental Social Rights: Case Law of the European Social Charter* (Strasbourg: Council of Europe Publishing, 1997).

Council of Europe, *European Social Charter: Collected Texts*, 2nd ed. (Strasbourg: Council of Europe Publishing, 2000).

Robin R. Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights', *European Journal of International Law*, Vol. 15, No. 3 (2004), pp. 417-456.

Urfan Khaliq and Robin Churchill, 'The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

11 EUROPEAN COURT OF HUMAN RIGHTS

1. INTRODUCTION

Since the late 1970s, the European Court of Human Rights has infused the European Convention of Human Rights and Fundamental Freedoms with a partially socio-economic character.¹ In some respects, this is a natural outgrowth of commonly overlooked provisions, such as those concerning respect for family life and home, property and education. Based in Strasbourg, the Court has condemned forced evictions, discrimination in educational languages and the destruction of the property of slum dwellers. It has also held that positive obligations flow from the rights in the Convention such as protection from environmental pollution, the duty to facilitate a 'gypsy' way of life for Travellers and provide persons with severe disabilities or diseases a right to a home. Many of these cases are summarised in chapter 20 of this dossier and analysed extensively in chapters 1 to 7 above.

However, filing a case with the European Court of Human Rights requires attention to a wide range of criteria that are beyond the scope of this publication. Ensuring that complaint complies with both the admissibility criteria of the Court has become increasingly important as the number of cases has sharply risen placing pressure on the Court to increase the number of cases it finds inadmissible. This chapter provides a brief introduction to filing a case with the Court and provides references to books and guides for further information.

2. EUROPEAN COURT OF HUMAN RIGHTS

The Court is the primary human rights enforcement mechanism within the European region, and it fulfils a unique adjudicative role. The Court is now directly accessible to individuals and its jurisdiction is compulsory for all States Parties to the European Convention on Human Rights and Fundamental Freedoms. The Court sits on a permanent basis and deals with all the preliminary stages of a case, as well as giving judgment on the merits of a case and establishing remedies.

The European Court of Human Rights set up under the Convention (as amended by Protocol No. 11) is composed of a number of independent judges equal to that of the States Parties (currently forty five). The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the States Parties of the rights set forth in the Convention or the Protocols thereto. States Parties to the Convention are obligated not to hinder in any way the effective exercise of this right of petition.

¹ For a critical overview of the jurisprudence see: Luke Clements and Alan Simmons, 'European Court of Human Rights', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Upon receiving a petition, the Court applies the following criteria, set forth under Article 35 of the European Convention, in order to make a determination on the admissibility of the case.

Article 35 – Admissibility criteria

- 1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
- 2 The Court shall not deal with any application submitted under Article 34 that:
 - a is anonymous; or
 - b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
- 3 The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
- 4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

In addition, only actual victims of human rights violations have standing to submit applications to the Court. Unlike other regional systems, organisations and advocates cannot file petitions alleging human rights violations unless they are directly representing the actual victim.

Any petitions presented to the Court that are clearly unfounded are sifted out of the system at an early stage by a unanimous decision of the Court, sitting as a three-judge Committee. In the large majority of cases, the Court sits as a seven-judge Chamber. If applications are judged admissible, the Chamber may attempt to reach a friendly settlement with the parties. If this is impossible, the Chamber delivers its judgment on the merits of the case.

In exceptional cases, for example, in cases raising a fundamental issue concerning the interpretation or application of the Convention, a case may be referred to a Grand Chamber of seventeen judges, either by a Chamber before judgment, or by one of the parties within three months of a Chamber judgment. Chamber judgments become final after three months and Grand Chamber judgments are final. The Court's final judgments are binding on the State concerned.

The Court is also empowered to render advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols. Under Article 47 of the European Convention, the Committee of Ministers may request the Court to issue an advisory opinion on a legal question or clarification regarding the Convention. Article 47 stipulates that:

Article 47 – Advisory opinions

- 1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
- 2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

- 3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

In addition to requesting advisory opinions, the Committee of Ministers also serves to monitor the implementation of the Court's judgments in cases where a violation is found. The Committee of Ministers is the Council of Europe's decision-making body. It comprises of the foreign affairs ministers of all the member states of the Council of Europe, or their permanent diplomatic representatives in Strasbourg. This mechanism is to ensure that States Parties take the measures needed to prevent further violations (through, for example: changing legislation, reforming institutions, or altering practices). The Committee of Ministers also makes sure that any damages awarded by the Court are paid to the applicant and, in certain cases that other concrete measures are taken to make sure full compensation is granted.

3. USEFUL RESOURCES

3.1 How to File a Complaint

Philip Leach, *Taking a case to the European Court of Human Rights*, 2nd Edition, (Oxford: Oxford University Press, 2005).

Luke Clements, *European Human Rights: Taking a case under the Convention*, 2nd edn (London: Sweet and Maxwell, 1999).

Information for complainants is available at <http://www.echr.coe.int/ECHR/>

3.2 Social Rights and the European Court and Human Rights

Luke Clements and Alan Simmons, 'European Court of Human Rights', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Claire Ovey and Robion White, *Jacobs and White: The European Convention on Human Rights* 4th Edn. (Oxford: Oxford University Press, 2006).

David Harris, Michael O'Boyle and Colin Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995; new edition due in 2006).

PART III

INTERNATIONAL PROCEDURES

12 HUMAN RIGHTS COMMITTEE

1. INTRODUCTION

Complaints about violations of civil and political rights may be made to the United Nations Human Rights Committee (HRC). The HRC oversees the International Covenant on Civil and Political Rights (ICCPR). Petitions may only be made against countries that have signed the ICCPR and the Optional Protocol to the International Covenant on Civil and Political Rights ('the first Optional Protocol'), which allows the submission of complaints by individuals. Rulings are not binding, but are fairly persuasive. The HRC has found violations of ICCPR rights in a significant number of cases through complaints that concern economic, social and cultural issues.

The procedure may be useful in several ways for litigating economic, social and cultural rights ('ESC rights'). Some of the rights in the ICCPR are social or economic in nature, for example, the right to respect for the home. Others have social or economic dimensions, for example, the right to life and the right to non-discrimination. Finally and strategically, in light of the fact that many violations of ESC rights occur in tandem with violations of civil and political rights, a complaint on the civil and political aspects of a case may help place pressure on countries to remedy the social or economic issues. The ICCPR also protects procedural rights (for example, judicial procedures) that may assist litigants who have been denied fair hearings on ESC rights at the national level.¹

2. BACKGROUND

The HRC is entrusted with the oversight of the ICCPR (see Part IV of the ICCPR). It is composed of 18 independent experts who are elected on the basis of expertise, not their nationality. The HRC has four main functions: (a) to review implementation of the rights in the ICCPR by considering periodic reports from States Parties; (b) to issue General Comments that give guidance in the interpretation of the rights; (c) to consider inter-State complaints, i.e., complaints lodged by one State Party against another State Party (there have been none to date); and (d) to consider communications (i.e., complaints) from individuals submitted under the first Optional Protocol procedure.

¹ See *Äärelä and Näkkäläjärvi v. Finland*, No. 779/1997, 7 Nov. 2001.

3. THE RIGHTS COVERED

A number of the rights in the ICCPR are directly relevant to ESC rights, including:²

- The right of all peoples to self-determination and to pursue freely their economic, social and cultural development (Article 1(a)). All peoples may, for their own ends, freely dispose of their natural wealth and resources, and, in no case, may a people be deprived of its own means of subsistence (Article 1).
- The right to life (Article 6)
- The prohibition on torture and cruel, inhuman and degrading treatment and punishment (Article 7)
- The prohibition on slavery, slave-trading, servitude and forced or compulsory labour (Article 8)
- The right of detained persons to humane treatment (Article 10)
- The right to liberty of movement and freedom to choose residence (Article 12)
- Equality before the law and the right to fair trial (Article 14)
- The prohibition on interference with privacy, family home and correspondence (Article 17)
- The right to freedom of association, including forming and joining a trade union (Article 22)
- The protection of family and marriage rights (Article 23)
- The rights of the child to protection, name and nationality (Article 24)
- Equality before the law, equal protection of the law and the prohibition on discrimination (Article 26)
- The right of minorities to enjoy culture, religion and language (Article 27)

Part I of the ICCPR sets out the *general obligations* of States Parties in relation to these rights: to respect the ICCPR rights without discrimination (Article 2(1)); to take the necessary measures to give effect to ICCPR rights, including an effective remedy for their violation (Article 2(2) and (3)); and to ensure the equal enjoyment of civil and political rights for men and women (Article 3). There are also restrictions on the limitation and derogation of the rights (*see* Articles 4 and 5).

4. RULES FOR MAKING A COMPLAINT

Complaints may not be submitted on the violation of every ICCPR right. The HRC has ruled that it is unable to entertain communications alleging violations of Article 1, but the right may be used in interpreting the content of other ICCPR rights.³ There are strict requirements on the actor that may be complained about, who may make a complaint and the subject matter of any complaint.

Who may you make a complaint against?

A communication may only be made against a State that have ratified the ICCPR and the first *Optional Protocol* to the ICCPR.⁴

2 E.g., the prohibition on imprisonment for failure to fulfil contractual obligations (Article 11); the expulsion of aliens may only occur in accordance with the law (Article 13); the prohibition on the retroactive application of criminal law (Article 15); the right to recognition as a person before the law (Article 16); the right to freedom of thought, conscience and religion (Article 18); the right to freedom of expression (Article 19); propaganda for war and other incitements are to be prohibited by law (Article 20); the right to peaceful assembly (Article 21); and the right of citizens to take part in public affairs, vote and be elected (Article 25).

3 See *Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993) and *Marie-Hélène Gillot et al. France* (Communication No. 932/2000).

4 To check whether a State has ratified the ICCPR and the first Optional Protocol to the ICCPR, go to the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>. Alternatively, contact the Petitions Team (*see* below).

Who may make a complaint?

Not everyone may make a communication. The following requirements must be satisfied:

- Only an *individual* may make a communication. Groups, associations, organisations (e.g., non-governmental organisations) and corporations may not make a communication. However, recognised leaders of indigenous communities have been entitled to represent themselves and their entire community. If the violation concerns another group, there are two options. An individual might lodge a communication as a test case or example for the others in the group. Alternatively, all affected individuals might separately lodge communications citing the same circumstances. In the latter instance, the HRC would most likely consider all the communications at the same time.
- The individual must be a *victim* of a violation of a right covered in the ICCPR. An individual must show that they have been ‘actually and personally’ affected by the violation of a right. There is no procedure for an *actio popularis*, whereby a law or action may be challenged in the abstract. However, an individual might argue that the existence of a law or other action *threatens* his rights, for example, the individual might claim that a law might be used against him in the future.⁵ Nonetheless, the threat must be more than a theoretical possibility.
- The individual must be under the *jurisdiction* of the State Party. This means there must be some ‘relationship’ between the State Party and the victim, whether territorial, legal, or circumstantial. Ordinarily, this means that the individual is a citizen of the State Party or resides in the territory of the State Party (legally or illegally). This may also include individuals who are able to show that their rights have been violated by a State Party’s action (or omission) even if they are not citizens or residents, for example, their houses are demolished by a foreign State Party’s army or agents. Article 25 of the ICCPR, concerning political participation, only applies to citizens of the State Party.

Who may represent an individual making a complaint?

If the author of the communication is not the victim, they must be authorised to make the complaint or show justification. A non-governmental organisation or individual (e.g., a lawyer or a family member) may lodge a communication on behalf of a victim. The author must satisfy the HRC that they have been authorised by the alleged victim to make a communication. If the representative has not been authorised by the alleged victim, they must (a) demonstrate that they have personal links with the victim (e.g., they are a family member) and (b) provide reasons why the victim is unable to submit the communication himself. This might include a child or person unable to give consent or a person in prison.

What may be complained about?

The communication must allege or show a violation of a human right covered by the ICCPR. If the complaint does not allege or clearly show a violation of an ICCPR right, then it will be inadmissible and declared ‘incompatible’ with the ICCPR (Article 3, first Optional Protocol). It is not strictly necessary to refer to the articles of the ICCPR, but it is certainly helpful and means there is less risk the complaint will be ruled inadmissible.

⁵ For example, in *Toonen v. Australia*, the HRC found that Mr Toonen had made ‘reasonable efforts’ to show that his right to privacy was threatened by the potential enforcement of legislation criminalising homosexuality and the effect of that legislation on administrative practices and public opinion; see Communication No. 488/1992 CCPR/C/50/D/488/199, para. 5.1.

Will the complaint show the name of the victim?

If the matters contained in the complaint are sensitive or if sensitive matters may emerge during the complaint process, you may request that the HRC suppress the identifying elements in its final decision. This might include not making public the victim or author's identity or the identity of other persons at risk.

Admissibility requirements

The HRC will only consider communications that satisfy certain procedural requirements. If these requirements are satisfied, then the communication is 'admissible', and the HRC may proceed to make a decision upon the merits of the case, i.e., whether an ICCPR right has been violated. Some of the admissibility requirements have already been mentioned (*see above*). Others include:

- The communication must be in *writing*.
- The communication must not be *anonymous*. The communication must contain the name of the victim. If the victim fears that exposure might lead to reprisal or other negative consequences, they may request that the HRC suppress identifying elements from its decision (*see above*). The communication will not be made public until the HRC has made a decision on the claim.
- The complaint must be sufficiently *substantiated*. If the HRC considers that the facts or arguments concerning the alleged violation have not been sufficiently substantiated, the complaint may be ruled inadmissible. This is analogous to the requirement in other procedures where a claim is rejected for being 'manifestly ill founded'.
- The complaint must not relate to events that occurred *before* the entry into force before the ratification by the State of the first Optional Protocol. The Protocol only comes into force three months following the date of ratification by the State or 23 March 1976, whichever is the later date. Any events complained about prior to that date will not be considered by the HRC. However, if the violation of the human right continued after that date, the HRC may examine the complaint.
- There is *no time limit* for making a communication. Therefore, very old violations may be complained about providing the State Party had ratified the first Optional Protocol at the time of the violation. However, older complaints may be difficult to substantiate, and the HRC may view the delay as inaction and therefore as an abuse of the right to petition or may otherwise consider the delay as a factor in determining the admissibility or merits of the complaint.
- The communication must not be an *abuse of rights of submission*. In other words, an author of a communication must not make claims if there is nothing in fact or law to support them. This rule is designed to avoid vexatious or frivolous claims. (The HRC has rarely ruled a communication to be an abuse of rights of submission.)
- The individual must have exhausted all *available domestic remedies*.⁶ For example, they must be able to show that national court or tribunal proceedings have been exhausted, an appeal has been pursued against an unfavourable decision, or a complaint has been made with an agency such as an ombudsman or human rights commission which have authority to receive legal complaints. If the ICCPR or other human rights treaty has not been incorporated into the domestic system, an individual will have to look carefully at other available remedies. This rule does not mean an individual must test every theoretically possible remedy. The HRC has stated that the available remedies must be *effective*; it does not require an individual to seek domestic remedies that have no objective chance

6 Article 2 and 5(2), Optional Protocol.

of success, for example, where a national law clearly provides that such a case may not be litigated. Special circumstances may also absolve an individual from seeking domestic remedies, for example, if no legal aid is available in a criminal case. If domestic remedies will only produce a decision after an unacceptable length of time, then they may be found ineffective. Article 5(2)(b) expressly states that the requirement to exhaust domestic remedies does not apply where “the application of the remedies is unreasonably prolonged”.

- If a matter or case is being *currently* considered by a *domestic court* or other domestic adjudicatory body, then the communication will be inadmissible.
- The matter must not be under present consideration through *another international procedure*, for example, the Committee against Torture or a regional procedure such as the Inter-American Court of Human Rights. If an individual is pursuing an individual complaint under another international procedure, the HRC communication will not be considered by the HRC unless that procedure has been exhausted or the related complaint discontinued. If the complaint in the other international procedure is not an individual complaint, for example, a complaint of gross violations under the 1503 procedure (*see* Chapter 16), then the HRC may examine the communication.
- The complaint may not concern an article of the ICCPR upon which a State has made a legitimate *reservation*. However, not all reservations are valid, and the HRC may consider a reservation to be impermissible; *see* General Comment No. 24 of the HRC.⁷ The complaint may not be considered if the State has made a reservation to the first Optional Protocol precluding complaints under certain circumstances, for example, that a communication may not be made if the matter has been considered under another international mechanism. To check whether a State has made reservations to the first Optional Protocol (and whether those reservations have been withdrawn), go to the website of the Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/>.

5. LODGING A COMPLAINT

Format of the communication

The communication must be set out in writing. It may be in the form of a letter or detailed submission. A model complaint form is available at <http://www.ohchr.org/english/bodies/docs/annex1.pdf> You should provide the communication in one of the working languages of the Secretariat, although this is not strictly necessary.

Content of the communication

The communication must contain the following information:

- The name of the author; you should also include contact details
- If the author is not the victim, authorisation or justification for representing the victim
- Name of the victim; you should include contact details
- Name of the State Party concerned
- Articles of the ICCPR allegedly violated unless it is patently clear which articles are addressed by the communication

⁷ *General Comment No. 24, Reservations to the Covenant or Optional Protocols or Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). To check whether a State has made reservations on the ICCPR (and whether those reservations have been withdrawn), go to <http://www.ohchr.org/english/law/ccpr.htm> and click on *Ratifications and reservations*.

- Details of steps taken by or on behalf of the alleged victim to exhaust domestic remedies *or* an explanation why domestic remedies have not been exhausted (e.g., they are unavailable or ineffective)
- Whether the matter has been submitted under another procedure or settlement
- A detailed description of the facts concerning the alleged violation or violations; the communication should set out all facts and circumstances giving rise to the violation

The following information should also be included:

- A chronology of events (i.e., relevant dates)
- A description of the role of the relevant government body, government agency, or law allegedly involved in the violation of ICCPR rights
- A description of the circumstances surrounding the alleged violation
- Copies of relevant documents obtained in pursuing domestic remedies, e.g., court decisions
- Copies of other relevant material, for example, newspaper reports, commentaries, statements of witnesses; do not provide too much information as this may slow the process
- A request for interim measures to prevent actions that may not be undone at a later stage; reasons should be provided on why interim measures are necessary (*see further below*)

Cost of a complaint

There is no charge or fee for submitting a communication. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the HRC and monitoring and following up on any decision the HRC takes. This should be borne in mind. There is no international provision for legal assistance to lodge a complaint. Non-governmental organisations and lawyers may be able to assist (*see Chapter 21*).

Where to send a communication

Petition Team
 Office of the High Commissioner for Human Rights
 United Nations Office at Geneva
 1211 Geneva 10, Switzerland
 Fax: 41 22 917 9022 (particularly for urgent inquiries)
 e-mail: tb-petitions@ohchr.org

Procedure for the determination of a complaint

Step 1. Initial stage

Registration of the communication

If the communication contains the essential elements set out above, the case will be registered. The author will be advised of registration. Further information may be requested by the Secretariat.

Submission of a case to a State Party

The communication is transmitted to the State Party concerned for its comments on both the admissibility of the communication and the merits of the claim. The State Party has six months to make comments.

Additional comments and replies

Once the State Party has made comments, both the author and the State Party may be afforded the opportunity to make additional comments.

Interim measures

The HRC is empowered to take urgent action if the author is able to show that irreparable harm would result if the communication were to be considered in a normal timeframe. (Currently, complaints take four years to be determined.) The HRC may issue a request to the State Party for 'interim measures' to prevent harm to the victim that might not be undone at a later stage, for example, if a house is to be demolished or a prisoner is being denied humane conditions of detention. The request for interim measures may be made at any time, but, ideally, should be included in the communication. A request should provide clear and comprehensive information why interim measures are necessary. The HRC may not force the State to adopt the measures.

Step 2. Admissibility stage

Before the HRC may consider the substance or merits of the communication, it must determine whether the communication is admissible. The formal requirements for admissibility are set out above. To avoid the risk of inadmissibility, counterarguments to potential State Party arguments should be included in the initial complaint. The author of the communication will be advised if the complaint is held to be inadmissible.

Step 3. Merits stage

Once the HRC has decided that the complaint is admissible, then it will proceed to examine and make a decision on the merits of the claim. The HRC does not have a margin of discretion doctrine such as the one of the European Court of Human Rights (*see* Chapter 3). However, the HRC will often require that the injury to the victim be significant.⁸

⁸ See, for example, *Länsman et al. v. Finland*, Communication No. 511/1992, CCPR/C/52D/511/1992, 8 Nov. 1994

6. JURISPRUDENCE OF THE HRC

In litigating ESC rights, the ICCPR may be helpful in three ways:

a. Some of the ICCPR rights may overlap with ESC rights, for example, the protection of detainees and children, the protection of the home, legal aid for a fair trial, and non-discrimination and minority rights.

b. ESC rights may be indispensable for realizing an ICCPR right, for example, the right to life may not be realisable without protection for the rights to food, water and health. A minority's right to enjoy culture may be impossible without protection of traditional livelihoods.

c. ICCPR rights may assist in the advocacy for ESC rights, for example, villagers protesting eviction or the destruction of fields as a result of dam construction will need to be able to exercise their rights to peaceful association and freedom of expression to advocate for their case.

Some examples of communications that fall into the above three categories are set out in Chapter 20 and analysed in Chapters 1 and 3-6 of this book.

7. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

The complaints procedure suffers from a number of weaknesses. First, the ICCPR only provides limited protection for ESC rights. Second, as with other international mechanisms, obtaining effective international decisions through the HRC may be difficult because of the requirement to exhaust domestic remedies, the uneven compliance by States with decisions and the delays in obtaining decisions from the HRC.

8. USEFUL RESOURCES

United Nations

Office of the United Nations High Commissioner for Human Rights, 'Communication Procedures', *Fact Sheet*, No. 7, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

Office of the United Nations High Commissioner for Human Rights, 'Civil and Political Rights: The Human Rights Committee', *Fact Sheet*, No. 15, http://www.ohchr.org/english/about/publications/docs/fs15rev.1_en.pdf

Other

Australian Human Rights Information Centre, 'Communicating with the Human Rights Committee: A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights', *Human Rights Booklet*, No. 1, July 1996, www.austlii.edu.au/ahric

Dominic McGoldrick, *Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 1991).

Martin Scheinin, 'Human Rights Committee', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Annex 12.1 Checklist before the Submission of an ICCPR Complaint

The respondent is a State that has:

- Ratified the ICCPR
- Ratified the first Optional Protocol to the ICCPR
- Not made a reservation concerning an ICCPR right that is the subject of the communication
- Not made a reservation to the Optional Protocol precluding a complaint about this matter

The author is:

- An individual
- A victim of a violation of an ICCPR right or someone authorised by the victim to bring a complaint
- Under the jurisdiction of the State Party

The communication must:

- Be in writing
- Name the respondent State
- Name the author, i.e., the communication must not be anonymous
- Allege or show a violation of a human right contained in the ICCPR
- Describe the facts concerning the violation in as much detail as possible; it is helpful to provide a chronology of key events
- Relate to violations that occurred before the State became bound by the Optional Protocol
- Not be an abuse of rights of submission; it must not be frivolous, vexatious, lacking in substance, or written in an abusive manner
- Detail how all available domestic remedies have been exhausted
- Not be submitted to another international procedure
- Request any interim measures that are necessary
- Provide copies of relevant documents obtained in pursuing domestic remedies, e.g., court decisions
- Provide copies of other relevant material, e.g., newspaper reports, commentaries, statements of witnesses; do not provide too much information as this may slow the process

13 COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

1. INTRODUCTION

The United Nations Committee on the Elimination of Racial Discrimination is empowered to hear complaints concerning racial discrimination in the enjoyment of human rights, including economic, social and cultural rights. The Committee oversees the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Petitions to the Committee may only be made against countries that have issued a declaration under Article 14 of the ICERD. Rulings are not binding, but are very persuasive. The Committee has found violations of the ICERD in a significant number of complaints that concern economic, social and cultural issues.

2. BACKGROUND

The Committee entrusted with the oversight of the ICERD is composed of 18 independent experts elected on the basis of expertise, not nationality. The Committee has four main functions: (a) to review the implementation of the rights covered in the ICERD by considering periodic reports from States Parties; (b) to issue General Recommendations that give guidance in the interpretation of the rights; (c) to consider inter-State complaints, that is, complaints lodged by one State Party against another State Party (there have been none to date); and (d) to consider communications (i.e., complaints) from individuals lodged against States that have accepted the complaints procedure set out in Article 14.

BOX 1. EARLY WARNING PROCEDURE FOR GROSS VIOLATIONS

In 1993, the Committee adopted an early warning procedure (based on Article 9 of the ICERD), whereby it will take urgent measures to help prevent or limit serious, large-scale violations of the prohibitions on racial discrimination. Non-governmental organisations may forward requests for implementation of the procedure to the Committee. See Amnesty International, *Using the International Human Rights System to Combat Racial Discrimination: A Handbook* (London, 2001).

3. THE RIGHTS COVERED

Article 2(1) of the ICERD obliges States “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races”. This includes refraining from racially discriminatory acts, ensuring an end to racial discrimination by public authorities and private actors and taking steps, where necessary, to guarantee that racial groups may equally enjoy human rights in the social, economic, cultural and other fields.¹ Racial discrimination is broadly defined. Article 5 requires that action be taken to prohibit and eliminate racial discrimination in the enjoyment of a wide range of human rights including:

- Economic, social and cultural rights, in particular: the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; the right to form and join trade unions; the right to housing; the right to public health, medical care, social security and social services; the right to education and training; the right to equal participation in cultural activities
- The right of access to any place or service intended for use by the general public, such as transportation, hotels, restaurants, cafes, theatres and parks

BOX 2. DEFINITION OF RACIAL DISCRIMINATION

Article 1(1) of the ICERD states that the “term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

¹ See Article 2(1)(a)-(e) and (2). Article 2(1) provides that:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

Article 2(2) provides that:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The definition is significant in that it includes descent and therefore covers systems such as the caste system in India. Discrimination on the basis of nationality is not covered (Article 1(2)), but any distinction based on citizenship should be closely examined to determine whether it is, in practice, based on race. Indirect discrimination is covered since laws that have a discriminatory impact on the enjoyment of human rights are covered by the definition. However, the Committee has noted that a distinction, although based on race, will not be racially discriminatory if it is 'legitimate' or 'justifiable'.

Affirmative action (of limited duration) that are intended to ensure that certain racial or ethnic groups may attain equal enjoyment of human rights are expressly permitted.²

4. RULES FOR MAKING A COMPLAINT

Who may you make a complaint against?

A communication may only be made against a State that has ratified the ICERD *and* that has explicitly accepted the complaints mechanism set out in Article 14.³

Who may make a complaint?

Not everyone may make a communication. The following requirements must be satisfied:

- Only an *individual or groups of individuals* may make a communication.
- The individuals must be *victims* of a violation of a right covered in the ICERD.
- The individual must be under the *jurisdiction* of the State Party. This means that there must be some 'relationship' between the State Party and the victim, whether territorial, legal, or circumstantial. Ordinarily, this means that the individual is a citizen of the State Party or resides in the territory of the State Party (legally or illegally). This may also include individuals who are able to show that their rights have been violated by a State Party's action (or omission) even if they are not citizens or residents, for example, because of their race, their homes have been demolished by a foreign State Party's army or agents.

² See Article 1(4), which states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

³ To check, go to the the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm> (the list is towards the end of the document). Alternatively, contact the Petitions Team (see below).

Who may represent an individual making a complaint?

If the author of the communication is not the victim, they must be authorised to make the complaint or show justification for their representing the victim. A non-governmental organisation or individual (e.g., a lawyer or family member) may lodge a communication on behalf of a victim. The author must satisfy the Committee that they have been authorised by the alleged victim to make a communication. If the representative has not been authorised by the alleged victim, they must (a) demonstrate that they have personal links with the victim (e.g., a family member) and (b) provide reasons why the victim is unable to submit the communication himself. This might include a child or person unable to give consent or a person in prison.

What may be complained about?

The communication must allege or show a violation of a human right covered in the ICERD. It is not strictly necessary to refer to the articles of the ICERD, but it is certainly helpful and means there is less risk the communication will be ruled inadmissible.

Will the complaint show the name of the victim?

All documentation relating to a claim is confidential, but all decisions are made public. If there are sensitive matters in the complaint or if such matters are likely to emerge in the process, you may request that the Committee suppress the identifying elements in its final decision. This might include not making public the victim or author's identity or the identities of other persons at risk. The communication must not, however, be anonymous.

BOX 3. WARNING: TIME LIMITS FOR LODGING COMPLAINTS

A complaint must be brought within six months of the exhaustion of domestic remedies (Article 14(5)). Otherwise, the complaint will be ruled inadmissible.

Admissibility requirements

The Committee will only consider communications that satisfy certain procedural requirements. If these requirements are satisfied, then the communication is 'admissible', and the Committee may proceed to make a decision upon the merits of the case, i.e., whether an ICERD right has been violated. Some of the admissibility requirements have already been mentioned above. Others include:

- The communication must be in *writing*. A model complaint form is available at <http://www.ohchr.org/english/bodies/docs/annex1.pdf>
- The communication must not be *anonymous*. The communication must contain the name of the victim. However, the Committee will only reveal the name of the author to the State Party with the author's consent (Article 14(6)).

- The complaint must be sufficiently *substantiated*. If the Committee considers that the facts or arguments concerning the alleged violation have not been sufficiently substantiated, it may rule the communication inadmissible. This is analogous to the requirement in other procedures whereby a claim is rejected for being ‘manifestly ill founded’.
- The complaint must not relate to events that occurred *before* the entry into force of the ICERD.
- The individual must have exhausted *all available domestic remedies*. Where the ICERD or another human rights treaty has not been incorporated into the domestic system, an individual will have looked carefully at other available remedies. This rule does not mean an individual must test every theoretically possible remedy. The Committee has stated that the purported remedy must be *effective*; it does not require that an individual seek domestic remedies that have no objective chance of success, for example, where a national law clearly provides that such a case may not be litigated. Special circumstances may also absolve an individual from seeking domestic remedies, for example, if no legal aid is available in a criminal case. If domestic remedies will only produce a decision after an unacceptable length of time, then they may be found ineffective. Article 14(7)(a) expressly states that the requirement to exhaust domestic remedies does not apply where “the application of the remedies is unreasonably prolonged”.
- The complaint may not concern an article of the ICERD upon which a State has made a legitimate *reservation*.⁴

5. LODGING A COMPLAINT

Format of the communication

The communication must be set out in writing; it may be in the form of a letter or a detailed submission. You should provide the communication in one of the working languages of the Secretariat (English, French, Spanish or Russian).

Content of the communication

The communication must contain the following information:

- The name of the author; you should also include contact details
- If the author is not the victim, authorisation or justification for representing the victim
- The name of the victim; you should include contact details
- The name of the State Party concerned.
- Articles of the ICERD allegedly violated unless it is patently clear which articles the communication concerns
- Details of the steps taken by or on behalf of the alleged victim to exhaust domestic remedies *or* an explanation why domestic remedies have not been exhausted (e.g., they are unavailable or ineffective)
- Whether the matter has been submitted under another procedure or settlement
- A detailed description of the facts concerning the alleged violation or violations; the communication should set out all facts and circumstances giving rise to the violation
- Whether consent is given for the Committee to show the name of the victim to the State Party

⁴ To check, go to the the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>. Alternatively, contact the Petitions Team (*see below*).

The following information should also be included:

- A chronology of events (e.g., relevant dates)
- A description of the role of the relevant government body, government agency, or law that has allegedly been involved in violating the rights covered in the ICERD
- A description of the circumstances surrounding the alleged violations
- Copies of relevant documents obtained in pursuing domestic remedies (e.g., court decisions)
- Copies of other relevant materials, for example, newspaper reports, commentaries, statements of witnesses; do not provide too much information because this may slow the process
- Request the implementation of interim measures to prevent actions that may not be undone at a later stage; reasons should be provided why interim measures are necessary (*see further below*)

Cost of the complaint

There is no charge or fee for submitting a communication. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the Committee and monitoring and following up on any decision the Committee makes. This should be borne in mind. There is no international provision for legal assistance to lodge a complaint. Non-governmental organisations and lawyers may be able to assist (*see Chapter 21*).

Where to send a communication

Petition Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
Fax: 41 22 917 9022 (particularly for urgent inquiries)
e-mail: tb-petitions@ohchr.org

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Step 1. Initial stage

Registration of the communication

If the communication contains the essential elements set out above, the case will be registered. The author will be advised of registration. Further information may be requested by the Secretariat.

Interim measures

The Committee may take urgent action if the author has shown that irreparable harm would result if the communication were to be considered according to the normal timeframe. The Committee may issue a request to the State Party for 'interim measures' to prevent harm to the victim that might not be undone at a later stage. The request for interim measures may be made at any time, but, ideally, should be included in the communication. A request should provide clear and comprehensive reasons why interim measures are necessary. The Committee may not force the State to adopt the measures.

Step 2. Admissibility stage

Before the Committee may consider the substance or merits of the communication, it must determine whether the communication is admissible. The formal requirements for admissibility are set out above. To avoid the risk that the claim will be held inadmissible, counterarguments to potential State Party arguments should be included in the initial complaint. The author of the communication will be advised if the complaint is held to be inadmissible.

Submission of a case to a State Party

The communication is transmitted to the State Party concerned for its comments on the admissibility of the communication. The merits stage is considered separately. The State Party has three months to make comments.

Additional comments and replies

Once the State Party has made comments, both the author and State Party may be afforded the opportunity to make additional comments. The author is usually accorded three months to make comments.

Decision on admissibility

The decision on admissibility is taken by the entire Committee. If a finding of inadmissibility is made, the case ceases. If the case is held admissible, it moves to the merits stage.

Step 3. Merits stage

Once the Committee decides that the complaint is admissible, then it will forward its decision to the State Party, which then has three months to submit its comments on the merits of the claim. The State's submissions are then sent to the author for reply. The author is usually given three months.

Step 4. Decision

A decision – termed 'Opinion' – is then taken by the Committee on whether there has been a violation of the ICERD. The Committee may recommend that the State Party take remedial action. In previous cases, this has included requests that the State Party provide compensation to victims, investigate a particular situation, amend legislation, or ensure that violations no longer occur.⁵ The Committee may also ask the State Party to report back to it on the State Party's actions. The Committee though has no formal follow-up procedure.

⁵ See Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System* (Ardsley, NY: Transnational Publishers, 2002), p. 115.

7. JURISPRUDENCE

Summaries of cases can be found in Chapter 20.1 and many are analysed in Chapters 1 and 4 of this book.

In addition, see *L. K. v. The Netherlands*, Communication No. 4/1991 (housing rights); *Miroslav Lacko v. Slovakia*, Communication No. 11/1998 (access to a restaurant); *Anna Koptova v. Slovakia*, Communication No. 13/1998 (housing rights); *Kashif Ahmad v. Denmark*, Communication No. 16/1999 (education rights); *F. A. v. Norway*, Communication No. 18/2000 (housing rights); and *B. J. v. Denmark*, Communication No. 17/1999 (access to a discotheque). A number of complaints concerning the right to work and housing discrimination have been held inadmissible or have been unsuccessful; see Communication No. 7, 12, 14, 15, 19, and 20.

8. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

The complaints procedure suffers from a number of weaknesses. First, the ICERD is limited to the field of racial discrimination. Second, similar to the situation with other international mechanisms, obtaining effective international decisions may be difficult because of the requirement of exhausting domestic remedies, the uneven compliance by States with decisions and the delays in obtaining a decision from the Committee.

9. USEFUL RESOURCES

United Nations, 'Communication Procedures' (*Fact Sheet*, No. 7), <http://www.ohchr.org/>

Amnesty International, *Using the International Human Rights System to Combat Racial Discrimination: A Handbook* (London, 2001).

Nathalie Prouvez, 'The Committee on the Elimination of Racial Discrimination', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Nathalie Prouvez, 'The Prevention of Racial Discrimination through Early Warning and Urgent Procedures', in B. G. Ramcharan (ed.), *Conflict Prevention in Practice* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), pp. 265-269.

Theo van Boven, 'CERD and Article 14: the unfulfilled promise', in G. Alfredsson et al. (eds.), *International Human Rights Mechanisms* (Kluwer Law International, 2001), pp. 153-166, at 155.

Annex 13.1 Checklist before the Submission of an ICERD Complaint

The respondent is a State that has:

- Ratified the ICERD and accepted the individual complaint provision in Article 14 ICERD
- *Not* made a reservation concerning an ICERD right that is the subject of the communication

The author is:

- An individual
- A victim of a violation of an ICERD right or someone authorised by the victim to bring a complaint
- Under the jurisdiction of the State Party

The communication must:

- Be in writing
- Name the respondent State
- Name the author, i.e., the communication must not be anonymous
- Allege or show a violation of a human right contained in the ICERD
- Describe the facts concerning the violation in as much detail as possible; it is helpful to provide a chronology of key events
- Not be an abuse of rights of submission; it must not be frivolous, vexatious, lacking in substance, or written in an abusive manner
- Detail how all available domestic remedies have been exhausted
- Not be submitted to another international procedure
- Request any interim measures that are necessary
- Provide copies of relevant documents obtained in pursuing domestic remedies, e.g., court decisions
- Provide copies of other relevant materials, e.g., newspaper reports, commentaries, statements of witnesses; do not provide too much information as this may slow the process
- Not focus on events that occurred prior to the entry into force of the ICERD for the state concerned⁶
- Submitted in a language which is a working language of the Secretariat (English, French, Spanish and Russian)⁷

⁶ How to Complain about Human Rights Treaty Violations: CEDAW', <http://www.bayefsky.com/tree.php/id/9182>.

⁷ Ibid.

14 COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

1. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted on 18 December 1979. It guarantees the right of all women to be free from discrimination and sets out obligations of States Parties that are designed to ensure the legal and practical enjoyment of that right by women.¹ The CEDAW established the Committee on the Elimination of All Forms of Discrimination against Women, which is responsible for overseeing the implementation of its provisions.

On 6 October 1999, the United Nations General Assembly, acting without a vote, adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and called on all States Parties to the CEDAW to become party to the new instrument as soon as possible. The Optional Protocol eventually entered into force on 22 December 2000.

States that ratify the Optional Protocol recognise the competence of the Committee on the Elimination of Discrimination against Women to receive complaints and consider petitions from individual women or groups of women within their jurisdiction alleging violations of rights under the CEDAW. The Optional Protocol has also established a procedure enabling the Committee to initiate inquiries into situations of grave or systematic violation of women's rights. (This will not be dealt with in depth here.)

Note: States may not make a reservation that has the effect of denying or limiting the Committee's competence to consider individual complaints under the procedure set out in the Optional Protocol. However, States may make reservations and opt out of the inquiry procedure at the time of signature, ratification or accession to the Protocol.

2. BACKGROUND

The Committee is composed of 23 experts who are elected by secret ballot from a list of persons "of high moral standing and competence in the field covered by the Convention" who are nominated by States Parties. In the election of persons to the Committee, consideration is given to equitable geographical distribution and to the representation of different civil traditions and legal systems. The members of the Committee serve four-year terms. Although nominated by their own governments, members serve in their personal capacity, not as delegates or representatives of their countries of origin.

¹ 'Complaint Procedures', *United Nations Fact Sheet*, No. 7/Rev.1, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

The Committee was established in 1982 and monitors the progress of the implementation of the CEDAW. It examines and makes General Recommendations on the reports submitted by States Parties in accordance with Article 18 of the CEDAW.² The Committee also receives and considers communications submitted under the complaints mechanism set out in the Optional Protocol.

3. THE RIGHTS COVERED

The CEDAW is framed in terms of a statement of the obligations of States Parties to eliminate discrimination and ensure the enjoyment, exercise and protection of women's civil, political, social, economic and cultural rights. Article 1 defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, or human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

The over-arching obligations of States Parties under Article 2 of the CEDAW include:

- Condemning discrimination against women in all its forms
- Taking all appropriate means, without delay, to establish a policy to eliminate discrimination against women
- Embodying the principle of equality in national constitutions and other laws
- Adopting legislative and other measures to ensure the practical realisation of non-discrimination
- Establishing legal protections through national tribunals and other public institutions
- Refraining from engaging in any act or practice of discrimination against women and ensuring that public authorities and institutions act in a similar fashion
- Taking all appropriate measures to eliminate discrimination against women by any person, organisation, or enterprise³
- Modifying or abolishing existing laws, regulations, customs and practices that discriminate against women

States may adopt special temporary measures to accelerate equality for women until the objective of equality has been achieved (Article 4).⁴

Other parts of the CEDAW require States Parties specifically to remove discrimination in the area of economic, social and cultural rights, covering the following areas:

- The trafficking and exploitation of prostitution among women (Article 6)
- Education, including career and vocational guidance, access to curricula, examinations, teaching staff, premises and equipment (Article 10)
- The revision of textbooks and school programmes and the adaptation of teaching methods (Article 10)
- Scholarships and other study grants; access to programmes of continuing education, including adult and functional literacy programmes (Article 10)

² Article 21 of the CEDAW. The General Comments of the Committee are also known as General Recommendations.

³ This obligation, which does not solely address actions by a State or its agencies, but expressly includes actions in the private sphere, is unique to CEDAW among human rights treaties.

⁴ Special measures aimed at the protection of maternity are not regarded as discriminatory.

- The number of girl and women students who drop out, with an obligation to reduce the number (Article 10)
- The participation in sports and physical education (Article 10)
- Educational information on the health and well-being of families (Article 10)
- Employment, including the free choice of profession and employment, job security, benefits and vocational training and retraining (Article 11)
- Equal pay and equal treatment for work of equal value, as well as equal social security benefits and paid leave (Article 11)
- The protection of health and safety at work, which must include safeguarding women's reproductive function (Article 11)
- Special protection during pregnancy, but any protective legislation with regard to employment shall be reviewed periodically and revised, repealed, or extended as necessary (Article 11)
- A prohibition on discrimination on the grounds of pregnancy, maternity leave, or marital status (Article 11)
- Paid maternity leave, without loss of employment, seniority, or social allowances (Article 11)
- Social allowances and support services, such as child-care facilities, that enable parents to combine family life, employment and participation in public life (Article 11)
- Access to health-care services, including those related to family planning, for men and women on an equal basis (Article 11)
- Appropriate services in connection with pregnancy, confinement and the post-natal period (free when necessary), as well as adequate nutrition during pregnancy and lactation (Article 12)
- The elimination of discrimination against women in areas of economic life not touched on by other provisions of the CEDAW, in particular family benefits, bank loans, mortgages and other forms of financial credit (Article 13)
- Participation in recreational activities, sports and all aspects of cultural life (Article 13)
- The situation of women in rural areas, including their equal right to participate in development planning, to have access to health-care facilities, to benefit from social security programmes, to obtain formal and non-formal education and training, to organise self-help groups and co-operatives, in addition to participating in community activities and enjoying adequate living conditions (Article 14)
- Marriage and family relations, including the formation of marriage, during marriage and at its dissolution, and the right to decide on the number and spacing of children, as well as to the guardianship, wardship and adoption of children (Article 16)
- The ownership, management and control of property; husbands and wives shall have the same personal rights in choosing a family name, profession, or occupation (Article 16)
- The elimination of child marriage (Article 16)
- States are also obliged to eliminate discrimination in the enjoyment of civil and political rights by women relative to men; some of these rights will have an impact on women's enjoyment of economic, social and cultural rights⁵

⁵ These rights include the right to vote, to be eligible for election, to participate in the formulation of government policy and to hold office on an equal basis with men. Women must be eligible to participate in non-governmental and other associations, including political parties, trade unions and professional associations, on an equal basis with men (Article 7), and women have the right to an equal opportunity to represent their governments and to participate in the work of international organisations (Article 8). States are obliged to ensure that women are granted equality with men before the law and equality in legal capacity in civil matters. Women must also be granted equal opportunities to exercise that capacity. Women must be ensured freedom of movement and the right to choose their residence and domicile on an equal basis with men (Article 15).

When planning litigation in relation to the social, cultural and, perhaps, economic rights of migrant workers, it is important to be aware of the declarations and reservations States Parties have made to the CEDAW. Article 28 states that reservations that are incompatible with the objectives and purposes of the CEDAW are not permitted.

4. MAKING A COMPLAINT

Who may you make a complaint against?

A complaint may be made against any State that is party to both the CEDAW and the Optional Protocol.⁶

Who may make a complaint?

Complaints may be submitted by or on behalf of *individuals* or *groups of individuals* who are under the *jurisdiction* of the State concerned. For a discussion of the requirement that an individual must be under the *jurisdiction* of the State Party, see the section on 'Who may make a complaint?' in Chapter 13 above.

Who may represent an individual making a complaint?

If the authors of the communication are not the victim(s), they must show proof of the consent of the individual(s) on whose behalf they are acting. If you submit a complaint on behalf of one or more persons, you must either show proof of their consent or justify acting on their behalf without their consent. While the Committee has not yet begun to interpret the circumstances that would justify acting without the consent of the alleged victim(s), the jurisprudence on this point of the other human rights treaty Committees, notably the Human Rights Committee, may provide some guidance.⁷

What may be complained about?

A complaint may be made about the violation of any of the provisions covered by the CEDAW.

Will the complaint show the name of the victim?

For a communication to be considered, the victim(s) must agree to disclose her/their identity to the State which is alleged to have committed the violation. The communication, if admitted, will be brought confidentially to the attention of the State Party concerned.

6 To check, go to the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>

7 'Complaint Procedures', (n. 1 above).

BOX 1. TIME LIMITS FOR LODGING COMPLAINTS

There is no time limit as such for the submission of communications but it is a considerable plus if complaints are filed expeditiously.⁸

Admissibility requirements

There are several conditions that the communication must satisfy to be deemed admissible by the Committee:

- Communications must be in writing and must not be anonymous; they must be signed (Article 3)
- The same matter must not have already been examined by the Committee; it must also not be the subject of a current or past examination under another procedure of international investigation or settlement (Article 4(2)(a))
- It must be compatible with the provisions of the CEDAW (Article 4(2)(b))
- It must not be manifestly ill founded or insufficiently substantiated (Article 4(2)(c))
- It must not represent an abuse of the right to submit a communication (Article 4(2)(d))
- The facts that are the subject of the communication must not have taken place prior to the entry into force of the Protocol for the State Party concerned (unless those facts continued after that date) (Article 4(2)(e))
- All available domestic remedies must have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief (Article 4(1))
- The complaint must refer to a State that is a party to both the CEDAW and the Optional Protocol

5. LODGING A COMPLAINT

Format and content of the communication

The communication must contain:

- Information concerning the author of the communication, including name, address, date of birth and occupation
- Information concerning the alleged victim(s) (if other than the author), including the name, address, date of birth and occupation of the victim(s) and verification of the victim's identity
- The name of the State Party against which the communication is directed
- The objective of the communication (the remedy requested, for instance).
- The facts of the claim
- The provision or provisions of the CEDAW alleged to have been violated
- Steps taken by the author or victim to exhaust domestic remedies
- The extent to which the same matter is being or has been examined under another procedure of international investigation or settlement
- Supporting documentation; no original documents should be sent, only copies

⁸ 'Complaint Procedures', *United Nations Factsheet*, No. 7/Rev.1, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

A copy of a model complaint is found in Annex 14.2 and at www.unhchr.ch/html/menu6/2/fs7.htm#cedaw

Cost of the complaint, free legal aid

There is no cost for bringing a complaint. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the Committee and monitoring and following up on any decision the Committee makes. This should be borne in mind. There is no free legal aid available at an international level for making such a complaint.

Where to send a communication

Committee on the Elimination of Discrimination against Women
c/o Division for the Advancement of Women
Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
UNITED STATES
Fax: 1 212 963 3463

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Step 1. Initial stage

Registration of the communication

Upon receiving a communication, the UN secretariat servicing the Committee (the Division for the Advancement of Women) may request clarification or additional information. In such cases, the author(s) of the communication will be given a time limit within which to submit the necessary information. However, such a request will not prevent the communication from being registered.

Circulation of the communication

Once a communication is registered, a summary of the relevant information obtained with respect to the communication is prepared and circulated to the members of the Committee by the Secretariat at the next regular session of the Committee.

Interim measures

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may issue a request to the State Party for such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. The fact that the Committee issues such a request does not mean that it has come to a decision on either the admissibility or on the merits of the communication.

Step 2. Admissibility and merits stage

As soon as possible after the communication has been received and provided that the individual or group of individuals consent to the disclosure of their identity to the State Party concerned, the Committee will bring the communication confidentially to the attention of the State Party and will request that it submit a written reply to the communication. After receiving the Committee's request, the State has six months to submit a written explanation or statement that relates to the admissibility of the communication and its merits, as well as to any remedy that may be provided in the matter. A State Party that has received a request for a written reply may submit a request in writing that the communication be rejected as inadmissible, setting out the grounds for such inadmissibility, provided that such a request is submitted to the Committee within two months of the Committee's request.

After receipt of the State Party's reply, the Committee may request that the State or the author of the communication submit additional written explanations or statements relevant to the issues of the admissibility or merits of the communication.

The Committee will transmit to each party the submissions made by the other party and will afford each party an opportunity to comment on these submissions within fixed time limits.

Where the Committee decides that a communication is inadmissible, it will communicate its decision and the reasons for the decision through the Secretariat to the author of the communication and to the State Party concerned. A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request that is submitted by or on behalf of the author(s) of the communication and that contains information indicating that the reasons for inadmissibility no longer apply.

Where the parties have submitted information relating both to the admissibility and to the merits of a communication, or where a decision on admissibility has already been taken and the parties have submitted information on the merits of that communication, the Committee will consider and formulate its views on the communication in the light of all written information made available to it by the author or authors of the communication and the State Party concerned, provided that this information has been transmitted to the other party concerned. The communications will be examined by the Committee in closed meetings.

When the Committee has come to a decision (which is determined by simple majority), the Secretary-General shall transmit its views, together with any recommendations, to the author(s) of the communication and to the State Party concerned.

A summary of all the complaints handled by the Committee is set out in its annual report. Such reports may also include a summary of the explanations and statements of the States Parties concerned and the Committee's own suggestions and recommendations.

Note: On occasion, when it deems this necessary, the Committee may decide to consider the question of admissibility of a communication and the merits of a communication separately to save both States Parties and complainants pointless effort. For example, if a State Party files submissions at an early point that cast serious doubt on the admissibility of the complaint, the Committee may invite the complainant to comment on these submissions. It will then take a preliminary decision on admissibility alone and will proceed to the merits stage only if the case is declared admissible. The complainant will be informed of any such departure from the usual practice.

Step 3. Follow-up

Upon the Committee's issuing its views on a communication, the State has six months to submit a written response to the Committee, including any information on any action taken in the light of the views and recommendations of the Committee. After that six-month period, the Committee may invite the State to submit further information about any measures the State party has taken in response to its views or recommendations. Under its Rules of Procedure, the Committee is to designate a rapporteur or working group on follow-up.⁹ The individual or working group will ascertain the measures taken by States in response to the Committee's views.¹⁰ Information on any follow-up activities must be included in the Committee's annual report to the General Assembly under Article 21 of the Convention.

7. JURISPRUDENCE OF THE COMMITTEE

See the case described in Chapter 20.1 and analysed in Chapters 5.2 and 6.2, focussing on the rights to appropriate health care services and to access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning. Another Communication, *Ms. A. T. v. Hungary* (Communication No. 2/2003) involving women's ESC rights centred on Hungary's failure to protect the author of the complaint from ongoing physical violence perpetrated by her former common law husband. Amongst other things, the Committee highlighted the fact that the author was unsuccessful, either through civil or criminal proceedings, to temporarily or permanently ban her former partner from the apartment where she and her children continued to reside. Furthermore, restraining or protection orders did not exist in Hungary. The author also could not flee to a shelter due to the fact that none were equipped to accept her together with her children (one of whom was fully disabled). All these facts together indicated that the rights of the author under articles 5 (a) and 16 of the Convention had been violated. As well as making general recommendations outlining steps that Hungary should take to address and counter domestic violence and provide protection and support to victims, the Committee stated that the State Party should take immediate and effective measures to guarantee the physical and mental integrity of the author and her family. In addition, the State Party was to ensure that she was given a safe home in which to live with her children, received appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights. In *Ms. Dung Thi Thuy Nguyen v. The Netherlands* (Communication No. 3/2004) the Committee dealt with the obligation of State Parties to take measures in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work (Article 11(2)). However, a majority of the Committee found no violation on the facts of the complaint. In *Rahime Kayhan v. Turkey* (Communication No. 8/2005) the author alleged that the fact that she had lost her status as a civil servant and her position as a teacher as result of her wearing a headscarf in the classroom amounted to a violation of her rights under Article 11. However, the Committee found the Communication to be inadmissible due to the author's failure to exhaust domestic remedies.

9 'How To Complain About Human Rights Treaty Violations: The Committee on the Elimination of Discrimination Against Women – Description', http://www.bayefsky.com/complain/37_cedaw.php

10 Ibid.

8. USEFUL RESOURCES

From United Nations

'Complaint Procedures', *United Nations Fact Sheet*, No. 7/Rev.1,
<http://www.ohchr.org/english/about/publications/docs/fs7.htm>

Information on the CEDAW, www.un.org/womenwatch/daw/cedaw/

'Discrimination against Women: The Convention and the Committee', *United Nations Fact Sheet*, No. 22,
www.unhchr.ch/html/menu6/2/fs22.htm#cedaw

Text of the Optional Protocol, www.unhchr.ch/html/menu3/b/opt_cedaw.htm

Text of the CEDAW, www.unhchr.ch/html/menu3/b/e1cedaw.htm

Model Communication form for the submission of communications to the Committee on the Elimination of Discrimination Against Women under the Optional Protocol of the Convention,
<http://www.un.org/womenwatch/daw/cedaw/protocol/modelform-E.PDF>

Rules of procedure for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,
<http://www.un.org/womenwatch/daw/cedaw/rules/part3/part3E.html>

Decisions/views of the Committee on the Elimination of Discrimination Against Women,
<http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>

Other Sources

'How to Complain about Human Rights Treaty Violations: CEDAW',
<http://www.bayefsky.com/tree.php/id/9182>

Leilani Farha, 'Committee on the Elimination of Discrimination Against Women', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

Rebecca Cook, 'State Accountability Under the CEDAW Convention' in Rebecca Cook (ed.), *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1994), pp. 437-461.

Annex 14.1 Checklist before the Submission of a CEDAW Complaint

The respondent is a State that has:

- Ratified the CEDAW
- Ratified the Optional Protocol to the CEDAW
- *Not* made a reservation opting out of the inquiry procedure

The author is:

- An individual or group of individuals
- A victim(s) of a violation of a CEDAW right or someone authorised by the victim(s) to bring a complaint
- Under the jurisdiction of the State Party

The communication must:

- Be in writing
- Name the respondent State
- Provide information concerning the the author, i.e., the communication must not be anonymous. It must also provide the address, date of birth and occupation of the author.
- Provide information concerning the alleged victim(s) (if other than the author)
- Allege or show a violation of a human right contained in the CEDAW
- Describe the facts concerning the violation in as much detail as possible; it is helpful to provide a chronology of key events
- Not be an abuse of the right of submission
- Be compatible with the provisions of the CEDAW
- Detail how all available domestic remedies have been exhausted
- Not be submitted to another international procedure
- Request any interim measures that are necessary
- Provide copies of relevant documents obtained in pursuing domestic remedies, e.g., court decisions
- Provide copies of other relevant materials, e.g., newspaper reports, commentaries, statements of witnesses; do not provide too much information as this may slow the process
- Outline objective of the complaint (i.e., the remedy requested).
- Not focus on events that occurred prior to the entry into force of the Optional Protocol for the state concerned¹¹
- Submitted in a language which is a working language of the Secretariat (Arabic, Chinese, English, French, Spanish and Russian)¹²

¹¹ 'How to Complain about Human Rights Treaty Violations: CEDAW', <http://www.bayefsky.com/tree.php/id/9182>.

¹² Ibid.

Annex 14.2 Model Complaint for the Submission of Communications to CEDAW under the Optional Protocol of the Convention

To be considered by the Committee, a communication:

- must be in writing;
- may not be anonymous;
- must refer to a State which is a party to both the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol;
- must be submitted by, or on behalf of, an individual or a group of individuals under the jurisdiction of a State which is a party to the Convention and the Optional Protocol. In cases where a communication is submitted on behalf of an individual or a group of individuals, their consent is necessary unless the person submitting the communication can justify acting on their behalf without such consent.

A communication will *not* normally be considered by the Committee:

- unless all available domestic remedies have been exhausted;
- where the same matter is being or has already been examined by the Committee or another international procedure;
- if it concerns an alleged violation occurring before the entry into force of the Optional Protocol for the State.

In order for a communication to be considered the victim or victims must agree to disclose her/their identity to the State against which the violation is alleged. The communication, if admissible, will be brought confidentially to the attention of the State party concerned.

If you wish to submit a communication, please follow the guidelines below as closely as possible. Also, please submit any relevant information which becomes available *after* you have submitted this form.

Further information on the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, as well as the rules of procedure of the Committee can be found at:

<http://www.un.org/womenwatch/daw/cedaw/index.html>

Guidelines for submission

The following questionnaire provides a guideline for those who wish to submit a communication for consideration by the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Please provide as much information as available in response to the items listed below.

Send your communication to:

Committee on the Elimination of Discrimination against Women
c/o Division for the Advancement of Women, Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America
Fax: 1-212-963-3463

1. Information concerning the author(s) of the communication

- Family name
- First name
- Date and place of birth
- Nationality and citizenship
- Passport/identity card number (if available)
- Sex
- Marital status and children
- Profession
- Ethnic background, religious affiliation, social group (if relevant)
- Present address
- Mailing address for confidential correspondence (if other than present address)
- Fax, telephone, e-mail
- Indicate whether you are submitting the communication as:
 - Alleged victim(s); if there is a group of individuals alleged to be victims, provide basic information about each individual
 - On behalf of the alleged victim(s); provide evidence showing the consent of the victim(s), or reasons that justify submitting the communication without such consent

2. Information concerning the alleged victim(s) (if other than the author)

- Family name
- First name
- Date and place of birth
- Nationality and citizenship
- Passport and identity card number (if available)
- Sex
- Marital status and children
- Profession
- Ethnic background, religious affiliation, social group (if relevant)
- Present address
- Mailing address for confidential correspondence (if other than present address)
- Fax, telephone, e-mail

3. Information on the State Party concerned

- Name of the State Party (country)

4. Nature of the alleged violation(s)

Provide detailed information to substantiate your claim, including:

- Description of the alleged violation(s) and alleged perpetrator(s)
- Date(s)
- Place(s)
- Provisions of CEDAW that have allegedly been violated; if the communication refers to more than one provision, describe each issue separately

5. Steps taken to exhaust domestic remedies

Describe the action taken to exhaust domestic remedies; for example, attempts to obtain legal, administrative, legislative, policy or programme remedies, including:

- Type(s) of remedy sought
- Date(s)
- Place(s)
- Who initiated the action
- Which authority or body was addressed
- Name of court hearing the case (if any)
- If domestic remedies have not been exhausted, explain why

Please note: Enclose copies of all relevant documentation.

6. Other international procedures

Has the same matter already been examined or is it being examined under another procedure of international investigation or settlement? If yes, explain:

- Type of procedure(s)
- Date(s)
- Place(s)
- Results (if any)

Please note: Enclose copies of all relevant documentation.

7. Date and signature

Date and place:
Signature of author(s) and victim(s):.....

8. List of documents attached (do not send originals, only copies)

15 COMMITTEE ON MIGRANT WORKERS

1. INTRODUCTION

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families came into effect in July 2003 upon the 20th ratification.¹ In addition to reiterating the rights of migrant workers that are detailed in other international and regional human rights instruments, the Convention sets out additional rights that are not contained in any other document. The Convention provides that those people who qualify as migrant workers are entitled to enjoy their human rights regardless of their legal status.²

However, so far, not even one State has made a declaration under Article 77 recognising the competence of the Committee on Migrant Workers (officially, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families) to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the Convention have been violated by that State Party. Ten State Parties must make declarations before the complaints procedure comes into force. Therefore, it is unlikely that the complaints procedure set out in this chapter will become a reality anytime soon, and significant advocacy will be required for it to happen.

2. BACKGROUND

The Committee was established in 2003 and is entrusted with reviewing the application of the Convention.³ The Committee consists of 10 experts of high moral standing, impartiality and recognised competence in the field covered by the Convention.⁴ They serve in their personal capacity. The members of the Committee serve four-year terms and may be re-elected.⁵

The Committee has three main functions: (a) examining and making comments on the reports submitted by State Parties under Article 73 of the Convention; (b) Considering claims by a State Party that another State Party is not fulfilling its obligations under the Convention; (c) Considering communications from or on behalf of individuals claiming that their individual rights under the Convention have been violated by a State Party.

¹ To check, go to the the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>

² 'The Rights of Migrant Workers', *United Nations Fact Sheet*, No. 24, <http://www.ohchr.org/english/about/publications/docs/fs24rev1.pdf>

³ Article 72, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁴ The experts are elected by secret ballot from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including States of origin and States of employment, and to the representation of the principal legal systems. Upon the 41st ratification by a State Party, the number of experts will go up to 14.

⁵ However, the terms of five of the first members elected expire at the end of two years as will the terms of two of the four experts elected after the Convention comes into force.

3. THE RIGHTS COVERED

The entire treaty is, in one sense, dedicated to economic, social and cultural rights since it sets out to protect the rights of a sub-group of workers. Besides covering a wide range of civil and political rights, the Convention includes a large number of explicitly economic, social and cultural rights for all migrant workers and members of their families. Different rights apply to migrant workers and their family members depending on whether they are in their State of origin,⁶ State of transit,⁷ or State of employment.⁸ The general right to freedom from discrimination in their enjoyment of the rights covered by the Convention is set out in Article 7. Part III sets out the rights of all migrant workers, Part IV contains additional rights for regularised or documented workers, and Part V concerns specific categories of workers.⁹

Part III of the Convention: Human Rights of All Migrant Workers and Members of Their Families

- The right to freedom from compulsory or forced labour (Article 11)
- The right to enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and (a) other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work that, according to national law and practice, are covered by these terms and (b) other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters that, according to national law and practice, are considered a term of employment¹⁰ (Article 25)
- The right to join freely or take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organisation concerned (Article 26)
- The right to enjoy in the State of employment the same treatment with respect to social security granted to nationals in so far as the migrant workers and their families fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties (Article 27)¹¹
- The right to receive any medical care that is urgently required for the preservation of their lives or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned (Article 28)
- The right of children of migrant workers to the basic right of access to education on the basis of equality of treatment with nationals of the State concerned¹² (Article 30)

6 The term 'State of origin' means the State of which the person concerned is a national (Article 6(a)).

7 The term 'State of transit' means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence (Article 6(b)).

8 The term 'State of employment' means the State where the migrant worker is to be engaged, is engaged, or has been engaged in a remunerated activity (Article 6(c)).

9 Other rights in the Convention may also be relevant to violations of economic, social and cultural rights, including the right to life (Article 9); freedom from torture or from cruel, inhuman or degrading treatment or punishment (Article 10); freedom from slavery and servitude (Article 11); freedom from arbitrary deprivation of property, whether owned individually or in association with others (Article 15); fair and adequate compensation in the case of the expropriation of assets in accordance with the law (Article 15); respect for cultural identity (Article 17); and the right to be free from imprisonment that is based merely on a failure to fulfil a contractual obligation (Article 20).

10 It is not lawful, in private contracts of employment, to derogate from the principle of equality of treatment referred to above.

11 Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned are to examine the possibility of reimbursing interested persons for the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

12 Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

- The right to respect for the cultural identity of migrant workers and members of their families and the right to maintain cultural links with their State of origin (Article 31)
- The right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings, upon the termination of their stay in the State of employment (Article 32)

Note: While these rights apply to all migrant workers and their families regardless of whether or not they are documented or undocumented, they must not be interpreted as implying the regularisation of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularisation of their situation.

Part IV of the Convention: Additional Rights of Migrant Workers and Members of Their Families who are Documented or in a Regular Situation

- The right to be fully informed at their departure or, at the latest, at the time of their admission to the State of employment, by the State of origin or the State of employment as appropriate, of all conditions applicable to their admission and, particularly, those concerning their stay and the remunerated activities in which they may engage, as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions (Article 37)
- The right to liberty of movement in the territory of the State of employment and freedom to choose their residence there (Article 39)
- The right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests (Article 40)
- The right to equality of treatment with nationals of the State of employment in relation to: (a) access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned; (b) access to vocational guidance and placement services; (c) access to vocational training and retraining facilities and institutions; (d) access to housing, including social housing schemes, and protection against exploitation in respect of rents; (e) access to social and health services, provided that the requirements for participation in the respective schemes are met; (f) access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned; and (g) access to and participation in cultural life (Article 43(1))
- The right of members of the families of migrant workers in the State of employment to enjoy equality of treatment with nationals of that State in relation to: (a) access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned; (b) access to vocational guidance and training institutions and services, provided that requirements for participation are met; (c) access to social and health services, provided that requirements for participation in the respective schemes are met; and (d) access to and participation in cultural life (Article 45(1))
- The right to transfer their earnings and savings from the State of employment to their State of origin or any other State (Article 47)
- The right of migrant workers in the State of employment freely to choose their remunerated activity, subject to certain restrictions or conditions (Article 52)
- The right to equality of treatment with nationals of the State of employment in respect of: (a) protection against dismissal, (b) unemployment benefits, (c) access to public work schemes intended to combat unemployment, and (d) access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to Article 52 of the Convention (Article 54(1))

- The right to address his or her case to the competent authorities of the State of employment where (s)he claims that the terms of his or her work contract have been violated by his or her employer (Article 54)

Part V of the Convention: Rights of Particular Categories of Migrant Workers and of Their Families

- Frontier workers are entitled to the rights provided for in Part IV that may be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State (Article 58)
- Seasonal workers are entitled to the rights provided for in Part IV that may be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year (Article 59)
- Itinerant workers are entitled to the rights provided for in Part IV that may be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State (Article 60)
- Project-tied workers, as defined in Article 2(2) of the Convention, and members of their families shall be entitled to the rights provided for in Part IV except the provisions of Article 43(1)(b)-(c), Article 43(1)(d) as it pertains to social housing schemes, Article 45(1)(b) and Articles 52 to 55
- Specified-employment workers, as defined in Article 2(2)(g) of the Convention, shall be entitled to the rights provided for in Part IV, except the provisions of Article 43(1)(b)-(c), Article 43(1)(d) as it pertains to social housing schemes, Article 52, and Article 54(1)(d)
- Members of the families of specified-employment workers are entitled to the rights relating to family members of migrant workers provided for in Part IV of the Convention, except the provisions of Article 53
- Self-employed workers are entitled to the rights provided for in Part IV, with the exception of those rights that are exclusively applicable to workers having a contract of employment (Article 63)

The rights of migrant workers and members of their families provided for in the Convention may not be renounced and may not be derogated from by contract (Article 82)

Note: When planning litigation in relation to the social, cultural and, perhaps, economic rights of migrant workers, it is important to be aware of the declarations and reservations made by State Parties to the Convention.¹³

4. MAKING A COMPLAINT

Who may you make a complaint against?

A complaint may be made against any State (whether State of origin, State of transit, or State of employment) that has made a declaration under Article 77 that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the Convention have been violated by that State

¹³ To check, go to the the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>

Party (Article 77(1)). For a discussion of the requirement that an individual must be under the *jurisdiction* of the State Party, see the section on ‘*Who may make a complaint?*’ in Chapter 13.

However, so far, not one State has made a declaration under Article 77 recognising the competence of the Committee on Migrant Workers to receive and consider communications. Ten such ratifications are needed for the mechanism to commence.

Who may make a complaint?

Migrant workers and their family members (or someone on their behalf), subject to the jurisdiction of the State Party being complained about, may make complaints. The Convention defines a migrant worker as a “person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” (Article 2(1). Under the Convention, ‘members of the family’ refers to persons married to migrant workers (or having with them a relationship that, according to applicable law, produces effects equivalent to marriage), as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned (Article 4).

Who may represent an individual making a complaint?

An individual or organisation may represent a migrant worker or a family member of a migrant worker.

What may be complained about?

Complaints may be made about violations by a State of the individual rights of migrant workers or the members of their families as long as the rights are set out in the Convention.

Will the complaint show the name of the victim?

This is yet to be determined by the Committee.

Admissibility requirements

The Committee will only review complaints that satisfy the following criteria:

- The concerned State Party must have made a declaration under Article 77 of the Convention recognising the competence of the Committee to consider communications alleging violation of Convention rights by that State Party
- Communications must not be anonymous
- A communication must not be an abuse of the right of submission of such communications or be incompatible with the provisions of the Convention
- The subject matter of the communication must not have been or be in the process of being examined under another procedure of international investigation or settlement
- The individual complainant must have exhausted all available domestic remedies; however, this shall not be necessary where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual

5. LODGING A COMPLAINT

Since the complaints procedure of the Committee has not been established, the system for lodging complaints is not yet in place. It is most likely that it will follow the procedures adopted by the other treaty bodies (see Chapters 12, 13 and 14 above).¹⁴

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Since the complaints procedure of the Committee has not been established, it has not yet adopted rules of procedure for the consideration of communications received under Article 77. The Convention provides, however, a rough outline of what the procedure will entail.

Upon receiving a communication, the Committee shall bring it to the attention of the State Party that has allegedly violated the Convention and is the subject of the communication. The State has six months to submit written explanations or statements to the Committee explaining the matter and the remedy, if any, that may have been provided by that State. The Committee will consider the communication in closed session in light of all information made available to it by or on behalf of the individual and by the State Party concerned. The Committee will then forward its views to the State Party concerned and to the individual who has submitted the complaint.

7. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

The complaints procedure is likely to share similar deficiencies to those of the other United Nations human rights treaty-monitoring bodies (see section 4.1 above).

8. USEFUL RESOURCES

United Nations

'The Rights of Migrant Workers', *United Nations Fact Sheet*, No. 24, www.unhcr.ch/html/menu6/2/fs24.htm

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (full text), www.unhcr.ch/html/menu3/b/m_mwctoc.htm

Websites of non-governmental organisations dedicated to migrant rights:

Portal for the Promotion and Protection of the Rights of Migrants, www.december18.net

Global Campaign for Ratification of the Convention on the Rights of Migrants, www.migrantsrights.org

International Catholic Migration Commission, <http://www.icmc.net/>

¹⁴ 'Complaint Procedures', *United Nations Fact Sheet*, No. 7/Rev.1, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

16 UNITED NATIONS HUMAN RIGHTS COUNCIL - THE 1503 PROCEDURE

BOX 1. THE 1503 PROCEDURE – A PROCEDURE IN FLUX

It should be noted that the 1503 Procedure is currently under review as part of the Human Rights Council's Review of all mandates, mechanisms and functions and responsibilities of the Commission on Human Rights, pursuant to paragraph 6 of General Assembly resolution 60/251. It is thus unclear if, and to what extent, the procedure will be maintained after the prescribed twelve month review period. The following chapter reflects the 1503 Procedure as it stands in December 2006.

1. INTRODUCTION

A special complaints procedure was established, pursuant to United Nations Economic and Social Council Resolution 1503 of 1970,¹ to deal with communications relating to violations of human rights and fundamental freedoms, indicating a consistent pattern of serious violations. Under this procedure, which is known as the '1503 procedure', the United Nations Commission on Human Rights (now the Human Rights Council) seeks to deal with the examination of country situations rather than resolving the complaints of individuals. The procedure was significantly amended in 2000 by the Economic and Social Council to make it more efficient, facilitate dialogue with the governments concerned and provide for a more meaningful debate in the final stages of a complaint before the Commission.²

2. BACKGROUND

The Human Rights Council was established by UN General Assembly resolution 60/251 to replace the Commission on Human Rights. It consists of 47 Members elected by secret ballot by the majority of the members of the General Assembly. Amongst other things, the Human Rights Council is mandated to assume all mandates, mechanisms, functions and responsibilities of its predecessor, the Commission

¹ Economic and Social Council resolution 1503 (XLVII) of 27 May 1970.

² Economic and Social Council resolution 2000/3 of 16 June 2000. Paragraph adapted from, 'Complaint Procedures', *United Nations Fact Sheet*, No. 7/Rev.1, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

on Human Rights, in order to maintain a system of special procedures, expert advice and a *complaint procedure*.³

The Working Group on Communications⁴ undertakes the initial examination of communications received from individuals and groups and any government responses. Where the working group identifies reasonable evidence of a consistent pattern of gross violations of human rights, it will refer the situation to the Working Group on Situations.⁵ This working group reviews the situations and decides whether to refer any to the Council.

3. THE RIGHTS COVERED

The 1503 procedure covers the rights contained in the Universal Declaration of Human Rights. While other international standards may be referred to in a complaint, the Council will consider the communication in terms of the provisions of the Declaration.

The explicit economic, social and cultural rights set forth in the Declaration include:

- The right to freedom from being subjected to arbitrary interference with his privacy, family, home or correspondence (Article 12)
- The right to marry and found a family and to equal rights in marriage (Article 16(1))
- The right of the family to protection by society and the State (Article 16(3))
- The right to property (Article 17)
- The right to social security (Article 22)
- The entitlement to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for the individuals' dignity and the free development of his personality (Article 22)
- The right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment (Article 23(1))
- The right to equal pay for equal work (Article 23(2))
- The right to just and favourable remuneration, supplemented, if necessary, by other means of social protection (Article 23(3))
- The right to form and to join trade unions (Article 23(4))
- The right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Article 24)
- The right to a standard of living adequate for the health and well-being of the individual and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control (Article 25(1))
- The entitlement of motherhood and childhood to special care and assistance; all children, whether born in or out of wedlock, shall enjoy the same social protection (Article 25(2))
- The right to education and to free compulsory education at elementary levels; technical and professional education shall be made generally available, and higher education shall be equally accessible to all on the basis of merit (Article 26(1))

³ Resolution 60/251, adopted 3 April 2006.

⁴ The Working Group on Communications consists of experts and is geographically representative of the five regions; due attention is paid to rotation in membership.

⁵ The Working Group on Situations consists of five members of the Human Rights Council.

- The right of parents to choose the kind of education that shall be given to their children (Article 26(3))
- The right freely to participate in the cultural life of the community (Article 27(1))
- The right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the individual is the author (Article 27(2))

The Declaration states that everyone is entitled to the above rights and prohibits discrimination of any kind (e.g., on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). The Declaration also prohibits any discrimination based on the political, jurisdictional, or international status of the country or territory to which an individual belongs (Article 2). However, the Declaration contains express limitations on the rights it seeks to protect.⁶

Other civil and political rights covered by the Declaration may also be relevant to claims of violations of economic, social and cultural rights.⁷

4. MAKING A COMPLAINT

Who may you make a complaint against?

A complaint may be made about any consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms occurring in any country.

Who may make a complaint?

A complaint may be made by any *individual or group* claiming to be the victim of a consistent pattern of gross and reliably attested violation of human rights and fundamental freedoms. Any person or group with direct and reliable knowledge of such violations may also make complaints.

Who may represent an individual making a complaint?

Complaints may be made by any person or group with direct and reliable knowledge of human rights violations. A non-governmental organisation may submit such a complaint, but on condition that it is acting in good faith in accordance with recognised principles of human rights and that it has direct, reliable evidence of the situation that is the subject of the complaint (e.g., the direct testimony of victims or their families).⁸

6 There are three limitations: The rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations (Article 29(3)); nothing in the Declaration may be interpreted as implying the right of any State, group, or person to engage in any activity or to perform any act that is aimed at the destruction of any of the rights and freedoms (Article 30); and limitations upon the exercise of a person's rights and freedoms shall only be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society (Article 29(2)).

7 These include the rights to life, liberty and security of person (Article 3); freedom from slavery or servitude (Article 4); freedom from torture or cruel, inhuman, or degrading treatment or punishment (Article 5); the right to equality before the law (Article 7); the right to an effective remedy by competent national tribunals (Article 8); freedom from arbitrary interference with privacy, family, home, or correspondence (Article 12); the right to property and the right not to be arbitrarily deprived of property (Article 17); and the right to freedom of opinion and expression, including the right to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19).

8 'Complaint Procedures', <http://www.ohchr.org/english/about/publications/docs/jfs7.htm>

What may be complained about?

A complaint may be made about a consistent pattern of gross violations of human rights. Individual cases are only relevant if they relate to such a pattern or situation. It should be noted that the 1503 Procedure is not directed at an assessment of the accuracy of an isolated individual violation, or the suggestion of a particular remedy.⁹ Rather, overall it is intended to bring to the attention of the Human Rights Council situations of massive human rights violations, and subsequently to pressure UN states to take action in relation to the state.¹⁰

BOX 2. A MAJOR 'PLUS' OF THE 1503 PROCEDURE

A complainant may submit a complaint against any country without needing to check whether that country had ratified a particular treaty of limited its obligations under that instrument.

The question of whether a series of violations constitutes a 'consistent pattern' is difficult to answer, and the finding of such a pattern largely depends on the view of the Council on the day rather than on a fixed set of consistently applied rules. Gross violations include (but are not limited to) torture, 'disappearances', killings, arbitrary or summary executions, widespread arbitrary imprisonment or long-term detention without charge or trial, or widespread denial of the right to leave one's country. A consistent pattern does not need to involve a huge number of gross violations.

It is may sometimes be more difficult to establish a 'consistent pattern of gross violations' of economic, social and cultural than of civil and political rights. While it may be argued that every act of torture is gross, in the case of a social, economic, or cultural right, the violation would probably have to be very serious in order to qualify as 'gross'. For instance, a government forcibly evicting hundreds of people from their homes and denying them housing might be an example of a gross violation of the right to housing.

It should be noted that the more widespread the practice, the less the need for violations to qualify as gross. Likewise, the more gross the violation, the less the need for it to be widespread.¹¹

Will the complaint show the name of the victim?

While complaints may not be anonymous, a complainant may request that his identity be suppressed if the complaint is forwarded to the government concerned.

⁹ 'How To Complain About Human Rights Treaty Violations: Choosing a Forum', http://www.bayefsky.com/complain/44_forum.php.

¹⁰ Ibid.

¹¹ Nigel Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' Hurst Hannum (ed.), *Guide to International Human Rights Practice (Second Edition)* (Philadelphia: University of Pennsylvania Press, 1992) pp.60-85, at p.68.

BOX 3. OTHER PROCEDURES

Since cases are not resolved on an individual basis under the ECOSOC Resolution 1503 Procedure, there is nothing to prevent the individual from simultaneously making use of the Procedure and drawing attention to the individual example of violations of human rights which has taken place in a context of broad human rights abuse.¹²

Admissibility requirements

Complaints will only be examined if they conform to the following requirements:

- There are reasonable grounds to believe – also taking into account any replies sent by the government concerned – that a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms exists.
- Communications based *exclusively* on reports in the mass media will not be admissible.
- The communication must not have manifestly political motivations. As a rule, this means that communications containing abusive language, insulting remarks about the State against which the complaint is directed, or comments impugning that State's legitimacy will not be considered. Abusive language will be deleted from the communication before it is considered for admissibility.
- All available domestic remedies must have been resorted to and exhausted. However, this condition will not apply where it has been shown that solutions at the national level would be ineffective or that they would extend over an unreasonable length of time. In practice, as long as there is strong evidence of systematic, continuing violations, references to domestic remedies or their inefficacy do not have to be extensively documented.¹³
- No communication will be admitted if it runs counter to the principles of the Charter of the United Nations.
- The communication must be submitted within a reasonable time after the exhaustion of domestic remedies.

5. LODGING A COMPLAINT

Format of the communication

There is no set format for a communication submitted under the 1503 procedure. However, a communication should be in writing. It may be submitted by e-mail, fax, or mail. If the communication is submitted by e-mail, it must include the communicant's postal address.

Communications should be submitted in English, French, or Spanish. While it is possible for communications in other languages to be considered, there will be a large delay in processing the complaint due to translation and other requirements.

¹² Ibid.

¹³ See Rodley (n. 11 above), at p.67.

Content of the communication

Each communication must contain the following information:

- *An indication of the rights that have been violated.* The communication should indicate the articles of the Universal Declaration of Human Rights that appear to have been violated. (The Working Group on Communications organises its work on an article-by-article basis.) While it is possible to invoke other human rights treaties, it is advisable to do so only in addition to the Declaration rights because the communication will be considered in terms of the provisions of the Declaration.¹⁴
- *A detailed description of the facts.* The communication should provide all the details necessary to show a consistent pattern of violations, including the names of alleged victims, dates, locations and other evidence. Because the 1503 procedure principally examines patterns of violations rather than individual violations, it is advisable that the complaint, if possible, avoid merely focusing on the facts of an individual's case, but also show the existence of a group or series of similar cases.
- *A statement of the purpose of the communication.* This should be a general statement, for example "to bring about UN action to put an end to the violations of human rights disclosed in this complaint".¹⁵
- The communication should be accompanied by *clear evidence* showing the existence of a consistent pattern of gross violations of human rights. While it is technically possible that a series of communications concerning individual violations might be taken together to reveal a consistent pattern, this is not the case in practice. Therefore, the communication should refer to a sufficient number of violations to constitute a pattern. All available documentary evidence should be attached to the communication in annex. Evidence must not be anonymous.
- It is wise to include a *cover letter* referring to Resolution 1503 of the Economic and Social Council, a summary of the allegations and a statement of purpose, as detailed above.

Cost of the complaint, free legal aid

There is no charge for submitting a communication under the 1503 procedure. However, costs will usually be incurred in exhausting domestic remedies, preparing the communication, communicating with the Council and monitoring and following up on any decision the Council makes. This should be borne in mind. There is no international provision for legal assistance to lodge a complaint. Non-governmental organisations and lawyers may be able to assist (see Chapter 21).

Where to send a communication

Communications should be sent to:

Treaties and Commission Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
Fax: 41 22 917 90 11
e-mail: 1503@ohchr.org

¹⁴ Sian Lewis-Anthony makes the point that, in general, it is advisable not to spell out in detail the relevant treaties and articles on human rights to which the concerned State is a party because this might be used as an argument to discourage consideration under the 1503 procedure on the grounds that the other treaty's specific machinery should be used.

¹⁵ See Rodley (n. 11 above), at p.68.

6. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

Much of the information in this section is taken from ‘Fact Sheet No.7/Rev.1, Complaint Procedures’, <http://www.ohchr.org/english/about/publications/docs/fs7.htm>

Step 1: Initial screening

Upon reception, a complaint will be screened to decide whether it is manifestly unfounded. This is done by the Secretariat of the Office of the United Nations High Commissioner for Human Rights, acting jointly with the chairperson of the Working Group on Communications. If it is found to be manifestly unfounded, the complaint will be rejected; otherwise, the communication will be acknowledged and forwarded to the government concerned for comment. Government replies remain confidential and will not be communicated to the complainant.

Step 2: Consideration by the Working Group on Communications

In late European summer, the Working Group on Communications meets to consider communications that have passed the initial screening stage in the previous year and any government replies. They will not consider during this session any communications that were not forwarded to the government concerned for comment at least 12 weeks before the session.

The working group will then bring situations that appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms to the attention of the Working Group on Situations. Where it so decides, the Working Group on Communications may hold over a communication to obtain replies or additional information from governments or for other reasons.

In practice, most complaints fail to proceed beyond this stage in the process.

Step 3: Consideration by the Working Group on Situations

The following European spring, the Working Group on Situations meets to consider situations that the Working Group on Communications has referred to it. It will also consider any situations from the previous session of which the Human Rights Council (or its predecessor, the Commission on Human Rights) remains seized. The Working Group on Situations decides whether, having regard to the material from the previous two stages of the process, the situations referred to it do, in fact, appear to reveal a consistent pattern of gross and reliably attested violations.

The working group may decide to close the file, keep the situation pending before it, or forward the situation to the Council. If the working group chooses this last option, it will usually make specific recommendations for action.

Note: The proceedings of the Working Group on Communications and the Working Group on Situations in Steps 2 and 3 are confidential and based on written material only. Neither governments nor complainants may appear before the working groups. While governments will be informed of the decisions of the working groups at both stages, the complainant will not be so informed.

Step 4: Consideration and final decision by the Human Rights Council

If the situation is forwarded to the Council, it will be considered in closed session, approximately one month after the meeting of the Working Group on Situations.

Representatives of the governments concerned will be invited to address the Council and answer questions. Shortly after this, the Council will meet again to consider its final decision (again in closed session). Representatives of the government concerned may also be present at this point.

The Council may choose to deal with the situation in one of a number of ways. It may:

- Keep a situation under review in the light of any additional information received
- Keep the situation under review and appoint an independent expert
- Discontinue the matter under the 1503 procedure and take it up instead under the public procedure governed by ECOSOC resolution 1235 (XLII)
- Discontinue the matter completely if no further consideration is warranted

If the Council so wishes, it may also make recommendations to the Economic and Social Council.

Step 5: Public meeting

After the Council has considered the situation and made a decision, the President of the Council announces at a public meeting the names of the countries examined under the 1503 procedure and those of countries no longer being dealt with under the procedure. The public is thereby informed of the countries that the Commission is reviewing under the 1503 procedure, but is not told of the action taken or of the alleged violations.¹⁶

Interim measures

There is no possibility of emergency measures under the 1503 procedure.

7. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

Complainants are not informed of the decisions taken at the various stages of the process or the reasons for the decisions. Furthermore, the complainants will not be informed of the response of the governments concerned to their complaints. Once complainants have submitted their communication, they do not become involved at any stage in the implementation of the process; in fact, they may not even be informed of the outcome unless it is made public. There is no possibility of emergency interim measures under the 1503 procedure. The procedure may also be drawn out over a long period.

8. USEFUL RESOURCES

Office of the United Nations High Commissioner for Human Rights, 'Discussion Paper on the HRC Complaint Procedure', <http://www.ishr.ch/hrm/council/1503/1503ohchr.pdf>

'Complaint Procedures', *United Nations Factsheet*, No. 7/Rev. 1, <http://www.unhcr.ch/html/menu6/2/fs7.htm#1503>

'The Revised 1503 Procedure', <http://www.ohchr.org/english/bodies/chr/1503.htm>

¹⁶ See Rodley (n.11 above), p.66.

International Service for Human Rights and Friedrich-Ebert-Stiftung, *A New Chapter for Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council*, pp.61-71 (Geneva: International Service for Human Rights and Friedrich Ebert Stiftung, 2006), <http://www.ishr.ch/handbook/Chpt5.pdf>

'Resolution 1503: Procedure for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms', [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/1970.1503.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument)

'Resolutions 2000/3: Procedure for Dealing with Communications concerning Human Rights', [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.3.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.3.En?OpenDocument)

Nigel Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations', in Hurst Hannum (ed.), *Guide to International Human Rights Practice (Second Edition)* (Philadelphia: University of Pennsylvania Press, 1992), pp.60-85.

Annex 16.1 Checklist before the Submission of a 1503 Complaint

The author is:

- An individual or group of individuals claiming to be victims of a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms
- A person or group with direct knowledge of a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms
- Under the jurisdiction of the State Party

The communication must:

- Be in writing
- Include a cover letter referring to Resolution 1503, a summary of the allegations and the statement of purpose of the communication
- Name the respondent State
- Be submitted within a reasonable time after the exhaustion of domestic remedies.
- Provide information concerning the author, i.e., the communication must not be anonymous.
- Provide all the details necessary to show a consistent pattern of gross and reliably attested violations of human right and fundamental freedoms. This will involve (a) describing the facts concerning the violations in as much detail as possible, including the names of victims, dates and locations, and (b) providing copies of other relevant materials, e.g., newspaper reports, commentaries, testimony of victims, statements of witnesses.
- Provide an indication of the rights that have been violated.
- Not be an abuse of the right of submission
- Not have manifestly political motivations
- Not be contrary to the principles of the UN Charter
- Not be based exclusively on reports in the mass media
- Detail how all available domestic remedies have been exhausted
- Provide copies of relevant documents obtained in pursuing domestic remedies, e.g., court decisions
- Should *preferably* be one of the UN's official languages (Arabic, Chinese, English, French, Russian and Spanish) and provide any available translations of relevant documents into those languages.

17 UNESCO COMPLAINTS PROCEDURE

1. INTRODUCTION

In 1978, the Executive Board of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) adopted Decision 104 EX/3.3, which laid down a *confidential* procedure for the examination of communications (complaints) received by UNESCO concerning alleged violations of human rights in education, science, culture and information — its fields of competence.¹ Complaints procedures also exist under various UNESCO conventions.

2. BACKGROUND

The purpose of UNESCO is to advance peace and security by promoting education, science and culture. According to the UNESCO Constitution, these activities will further “universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations”.²

Since 1948, UNESCO has conducted research activities and facilitated the adoption of new standards and almost 60 conventions, declarations and recommendations. Many of these instruments are linked with those human rights that fall within UNESCO’s fields of competence and contain implicit and explicit monitoring procedures.³ The subject of this chapter will be the confidential complaints procedure established by Decision 104 EX/3.3.

3. THE RIGHTS COVERED

The rights covered by the procedure are essentially the following (each article mentioned hereunder refers to the Universal Declaration of Human Rights; the rights concerned may also appear in the United Nations Covenants of 16 December 1966, that is, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights):⁴

- The right to education (Article 26)
- The right to share in scientific advancement (Article 27)
- The right to participate freely in cultural life (Article 27)
- The right to information, including freedom of opinion and expression (Article 27)

¹ The text of Decision 104 EX/3.3 may be found at <http://unesdoc.unesco.org/images/0002/000284/028409e.pdf#page=13>

² See Article 1(1) of the *Constitution* of UNESCO.

³ Klaus Hüfner, *How to File Complaints on Human Rights Violations?: A Manual for Individuals and NGOs* (Bonn: UNO-Verlag, 1998), chap. 4.

⁴ ‘Other procedures within the UN system: the UNESCO Procedures’, http://www.unesco.de/c_humanrights/IV-I.php

These rights may imply the exercise of others,⁵ including:

- The right to freedom of thought, conscience and religion (Article 18)
- The right to seek, receive and impart information and ideas through any medium and regardless of frontiers (Article 19)
- The right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production (Article 27)
- The right to freedom of assembly and association (Article 20) for the purposes of activities connected with education, science, culture and information
- The right of children to special protection (insofar as this concerns their education and access to culture and information)⁶

Two collective rights may also be relevant because they have a cultural dimension:⁷

- The right of minorities to enjoy their own culture, to profess and practice their own religion, and to use their own language
- The right of peoples to self-determination, including the right to pursue cultural development

Note: While all 13 rights listed above form part of the International Bill of Human Rights, only the first eight have been recognised in official UNESCO documents and on the form letter sent to complainants (see Annex 18.1). However, UNESCO has mentioned all human rights, except the right to self-determination, in statements before the Human Rights Committee or in interpretations by the UNESCO Committee on Conventions and Recommendations.⁸

4. THE PRINCIPAL ORGANS OF THE UNESCO INDIVIDUAL COMPLAINTS SYSTEM

The UNESCO *Committee on Conventions and Recommendations* is the most important body in relation to the individual complaints procedure. The Committee consists of 24 members, who are appointed by the Member States of UNESCO and do not serve as experts in their personal capacity. The Committee reports to UNESCO's Executive Board.

The Committee is entrusted with: (a) consideration of all questions relating to the implementation of UNESCO's standard-setting instruments,⁹ including periodic reports by Member States on the implementation of Conventions and Recommendations, and (b) examination of communications relating to cases and questions concerning the exercise of human rights in UNESCO's fields of competence.

The Committee meets twice a year (in spring and autumn) during Executive Board sessions and examines communications in private session.

The *Director-General* of UNESCO refers individual communications received by the organisation to the Committee. They also have the right of intercession¹⁰ personally to make various humanitarian

⁵ Ibid.

⁶ Stephen Marks, 'The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organisation' in Hurst Hannum (ed.), *Guide to International Human Rights Practice*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1992) pp.86-98, at 91.

⁷ Ibid.

⁸ Ibid.

⁹ Not all UNESCO standards have been placed under the jurisdiction of the Committee by the Executive Board.

¹⁰ Vested in him by the General Conference of UNESCO, in particular in 19C/Resolution 12.1.

representations on behalf of persons who have allegedly been victims of human rights violations in UNESCO's fields of competence and whose cases have called for urgent consideration. This is recognised in Decision 104 EX/3.3.

5. MAKING A COMPLAINT

Who may you make a complaint against?

A communication may be filed against any country. However, the necessary dialogue with a government that forms part of the procedure will be effectively impossible if a country is not a member of UNESCO.¹¹

Who may make a complaint?

Individuals, groups of individuals and non-governmental organisations may submit communications (complaints) to UNESCO concerning violations of human rights, whether the authors of these communications are themselves victims of such violations or may be deemed to have reliable knowledge of such violations.¹²

Relevant victims of human rights violations might include teachers, students, researchers, artists, writers, or journalists. These are persons that ordinarily fall within UNESCO's fields of competence by virtue of their positions. Victims may also include any other person who has suffered violations of the above rights.¹³

Who may represent an individual making a complaint?

Individuals, groups of individuals and non-governmental organisations may submit communications (complaints) to UNESCO concerning violations of human rights where they are deemed to have reliable knowledge of such violations. The Committee has agreed to apply the presumption of good faith in considering whether the author has reliable knowledge.

As stated above, the Director-General may personally make various humanitarian representations on behalf of persons who have allegedly been victims of human rights violations in UNESCO's fields of competence and whose cases have called for urgent consideration.

What may be complained about?

Complaints may be made about alleged violations of human rights in UNESCO's fields of competence, namely education, science, culture and information. Complaints may refer to both individual cases and wide-scale violations.

¹¹ Marks, (n. 6 above), p.93.

¹² Complaints Concerning Violations of Human Rights in UNESCO'S Fields of Competence: Outline of the procedure', http://www.geocities.com/vanessavonstruensee_2000/procedureunesco.html

¹³ Ibid.

Admissibility requirements:

There are 10 conditions that the complaint must satisfy to be examined by the Committee:¹⁴

- The communication must *not be anonymous*
- Only a victim or group of victims of an alleged violation, or a person, group of persons, or a non-governmental organisation having reliable *knowledge of the violations* may author a communication
- The communication must concern violations of human rights falling within UNESCO's competence in the fields of *education, science, culture and information* and may not exclusively concern other considerations (e.g., political ones)
- The communication must be compatible with *international instruments* in the field of human rights (for example, the principles of UNESCO, the Charter of the United Nations, the Universal Declaration of Human Rights and the international covenants on human rights)
- The communication must not be *manifestly ill founded* and must appear to contain relevant *evidence*
- The communication must be neither *offensive* nor an *abuse* of the right to submit communications. However, such a communication may be considered if it meets all other criteria of admissibility after the exclusion of the offensive or abusive parts
- The communication must not be based exclusively on information disseminated through the mass media
- The communication must be submitted within a *reasonable time limit* following the occurrence of the facts of the case or the point at which these facts become known. 'A reasonable time limit' will be interpreted according to the circumstances. This time limit is not considered to run during the period that a victim or organisation is attempting to obtain redress through domestic or other international channels.
- The communication must indicate whether an *attempt* has been made to *exhaust available domestic remedies* and the result of such an attempt, if any. It is important to note that *prior* exhaustion of local remedies is not necessarily required. All that is necessary is that the author indicate whether an attempt has been made to do so. However, it is unlikely that the Committee will consider a communication admissible if it appears to be the first or only forum which the author is approaching.
- Communications relating to matters already settled by the States concerned in accordance with the human rights principles set forth in the Universal Declaration of Human Rights and the international covenants on human rights will not be considered

6. LODGING A COMPLAINT

Format requirements

The complainant should address a letter to the Director-General of UNESCO that contains a concise statement of the allegations. This letter may be written in English or French and must be signed. This letter is a first step and will not be considered as the formal communication or complaint.

On receipt of the letter, the UNESCO Secretariat will send the author of the letter a form that has been prepared by UNESCO. Once completed and returned to UNESCO, this form will constitute the communication, which will be transmitted to the government concerned and examined by the Committee. It

¹⁴ These conditions are set out in paragraph 14(a) of Decision 104 EX/3.3.

is also possible to make a copy of the form and attach the completed form to the initial letter to the Director-General.

The form will request information regarding the author's name, nationality and address; the relationship of the author to the alleged victim; factual information, including a statement of the human rights allegedly violated (with reference, if possible, to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, or the International Covenant on Civil and Political Rights)¹⁵ and an explanation of the connection between the violation and education, science, culture, or information; information concerning the means of redress already sought; and the purpose of the communication. The form should be accompanied by the fullest documentation possible. Furthermore, if the communication is complex, it may be helpful to provide a summary, incorporating, by reference, any important documents in annex to the communication.

The author must sign the form, including the agreement that it be transmitted to the government in question, whereby the name of the author will be divulged. Authors should try to submit communications at least two months ahead of scheduled Committee meetings to allow the Secretariat sufficient time to process the communication and send it to the government.

For a copy of the form, go to:

http://portal.unesco.org/en/file_download.php/05afb69dc83a78c9198665e6b1f382eaFormulaire+CR+e.pdf

Cost of the complaint, free legal aid

There is no cost for making a complaint. No free legal aid is available for making such a complaint.

Where to send a complaint

Director
Office of International Standards and Legal Affairs of UNESCO
7 Place de Fontenoy
F-75352 Paris 07 SP
FRANCE
Fax: 33 1 45 68 55 75

7. PROCEDURE FOR THE DETERMINATION OF A COMPLAINT

The information in this section is largely taken from Decision 104 EX/3.3.

Step 1: Receipt of letter

Upon receipt of the initial letter, the Director-General will acknowledge receipt and send the author(s) a copy of the UNESCO-prepared form and details on the conditions that must be satisfied in relation to admissibility.

¹⁵ Where appropriate, the communication should refer to UNESCO's own normative instruments. However, in practice, these are not frequently cited in communications received by UNESCO.

Step 2: Communication to the government

After receiving the completed form, the Director-General will transmit the communication to the government concerned. The Director-General will inform the government that the complaint will be brought to the notice of the Committee at its next session, along with any reply the government may wish to make. The Director-General will generally allow the government at least one month to reply.

Step 3: Admissibility

The Committee will then examine in private session the communications transmitted to it by the Director-General. The Committee will first decide on the admissibility of the communications.

Representatives of the governments concerned may attend Committee meetings to provide additional information or to answer questions from members of the Committee on either admissibility or the merits of the communication. The Committee may avail itself of the relevant information at the disposal of the Director-General. There is a theoretical possibility under the procedure that, in exceptional circumstances, the author of the communication or other witnesses may appear before the Committee; however, this has never occurred.

The Director-General will notify the author of the communication and the government concerned of the Committee's decision on the admissibility of the communication. The Committee will also dismiss any communication that, having been found admissible, does not, upon examination of the merits, appear to warrant further action.

Step 4: Merits

Once a communication has been declared admissible, the Committee will proceed to *examine the substance* of the allegations put forward. The Committee acts with a view to bringing about a friendly solution. Indeed, it is expressly stated in the preamble of Decision 104 EX/3.3 that UNESCO should not play the role of an international judicial body, and the main characteristic of the stage in which the merits are considered is a search for dialogue with the government. In searching for an amicable solution, the Committee works in strictest confidentiality.

The author of the complaint and the government concerned will be informed of the decision after the session of the Committee during which the communication has been examined.

The decision is not subject to appeal. However, the Committee may agree to re-examine a communication if it receives additional information or new facts.

Step 5: Executive Board

The Executive Board of UNESCO will subsequently examine the decision of the Committee in closed session. If the report contains recommendations for action, the record of the meeting will show that the Board has endorsed the wishes of the Committee. However, the public record of the Committee's recommendations are often weak, and specific countries are not mentioned. Therefore, information about the Committee's decisions and recommendations are only available to the Executive Board, the complainant and the government concerned.

BOX 1. THE GROSS VIOLATIONS PROCEDURE: PUBLIC BUT NEVER USED

UNESCO has a separate procedure for individual cases and for “questions of massive, systematic, or flagrant violations of human rights committed de jure or de facto by a State or from an accumulation of individual cases forming a consistent pattern” (Decision 104 EX/3.3, para.10(b)). Such ‘questions’ include, among other actions, aggression, interference in internal affairs, foreign occupation, colonialism, genocide, apartheid, racism and national and social oppression. The difference between a ‘case’ and a ‘question’ is that both the Executive Board and the General Conference of UNESCO will consider a ‘question’ in public. However, to avoid the public procedure, the Committee has adopted a practice of requesting that an author divide the communication into a series of individual cases. (Information taken from Stephen Marks, ‘The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organisation’ in Hurst Hannum (ed.), *Guide to International Human Rights Practice*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1992) pp.86-98, at 95-6).

8. THE LIMITATIONS OF THE COMPLAINTS PROCEDURE

- Authors of complaints are not allowed to attend the meetings of the Committee and are thus not offered the opportunity to respond directly to the replies of government representatives.
- The Committee often fails to verify the replies of Member States with authors before closing cases. Thus, the procedure is biased in favour of the governments alleged to be responsible for violations.¹⁶
- The identity of the author(s) of a complaint is disclosed to the government concerned.
- The way in which the Committee construes the admissibility criteria is shrouded in secrecy, and it is thus difficult to know how the complaint will fare.¹⁷
- In practice, the Committee has mingled the admissibility phase and the later ‘friendly solution’ phase. This has led to unjustifiable delays in the consideration of cases.

9. USEFUL RESOURCES

‘The UNESCO Procedures’, http://www.unesco.de/c_humanrights/IV-I.php

‘Complaints Concerning Violations of Human Rights in UNESCO’S Fields of Competence: Outline of the procedure’,
http://www.geocities.com/vanessavonstruensee_2000/procedureunesco.html

Rose Farley and David Weissbrodt, ‘The UNESCO Human Rights Procedure: An Evaluation’, *Human Rights Quarterly*, Vol. 16 (1994), pp. 391-414.

Stephan Marks, ‘The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization’ in Hurst Hannum, *Guide to International Human Rights Practice*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1994), pp. pp.86-98.

¹⁶ Rose Farley and David Weissbrodt, ‘The UNESCO Human Rights Procedure: An Evaluation’, *Human Rights*, Vol. 16 (1994), pp. 391-414, at 404-405.

¹⁷ *Ibid* at 396.

Annex 17.1 Form for Communications Concerning Human Rights to be Submitted to UNESCO

For UNESCO use only:

Date of communication:
Number of communication:
Date of dispatch of this form:

To be filled in by the author of the communication:

I. Information Concerning the Author

Name First name(s)
Nationality..... Profession
Date and place of birth
Present address
Address for exchange of confidential correspondence (if other than present address)
.....
.....
.....

Indicate, by ticking the appropriate box, in which capacity you are acting:

- victim of the violation or violations described below
- representative of the victim or victims of the violation or violations described below
- person, group of persons or organisation with reliable knowledge of the violation or violations described below
- in another capacity. Specify.....
.....

II. Information Concerning the Victim or Victims of the Alleged Violations

- If the author is the victim, tick here and turn directly to Part III.

Give the following particulars for each victim, adding as many pages as necessary.

Name First name(s)
Nationality..... Profession
Date and place of birth
Present address or whereabouts
.....

III. Information Concerning the Alleged Facts

Name of the country considered by the author to be responsible for the alleged violation
.....
Human rights allegedly violated (refer, if possible, to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights)
.....
.....
.....
.....

Connection between the alleged violation and education, science, culture, or information

.....
.....
.....

Facts of the claim

.....
.....
.....

IV. Information Concerning Means of Redress Used

What steps have been taken to exhaust domestic remedies (recourse to the courts or other public authorities), by whom, when and with what results?

.....
.....
.....

Has the same matter been submitted to another international authority concerned with protection of human rights? If so, when and with what results?

.....
.....
.....

V. Purpose and Aim of this Communication

.....
.....
.....

VI. Declaration by the Author

Does the author agree to his/her communication being examined in accordance with the procedure approved by the Executive Board of UNESCO in its 104 EX/Decision 3.3 and, in particular, is he/she willing to be divulged and for the communication to be transmitted to the government concerned and brought to the notice of the UNESCO Executive Board Committee on Conventions and Recommendations?

Yes No

Date.....

Name, first name

Signature of author

18 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

1. INTRODUCTION

Complaints about the activities of multinational enterprises that violate the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises may be brought before 'National Contact Points' (NCPs). While the Guidelines and enforcement mechanisms are weak, they currently represent the only international avenue for holding multinational corporations directly accountable for human rights violations.

2. BACKGROUND: OECD AND THE NCPs

The OECD currently comprises 30 countries, principally in North America and Europe.¹ The Guidelines, of 1976, contain non-binding recommendations by governments to multinational enterprises. Their stated aim is to ensure that the activities of multinational enterprises are consistent with the policies of OECD members and to strengthen confidence between multinational enterprises and host governments. The chapters of the revised Guidelines cover a wide range of areas, including human rights, disclosure, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation. A system of NCPs has been established to promote and help implement the Guidelines.

BOX 1. THE LEGAL STATUS OF THE OECD GUIDELINES

The Guidelines are not legally binding, but they do possess a strong moral character. They are often quoted by international organisations, such as the United Nations and International Financial Institutions, and some predict they will become international customary law over time.

¹ Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. See www.oecd.org

3. THE RIGHTS COVERED

The Guidelines address human rights directly and indirectly. Section II(2) of the Guidelines requires that enterprises should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”. The Commentary in the section notes that multinational enterprises should respect human rights in their dealings with employees and others affected by enterprise activities.² In determining a company’s human rights obligations, the Preamble and the Commentary of the Guidelines both refer to the Universal Declaration of Human Rights and other human rights obligations of host governments, which would presumably include human rights treaties a country has ratified.

Numerous parts of the Guidelines overlap with human rights. For example, multinational enterprises should contribute to economic, social and environmental progress (section II.1) by:

- Encouraging local capacity-building and creating employment opportunities (sections II.3 and II.4)
- Refraining from seeking regulatory exemptions (section II.5)
- Encouraging compliance by business partners, including suppliers and sub-contractors (section II.10)
- Disclosing information on activities and structure (section III.1)
- Respecting trade union rights and helping to eliminate child labour and forced labour (section IV.1)
- Refraining from discrimination in employment (section IV.1(d))
- Facilitating worker representatives in the development of collective agreements (section IV.2)
- Ensuring occupational health and safety (section IV.4)
- Protecting the environment and public health and safety (*see* section V)
- Permitting the transfer and diffusion of technologies and expertise (section VIII.2)

4. MAKING A COMPLAINT

The OECD members have established the system of NCPs – often located in national government departments – to hear concerns over the activities of multinational corporations.³

Who may make a complaint?

Any ‘interested party’ may file a complaint, technically a ‘specific instance’. The party may be an individual or an organisation. The ‘interest’ may arise from direct harm to the party (e.g., a community affected by pollution) or from the mandate or concerns of an organisation (e.g., an institution promoting the right to a healthy environment).

Which companies may be covered?

The complaint must concern a multinational enterprise operating on the territory of an adhering country.⁴ If the issue involves a country that does not adhere to the OECD, for example a Dutch corporation in Malawi (not an adhering country), then the NCP has some discretion in investigating the complaint. But the NCP must follow the procedure ‘where relevant and practicable’.

² See para. 4.

³ See the decision of the OECD Council, June 2000, listed in section 7 below.

⁴ See n. 1 above.

BOX 2. ADIDAS AND THE INDIA COMMITTEE OF THE NETHERLANDS CASE

The India Committee of the Netherlands lodged a complaint with the Dutch NCP claiming that Adidas had failed to ensure that its suppliers were in compliance with the Guidelines, particularly in relation to minimum wages, unionisation and child labour.

A public settlement was reached in July 2003 whereby the parties agreed on common labour standards and the need for external monitoring. If future communications break down the NCP might be asked to step in once more.

See the Clean Clothes Campaign website: www.cleanclothes.org/legal

Who receives complaints?

Complaints are made to an NCP established in each adhering country. The NCP is often located in a country's economic or finance department.⁵ NCPs must "operate in accordance with core criteria of visibility, accessibility, transparency and accountability". It is advisable to call an NCP before making a complaint in order to locate the relevant person and determine the assistance they may provide. Ideally, the complaint should also be sent to the relevant unions and non-governmental organisations.

Is the procedure confidential?

Confidentiality is to be maintained during Stage 2 of the proceedings (consultation; *see below*). Furthermore, any information or views presented during Stage 2 of the proceedings always remain confidential unless the party providing the information and views agrees to their disclosure. The statement presented during Stage 3 (*see below*) may be confidential, a practice so far adopted by all NCPs. The Dutch NCP in one case reprimanded a non-governmental organisation that had publicly made its complaint available.

5. LODGING THE COMPLAINT

What is the form of the complaint?

There are no strict rules for making complaints. It is advisable to make short complaints (no more than 10 pages; appendices may be included) and to rely on the most important parts of the Guidelines breached. Complaints should include: (a) the claimant's identity and interest, (b) the name of the enterprise, (c) the location of the activities of the enterprise, (d) the relevant section of the Guidelines, (e) description of the problem activity, with supporting evidence, (f) the identification of the parts of the complaint that may or may not be revealed to the company.

⁵ For a list of NCPs contacts, *see* the document by Friends of the Earth Netherlands in section 7 below.

Cost of the complaint, free legal aid

There is no cost for making a complaint. There is no free legal aid available for making such a complaint.

Where to send a complaint

For a list of NCPs, see Trade Union Advisory Committee, *A User's Guide for Trade Unionist to the OECD Guidelines for Multinational Enterprises*, www.tuac.org/publicat/cpublica.htm

What is the procedure for assessing the complaint?

Step 1. Initial assessment

The NCP will make an initial assessment. This will include examination of the identity of the party and its interest, whether evidence supports the claim, the treatment of similar issues in other forums and whether proceedings would contribute to the aims and effectiveness of the Guidelines.

Stage 2. Consultation

If the NCP believes the issues 'merit further examination', the NCP will try to assist the parties involved (including the corporation) to resolve the issues. In an effort to resolve the dispute, the NCP may also contact other relevant actors, including NCPs in other countries, seek the interpretive guidance of the Committee on International Investment and Multinational Enterprises (see below) and offer conciliation and mediation services.

Stage 3. Statement

If no agreement is reached, then the NCP will issue a statement and make recommendations as appropriate on the implementation of the Guidelines.

May NCP decisions be reviewed?

Parties have no right to appeal the procedural or substantive decisions of an NCP. But adhering countries or the Trade Union Advisory Committee may submit any concerns to the Committee on International Investment and Multinational Enterprises. The Committee may determine whether "an NCP has correctly interpreted the guidelines in specific instances" and make recommendations.

6. THE LIMITATIONS OF THE PROCEDURE

There are some advantages to the procedure, as follows. A broad range of multinational enterprise activity may be challenged at the international level. The Guidelines apply to corporate activities outside the home base of the enterprises. Claimants do not have to show that they have directly suffered from corporate activity. The procedure is simple compared to a court case. Domestic remedies do not need to be exhausted, and the filing of a complaint increases pressure on a company to start a dialogue. Confidentiality rules over NCP findings have been strictly applied; no NCP statements have yet been made public.

At the same time, the procedure suffers from a number of weaknesses, as follows. The recommendations of an NCP are not enforceable. The Guidelines are exhortatory and not binding, using words like ‘should’ or ‘where practicable’. The standards are sometimes lower than those in other international instruments. There is no automatic right to review NCP decisions. NCP staff are usually not legally trained.

7. USEFUL RESOURCES

‘Decision of the OECD Council, June 2000’, contains procedures, www.ausncp.gov.au/content/docs/20000719_council.pdf

Patricia Feeney, *Making Companies Accountable: An NGO Report on Implementation of the OECD Guidelines for Multinational Enterprises by National Contact Points*, October 2002, <http://www.oecd.org/dataoecd/16/37/2965489.pdf>

Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises: A Critical Starterkit for NGOs*, August 2002 (also in French and Spanish), http://www.foenl.org/tk_english.htm

OECD Guidelines for Multinational Enterprises 1976, available on the OECD website or at <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/oecd.htm#text>

Trade Union Advisory Committee, *A User’s Guide for Trade Unionists to the OECD Guidelines for Multinational Enterprises*, www.tuac.org/publicat/cpublica.htm

Useful contacts

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Rights and Accountability in Development (RAID)
raid.oxford@ntlworld.com

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FRANCE
Tel: 33 0155 373737
Fax: 33 0147 549828
e-mail: tuac@tuac.org web: www.tuac.org

Annex 18.1 Checklist before Submission of a Complaint on the OECD Guidelines

- Is the corporation operating or registered in an adhering country?
- Is the corporate abuse a breach of the Guidelines?
- Have you got evidence of breaches?
- Has the company previously been advised of your concerns?
- Does your organisation have a sufficient interest in the issue?
- Have you located the relevant person in the NCP?
- Does the complaint set out the breaches, together with evidence?

Strategy issues

- Is the abuse a violation of laws of the host country and, thus, would it be better to bring the complaint there?
- Do you have the necessary resources and expertise?
- Have you got the support of relevant unions and non-governmental organisations in the host country and the NCP country?
- If there is more than one NCP available, is/are the one(s) chosen cooperative and pro-active?
- What will be the impact of a possible NCP statement?
- If you believe you will face danger from filing a complaint, may another organisation lodge it on your behalf?
- If the issue relates to non-adhering countries, for example a Dutch corporation operating in Nigeria, the NCP is not strictly bound to consider the matter but should “follow these procedures where relevant and applicable”.

19 OTHER INTERNATIONAL MECHANISMS

1. INTERNATIONAL LABOUR ORGANISATION

The International Labour Organisation (ILO) has an extensive range of mechanisms to deal with complaints by workers and others about violations of the labour rights set out in ILO Conventions. These mechanisms may not be activated by individual workers, but must be brought by trade unions that are members of the ILO. The ILO has four principal mechanisms for the presentation of complaints, as follows.

Freedom of association

Complaints may be presented to the Committee on Freedom of Association concerning violations by any State of the right to freedom of association set out in ILO Conventions 87 and 98.

Breaches of ILO Conventions

Representations concerning a country that may have failed to comply with obligations in a ratified Convention may be brought under Article 24 of the ILO Constitution. These are dealt with by specially constituted three person (and tripartite) committees of the Governing Body; if they concern freedom of association, they will usually be forwarded to the Committee on Freedom of Association.

Special commission of inquiry

Complaints concerning a country that may have failed to comply with obligations in a ratified Convention may be brought under Article 26 of the ILO Constitution. These are heard by a specially constituted commission of inquiry that consists of three independent persons who are sworn in for this purpose alone (although, in the case of the most recent such procedure, involving Myanmar, all three commissioners were members of the ILO Committee of Experts).

Regular supervision cycle

Aside from complaints, there is a regular process of the supervision of compliance with the ratified obligations that takes place under the reporting procedures. In the first instance, reports are scrutinised by the ILO Committee of Experts on the Application of Conventions and Recommendations. The Committee meets in private, and no party is represented before it. More serious cases may later be taken up by the Committee on the Application of Standards of the International Labour Conference.

This is an open, public and political forum, at which a representative of the government of the country in question will be asked to appear. Neither body has any power other than to issue reports — for that matter, this is generally true of the complaints mechanisms. The exception is the case of a country fail-

ing to comply with recommendations of a commission of inquiry established under Article 26 of the ILO Constitution. Then, ultimately, the ILO Conference may take steps to ensure compliance with the recommendations, pursuant to Article 33 of the ILO Constitution. This power has been exercised for the first time in the ILO's history in the case of Myanmar.

For more information, see:

International Labour Organisation (ILO), *ILO Law on Freedom of Association: Standards and Procedures* (Geneva, 1995).

International Labour Organisation (ILO), *Manual on Procedures Relating to International Labour Conventions and Recommendations*, D.31.1965 (Geneva, 1984).

Colin Fenwick, 'International Labour Organisation' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

2. COMMITTEE AGAINST TORTURE

Freedom from torture is traditionally thought of as exclusively a civil right, but the prohibitions on torture and cruel or degrading treatment have been partially extended to include social and economic concerns. Thus, the United Nations Committee against Torture (similar to the European Court of Human Rights) has held that the destruction of housing, in certain circumstances, may amount to cruel and degrading treatment. See *Hajrizi Dzemajl et al. v. Yugoslavia* and the summary in Chapter 20.1.¹

The procedures for making a complaint to the Committee against Torture are very similar to those of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. See:

Committee Against Torture Website, <http://www.ohchr.org/english/bodies/cat/index.htm>

3. WORLD BANK INSPECTION PANEL

The World Bank Inspection Panel, created by the World Bank in 1993, is empowered to receive complaints from communities affected by projects funded or approved by the World Bank. While the Panel may only scrutinise compliance with Bank operational guidelines, non-governmental organisations have made use of the standards to contest human rights violations stemming from Bank activities.

The majority of the cases heard by the Panel concern damage caused directly by major projects, for example, the displacement of persons or environmental degradation. In another case, cutbacks to a nutrition programme were challenged on the basis that the Bank had failed properly to monitor the Structural Adjustment Agreement with the national government.

¹ Communication No. 161/2000, CAT/C/29/161/2000. For background to the case, see Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva, 2002), www.cohre.org/litigation

For more information, see:

Dana Clark, *A Citizen's Guide to the World Bank's Inspection Panel* (Washington, DC: Centre for International Environmental Law, 1999). Available in English, French, Portuguese and Spanish.

For background, see:

Dana Clark, Jonathan Fox, and Kay Treakle, *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel*, (Lanham, MD: Rowman and Littlefield, 2003).

Daniel Bradlow, 'The World Bank, the IMF, and Human Rights' *Transnational Law and Contemporary Problems*, Vol.6, Spring (1996), pp.47-90.

Elihu Lauterpacht, 'Judicial Review of the Acts of International Organisations' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), pp.92-102.

4. PERIODIC REVIEWS BY INTERNATIONAL HUMAN RIGHTS TREATY-MONITORING BODIES

Overview

All international human rights committees undertake regular reviews of the performance of States Parties with respect to the rights contained in the relevant covenants and conventions. This includes the committees examined above, namely, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of All Forms of Racial Discrimination and the Committee on the Elimination of Discrimination against Women. It also includes those committees without a complaints mechanism, such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.

Most of these committees allow non-governmental organisations to provide information in response to the reports provided by governments to the Committees. Depending on the committee and the circumstances, many of the committees have been willing to examine violations of rights in their Concluding Observations and make recommendations based on information provided by individuals, non-governmental organisations and even United Nations specialised agencies. For more information see Office of the High Commissioner for Human Rights, 'Mechanisms for the protection and promotion of human rights', <http://www.ohchr.org/english/bodies/index.htm>

Case study: Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights is not explicitly empowered to receive complaints from individuals alleging violations of economic, social, or cultural rights contained in the International Covenant on Economic, Social and Cultural Rights. However, the Committee has developed two practices that have been characterised as an 'informal petition procedure'.²

² Matthew Craven, 'Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights' in K. Drzewicki, C. Krause and A. Rosas, *Social Rights as Human Rights: A European Challenge* (Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 1994), pages 91-113.

First, during the regular reporting procedure (each State is reviewed every five years), the Committee has examined concrete cases of violations of the Covenant, determined that the situation is not in compliance with the Covenant and made recommendations to the government with regard to remedying the violation. The recommendations have included the repeal of laws, halting threatened violations and providing compensation.³ The Committee has also made recommendations to governments to ensure that the arguments of governments in court cases conform to the Covenant.⁴

Second, the Committee has occasionally been willing to take action on *ad hoc* requests from non-governmental organisations and others that have complained of serious, imminent and massive violations of the rights in the Covenant. The Committee, for example, has written letters to governments concerning planned forced evictions and the repeal of constitutional guarantees.

Box 1 provides further guidance on how to use the Committee.

BOX 1 USING THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS⁵

About the Committee

The Committee is comprised of 18 independent human rights experts who monitor State party compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR). The human rights in ICESCR are set out in Chapter 1.3.1 above. As a treaty monitoring body, the Committee is responsible for holding States parties to the ICESCR to their legal obligations to respect, protect, promote and fulfil the rights contained in the Covenant, particularly treatment of marginalised and disadvantaged groups. The Committee does this by:

- Receiving the obligatory States reports from governments every five years
- Receiving parallel or shadow reports from NGOs
- Requesting further information and clarification of particular issues that may constitute violations of the rights contained in the ICESCR
- Conducting oral hearings (“constructive dialogues”), where it questions representatives of States parties regarding laws and policies related to economic, social and cultural rights
- Listening to oral submissions from NGOs
- Assessing all of the information it has received throughout the review process
- Issuing Concluding Observations evaluating each State party’s performance based on this information and entailing specific recommendations
- Reaching out to UN specialized agencies and programmes such as UNHCR, ILO and UNICEF for information on States Parties

3 See, for example, *Concluding Observations on the Reports Submitted by the Dominican Republic Pursuant to the 6 December 1991 Request*, 19 Dec. 1994, U.N. Doc. E/C.12/1994/15; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: The Philippines*, 7 June 1995, U.N. Doc. E/C.12/1995/7.

4 See Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva, 2002), chap. 7, www.cohre.org/litigation

5 This information is drawn from <http://www.cohre.org> (Take action, Using the UN).

- Occasionally, in emergency situations, communicating directly with governments to inquire about particularly serious or emerging situations amounting to alleged violations of the Covenant
- Developing law by adopting General Comments elaborating the content and meaning of specific rights and key implementation issues to assist States parties with their reporting obligations and domestic implementation of the ICESCR.

The Committee holds two three-week sessions in Geneva, in May and in November.

How might advocacy at the Committee assist national work?

The Committee has jurisdiction over a country if it has ratified or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶ Though the Committee is very open to NGO participation, it is important to have a complete understanding of what can and cannot be achieved through efforts involving the Committee. Lobbying the Committee to make concluding observations on certain topics can assist national advocacy strategies, particularly if the Committee's findings and recommendations are precise, for example, if there is:

- A finding that your government has violated the Covenant
- A statement urging that your government adopt new legislation, for example regularization of land ownership arrangements
- A statement urging the repeal of legislation, for example a law which discriminates against women will need to be overturned
- An appeal to your government to implement existing laws, for example laws allowing the government to requisition housing left unoccupied by owners
- A request that your government not undertake a planned action that would violate the Covenant, for example a mass forced eviction
- Encouragement from the Committee that your government use your input when taking a decision with a bearing on economic, social and cultural rights
- A recommendation that your government provide specific services, policies, and institutions, for example that the government should construct low-cost rental housing, develop a comprehensive housing policy or create a national Commission on Housing

Or the Committee may occasionally write a letter to governments concerning emergency human rights situations involving pending and clear violations of the Covenant

What is the domestic impact of Committee actions?

Even if the Committee issues language that assists in the form of a concluding observation or urgent letter, it is unlikely that the government will implement the Committee's recommendations without follow up activity. At the same time, many governments take their human rights obligations seriously, and the Committee's activities may open up new opportunities to convince policy makers and judges, attract media attention and change public opinion. As such, the Committee's actions have to be seen as a tool to support and complement your action at the national level.

⁶ To check, go to the the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/english/countries/ratification/index.htm>

When is the best time to approach the Committee?

State party reports must be submitted to the Committee every 5 years. In these reports, States should detail the status of implementation of all of the rights enshrined in the ICESCR and describe difficulties encountered in implementing their obligations under the Covenant. The submission of reports will trigger the review process by the Committee. However, in case of a persistent failure to report, the Committee can review a State party's implementation of its obligations of the Covenant in the absence of a report.

The review process develops in two subsequent stages. First, the Committee will undertake an initial consideration of the report at a meeting of the 'Pre-Sessional Working Group' (normally immediately following a Committee session and generally 6 months prior to the appearance of a State before the Committee). During the Pre-Sessional Working Group meeting, the Committee drafts a 'List of Issues' seeking further information and clarification from the State party on particular issues. The Committee transmits the List of Issues to the State party for written responses prior to the oral review of the State party. It is most important to engage with the Committee prior to this first stage.

Second, the oral review or so-called constructive dialogue then occurs, generally 6 months — 1 year after the Pre-Sessional Working Group, and is largely based on the List of Issues and the written responses from the Government. Delegations of the State party are asked to attend Committee hearings for three hours sessions to answer Committee questions. On the first day of each Committee session, NGOs have an opportunity to make oral submissions concerning the economic, social and cultural rights situation in States appearing before the Committee at that session. NGOs do not currently participate during the oral review of the State party. However, they can attend to monitor the proceedings.

How to use the ESC Committee?

Provide Written Information to Committee Members

In general, the Committee accepts written materials from NGOs at any time. However, for written materials to be most effective, they should take the form of what are often referred to as alternative or shadow reports submitted in reply to or after the Government submits its periodic report. Shorter documents addressing the State party's response to the List of Issues or fact sheets used to assist Committee members in understanding complex issues can also be submitted, along with the alternative report. At the same time, the Committee Secretariat maintains a 'country file' on every State party to the Covenant. It is possible to submit any information you deem relevant to your country's compliance with the Covenant at any time, and request this be included in the country file of your country.

7 The rules of the ESC Committee allowing NGO's to participate in its work are available at http://www.cohre.org/get_attachment.php?attachment_id=1986

Participate in the Pre-Sessional Working Group⁸

After each session, five members of the Committee hold what is called a Pre-Sessional Working Group, as noted above. The purpose of this working group is to “identify in advance the questions which will constitute the principal focus of the dialogue with the representatives of the reporting States” and put them into a “List of Issues”. NGOs can provide written or in person information to the working group as long as it “relates to matters on the agenda of the working group.” The working group usually meets at least six months prior to the actual consideration of a States party report.

Participate in NGO Hearings Before the Committee

On the first afternoon of each formal session in May and November, the Committee holds NGO hearings in which it allows NGO representatives to make presentations. This meeting is open and provided with interpretation and press services. NGO representatives have to get official approval from the Committee Secretariat or Chairperson before actually speaking to the Committee. Copies of oral presentations should be made available and showing videos is not recommended unless they are very brief and copies of the transcript of the video are made available in English, Spanish and French.

Attend the Oral Review of Your Country’s Report

The Committee generally holds 3 three-hour meetings to examine a State party report together with State Party representatives. Only governments, relevant specialized agencies and other international bodies may speak at these sessions, but they are open to the public. The Committee makes audiotapes of these sessions available to the public and NGOs can videotape the sessions as well, which may be very useful advocacy tools for domestic use. It is also possible to influence the questions the Committee members put to a government as the proceedings unfold, and it is very important that NGOs attend these sessions. The Committee has established rules about the oral examination of the State report.

Meet Individual Committee Members

When a country’s report is up for review, one member of the Committee is named as the “Rapporteur” for that country. The Rapporteur takes the lead on deciding what issues are presented to the government and what is said in the Committee’s Concluding Observations of the Committee about that country. It is important to meet with the country Rapporteur either at the Pre-Sessional Working Group or at the session when your country is under review.

Participate in Days of General Discussion

One day of each session, usually the Monday of the third week, is devoted to a day of ‘general discussion’ to discuss a particular theme or right rather than a particular country. It is possible to participate in such sessions and the Committee has established procedures for days of general discussion.

To contact the Secretariat of the ESC Committee, email Ms Wan-Hea Lee wlee@ohchr.org

⁸ The ESC Committee’s general rules about the Pre-Sessional Working Group, are available at http://www.cohre.org/get_attachment.php?attachment_id=1994

Useful resources

The Committee's website can be found at <http://www.ohchr.org/english/bodies/cescr/index.htm>

On COHRE's website at www.cohre.org (click on 'Take Action') you can find more information on using this Committee, for example on:

- Government's role in the Process
- Before coming to Geneva
- What to do in Geneva
- Geneva Logistics
- Using Other UN Mechanisms

Jeff King, *Activist's Manual on the International Covenant on Economic, Social and Cultural Rights* (Colombo: Law & Society Trust and the Center for Economic and Social Rights, 2003), available at <http://www.comminit.com/materials/ma2005/materials-2155.html>

Allan McChesney, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook* (Washington, DC: American Association for the Advancement of Science, 2000).

PART IV

LEGAL RESOURCES

20 LEADING CASES ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SUMMARIES¹

1. INTERNATIONAL DECISIONS

Human Rights Committee²

*Mukong v. Cameroon*³

Communication No. 458/1991, CCPR/C/51/D/458/1991 (1994)

Keywords: prisoners' rights – food rights – housing rights – positive obligations

Facts: Mukong's cell lacked sanitation facilities. He slept on a concrete floor – initially, without clothes – and later slept on old cartons. He was without food for several days.

Decision: The Human Rights Committee held that conditions of detention must meet minimum standards. These standards include the United Nations Standard Minimum Rules for the Treatment of Prisoners. The conditions were held to be cruel, inhuman and degrading treatment contrary to Article 7 of the International Covenant on Civil and Political Rights. Cameroon was urged to provide compensation and to ensure that similar violations do not occur in future.

Lantsova v. The Russian Federation

Communication No. 763, CCPR/C/74/D/763/1997 (2002)

Keywords: right to life – prisoners' rights – health rights – positive obligations

Facts: Mr Lantsov was placed in a pre-trial detention centre in March 1995 and died one month later. The prison was overcrowded, and conditions were inhuman due to inadequate ventilation, food and hygiene.

Decision: The Human Rights Committee found that the detention of an individual obliges the State to protect the individual's right to life (Article 6). The right was violated since the State had failed to take steps to ascertain Mr Lantsov's health and provide adequate medical assistance and conditions of detention. The

¹ Periodically updated versions of this chapter can be found at www.cohre.org/litigation. You can also find many ESC rights case summaries online at www.escri-net.org. In addition, the Housing & ESC Rights Law Quarterly contains ESC rights case summaries and analyses of legal developments in relation to housing and ESC rights at the national, regional and international levels. The Quarterly is available online at www.cohre.org. To subscribe, email quarterly@cohre.org.

² These decisions may be accessed at OHCHR's Treat Body Database which is currently at: <http://www.unhchr.ch/tbs/doc.nsf>

³ In a later case, *Henry and Douglas v. Jamaica*, the Committee held that the obligation to provide adequate medical care is part of the duty to respect the inherent dignity of individuals deprived of liberty (Article 10); Communication No. 571/1994, 25 July 1996.

conditions of detention also violated the right to respect of the inherent dignity of detained individuals (Article 10). The Committee held that the Russian Federation should provide appropriate compensation, order an inquiry into the death and ensure that similar violations do not occur in future.

Zwaan-de Vries v. The Netherlands⁴

Communication No. 182/1984, CCPR/C/29/D/182/1984 (1987)

Keywords: equality and discrimination – social security and welfare – progressive realisation and maximum available resources

Facts: Zwaan de Vries was denied long-term unemployment benefits because she was a married woman and was not the family 'breadwinner'. Married men, however, would receive unemployment benefits even if their wives were the principal income earners or breadwinners.

Decision: The Human Rights Committee held that the case represented a violation of Article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are entitled to equal protection of the law without discrimination. This protection applies to the social and economic domain and is not limited to the rights explicitly enshrined in the Covenant. Rather, all legislation should be non-discriminatory. In this case, the legislation required married women to meet a condition that did not apply to married men. This differential treatment was not based on objective or reasonable criteria. The legislation was therefore discriminatory. The legislation had been repealed before the decision, and an appropriate remedy for Zwaan de Vries was recommended.

Gueye et al. v. France

Communication No. 196/1985, CCPR/C/35/D/196/1985 (1989)

Keywords: equality and non-discrimination – social security rights – equality and non-discrimination – non-nationals

Facts: The complainants claimed to be victims of discrimination (Article 26) since French legislation provided superior pensions for soldiers of French nationality than it did for retired soldiers of Senegalese nationality who had served in the French army prior to the independence of Senegal in 1960. The French Government claimed that the different treatment was justified due to: (a) the complainants' loss of French nationality upon independence, (b) the difficulties in establishing the identity and family situation of retired soldiers, and (c) the differences between the economic and social conditions prevailing in France and in its former colonies.

Decision: The Committee rejected the government's arguments. It was not the question of nationality that determined the granting of pensions to the complainants, but the services rendered by them in the past, which were the same as those rendered by their French counterparts. Mere administrative inconvenience or the possibility of some abuse of pension rights may not be invoked to justify unequal treatment. Likewise, differences in the economic, financial and social conditions between France and Senegal may not be invoked as a legitimate justification. Otherwise, for example, all retired soldiers living in Senegal, whether of Senegalese nationality or French nationality, would face the same economic and social conditions; yet, their treatment for the purpose of pension entitlements would differ.

⁴ For a similar case concerning non-discrimination and social security, see *S. W. M. Brooks v. The Netherlands*, Communication No. 172/1984, CCPR/C/29/D/172/1984, 9 Apr. 1987.

*Länsman et al. v. Finland*⁵

Communication No. 511/1992, CCPR/C/52D/511/1992 (1994)

Keywords: indigenous peoples – economic development and poverty – rural and land issues – cultural rights-participation

Facts: Quarry mining was threatening Sami reindeer herding in Finland. Article 27 of the International Covenant on Civil and Political Rights provides for the right of minorities to enjoy culture. The enjoyment of culture has been interpreted by the Committee to include traditional livelihoods.

Decision: The Human Rights Committee found that the limited nature of the quarrying did not ‘substantially’ infringe the herdsman’s rights. It warned, however, that any future approval of large-scale mining activities in the area might constitute a violation of the right. They also stated that the Sami should also be consulted before any activity is undertaken that potentially threatens their rights.

Committee on the Elimination of Discrimination against Women⁶

Andrea Szijjarto v. Hungary

Communication No. 4/2004, CEDAW/C/36/D/4/2004

Keywords: women’s rights – health rights – Roma

Facts: The author was a Roma woman who arrived at a hospital having gone into labour. While examining the author, the attending physician found that the foetus had died in her womb and informed her that a Caesarean section needed to be performed immediately in order to remove the dead foetus. While on the operating table, the author was asked to sign a form consenting to the Caesarean section. She also signed a barely legible note that had been handwritten by the doctor and added to the bottom of the form. This form was an agreement to sterilisation, which was referred to by a Latin term that the author did not understand. Only after the operation did she learn the meaning of the word ‘sterilisation’.

Decision: Among other complaints, she alleged a violation of Articles 10(h) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women. Referring to paragraphs 20 and 22 of General Comment No. 24 on Women and Health, she submitted that she had been unable to make an informed choice before signing the consent form for the sterilisation procedure.⁷ She argued that her inability to give informed consent on account of the incomplete information provided constituted a violation of the right to appropriate health-care services. Referring to its General Comment No. 24, the Committee concluded that the State Party had not ensured that the author gave her fully informed consent to be sterilised and that, consequently, her rights under Article 12 had been violated.

5 See also: subsequent cases concerning Sami reindeer herding rights: *Jouni E. Länsman v. Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/671/1995, 30 Oct. 1996; *Jouni Länsman et al. v. Finland*, Communication 1023/2001, U.N. Doc. CPR/C/83/D/1023/2001, 15 Apr. 2005.

6 This and other decisions may be accessed at <http://www.un.org/womenwatch/daw/cedaw/> (select *Decisions/Views*).

7 Paragraph 20 states that “[w]omen have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives”. Paragraph 22 provides that “States parties should also report on measures taken to ensure access to quality health-care services, for example, by making them acceptable to women. Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violates women’s rights to informed consent and dignity”.

The Committee also considered Article 10(h) of the Convention and the obligation to ensure equal access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning. The Committee stated that the author had a right protected by Article 10 (h) to specific information on sterilisation and alternative procedures for family planning in order to guard against such an intervention without her having made a fully informed choice. In this case, considering all the relevant factors (including the author's state of health on arrival at the hospital and the fact that any counselling that she received must have been given under stressful and most inappropriate conditions), the Committee found a failure of the State Party, through the hospital personnel, to provide appropriate information and advice on family planning, which constituted a violation of the author's right under Article 10(h) of the Convention.

Among other recommendations, the Committee recommended that Hungary review its domestic legislation on the principle of informed consent in cases of sterilisation and ensure its conformity with international human rights and medical standards. It also recommended that Hungary should monitor public and private health centres that perform sterilisation procedures so as to ensure that fully informed consent is being given by the patient before any sterilisation procedure is carried out, with appropriate sanctions in place in the event of a breach.

Committee on the Elimination of Racial Discrimination⁸

Ms. L. R. et al. v. Slovakia

Communication No. 31/2003, CERD/C/66/D/31/2003

Keywords: housing rights – Roma – non-retrogression

Facts: The case concerned a resolution adopted by the Dobšiná municipal council, under pressure from right-wing anti-Roma groups, to cancel a previous resolution in which the council had approved a plan to construct low-cost social housing for Roma inhabitants living in very poor conditions. The petitioners contended, *inter alia*, that the State Party had failed to safeguard their right to adequate housing, thereby violating Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Decision: The Committee ruled that, taken together, the council resolutions in question – which consisted of an important practical and policy step towards realisation of the right to adequate housing, followed by its revocation and replacement with a weaker measure – amounted to an impairment of the recognition, or exercise on an equal basis, of the human right to housing. This right is protected by Article 5(e)(iii) of ICERD and Article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee also found that the State Party was in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to Article 5(e)(iii). The Committee ruled that Slovakia should, *inter alia*, take measures to ensure that the petitioners be restored to the position that they were in upon adoption of the initial resolution by the municipal council.

⁸ These decisions may be accessed at OHCHR's Treat Body Database which is currently at: <http://www.unhchr.ch/tbs/doc.nsf>

A. YlimazDogman v. The Netherlands⁹

Communication No. 1/1984, CERD/C/36/D/1/1984 (1988)

Keywords: right to work and labour rights – national origin and discrimination – remedies

Facts: A labour authority and Cantonal court endorsed the termination of Mrs YlimazDogman, a Turkish national, from her employment. The employer's letter requesting termination alleged that foreign women workers with children were more likely to be absent from work.

Decision: The Committee found that the judicial endorsement of the termination failed to address the alleged racial discrimination in the employer's letter. Therefore, Article 5(e)(i) of the International Convention of the Elimination of All Forms of Racial Discrimination, which prohibits discrimination in relation to the right to work, was violated. The Committee recommended that the State Party ascertain whether Mrs YlimazDogman was now gainfully employed and take steps to secure alternative work for her or provide other equitable relief. The Committee rejected, though, the claim that the State Party had violated Article 4 by declining criminally to prosecute this case of alleged racial discrimination or Article 6 by failing to provide an appeal mechanism to contest the Court of Appeal's endorsement of the decision not to prosecute.

Committee against Torture

This and other decisions may be accessed at <http://www.ohchr.org/> (select *Human Rights Bodies, Search the Treaty Body Database, CAT and Jurisprudence*).

Hajrizi Dzemajl et al. v. Yugoslavia

Communication No. 161/2000, CAT/C/29/161/2000 (2002)

Keywords: housing rights and forced evictions – non-State actors – civil and political rights

Facts: A non-Roma mob set fire to a Roma settlement, destroying it completely. Police among the mob made no effort to halt the violence even though they were warned beforehand by the victims. Investigations into the incident were discontinued due to 'lack of evidence', and Yugoslavia failed to provide redress and compensation to the Roma community, which is now living in dire poverty elsewhere.

Decision: The Committee found that the "burning and destruction of houses constitutes, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment". Other aggravating factors in this case were the presence of older residents within the buildings and the racial motivation behind the acts. Consequently, the Committee held that the failure of the State to provide protection, as well as redress and compensation, to the victims violated Article 16 of the Convention against Torture, which obliges States Parties to prevent acts of cruel, inhuman, or degrading treatment that do not amount to torture and are instigated by or with the consent or acquiescence of a person acting in an official capacity. In a separate opinion, two Committee members considered that the acts amounted to 'torture' due

⁹ Other cases of the Committee on the Elimination of Racial Discrimination dealing with economic, social and cultural rights include *L. K. v. The Netherlands*, Communication No. 4/1991 (housing rights); *Miroslav Lacko v. Slovakia*, Communication No. 11/1998 (access to a restaurant); *Anna Koptova v. Slovakia*, Communication No. 13/1998 (housing rights); *Kashif Ahmad v. Denmark*, Communication No. 16/1999 (education rights); *F. A. v. Norway*, Communication No. 18/2000 (housing rights); and *B. J. v. Denmark*, Communication No. 17/1999 (access to a discotheque). A number of complaints concerning the right to work and housing discrimination have been held inadmissible or have been unsuccessful: Communication Nos. 21, 19, 15, 14, 12 and 7.

to the manner and severity of the destruction and the resulting penury of the complainants. The resulting (inadequate) investigation and failure to prosecute those responsible also constituted violations of Articles 12 and 13.

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

International Court of Justice, Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, General List No. 131 (9 July 2004)

Keywords: ICESCR – CRC – application – reparations

Facts: The United Nations General Assembly adopted a resolution asking the International Court of Justice urgently to render an advisory opinion on the legal consequences arising from the State of Israel's construction of a wall in the Occupied Palestinian Territory, considering the rules and principles of international law.¹⁰

Decision: The Court held that the rules and principles of international law that were relevant in assessing the legality of the measures taken by Israel included the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, both of which the Government of Israel has ratified. The Court held that the Covenant is applicable both to territories over which a State has sovereignty and to those over which it exercises jurisdiction outside sovereign territory,¹¹ and that Israel is obliged to raise no obstacles to the exercise of Covenant rights in those areas where competence has been transferred to Palestinian authorities. With regard to the Convention on the Rights of the Child, the Court highlighted that that Article 2 of that instrument provides that “States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .”. Thus, that Convention is applicable within the Occupied Palestinian Territory.

The Court held that the construction of the wall and its associated regime, *inter alia*, impeded the exercise by the persons concerned of their rights to work, health, education and to an adequate standard of living as guaranteed by the Covenant and the Convention. The Court observed that the restrictions on the enjoyment by the Palestinian population of their economic, social and cultural rights failed to conform with the condition of Article 4 of the Covenant, that such restrictions must be “solely for the purpose of promoting the general welfare in a democratic society”.

The Court directed Israel to cease construction and dismantle the wall, provide compensation and other forms of reparation to the Palestinian population and to return any land and other immovable property seized for the purposes of constructing the wall.

¹⁰ Resolution ES-10/14, adopted 8 Dec. 2003. This case summary focuses on those aspects of the Court's decision that deal with social and economic rights set out in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

¹¹ For the full text of the decision, see <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (see Peter Bekker, 'The World Could Rule that Israel's West Bank Barrier Violates International Law', *ASIL Insight*, July 2003, <http://www.asil.org/insights/insigh141.htm>

2. REGIONAL DECISIONS

African Commission on Human and Peoples' Rights

*Purohit and Moore v. The Gambia*¹²

African Commission on Human and Peoples' Rights, Communication 241/200. Decided at the 33rd Ordinary Session of the African Commission (15-29 May 2003)

Keywords: health rights – maximum available resources – mental health patients

Facts: The applicants alleged, *inter alia*, that the legislative regime in The Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health (Article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs (Article 18(4)) guaranteed in the African Charter on Human and Peoples' Rights.

Decision: Holding that The Gambia fell short of satisfying the requirements of Articles 16 and 18(4) of the Charter, the Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. The Commission iterated that mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance. This would be consistent with Article 18(4) and the standards outlined in the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. Recognising the prevailing poverty that renders African countries incapable of providing the necessary amenities, infrastructure and resources to facilitate enjoyment of the right to health, the Commission read the obligation on States Parties, "to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind" into Article 16.

*SERAC and CESR v. Nigeria*¹³

African Commission on Human and Peoples' Rights, Case No. 155/96, Decision taken at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001

Keywords: food rights – housing rights – health rights – obligation to respect – obligation to protect – obligation to fulfil – transnational corporations

Facts: The communication alleged that the Government of Nigeria was guilty of, *inter alia*, violations of the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights because it condoned and facilitated the operations of oil corporations in Ogoniland.

Decision: The Commission ruled that the Ogoni had suffered violations of their right to health (Article 16) and right to a clean environment (Article 24) due to the Government's failure to prevent pollution and ecological degradation. It held, further, that the failure to monitor oil activities and involve local communities in decisions violated the State's duty to protect its citizens from the exploitation and despoliation of their wealth and natural resources (Article 21). The Commission suggested that a failure to provide material benefits for the Ogoni people was also a violation. The Commission also held

¹² The full text of the decision is available through the COHRE Litigation Programme.

¹³ For the full text of the decision, go to: <http://cesr.org/nigeria>

that the implied right to housing (including protection from forced eviction), which is derived from the express rights to property, health and family, was violated by the destruction of housing and the harassment of residents who returned to rebuild their homes. Finally, the destruction and contamination of crops by Government and non-State actors violated the duty to respect and protect the implied right to food. The Commission issued orders to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation to victims, to prepare environmental and social impact assessment in the future and to provide information on health and environmental risks.

World Organisation against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jéhovah/Zaire¹⁴

African Commission on Human and Peoples' Rights, Communications 25/89, 47/90, 56/91, 100/93

Keywords: health rights – obligation to protect – positive obligations

Facts: The petitioners made numerous allegations of human rights violations, ranging from arbitrary arrests, detention, torture and religious persecution to the shortage of medicines and the failure of the Government to provide basic services such as safe drinking water and electricity.

Decision: The failure of the Government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity, and the shortage of medicines constituted a violation of the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as set out in Article 16 of the African Charter on Human and Peoples' Rights.

The Mauritania Cases¹⁵

African Commission on Human and Peoples' Rights, Communications 54/91, 61/91, 98/93, 164/97, 196/97, and 210/98

Keywords: slavery – eviction – health rights

Facts: Five joined communications alleged the existence of slavery and analogous practices in Mauritania and of institutionalised racial discrimination perpetrated by the ruling Moor community (also known as 'Beidanes') against the more populous black community.¹⁶ It was alleged, *inter alia*, that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the Government along with their livestock.¹⁷ It also was alleged that the members of the black community of Mauritania were denied access to employment and were subjected to tedious and unremunerative work.¹⁸ The communication also made allegations about the conditions of detention of people who had been imprisoned for political causes and other reasons. (This case note focuses solely on the Commission's findings with regard to economic, social and cultural rights.)

14 www.umn.edu/humanrts/africa/comcases/comcases.html

15 For the full text, go to: <http://www.umn.edu/humanrts/africa/comcases/54-91.html>

16 A. Chidi, 'Analysis of Paralysis or Paralysis by Analysis?: Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *HRQ* 327.

17 *Ibid.*

18 *Ibid.*

Decision: The Commission found repeated violations of the right to life (Article 4). The Commission concluded that the general state of health of the prisoners had deteriorated due to the lack of sufficient food, blankets and adequate hygiene. The Mauritanian State was directly responsible for this state of affairs; therefore, Article 16 (the right to enjoy the best attainable state of physical and mental health) had also been violated. The Commission further concluded that the confiscation and looting of the property of black Mauritians and the expropriation or destruction of their lands and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14, as well as of the right to freedom of movement and residence (Article 12(1)). The Commission also found a violation of Article 2 (the prohibition on discrimination in the enjoyment of rights under the African Charter on Human and Peoples' Rights). The Commission stated that, in light of Article 23(3) (the right to just and favourable remuneration) of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social and Cultural Rights, there had been a violation of Article 5 of the Charter due to practices analogous to slavery. The Commission, however, did not conclude that there was a practice of slavery based on this evidence. Furthermore, the Commission stated that it had insufficient evidence upon which to determine if there has been a violation of Article 17 (the right to partake in the cultural life of one's community) in terms of the Government denying black groups the right to speak their own languages.

EUROPEAN COURT OF JUSTICE

*Taylor v. United Kingdom*¹⁹

European Court of Justice, Case 382/98, 16 Dec. 1999

Keywords: equality and non-discrimination – social security rights

Facts: Regulations entitled receipt of a winter fuel payment for those on social security benefits. The payment was available to women aged 60 and over and men aged 65 and over. Mr Taylor was 62 and brought a complaint on the basis that the regulation did not comply with the European Union Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The High Court of England referred the interpretation of the Directive to the European Court of Justice.

Decision: The European Court of Justice determined that the winter fuel payment was covered by the Directive since it provided protection against the risks of old age. The Court ruled that the regulations were discriminatory. The application of different ages, according to sex, might only be justified for non-contributory benefits where it was designed to ensure consistency between retirement pension schemes and other benefits. The United Kingdom argued that the differences in age requirements would be justified on the basis that State retirement pensions were granted at different ages for men and women. (Pensions are largely exempted from the Directive.) The Court found that the basis for the payment was old age and not the consistency of retirement schemes.

¹⁹ This decision may be accessed at <http://curia.eu.int/> (select the preferred language entry; select case law; under the heading 'Cases lodged before the Court of Justice', select After 1989; click on the case number). For a full review of cases by the European Court of Justice, see Philippa Watson, 'European Court of Justice', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, forthcoming).

EUROPEAN COURT OF HUMAN RIGHTS

To access these and other decisions, go to www.echr.coe.int/ (select *Judgments and Decisions*, go to *Search the Case-Law – HUDOC*; insert the case title and select *submit*).

Airey v. Ireland

European Court of Human Rights, 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305

Keywords: economic development and poverty – equality and non-discrimination – women’s rights

Facts: Mrs Airey sought a judicially ordered separation from her physically abusive husband. She was unable to obtain such an order since, in the absence of legal aid, she lacked the financial means to retain a solicitor.

Decision: The European Court of Human Rights held that the case revolved around a violation of the applicant’s right to access a court for determination of her civil rights and obligations (Article 6 of the European Convention on Human Rights). The Court referred to international law, as well as the Convention’s intention and said that remedies must be effective, not illusory. It noted that many civil and political rights had social and economic implications involving positive obligations. Thus, there was a right to legal assistance if it was indispensable to effective access to the courts. In this case, self-representation was ineffective due to, *inter alia*, the complexity of the law and the High Court procedure.

The Court also held that there was a violation of Article 8 concerning the respect of family life. Respect of family life, which may entail positive obligations on the State, requires effective access to protective mechanisms concerning family life — in this case, to petition for judicial separation. The Court did not address the claim of discrimination, which raised the question as to whether denial of civil rights due to poverty amounts to discrimination.

Belgian Linguistic Case (No. 1 and No. 2)

(No. 1) (1967), Series A, No. 5 (1979-80) 1 EHRR 241

(No. 2) (1968), Series A, No.6 (1979-80) 1 EHRR 252

Keywords: education rights – civil and political rights – equality and non-discrimination

Facts: The applicants were French-speaking residents of certain Flemish-speaking areas of Belgium who wanted their children to be educated through French. While Dutch-speaking children in a particular French-speaking area were allowed to be educated in Dutch-speaking schools in a bilingual district outside the neighbourhood, French-speaking children in an equivalent Flemish area were not permitted to attend the French-speaking schools in the same bilingual district, but were compelled to attend their local Dutch-language schools.

Decision: The European Court of Human Rights held, *inter alia*, that Article 2 of the First Protocol to the European Convention on Human Rights does not recognise a right to education such as would require States to establish at their own expense or to subsidise education of any particular type or at any particular level — rather, it guarantees a right of access to educational institutions existing at a given time and a right to an effective education. For the right of education to be effective, there must be a right to official recognition of the studies a student has successfully completed.

The Court, however, found that there had been a violation of Article 14 of the Convention (anti-discrimination), in conjunction with Article 2, because the legislation prevented children from having access to French-language schools in certain communes of Brussels solely on the basis of the residence of their parents. This was not the case for Dutch-language schools and thus constituted differential treatment, which was unjustifiable under Article 14.

Botta v. Italy

European Court of Human Rights (1998) 26 EHRR 241

Keywords: people with disabilities – obligation to provide – positive obligations

Facts: The (disabled) applicant complained that the State's failure to provide an access ramp to a beach violated his right to private and family life (Article 8).

Decision: The European Court of Human Rights confirmed that States have positive obligations where there is a direct and immediate link between the measures sought and the effective respect of the right. The Court noted that Italian legislation obliged local authorities to provide such ramps and that funds were provided for such purposes. However, in this case, a direct and immediate link was not found: the applicant's normal place of residence was far from the beach, and the complaint concerned "interpersonal relations of ... broad and indeterminate scope".

Chapman v. United Kingdom

European Court of Human Rights (2001) 33 EHRR 399

Keywords: equality and non-discrimination – housing rights and forced eviction – land and property rights – race and ethnicity

Facts: The applicant, a Gypsy woman,²⁰ purchased land in 1985 with the intention of living on it in a caravan after a history of continual eviction and harassment. She was refused planning permission to reside on the land and was given 15 months to vacate the land. She claimed that, *inter alia*, her right to respect for her home, family and private life (Article 8) and her right to non-discrimination (Article 14) had been violated.

Decision: The European Court of Human Rights held that there had been an 'interference' with the enjoyment of a home, as well as private and family life, since at issue was a traditional way of life. Article 8 also implied positive obligations to facilitate the Gypsy way of life by giving special consideration to Gypsies' needs and different lifestyle. The Court, however, applied the exception in Article 8(2) that such interference was 'necessary in a democratic society'. The land was the subject of environmental protection, and a wide margin of discretion was to be accorded to planning issues. The Court also noted that the emerging consensus among Contracting States of the Council of Europe on the special needs of minorities and an obligation to protect their security, identity and lifestyle was not sufficiently concrete

20 While the term 'Gypsy' has often been used and experienced as a derogatory term, that is not the intention here. In the United Kingdom, in the context of planning and local authority law, the term 'Gypsy' has the specific meaning of anyone – regardless of race or origin – who is of a nomadic habit of life and travels around for economic reasons. In this case, the Court referred to the applicant as a 'Gypsy'. More generally, the term is often used to denote native English nomadic people (as opposed to 'Roma', who are usually perceived as hailing from Eastern Europe, and 'Travellers', who are generally Irish or of Irish extraction). Several nomadic peoples' rights groups use the term self-descriptively (including the Gypsy Council for Education, Culture, Welfare and Civil Rights and the Gypsy and Traveller Law Reform Coalition). See 'Your Rights: Liberty's Online Guide to Human Rights Law for England and Wales', <http://www.yourrights.org.uk/your-rights/chapters/rights-of-gypsies-and-travellers/index.shtml>

for the Court to derive any guidance as to the conduct or standards for treatment of minorities that Contracting States consider desirable in any particular situation. The right to non-discrimination had likewise not been violated since any differences in treatment were a legitimate aim for environmental protection and any discrimination was proportionate to that aim. It should be noted that the minority registered a strong dissent.

López Ostra v. Spain

European Court of Human Rights, Series A, No. 303-C (1995) 20 EHHR 277

Keywords: environmental rights – housing rights – positive obligations

Facts: The national authorities failed to regulate a privately owned tannery plant that produced air pollution that made the living conditions of local residents unbearable and caused them serious health problems. The applicant alleged that there had been a violation by a public authority of her right to respect for her home that made her private and family life impossible (Article 8). She also claimed that she was the victim of degrading treatment (Article 3). It was not proven incontrovertibly that there was a causal link between the health damage suffered and the pollutants released from the plant.

Decision: The European Court of Human Rights stated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health. The Court held that the State failed to strike a fair balance between the interest of the town's economic well-being in having a waste-treatment plant and the applicant's effective enjoyment of her individual right to respect for her home and her private and family life. Consequently, it held that there had been a violation of Article 8 of the European Convention on Human Rights and awarded compensation. The Court held further that the conditions in which the applicant and her family had lived did not amount to degrading treatment within the meaning of Article 3.

Selçuk and Asker v. Turkey

European Court of Human Rights (1998) 26 EHRR 477

Keywords: housing rights – property rights – forced evictions – inhuman treatment

Facts: The applicants argued that the destruction of their homes by Turkish military forces was, *inter alia*, a violation of their rights to respect for the home and peaceful enjoyment of their property. They also claimed that the circumstances of the destruction of their homes and their eviction from their village constituted a breach of Article 3 of the European Convention on Human Rights, which declares that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

Decision: The European Court of Human Rights held that there had been a violation of the applicants' rights to peaceful enjoyment of their property and to respect for their homes. Furthermore, the Court held that, bearing in mind the manner in which the applicants' homes were destroyed and their personal circumstances, they had been subject to inhuman treatment in violation of Article 3. Due to the absolute nature of Article 3, any such violation is unjustifiable, even in times of national emergency.

Akkus v. Turkey

European Court of Human Rights, App. No. 00019263/92, Judgment 24 June 1997

Keywords: property rights – compensation

Facts: The Turkish Water Board expropriated land belonging to the applicant in order to build a hydro-electric dam. There was a 17-month delay by the State in paying compensation due on expropriation, which, owing to 70 percent inflation per annum, caused the applicant substantial loss. The applicant asserted that the State's delay in paying the compensation due her was an infringement of her right to the peaceful enjoyment of her possessions. She alleged a violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights.

Decision: The European Court of Human Rights stated that it had to examine whether a fair balance had been maintained between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. It held that, by deferring payment of the compensation for 17 months, the national authorities rendered that compensation inadequate and, consequently, upset the balance between the protection of the right to property and the requirements of the general interest. There had therefore been a violation of Article 1 of the Protocol to the Convention.

European Committee of Social Rights

European Roma Rights Centre v. Italy

Complaint No. 27/2004 (7 Dec. 2005)

Keywords: Housing rights – eviction – Roma – equality

Facts: The European Roma Rights Centre alleged that Roma in Italy are denied an effective right to housing in violation of Article 31 of the revised European Social Charter. They also alleged that segregationist policies and practices in the housing field constituted racial discrimination contrary to Article 31 read alone or in conjunction with Article E of the revised Charter (principle of non-discrimination).

Decision: The European Committee of Social Rights considered that the complaint raised three specific issues and made the following findings regarding them. First, it held that the insufficiency and inadequacy of camping sites for itinerant Roma constituted a violation of Article 31(1) (States Parties' duty to promote access to housing of an adequate standard), taken together with Article E. Second, the systematic forced evictions of Roma from sites or dwellings unlawfully occupied by them constituted a violation of Article 31(2) (State Parties' duty to prevent and reduce homelessness with a view to its gradual elimination), taken together with Article E. Finally, the Committee held that the lack of permanent dwellings of an acceptable quality to meet the needs of Roma wishing to settle constituted a violation of Article 31(1) and 31(3) (States Parties' duty to make the price of housing accessible to those without adequate resources), taken together with Article E.

European Roma Rights Centre v. Greece

Complaint No. 15/2003 (8 Dec. 2004)

Keywords: housing rights – eviction – Roma – equality

Facts: This collective complaint, made by the European Roma Rights Centre, alleged that Roma in Greece were denied an effective right to housing. The European Committee of Social Rights focused on three aspects of the claims made in the complaint: (a) the insufficient number of permanent dwellings of an acceptable quality to meet the needs of settled Roma, (b) the insufficient number of stopping places for Roma who choose to follow an itinerant lifestyle or who are forced to do so, and (c) the systematic eviction of Roma from sites or dwellings considered to be unlawfully occupied by them. The complainants alleged that these facts constituted a violation of Article 16 of the European Social Charter²¹ or Article 16, in light of the Preamble²² of the Charter.

Decision: The Committee noted that the right to housing allows the exercise of many other rights (civil and political, as well as economic, social and cultural) and is of central importance to the family. The Committee recalled its previous case law to the effect that, in order to satisfy Article 16, States must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing is of an adequate standard and includes essential services. In addition, ‘adequate housing’ requires a dwelling of suitable size. Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction.

The Committee held that the implementation of Article 16 with regard to nomadic groups, including itinerant Roma, implies that adequate stopping places should be provided. The Committee stated that, in this respect, Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights.

Regarding the first aspect of the complaint, (a), the Committee found that Greece had failed to take sufficient measures to improve the living conditions of Roma and that those measures taken had not yet achieved what is required by the European Social Charter (notably, because there were insufficient means for constraining or sanctioning local authorities). On the evidence submitted, the Committee found that a significant number of Roma were living in conditions that failed to meet minimum standards. In light of the excessive numbers of Roma living in substandard housing conditions, “even taking into account that Article 16 imposes obligations of conduct and not always of results and noting [that] the overarching aim of the Charter is to achieve social inclusion”,²³ the Committee held that the situation was in violation of Article 16 of the Charter.

In relation to the second aspect of the complaint, (b), the Committee noted that the law set out extremely strict conditions for temporary encampment and amenities and that, due to the local authorities’ lack of diligence in selecting appropriate sites, as well as their reluctance to carry out the necessary works to provide the appropriate infrastructure, Roma had an insufficient supply of appropriate camping sites. This situation constituted a violation of Article 16 of the Charter. With regard to the third aspect, (c), the Committee stated that illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However, the criteria of illegal occupation must not be unduly wide, the eviction should take

²¹ Article 16 provides for the right of the family to social, legal and economic protection, including the undertaking of States Parties to promote the economic, legal and social protection of family life by means including the provision of family housing.

²² The Preamble states that the enjoyment of social rights should be secured without discrimination on the grounds of, *inter alia*, race.

²³ Para. 43.

place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned. The Committee considered that the situation at issue was not satisfactory on these three grounds.

The Committee of Ministers of the Council of Europe subsequently adopted a resolution²⁴ in which it noted, *inter alia*, the extension and revision of the housing loans programme for Greek Roma and the fact that a Commission for the Social Integration of Greek Roma had been established.

*International Federation of Human Rights Leagues (FIDH) v. France*²⁵

Complaint No. 14/2003 (2003)

Keywords: illegal immigrants – right medical assistance – children’s rights

Facts: The International Federation of Human Rights Leagues claimed that France had violated the right to medical assistance (Article 13) by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. The Federation also submitted that a 2002 legislative reform restricting access to medical services for children of illegal immigrants violated Article 17 (the rights of children and young persons). Such children had to wait three months to qualify for medical assistance and were only accorded assistance in “situations that involve an immediate threat to life”. The Federation argued that these children were lawful residents because residency permits were not required for those under 16 years of age. Therefore, the differences between the arrangements made for the exercise of the right to medical assistance by French children and those made for the exercise of the same right by the children of illegal immigrants constituted a violation of Article 17, in conjunction with Article E (the non-discrimination principle in the enjoyment of rights under the European Social Charter). Paragraph 1 of the Appendix of the revised Charter states that “the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”.

Decision: The European Committee of Social Rights began by addressing the scope of the Appendix. Drawing on the Vienna Convention on the Law of Treaties, it emphasised that the Charter must be interpreted purposively so as to give life and meaning to fundamental social rights. Restrictions on rights should therefore be read narrowly. The Committee noted that the restriction in the Appendix attaches to a wide variety of social rights in the Charter and impacts on them differently. The Committee stated that, in the circumstances of this particular case, the restriction trod on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacted adversely on children who are exposed to the risk of no medical treatment. Stating that “human dignity is the fundamental value of positive European human rights law and that health care is a prerequisite for the preservation of human dignity”, the Committee concluded that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter”.

The Committee found no violation of Article 13, however, since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for “emergencies and life threatening conditions”. This finding was reached

²⁴ Resolution ResChS(2005)11, 8 June 2004.

²⁵ For the full text of the decision: http://www.coe.int/T/E/Human_Rights/Esc/

despite evidence of significant problems with the implementation of the legislation. The Committee found a violation of Article 17, even though children had similar access to health care as adults. The Committee noted that Article 17 was inspired by the Convention on the Rights of the Child and that it protects, in a general manner, the right of children and young persons to care and assistance.²⁶

On 4 May 2005, the Committee of Ministers of the Council of Europe took note of the Committee's decision and also noted information received from the Government. This included a circular issued on 16 March 2005 and providing that "all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement".²⁷

Autisme-Europe v. France²⁸

European Committee of Social Rights, Complaint No. 13/2002 (7 Nov. 2003)

Keywords: education rights – non-discrimination – children's rights – people with disabilities

Facts: The complainant alleged that the French Government had made insufficient educational provision for autistic persons, thereby violating several provisions of the revised European Social Charter, including the obligation of States Parties to ensure the effective exercise by persons with disabilities of their right to independence, social integration and participation in the life of the community by, *inter alia*, taking the necessary measures to provide such persons with education (Article 15(1)); the obligation of States Parties to secure the right to education of all children and young persons (Article 17(1)) and the non-discrimination principle in the enjoyment of Charter rights (Article E).

Decision: The European Committee of Social Rights stated that Article E prohibits both direct discrimination and all forms of indirect discrimination. Referring to its own case law, the Committee emphasised that States Parties are obliged to take both legal and practical action to give full effect to Charter rights. When the achievement of a right is exceptionally complex and particularly expensive to resolve, State Parties must take measures that allow them to achieve the objectives of the Charter "within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources". The Committee found that the numbers of autistic children being educated in either general or specialist schools were disproportionately low in comparison to other children and that there was a chronic shortage of care and support facilities for autistic adults. This constituted a violation of Articles 15(1) and 17(1) whether read alone or in conjunction with Article E.²⁹

26 Author's note: Article 13 is more restrictive in its wording.

27 Circular DHOS/DSS/DGAS. For further information, please contact the COHRE Litigation Programme.

28 For the full text of the decision:

http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/RC13_on_merits.pdf

29 The Committee of Ministers, to which the European Committee of Social Rights reports, subsequently adopted a resolution (ResChs(2004), Collective Complaint No. 13/2002, *Autisme-Europe v. France*) stating that it noted France's undertaking to bring the situation into conformity with the revised Charter and that it looked forward to France reporting that the situation had improved in its next report under the revised Charter.

*The International Commission of Jurists v. Portugal*³⁰

European Committee of Social Rights, Complaint No. 1/1998

Keywords: children's rights – labour rights

Facts: The International Commission of Jurists made a complaint alleging that a large number of children in Portugal were working in poor conditions, which had an adverse effect on their health. The International Court of Justice claimed that Portugal was in violation of Article 7(1) of the European Social Charter as a result of its failure properly to supervise child labour.

Decision: The European Committee of Social Rights provided an interpretation of Article 7(1). It stated that the Charter's prohibition on child labour relates to all work by children in all economic sectors and types of enterprises, including family businesses whether paid or not. The only exception to this prohibition is 'prescribed light work', although States are under an obligation to define the types of work that are 'light' (or, at the very least, draw up a list of those that are not). The Committee defined certain working hours as being contrary to the Charter *per se* and declared that work for the family should not automatically be presumed to be 'light'. The Committee held that it was clear that thousands of children performed work in breach of both the Charter and Portuguese law, that a significant amount of work was in sectors that naturally give rise to heavy types of work and that the duration of the work was frequently excessive. Furthermore, the number of inspections made by Portugal's Labour Inspectorate to detect the exploitation of children in the workforce was insufficient. Consequently, Portugal was in violation of Article 7(1).³¹

Inter-American Court of Human Rights

*Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*³²

Inter-American Court of Human Rights, Judgment of 31 Aug. 2001, Inter-Am. Ct. H.R. (Ser. C), No. 79 (2001)

Keywords: indigenous peoples – land and property rights – obligation to protect – compensation

Facts: The complainants requested a ruling from the Inter-American Court of Human Rights requiring that Nicaragua compensate the Awas Tingni Indians for the encroachment on their land caused by the Government's approval of destructive logging concessions on indigenous communal lands without consultation with or the agreement of the affected communities. It was alleged that Nicaragua had failed to carry out its legal duty to demarcate and legally secure indigenous lands.

Decision: The Court held that Article 21 of the American Convention on Human Rights protects the right to property in a sense that includes the rights of members of indigenous communities within the framework of communal property. It stated that the Government had breached Article 21 of the Convention by failing to demarcate the indigenous lands of the community and by not taking other effective measures to ensure the property rights of the community to the community's ancestral lands and natural resources. The Court granted monetary compensation to the Awas Tingni community and ordered the State to adopt the measures necessary to create an effective mechanism for delimitation, demarcation

³⁰ For the full text of the decision, go to www.humanrights.coe.int/csweb/GB/GB3/GB32.htm

³¹ The Committee of Ministers, to which the European Committee of Social Rights reports, concluded differently. They noted that they had earlier recommended that Portugal address the problem and recalled that Portugal would present the measures it had taken with regard to their recommendation in its next periodic report.

³² For the full text of the decision: <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>

and titling of the property of indigenous communities within 15 months. Furthermore, until the delimitation, demarcation and titling of the lands had been carried out, the State was required to abstain from acts that might lead State agents or third parties taking steps, with its acquiescence, to affect the existence, value, use, or enjoyment of the lands in question. More generally, the Court ruled that, under Article 1(1) of the Convention, States Parties have a “fundamental duty to respect and guarantee the rights recognised in the Convention” and that either acts or omissions of any public authority constitute an act imputable to the State.

Inter-American Commission on Human Rights

Dilcia Yean and Violeta Bosica v. Dominican Republic

Inter-American Commission on Human Rights, Report 28/01, Case 12.189 (22 Feb. 2001)

Facts: The petitioners were two girls born in the Dominican Republic of mothers who had immigrated from Haiti. As such, they were denied the birth certificates necessary to prove they were citizens of the Dominican Republic. The certificates were necessary to enrol in school.

Decision: The Inter-American Commission on Human Rights considered the case under both Article XII (right to education) of the American Declaration of the Rights and Duties of Man, as well as Article 19 (rights of the child) of the American Convention on Human Rights. The Commission recalled that, while the Convention had replaced the Declaration as the primary human rights instrument in the Inter-American system with respect to the Dominican Republic, the Convention may not be interpreted to exclude or limit the effect of the Declaration or other international instruments.

With respect to Article XII of the Declaration, the Commission held that the Government of the Dominican Republic had deprived the petitioners of their right to education when it discriminatorily deprived them of their legal identity under domestic law. In interpreting Article 19 of the Convention, the Commission was guided by the Advisory Opinion 17/02 of the Inter-American Court of Human Rights, which, *inter alia*, held that the substantive law of the Convention on the Rights of the Child informs the content of Article 19 of the American Convention. Under Article 19, as informed by the Convention on the Rights of the Child, the Dominican Republic is obligated to provide special protections to children, including preventing economic and social degradation. The obligations under Article 19 include the right to education since education gives rise to the possibility that children may have a better standard of living and thus contributes to the prevention of unfavourable situations for the children and for society itself. The Government was held to have violated Article 19 by not extending such protections to Dominican children of Haitian descent. Instead, the Court found, the Government took actions that maintained a status that denied the petitioners the most basic rights of citizenship, including education, and was consequently in violation of Article 19.

“Achi” Tribe of Paraguay v. Paraguay³³

Inter-American Commission on Human Rights, Case 1802 (1977)

Keywords: Indigenous peoples – health rights – labour rights

Facts: The Inter-American Commission on Human Rights considered submitted allegations regarding the persecution of the Achi Tribe in Paraguay, which included complaints of murder, torture, the withholding of medical attention and medicines during epidemics, inhuman conditions of work, the sale of children and acts aimed at the destruction of culture.

Decision: Paraguay did not respond to the request for information. Therefore, the Commission presumed the facts to be established and consequently found violations of civil and political rights, but also of the right to the protection of the family, the right to the preservation of health and well-being, the right to work and fair remuneration and the right to leisure time.

Jorge Odir Miranda Cortez et al. v. El Salvador³⁴

Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000)

Keywords: American Convention – right to health – Protocol of San Salvador – interpretation

Facts: The petitioners were people living with HIV/AIDS. They alleged that the failure of the Government of El Salvador to provide them with triple therapy medication violated, *inter alia*, their rights to life (Article 4), freedom from inhuman treatment (Article 5), equal protection (Article 24) and judicial protection (Article 25), as well as their economic, social and cultural rights (Article 26) under the American Convention on Human Rights. They also alleged that this omission by the State constituted a violation of the right to health guaranteed by Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

Decision: The Inter-American Commission on Human Rights ruled that the case was *admissible* with respect to Article 26 of the Convention, which obliges States to take steps to progressively realise the rights implicit in the economic, social and cultural standards enshrined in the Charter of the Organisation of American States. The Commission stated that, while it was not competent to determine violations of Article 10 (the right to health) of the Protocol,³⁵ it would use this rights provision and the other economic, social and cultural rights provisions of the Protocol for interpretive purposes in order to define more precisely the guarantees under Article 26 of the Convention.

Yanomami Indians v. Brazil³⁶

Inter-American Commission on Human Rights, Case 7615 (1984)

Keywords: indigenous peoples – health rights – cultural rights – land and property rights – positive obligations

Facts: As a result of the Brazilian Government’s sanctioning of the exploitation of the Amazon by means of a road-building programme, the Yanomami Indians were displaced from their ancestral lands and

33 For the full text of the decision: <http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/77sec2part3/case1802.html>

34 For the full text: <http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/ElSalvador12.249.htm>

35 According to Article 19(5) of the Protocol, the Commission and the Inter-American Court of Human Rights only have jurisdiction to consider claims with respect to Article 8 (trade union rights) and Article 13 (right to education) of the Protocol.

36 For the full text of the decision: http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/1984_85/res1285.html

exposed to epidemics of diseases, including influenza, tuberculosis, measles and others. They argued that the Government had not taken adequate action to address these health crises.

Decision: The failure of the Brazilian Government to fulfil its positive obligations to provide the Yanomami Indians with a park for the protection of their heritage or to protect them from disease and ill health amounted to, *inter alia*, a violation of their right to residence and movement and the right to the preservation of health and to well-being as recognised in Articles VIII and XI of the American Declaration of the Rights and Duties of Man. The Inter-American Commission on Human Rights recommended that, among other steps, “the Government of Brazil continue to take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases”.

3. NATIONAL DECISIONS

Argentina

Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A. Amparo

Cordoba City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial Court of First Instance), 8 Apr. 2002³⁷

Facts: The water supply of a group of low-income and indigent families was disconnected by a water service company due to non-payment. The families sued the water service company, arguing that the disconnection was illegal, that the company had failed to comply with its regulatory obligation to provide 50 litres of water per day (which was to be supplied regardless of payment) and that even that minimum supply obligation should be increased to a daily amount of 200 litres per family.

Decision: The Court held that the company had the right to ‘reduce’ (but not to cut) the provision of drinking water to non-payers. The judge held that the right to have access to the provision of drinking water affects the health and physical integrity of individuals since the lack of water has many implications for the health of people, especially low-income people. On this basis, the Court decided that the regulatory provision allowing the company to reduce the water to a minimum of 50 litres per day per household was clearly insufficient to meet the health and hygiene requirements of a standard family and required the company to provide a minimum of 200 litres per household.

The Court also held that, on the basis of provisions of the Cordoba Constitution and provincial law, it is “incontestable that the Provincial State is responsible for providing potable water services to all citizens, because [this] is an essential service”. Furthermore, were the State to fail to provide adequate public utilities at the required quality and quantity, at low cost and at regulated tariffs, taking into account the situation of the less well off, this would, *inter alia*, violate section 42 of the Constitution of Argentina.

The Court confirmed that the ‘public service’ (essential) nature of the provision of drinking water is not affected by the fact that it is provided by a private company rather than by the State. In this regard, the Court held that, whenever an activity is classified as a ‘public service’, it is because the satisfaction

37 This is a paraphrased version of the judgment in this case.

of basic needs of the individuals are involved and that this objective does not change if the State delegates the responsibility to the private actor. The Court emphasised that the purpose of the concession of a 'public service', as well as the justification of such a service is the 'public interest' and never the interest of the concession company.

Defensoria de Menores Nro 3 v. Poder Ejecutivo Municipal

Agreement 5, Superior Justice Court. Neuquen, 2 Mar. 1999

Keywords: right to water – children's rights – health rights

Facts: The case was filed by the children's public defender of the province of Neuquen on behalf of the children of the rural colony of Valentina Norte who were drinking water polluted with hydrocarbons.

Decision: The Superior Justice Court upheld the decision of the Court of Appeal, which required the state government to provide 100 litres of drinkable water per day for each individual member of the families living in the colony, as well as means so that the less well off might store the water in safe conditions. The Court directed that the order be implemented within 48 hours and continue until such time as a definite solution to the contamination of underground water had been found and implemented. The Court also specified that water should be provided to all children and their families irrespective of their legal entitlement to reside in the colony. As well as relying on the provisions of the Argentine Constitution, the Superior Court based part of its arguments on the provisions of the right to health in the Convention on the Rights of the Child and on the general principles of *pro homine* and *erga omnes*.

Viceconti v. Ministry of Health and Social Welfare³⁸

Poder Judicial de la Nación, Causa no. 31.777/96, 2 June 1998

Keywords: health rights – positive obligations – domestic application of international law

Facts: The plaintiff and the national ombudsman filed an action seeking protection of the right to health of people living in areas affected by haemorrhagic fever. They requested the Court to order the Argentine Government to take protective measures against the fever, including producing the Candid 1 vaccine and improving the ecological system that was facilitating the spread of the disease.

Decision: The Federal Court of Appeals found that any individual may bring complaints concerning the right to health because of the incorporation into the Constitution of international treaties referring to the right. The incorporated treaties include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. The Court also noted that the Constitution should be interpreted as consistently as possible with its preambular objectives of social justice and the promotion of the general welfare. The Court held that the Government was legally obliged to intervene to provide health care when the health of individuals might not be guaranteed either by themselves or by the private sector. It ordered the State to manufacture the vaccine and to comply strictly and without delay with the schedule that had already been designed for such purposes by the Ministry of Health. The Court subsequently issued additional orders for the execution of the judgment.

³⁸ For the full text: http://69.59.138.36/CaseLawDocs/79D_S_sentencia%202.6.98%20en%20ingl%Egs.doc

Bangladesh

*ASK v. Government of Bangladesh*³⁹

Supreme Court of Bangladesh, Writ No. 3034 of 1999

Keywords: housing rights and forced evictions – directive principles – negative obligations – right to livelihood

Facts: The inhabitants of a large number of *basties* (informal settlements) in Dhaka City were evicted without notice, and bulldozers were used to demolish their homes. Two inhabitants and three non-governmental organisations lodged a complaint.

Decision: Referring to *Olga Tellis v. BMC* (a Supreme Court of India decision; *see below*), the Supreme Court found that the right to livelihood may be derived from fundamental constitutional rights, including the rights to life, respect for dignity and equal protection of the law. The Court noted that the right to livelihood of the inhabitants had been severely impacted by the evictions. The Court held that the State must direct its policy towards ensuring the provision of the basic necessities of life, including shelter, a Directive Principle enshrined in the Constitution (Article 15). While such Directive Principles are not judicially enforceable, the Court held that the right to life included the right not to be deprived of a livelihood and shelter. The Court ordered the Government to develop master guidelines or pilot projects for the resettlement of the slum-dwellers. Any plan to evict slum-dwellers should provide for evictions to occur in phases and according to a person's ability to find alternative accommodation. The Court directed that reasonable time should be provided before the eviction.

Brazil

Bill of Review 0208625-3

Special Jurisdiction Appellate Court, Paraná, August 2002

Keywords: right to water – health rights – compensation

Facts: The water supply of Mr Marques, a resident of Londrina, Paraná, was disconnected. He applied for an injunction directing reconnection during legal proceedings.

Decision: The apex Court of Paraná determined that the water supply should be immediately re-established. The decision was based on the petitioner's constitutional, human and consumer rights. The Court took into consideration the vulnerability of one of the residents of the house, who was sick. It found that such a situation must prevail over discussions concerning the legality of discontinuing the water supply. Applying the Consumers' Defence Code, Brazilian jurisprudence considers it illegal to interrupt the water supply even if the consumer has defaulted. The Code forbids exposure of the user to humiliating situations. Compensation was awarded since a basic service must be continuously applied, and, where it is not, the consumer has the right to recovery.

³⁹ For more on this case, *see* Centre on Housing Rights and Evictions and Asian Coalition for Housing Rights, *We Didn't Stand a Chance: Forced Evictions in Bangladesh* (Geneva: Centre on Housing Rights and Evictions, 2001), <http://www.cohre.org>

Bulgaria

*ERRC v. Ministry of Education, Sofia Municipality and 103rd Secondary School of Sofia*⁴⁰

Sofia District Court, Case 11630/2004, decided on 25 Oct. 2005

Keywords: discrimination – education rights – Roma

Facts: The case was brought by the European Roma Rights Centre, which challenged the failure of the Bulgarian authorities to terminate the conditions of racially segregated education of Romani children attending a ghetto school, School 103. The action sought to ensure that the Romani children have equal access to education and equal treatment in education. The Centre claimed that the fact that 100 percent of the student body of school 103 was Romani constituted segregation on racial or ethnic grounds in educational institutions. This was in contravention of Article 29 of the Protection against Discrimination Act 2003. This law imposes a positive obligation on the authorities to take measures to prevent and eliminate discrimination. The Centre claimed, further, that action and inaction on the part of the Bulgarian authorities, including substandard material conditions in the school, lower expectations of the students' performance, lack of training for teachers working with bilingual children and lack of supervision over school attendance, were in violation of the rights to equal education (equal treatment regarding education) and to an integrated environment of the children.

Decision: The Sofia District Court found in favour of the Centre on both aspects of the claim. With regard to the second aspect, the action and inaction of the authorities, the Court found that the poor material conditions in school 103, the low educational results of the children and the failure of the school authorities to exert supervision over truancy were manifestations of unequal and degrading treatment of the children in violation of the prohibition on racial segregation enshrined in the Protection against Discrimination Act. Regardless of the fact that national standard educational requirements were applicable to the school, the available evidence indicating that the Romani children were unable to meet these requirements in a manner comparable to that of children in other schools was sufficient to prove a violation of the right of the Romani children to equal and integrated education. The Court thus found that the Bulgarian Ministry of Education, the Sofia municipality and school 103 of Sofia had violated the prohibition on racial segregation and unequal treatment set out in Bulgarian and international law.⁴¹

Sevda Nanova v. VALI Ltd

Sofia District Court, Case No. 1969/2004, 23 July 2004

Keywords: discrimination – access to services – Roma rights

Facts: An employee of the defendant company, which owned a clothing shop in Sofia, refused to provide services to a Roma woman and banned her from the company's premises. In doing so, the employee threatened the complainant with violence and repeatedly resorted to extreme verbal abuse with respect to her Romani origin.⁴²

⁴⁰ A copy of the decision is available from quarterly@cohre.org

⁴¹ Case note adapted from European Roma Rights Centre, 'Desegregation Court Victory: ERRC Prevails in Court against Bulgarian Ministry of Education on School Segregation of Roma', 26 Oct. 2005, www.errc.org (accessed 1 Jan. 2006).

⁴² 'First Court Victory for Roma Based on the New Bulgarian Anti-Discrimination Act', *Social Rights Bulgaria*, 26 July 2004, <http://socialrights.org/spip/article685.html>

Decision: The Court found the company guilty of direct discrimination based on ethnic origin in contravention of the Bulgarian Protection against Discrimination Act, which prohibits discrimination by public and private parties in all fields of public life, including in the provision of services. The Court awarded compensation to the complainant on account of the non-pecuniary damages suffered.

Rumen Grigorov v. Sofia Electric Company

Sofia District Court, 19 Aug. 2004

Keywords: *discrimination – access to services – Roma rights*

Facts: A breakdown in the power grid in the segregated Romani neighbourhood in Sofia cut off the power supply to more than 100 Romani families. The provider refused to repair the network, claiming that many of the affected consumers had unpaid bills to the company. However, more than 30 Romani families with no outstanding bills were also denied restoration of their power supply. The plaintiffs argued that such actions amounted to a collective sanction imposed on debtors, as well as non-debtors, and that they were discriminatory because they were imposed on residents of a Romani neighbourhood.

Decision: The Court found that the failure of Sofia Electric Company to repair the electricity grid for about a month, as a result of which the consumers from the Romani neighbourhood who had valid contracts with the company were deprived of electricity, constituted unfavourable and discriminatory treatment. The Court judged that the company failed to justify the need to discontinue the electricity in the Fakulteta neighbourhood for a period longer than 48 hours, the maximum period for which, according to the Law on Electricity Supplies, electricity may be interrupted. The Court ordered the respondent company to provide the plaintiffs adequate access to and control of the electricity metre and not adopt such practices in the future.

Canada

Eldridge v. British Columbia (Attorney General)⁴³

Supreme Court of Canada [1997] 2 S.C.R. 624

Keywords: *equality and non-discrimination – people with disabilities – obligation to provide*

Facts: The appellants sought a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violated their right to the equal protection and equal benefit of the law without discrimination (section 15(1) of the Canadian Charter of Rights and Freedoms).

Decision: The Supreme Court of Canada found that the failure to provide sign language interpretation to deaf patients in medical institutions deprived them of their ability to “benefit equally from services offered to the general public”. When the provincial government sought to justify this failure on the basis that it had insufficient resources, the Court confirmed the longstanding position in Canadian constitutional rights jurisprudence that “financial considerations alone may not justify Charter infringements”. The Court granted a declaration order directing the government of British Columbia to rectify the constitutional violations in the system.

⁴³ For the full text of the decision: <http://www.canlii.org/ca/cas/scc/1997/1997scc89.html>

Kearney & Ors v. Bramlea Ltd & Ors

Ontario Board of Inquiry (No. 2) (1998), 34 CHRR D/1

Keywords: equality and non-discrimination – women’s rights – housing rights and forced evictions – race and discrimination

Facts: The applications of three different women to rent apartments were rejected by corporate landlords. Each landlord used minimum-income criteria to vet applications (e.g., rental payments should not exceed a percentage of income, for example, 30 percent). Since landlords had fixed rents, this requirement resulted in excluding low-income persons.

Decision: The Board of Inquiry found that the minimum income criteria constituted indirect discrimination. The rule adversely affected women, racial minorities, younger people and those receiving social security. These groups were more likely to be poor and therefore disadvantaged by the rule. Arguments that the rule was necessary for business profitability were dismissed — there was no evidence that those paying in excess of 30 percent of income on rent would be more likely to default on their rental payments.

Colombia

Decision T-170/03 [Mora v. Bogotá District Education Secretary & Ors]

Colombian Constitutional Court, Decision T-170/03, 28 Feb. 2003

Keywords: education rights – positive obligations

Facts: A 5-year-old child in a low-income family was placed in a public school located in a neighbourhood that was not the neighbourhood in which her family lived. Her family alleged a violation of the right to education.

Decision: The Court ordered the Government to relocate the girl to a school close to her home, stating that, if the right to education of the child is affected because of quota restrictions within the schools near her home, then the guarantee of this right is not effective. The quota system must take account of social and economic factors. Quota assignments may not be made in a mechanistic way merely ‘theoretically’ to fulfil the obligation to provide education to the population, but must permit effective access to education. In this case, the system did not take into account the mother’s lack of income – there were transport costs in sending the child to the school – and the time required to bring her daughter to the assigned school.

Ecuador

*Mendoza & Ors v. Minister of Public Health and the Director of the National AIDS-HIV-STI Programme*⁴⁴

Tribunal Constitucional, 3ra. Sala, Ecuador, Resolución No. 0749-2003-RA, 28 Jan. 2004

Keywords: health rights – justiciability – people living with HIV/AIDS

Facts: The public hospital where the applicants (persons living with HIV/AIDS) were receiving treatment stopped providing them with all three drugs of the required triple anti-retroviral therapy. They filed a constitutional *amparo* demanding the immediate restitution of such provision and the performance of the medical tests necessary to update their medical prescriptions. Their writ alleged violations of, *inter alia*, their constitutional right to health and the constitutional guarantee that public services for medical attention shall be free of charge for those persons who need it.

Decision: The Court ruled that the State must take precautions to safeguard the right of Ecuadorians to health and that the right to health, without prejudice to its autonomy, also forms part of the right to life. The right to health grants citizens the power to demand that the State not only adopt policies, plans and programmes with regard to general health, but also obliges the State to draw up regulations, carry out research and establish public policies by establishing appropriate bodies and making them available to the population. The Court found that there had been an omission on the part of the Ministry of Public Health in that it had not provided an immediate, diligent and effective solution, as was its duty, and that this caused serious damage to the quality of life of those suffering from HIV/AIDS. This omission violated rights guaranteed by the Constitution and by international instruments ratified by Ecuador and incorporated into its domestic legislation. These rights include ‘positive’ social rights — immediately enforceable legal rights that are binding upon the authorities, which have corresponding legal obligations. The Court concluded that the right to health was an economic right, directly enforceable by the plaintiffs and that the Ministry’s omission violated the plaintiffs’ fundamental rights to life and to health.

Finland⁴⁵

KKO 1997: 141 (Employment Act Case)

Yearbook of the Supreme Court, 1997, No. 141 (Supreme Court of Finland)

Keywords: right to work – obligation to provide – compensation

Facts: A municipality failed to comply with its legislative duty to arrange an opportunity to work for six months for a long-term unemployed person who was seeking a job.

Decision: The Supreme Court held that the municipality had failed to satisfy its obligations under the Employment Act by failing to arrange an opportunity to work for six months for a long-term unemployed person when other efforts to employ the person in question had failed. The Court held that obligations of municipalities extended beyond the mere promotion of general employment to an explicit guarantee to a person qualifying as a long-term unemployed person under the Employment Act to an

⁴⁴ The full text of the decision is available through the COHRE ESC Rights Litigation Programme.

⁴⁵ English summaries of these decisions from Finland may be found at www.nordichumanrights.net/tema/tema3/caselaw/ (The full Finnish text of the decisions may be accessed at www.finlex.fi).

individual right to an arranged job. Social assistance was not an adequate alternative, and the complainant was entitled to compensation from the municipality.

Case No. 598/225 (Child-Care Services Case)

Helsinki Court of Appeals, 28 Oct. 1999

Keywords: family rights – right to work and labour rights – obligation to provide – right to social services – compensation

Facts: One parent in a household was unable to work for a few weeks because of a delay by the municipality in arranging child-care services for their two children.

Decision: The Helsinki Court of Appeals held that parents have a subjective (immediate) right to place their children in municipal daycare until the children reach the age of compulsory education and begin school. The Court noted that it was stated both in the Constitution and in legislation that the public authorities shall guarantee to everyone adequate social, health and medical services and shall support families and others responsible for child-care so that they have the ability to ensure the well-being and personal development of the child. Therefore the city was responsible for the damage it caused to the parent as a result of its delay in arranging daycare.

Germany

Numerus Clausus I Case

German Constitutional Court (1972), 33 BverfGE 303

Keywords: education rights – obligation to provide – equality and non-discrimination

Facts: A numerical limit on admission to university had been imposed by several universities. A complaint was made by students who failed to gain entry to medical school. It was claimed that the criteria used to select students were arbitrary and that there had been a violation of the right of the students to choose where they were to be educated and their occupation (Article 12(1)), as well as their right to equality.

Decision: The Court held that the State was required to prove that the number of spaces available was the maximum possible and must cease using arbitrary criteria for selection. The Court declared that absolute restrictions on admission are permissible only if they are completely necessary, if the available educational and training capacity has been exhausted and if the choice and distribution of candidates take place fairly in accordance with objective criteria. The Court explicitly refused to rule on the issue of whether the State was under a constitutional mandate to provide sufficient educational places for all courses of study, which might form the basis of an enforceable claim for an individual.

Hungary

The Benefits Case

Constitutional Court of Hungary, Decision No. 43/1995

Keywords: social security rights – progressive realisation – maximum available resources – children’s rights – women’s rights

Facts: The Economic Stabilisation Act limited certain maternity and child welfare benefits to those persons who were in ‘need’. The benefits had previously been available regardless of recipients’ financial resources. The complainants alleged that the new legislation violated their constitutional right to social security.

Decision: The Court held that entitlement to the benefits in question might legitimately be changed from an unconditional right to a need or means-based right. However, the Court stated that the principle of legal certainty and the fact that individuals and families relied on such benefits in undertaking their financial planning had led to the development of ‘acquired rights’ to the welfare benefits. The substantial nature of the changes enacted in the legislation violated these acquired rights, and the Court stated that such welfare benefits must not be altered rapidly or without special reason and sufficient justification. The Court held that the Government has discretion with regard to achieving the constitutional right to social security. However, although the right to social security does not mean a guaranteed income or that living standards may not decline as a result of economic conditions, welfare benefits may not be reduced to below a minimum threshold.

India

*Shantistar Builders v. Narayan Khimatal Tomtame*⁴⁶

Supreme Court of India, Civil Appeal No. 2598/1989, 31 Jan. 1990

Keywords: housing rights – right to life – integrated approach

Facts: Under sections 20 and 21 of the Urban Land Ceiling and Regulation Act, 1976, the state government exempted certain excess lands from the provisions of this law on the condition that the land be used by the builders for the purpose of providing housing for the ‘weaker sections of society’. It was alleged that the builders had not done so.

Decision: The Court stated that the “[b]asic needs of man have traditionally been accepted to [be] the three — food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in”. The Court iterated that shelter for a human being has to be a suitable accommodation that would allow him to grow and develop in every aspect — physical, mental and intellectual. A reasonable residence is an indispensable necessity for the fulfilment of the constitutional goal in the matter of the development of man and should be taken as included in ‘life’ under Article 21. The Court ordered, *inter alia*, the builders not to make any allotment of flats until the claim of the complainants (who belonged to the ‘weaker sections’) were scrutinised and the allotment of accommodation for such number of persons as were found to belong to the ‘weaker sections’ was provided.

⁴⁶ For a full text of the decision: <http://www.elaw.org/resources/text.asp?id=1064>

Orissa Starvation Deaths Proceedings⁴⁷

National Human Rights Commission of India, Case No. 37/3/97-LD, 17 Jan. 2003

Keywords: right to food — directive principles – State obligations – integrated approach

Facts: This decision was part of an ongoing series of hearings by the National Human Rights Commission of India on the state of Orissa's response to starvation deaths. The Commission considered the petitioner's argument that the Relief Manuals and Codes of India, which govern relief administration, violated the right to food, which is an integral part of the right to life as enshrined in the Constitution of India (Article 21). This interpretation was based on the assertion that 'beneficiaries' of relief are treated as recipients of state charity rather than as claim-holders.

Decision: The Commission agreed with the petitioner's interpretation, holding that, when the right to life is read with the requirements set out in Article 39(a) of the Constitution (a Directive Principle that requires the State to direct its policy towards upholding its citizens' right to an adequate means to livelihood) and in Article 47 (which sets out the State's duty to raise the level of nutrition and standard of living of its people as a primary responsibility), the right to food is clearly a guaranteed, enforceable constitutional right. The Commission declared that the requirements of the Constitution are consistent with those set out in Article 11 of the International Covenant on Economic, Social and Cultural Rights. Furthermore, the right to food implies the right to food at appropriate nutritional levels. It also implies that the quantum of relief to those in distress must meet those levels in order to ensure that the right is actually secured.

People's Union For Civil Liberties v. Union of India & Ors

Supreme Court of India, 2001, Unreported, 2 May 2003.

Keywords: food rights – positive obligations – right to life

Facts: Starvation deaths had occurred in Rajasthan despite the stocks of excess grain kept for 'official' times of famine. Various schemes throughout India for food distribution were also not functioning. In 2001, the People's Union for Civil Liberties petitioned the Court for enforcement of the schemes and the Famine Code. The Union based their arguments on the right to food, deriving it from the right to life.

Decision: The Court, noting the right to life, stated: "Would the very existence of life of those families which are below the poverty line not come under danger for want of appropriate schemes and implementation". They found systematic failure by the Government to implement and resource various food schemes. The Court ordered that: (a) the Famine Code be implemented for three months, (b) grain allocations for the food for work scheme be doubled (from 5 to 10 million tonnes) and increased financial support for schemes, (c) ration shop licencees must stay open and provide the grain to families below the poverty line at the set price, (d) the government must publicise the rights of such families to grain to ensure that all eligible families are covered, (e) all individuals without means of support (older persons, widows, disabled adults) be granted an Antyodaya Anna Yozana ration card for free grain, and (f) state governments progressively implement the midday meal scheme in schools.

⁴⁷ For a full text of the decision: <http://nhrc.nic.in/impdirections.htm#37/3/97-LD>

Olga Tellis v. Bombay Municipality Corporation⁴⁸

Supreme Court of India [1985] 2 Supp SCR 51 (India), (1987) LRC (Const) 351

Keywords: housing – right to life – adequate standard of living – right to livelihood – integrated approach

Facts: The state of Maharashtra and the Bombay municipal council in 1981 moved to evict all pavement- and slum-dwellers from Bombay city. The petition claimed that this was a violation of the pavement-dwellers' right to livelihood, which is included in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law.

Decision: The Court held that the constitutionally enshrined right to life encompasses the right to livelihood. This conclusion is supported by constitutional Directive Principles concerning the adequate means of livelihood and work. It was held that the authorities' action amounted to a deprivation of the citizens' right to livelihood because they required housing for their livelihoods in order to secure their right to life. But the Court also held that deprivation of the right to livelihood might occur if there was a just and fair procedure undertaken according to law. The action must be reasonable, and the persons affected must be afforded an opportunity of being heard. The Court found that this condition was satisfied by the Supreme Court proceedings. The Court held that there was no right to an alternative site. Nonetheless, it stated that the state government must hold to its assurances to give alternative sites to those with 1976 census cards and to those in slums for 20-years duration. Furthermore, high priority should be given to resettlement for other residents. Finally, the Court ordered the evictions to be delayed until one month after the end of the monsoon season to minimise the hardships caused by the evictions.

Paschim Banga Khet Mazdoor Samity v. State of West Bengal⁴⁹

Supreme Court of India (1996) 4 SCC 37

Keywords: right to life – health rights – emergency treatment

Facts: The petitioner sustained serious injuries after falling off a train. He was refused treatment at six successive state hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed.

Decision: The Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person and that preservation of human life is of paramount importance. This obligation on the State stands irrespective of constraints in financial resources. The Court stated that denial of the timely medical treatment necessary to preserve human life in Government-owned hospitals is a violation of this right.

⁴⁸ For a full text of the decision: <http://www.elaw.org/resources/text.asp?ID=1104>

⁴⁹ For a full text of the decision: <http://www.lawinc.com/year/910011996/9100119960506007.htm>

Mohini Jain v. State of Karnataka

India Supreme Court (1992) 3 SCC 666

Keywords: education rights – equality and non-discrimination – economic development and poverty

Facts: The case involved a challenge to the constitutionality of the capitation fees charged by a private medical school.

Decision: The Court held that the right to education was part of the fundamental rights to life and personal liberty guaranteed by the Constitution (Article 21). The Court referred to the Preamble and the Directive Principles and stated that, without education, the fundamental freedoms in Article 19 of the Constitution might not be fully enjoyed nor might the dignity of the individual under Article 21 of the Constitution be assured. It held that the capitation fee placed education beyond the reach of the poor and that the deprivation of education amounts to an arbitrary action in violation of the constitutionally enshrined right to equality (Article 14).

Unni Krishnan, J. P. v. State of A. P. and Others⁵⁰

Supreme Court of India [1993] 4 *Law Reports of the Commonwealth* 234

Keywords: right to life – right to education

Facts: The case involved a challenge to the constitutionality of capitation fees charged by certain private professional educational facilities.

Decision: The Court held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the Directive Principle on basic education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45, which provides that the State is to endeavour to provide, within a period of 10 years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14 (Article 45). The Court ruled that there is no fundamental right to education for a professional degree that flows from Article 21. It held, however, that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 into one enforceable under the law. After reaching the age of 14, the right of children to education is subject to the limits of economic capacity and development of the State (as per Article 41).

Nigeria

Gbemre v. Shell Petroleum Development Company, the Nigerian National Petroleum Corporation & Attorney General of the Federation⁵¹

Suit No. FHC/B/C/53/05, 14 Nov. 2005

Keywords: environmental rights – multinational corporations

Facts: The case was brought by members of the Iwherekan Community in Delta State, Nigeria.

⁵⁰ For a full text of the decision: <http://www.judis.nic.in/> and <http://www.lawinc.com/year/910011993/9100119930204003.htm>

⁵¹ A copy of the order is available at: www.climatelaw.org (accessed 31 Dec. 2005).

Decision: In November 2005, the Federal High Court of Nigeria (Benin Judicial Division) held that the flaring of gas by the Shell Petroleum Development Company and the Nigerian National Petroleum Company in the course of their oil exploration and production activities violated the applicants' constitutional rights to life⁵² (including a healthy environment) and to respect for the dignity of the human person.⁵³ The Court declared that the constitutional rights to life and dignity of the human person, reinforced by provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁵⁴ "inevitably includes the right to clean, poison-free, pollution-free and healthy environment".⁵⁵ The Court also found legislation permitting the flaring of gas in Nigeria to be unconstitutional. The Court, *inter alia*, ordered the respondents to cease all gas flaring and directed the attorney-general and minister of justice to set in motion the processes necessary to amend the offending legislation. Shell and the Nigerian National Petroleum Company appealed the order, and their application for a stay of execution is currently before the courts. Since the ruling, Shell and Nigerian Petroleum continued gas flaring. On 16 December 2005, contempt of court proceedings were undertaken in the High Court against Shell's failure to halt its illegal activities.⁵⁶ The Court ruled that the contempt proceedings should be put on hold until the stay application is determined. In the interim, the defendants are obliged to comply with the High Court's order.

Latvia

*Case No. 2000-08-0109*⁵⁷

Constitutional Court of Latvia, 13 Mar. 2001

Keywords: social security rights – appropriate measures – positive obligations – domestic application of international law

Facts: It was alleged that the State's failure to take sufficient measures to ensure that all employers paid contributions for their workers into a State account as part of a State social insurance scheme amounted to a violation of the constitutional right to social security and the rights to social security (Article 9) and an adequate standard of living (Article 11) set out in the International Covenant on Economic, Social and Cultural Rights.

Decision: In its judgment, the Court referred to General Comments No. 3, on the Nature of States Parties Obligations, and No. 9, on the Domestic Application of the Covenant, of the Committee on Economic, Social and Cultural Rights and to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. The Court held that the State had discretion when it came to choosing the means by which to implement the right to social security. The Court held, however, that the State must develop an efficient system for the accomplishment of the right. It also stated that failure to collect taxes or premiums would not be a defence for failure to implement social rights. The Court held that the legislation at issue was inconsistent with the right to social security since it allowed for the possibility of non-compliance of employers to the disadvantage of employees.

52 Article 33(1) of the Constitution of Nigeria.

53 *Ibid.* Article 34(1).

54 Cap. A. 9, Vol. 1, Laws of the Federation of Nigeria, 2004. This law incorporates the African Charter on Human and Peoples' Rights into Nigerian law. Articles 4, 16 and 24 of the Charter guarantee, respectively, the right to life and integrity of the person, the right to enjoy the best attainable state of physical and mental health and the right of peoples to a generally satisfactory environment favourable to their development.

55 P. 3 of the Order.

56 Climate Justice Programme, 'Gas Flaring in Nigeria: Contempt Proceedings Start against Shell and NNPC [Nigerian National Petroleum Company]', Press Release, 16 Dec. 2005, www.climatelaw.org (accessed 31 Dec. 2005).

57 For a full text of the decision: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/08-0109\(00\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/08-0109(00).htm)

Pakistan

*Fatal Jan v. Joshua Din*⁵⁸

Supreme Court of Pakistan, PLD 1990 SC 661

Keywords: women's rights – children's rights – non-discrimination and equality – positive obligations

Decision: The fundamental constitutional right to equality allows the Government of Pakistan to make special provision for the protection of women and children. The Court found this imposed on the State a positive obligation on all State organs to take active measures to safeguard the interests of women and children.

Amber Ali v. State

Supreme Court of Pakistan, 1991 SCMR 2114

Keywords: standing – access to justice

Decision: The Islamic concept of justice is the “paramount Human right that is inviolable and inalienable”, and therefore every citizen has the right to obtain justice. This decision has facilitated public interest litigation by allowing simple and direct petitions to the Supreme Court, as well as potentially widening the scope of justiciable rights; see *Dashing Mash v. The States* PLD 1990 SC 513.

*Sheila Zima v. WAPDA*⁵⁹

Supreme Court of Pakistan, PLD 1994 SC 693

Keywords: right to life – environmental rights – participation – positive obligations – remedy

Facts: A group of residents approached the Court seeking to halt the construction of an electricity grid station in their neighbourhood by the Water and Power Development Authority. The residents cited the health hazards of electromagnetic transmissions.

Decision: Referring to the jurisprudence of the Supreme Court of India, the court held that the petitioners' claim was based on the rights to life (Article 9) and dignity (Article 14), which include the right to live in a clean environment. The Court applied the 'precautionary principle' set out in the 1992 Rio Declaration, which states that lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The Court stated that, though not 'binding', the principle was of “persuasive value and commands respect”. While the Court held that it did not have the expertise to adjudicate on the different scientific and policy arguments, it ordered the Water and Power Development Authority to introduce a public consultation procedure for all projects involving grid stations and power lines. It also ordered the establishment of a commission of scientists to examine the health risks.

⁵⁸ See Martin Lau, 'Islam and Judicial Activism: Public Address Litigation under Environmental Protection in the Islamic Republic of Pakistan' in Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996), pp. 285-302, at p. 295.

⁵⁹ *Ibid.*

The Philippines

*Minors Oppose v. Secretary of the Department of Environment and Natural Resources (DENR)*⁶⁰

33 I.L.M. (1994) 173

Keywords: health rights – environmental rights – children’s rights – future generations

Facts: An action was filed by several minors, represented by their parents, against the Department of Environment and Natural Resources to cause it to cancel existing timber licence agreements in the country and to stop issuance of new ones. It was claimed that the resultant deforestation and damage to the environment violated constitutional rights to a balanced and healthful environment and to health (section 15). The petitioners asserted that they represented others of their generation, as well as generations yet unborn.

Decision: The Court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations because “the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come”.

Romania

*Decision on the unconstitutionality of the provisions under Article 6 (1, e) of Law no. 1/1991 concerning the social assistance of the unemployed and their professional reinstatement, republished*⁶¹

Constitutional Court of Romania, Decision No. 81, 19 May 1998

Keywords: social security rights – equality

Facts: The case involved a challenge to legislation providing that unemployment benefits should not be granted to graduates of upper secondary schools attending higher education. The complainant alleged that this was, *inter alia*, a violation of the constitutional principle of equality of rights and the right to unemployment benefits.

Decision: The Court held the legislation to be unconstitutional, stating that the right to receive unemployment benefits is not only a legal right set out in legislation, but a constitutional one as well (Article 43(2)). Referring to Article 14 of the European Convention on Human Rights and employing the justification for differences in treatment adopted by the European Court of Human Rights in *Merck v. Belgium*, the Court held that, if an unemployed person attends higher education, this does not constitute an ‘objective and sensible justification’ for depriving the person of his constitutional right to receive unemployment benefits. The action thus violated the constitutional principle of equality under the law and before the public authorities, which applies to all rights and liberties guaranteed by the Constitution (Article 16(1) and in law. The Court held that the exercise of a constitutional right (*e.g.*, the right to education) may not constitute a justification for the deprivation of the exercise of another constitutional right (*e.g.*, the unemployment right).

60 For the full text of the decision: <http://www.elaw.org/resources/text.asp?ID=278>

61 For the full text of the decision: http://www.ccr.ro/decisions/pdf/en/1998/Do81_98.pdf

South Africa

*Gory v. Kolver NO & Ors*⁶²

South Africa High Court, Case No. 4928/2005 (31 Mar. 2006)

Keywords: gay rights – discrimination – inheritance rights

Facts: Section 1(1) of the Intestate Succession Act 81 of 1987 provides that, where a person dies intestate, their surviving ‘spouse’ shall inherit the intestate estate. The applicant (the survivor of a same-sex partnership) sought, *inter alia*, to have the words “or partner in a same-sex partnership in which the partners have undertaken reciprocal duties of support” read into the section, after the word ‘spouse’.

Decision: Judge Hartzenburg in the Pretoria High Court declared section 1(1) to be inconsistent with the Constitution of South Africa. Referring to previous judicial decisions holding that same-sex life partnerships deserve the same considerations as heterosexual marriages, the Court held that the applicant had been discriminated against on the ground of sexual orientation and granted the relief sought. The order only has prospective effect. In November 2006, this decision was upheld by the Constitutional Court who made minor changes to the remedy granted by Hartzenburg J. In particular, the Court altered Hartzenburg J’s decision that the order of constitutional invalidity was to have no effect on the validity of acts performed in respect of the administration of an intestate estate that has been finally wound up by date of his order. Instead the Constitutional Court held that the order should in the main operate retrospectively, but with limitations so as to reduce the risk of disruption in the administration of deceased estates and to protect the position of bona fide third parties.

Governing Body of Mikro Primary School & Anor. v. Western Cape Minister of Education & Ors

South African Supreme Court of Appeal, Case No. 140/05 (27 June 2005)

Keywords: right to receive education in an official language of one’s choice – children’s rights – interpretation

Facts: The governing body of Mikro primary school, an Afrikaans language public school, brought an action in the Cape High Court against the provincial minister of education and the head of education at the Western Cape Education Department. The head of department had issued a directive instructing the governing body to admit certain learners and teach them in English. Prior to the directive, the governing body had refused a request from the Department of Education to change the language policy of the school so as to convert it into a parallel medium school (e.g., a school in which instruction was given in both Afrikaans and English). The governing body sought an order setting aside the directive and the decision on appeal, as well as for ancillary relief. This was granted by the High Court.⁶³ The minister and head of department submitted, *inter alia*, that section 29(2) of the Constitution should be interpreted to mean that everyone had the right to receive education in the official language of her or his choice at each and every public educational institution where this was reasonably practicable.⁶⁴ This case note focuses solely on the Court’s findings with regard to section 29(2).

⁶² For a full text of the decision: <http://www.constitutionalcourt.org.za>

⁶³ *Governing Body of Mikro Primary School v. Western Cape Minister of Education* [2005] 2 All SA 37 (C).

⁶⁴ “Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity; practicability; and the need to redress the results of past racially discriminatory laws and practices.”

Decision: The Supreme Court of Appeal held that the right of everyone to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable is a right against the State.⁶⁵ To ensure effective access to and implementation of this right, the State must, in terms of section 29(2), consider all reasonable educational alternatives, including single-medium institutions (i.e., a single language). Section 29(2) therefore empowers the State to ensure the effective implementation of this right by providing single-medium educational institutions. The Court held that this was a clear indication that, in terms of section 29(2), the constitutional right to receive education in an official language at a public educational institution was not a right to receive such education at each and every public educational institution, subject only to it being reasonably practicable to do so. Even if it was reasonably practicable to provide such education at the Mikro primary school, the children did not have a constitutional right to receive education in English at that school. The Court confirmed the High Court's order that, in light of the fact that the children had a right to be educated in English, the children presently attending Mikro primary school were to be sent to another suitable school or schools on a permanent basis as soon as was reasonably practicable. The placement of the children at another suitable school was to be done taking into account the best interests of the children. Until the children were permanently placed, they were to continue to attend Mikro primary school and receive instruction in English.

Port Elizabeth Municipality v. Various Occupiers

Constitutional Court, 2004 (12) BCLR 1268 (CC)

Keywords: housing rights – evictions – right to alternative land or accommodation

Facts: The occupiers resided on privately owned land within the municipality. The land was zoned for residential purposes. Most of the occupiers had come there after being evicted from other land. They had not applied to the municipality for housing. Responding to a neighbourhood petition, the signatories of which included the owners of the property, the municipality sought an eviction order before the High Court. The occupiers indicated they were willing to leave the property if they were given reasonable notice and provided with suitable alternative land to which they might move. They refused the municipality's offer that they move to a particular area, stating that that area was crime ridden, unsavoury and overcrowded. Furthermore, they feared they would have no security of occupation there and find themselves liable to yet further eviction. The municipality contended, *inter alia*, that if alternative land was made available to the occupiers, they would effectively be 'queue-jumping', disrupting the established housing programme and forcing the municipality to grant them preferential treatment.

Decision: The Court stated that section 26(3) of the South African Constitution expressly acknowledges that eviction of people living in informal settlements may take place, even if it results in loss of home. However, in making its decision whether or not to grant an eviction order in terms of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998,⁶⁶ which provides that a court may grant such an order 'if it is just and equitable to do so', a court must take account of all relevant circumstances, including (a) the manner in which occupation was effected,⁶⁷ (b) its duration,⁶⁸ and (c) the availability of suitable alternative accommodation or land.⁶⁹

65 Section 7(2) of the Constitution states that the "State must respect, protect, promote and fulfil the rights in the Bill of Rights."

66 S.6 of the law provides for circumstances in which a municipality may apply to evict unlawful occupiers.

67 Section 6(3)(a) of the law.

68 Section 6(3)(b) of the law.

69 Section 6(3)(c) of the law.

With regard to (a), the Court referred expressly to ‘queue-jumpers’ stating that “persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with a view to disrupting the organised housing programme and placing themselves at the front of the queue”. The Court stated that, on the facts, the occupiers were not ‘queue jumpers’. In considering (b), the Court stated that a court will be far more cautious in evicting well-settled families with strong local ties than persons who have recently moved on to land and erected their shelters there. With regard to (c), the Court stated that there is no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available: “In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”

The Court stated further that, while the existence of a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost-effective way would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable, it falls short of being determinative of whether and under what conditions an actual eviction order should be made in a particular case. Given the special nature of the competing interests involved in eviction proceedings launched under section 6 of the law, the Court said that, absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions and, where appropriate, mediation have not been attempted. In appropriate circumstances, the courts should themselves order that mediation be tried. The Court concluded that, in light of the circumstances of this case, it was not just and equitable to order the eviction of the occupiers.

Prinsloo & Anor. v. Ndebele-Ndzundza Community & Ors

Supreme Court of Appeal of South Africa, Case No. 106/2004, 31 May 2005

Keywords: restitution – dispossession – compensation – land rights

Facts: The matter at issue was whether the claimants had established their entitlement to restitution of a right in land, in this case, portions of a Transvaal farm, as contemplated by section 2 of the Restitution of Land Rights Act 22 of 1994. The action was an appeal against a decision by the Land Claims Court in favour of the claimants, members of the Ndebele-Ndzundza tribe, whose ancestral lands had been seized in 1883 and distributed to white farmers. The tribe was then scattered by the enforcement of a system of indentured labour on white farms. In the late 19th century, one of the claimants’ predecessors and some of his followers settled on some of this ancestral land, including the farm at issue.

Decision: The Court held that, on the facts, the claimants’ predecessors constituted a group of people who had lived on and worked the farm continuously for 50 years until they were relocated to another farm in the late 1930s. Although their settlement at the new farm was initially intended to be temporary, it ended up being near permanent. Although the claimants’ predecessors were not the legal owners of the land at issue, they had held it exclusively, as a group and in common with each other, in accordance with the customs and traditions of the Ndebele-Ndzundza people. The Court held that the claimants had rights in the land in terms of the law in question in (at least) the form of a customary law interest and the rights of labour tenants and sharecroppers. The Court also held that “the fact that registered title exists neither necessarily extinguishes the rights in land that the statute contemplates, nor prevents them from arising”.⁷⁰ With

⁷⁰ Ibid. para. 36.

regard to whether the claimants were a ‘community’ within the meaning of the law in question, the Court held that the claimants’ predecessors constituted a group or part of a group the rights in land of which were derived from shared rules determining access to, use and enjoyment of land they held in common. In the Court’s view, the fact that there had been no physically forced removal did not mean that there was no ‘dispossession’. In this case, the residents had not been given any real choice: they had had to relocate to a different area and work and live in changed circumstances or remain on the farm under conditions that were significantly changed. They no longer had control or use of the land over which, for many decades, they had enjoyed unrestricted access and control.

The Court then dealt with whether section 2(2) of the law applied. Section 2(2) provides that no one shall be entitled to restitution of a right in land if just and equitable compensation calculated at the time of dispossession was received in respect of such dispossession. The ‘compensation’ at issue was the farm to which the community had been relocated. The Court remanded the issue of the application of section 2(2) to the Land Claims Court on the basis that, unlike that Court, it did not consider that compensation originally intended as temporary may never be included in the calculation of just and equitable compensation. Nor might the fact that the compensation was provided as part of a manifestly discriminatory process necessarily invalidate it for statutory purposes.

President of the Republic of South Africa & Anor. v. Modderklip Boerdery & Ors

Constitutional Court of South Africa, Case CCT 20/04, 13 May 2005

Keywords: eviction – compensation – housing rights – right to a remedy

Facts: This judgment dealt with two related matters. The first was an application for leave to appeal an eviction order granted under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 36 by the High Court against 40 000 illegal occupiers of a farm owned by Modderklip Boerdery. The second matter involved an attempt on the part of the landowner to get the State to enforce the eviction order.

Decision: While the Supreme Court of Appeal had largely based its decision on the illegal occupiers’ constitutional right of access to adequate housing and the need for the State to provide alternative land for them, the Constitutional Court primarily focused on Modderklip’s constitutional right “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent, impartial tribunal or forum”. The Court held that the obligation on the State goes further than mere provision of a legislative framework, mechanisms and institutions such as the courts and an infrastructure to facilitate the execution of court orders. The State is also obliged to take reasonable steps to ensure that “large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law”. The Court stated further that it is unreasonable for a private entity to be forced to bear the burden, which should be borne by the State, of providing the occupiers with accommodation. The circumstances of this case were extraordinary in that it was not possible to rely on mechanisms normally employed to execute evictions. The Court stated that to execute the eviction order granted in this case and evict tens of thousands of people would cause social chaos, misery and disruption. “In the circumstances of this case, it would also not be consistent with the rule of law.” The State was constitutionally obliged to take reasonable steps to ensure that Modderklip was provided with effective relief. It could have done so by expropriating the property in question or by providing other land. It had not done so and thus violated Modderklip’s right to an effective remedy. The Court upheld the award of compensation to Modderklip made by the Supreme Court of

Appeal (which had held that the State had violated the landowner's rights to equality and property) as 'appropriate relief' for violation of its constitutional rights. Such compensation would be offset against any compensation to be given were the State to expropriate the land.

Jaftha & Anor. v. Van Rooyen & Anor⁷¹

Constitutional Court of South Africa, Case No. CCT74/03, 8 Oct. 2004

Keywords: housing rights – obligation to respect

Facts: The plaintiffs alleged that legislation allowing debtors' homes to be attached and sold to satisfy petty debts, even where this might result in homelessness, violated the negative aspect of the constitutional right to have access to adequate housing (section 26).

Decision: In considering what constitutes 'adequate housing', the Court referred to international law, including the International Covenant on Economic, Social and Cultural Rights and jurisprudence of the Committee on Economic, Social and Cultural Rights. The Court emphasised that the need for the protection of security of tenure in section 26 must be viewed in light of past forced removals from land and evictions. The Court found that any measure that permits a person to be deprived of existing access to adequate housing limits the constitutional right to housing. It then proceeded to consider whether such a measure is "reasonable and justifiable in an open and democratic society based on human dignity equality and freedom" and held the legislation to be unconstitutional to the extent that it allowed execution against the homes of indigent debtors where they lose their security of tenure. The legislation was unjustifiable and might not be saved to the extent that it allowed for such executions where no countervailing considerations in favour of the creditor justify the sales in execution. The Court ordered the provision of judicial oversight over sales in execution against the immovable property, enabling a court to determine whether an execution order against immovable property is justifiable in the circumstances of the case.

Daniels v. Campbell NO and Ors⁷²

Constitutional Court of South Africa, CCT40/03, 11 Mar. 2004

Keywords: inheritance rights – property rights – women's rights – equality

Facts: At the time of the applicant's marriage to Mr Daniels, she was the tenant of a council dwelling. After her marriage, the city of Cape Town transferred the tenancy of the property into her husband's name. The property was subsequently purchased in Mr Daniels' name, Mrs Daniels having contributed to the purchase price. Mr Daniels died intestate. The applicant was then told she could not inherit from the estate because she did not qualify as a 'surviving spouse', as her marriage had not been formally solemnised in accordance with the Marriage Act. She argued that the protection afforded to spouses under the Intestate Succession Act and the Maintenance of Surviving Spouses Act should extend to her, as a spouse in a *de facto* monogamous union married according to Muslim rites.

Decision: The Constitutional Court held that the laws as interpreted were unconstitutional. The Court stated that the constitutional values of equality, tolerance and respect pointed strongly in favour of giving the word 'spouse' a broad and inclusive construction, the more so when it corresponds with the

⁷¹ For the full text of the decision: <http://www.concourt.gov.za/files/7403/7403.pdf>

⁷² For the full text of the decision: <http://www.concourt.gov.za/files/daniels/daniels.pdf>

ordinary meaning of the word. Saying that the value of non-sexism “is foundational to our constitution”, Justice Sachs pointed out that the objective of the laws was to ensure that widows received at least a child’s share instead of being precariously dependent on family benevolence. The purpose of the laws would be frustrated if widows were to be excluded from the protection the laws offer simply because the legal form of their marriage happened to accord with Muslim tradition and not the Marriage Act. The applicant was therefore a ‘spouse’ and a ‘survivor’ for the purpose of the laws.

Grootboom v. Oostenberg Municipality et al⁷³

Constitutional Court of South Africa, Case CCT 11/00, 4 Oct. 2000

Keywords: housing rights – land rights – positive obligations

Facts: Some 900 persons were evicted, and they settled on a sports field. The community approached the Court on the basis of their constitutional right to have access to adequate housing.

Decision: The Court held that the Constitution does not oblige the State to go beyond its available resources or to realise the social and economic rights contained in the Constitution immediately. The State, however, must give effect to these rights, and, in appropriate circumstances, the courts may and must enforce these obligations. The Court held that the question to be considered by the Court is whether the measures taken by the State to realise social and economic rights under the Constitution (including the right to have access to adequate housing) are reasonable. The Court stated that, for measures to qualify as ‘reasonable’, they may not leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored. If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness.

The Court held that, although the measures in this case had been statistically successful, the failure of the State housing programme to provide any form of temporary relief to those in desperate need, with no roof over their heads or living in crisis conditions, meant that the programme was not reasonable and failed to satisfy the State’s obligation to achieve the progressive realisation of these rights. The Court issued a declaratory order that required the State to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for in the State.

Residents of Bon Vista Mansions v. Southern Metropolitan Local Council⁷⁴

High Court 2001, App No. 12312 (South Africa)

Keywords: right to water – housing rights – obligation to respect

Facts: A local council disconnected the water supply to a block of flats in Johannesburg. Residents asked the High Court for an injunction ordering reconnection.

Decision: The High Court found that disconnection was a *prima facie* breach of the constitutional and legislative right to have access to sufficient water. The Council was obliged to demonstrate that the dis-

⁷³ For the full text of the decision: <http://www.concourt.gov.za/judgments/2000/grootboom.pdf>

⁷⁴ The full text of the decision is available through the COHRE ESC Rights Litigation Programme.

connection was 'fair and equitable', and this included taking ability to pay into account. The Council had not discharged this onus, and an interim order was made for reconnection of the water supply.

TAC v. Ministers of Health⁷⁵

2002 (10) BCLR 1033 (CC)

Keywords: health rights – positive obligations – remedy

Facts: The applicants sought to compel the South African Government and its relevant agencies to provide and to allow the provision of anti-retroviral drugs to all HIV-positive pregnant women to prevent woman-to-foetus HIV transmission. It was argued that the steps taken by the State to give the whole affected population access to a woman-to-foetus transmission prevention programme could not be regarded as reasonable and thus constituted a violation of the constitutional right to have access to adequate health care.

Decision: The Court stated that it is impossible to give everyone access even to a 'core' service immediately and that all that may be expected of the State is that it act reasonably to provide access to the social and economic rights identified in sections 26 and 27 on a progressive basis. The Court held that the State's policy not to make nevirapine available at hospitals and clinics other than the research and training hospitals was unreasonable and therefore fell short of meeting its obligation to devise and implement, within its available resources, a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat the woman-to-foetus transmission of HIV. The Court ordered that the Government act 'without delay' to provide nevirapine in public hospitals and clinics when this was medically indicated and to take reasonable measures to provide testing and counselling facilities at hospitals and clinics.

Khosa & Ors v. Minister of Social Development & Ors⁷⁶

Constitutional Court of South Africa, 4 Mar. 2004

Keywords: right to social security – non-citizens – older persons – children

Facts: The applicants were Mozambican citizens with permanent resident status in South Africa. They brought an action challenging legislative provisions that limited entitlement to social grants for the aged to South African citizens and would prevent children of non-South African citizens in the same position as the applicants from claiming any of the child-care grants available to South African children (regardless of the citizenship status of the children themselves). The applicants alleged that the exclusions violated the State's constitutional obligation to provide access to social security, infringed their constitutional rights to life and dignity, limited their right to equality, amounted to unfair discrimination and infringed the rights of their children.

Decision: The Court held that the Constitution gave 'everyone' the right to have access to social security – not merely citizens – and that 'everyone' would include those residing in the country legally. The Court stated that, due to their position as people who have become part of South African society and made their homes in South Africa, the exclusion of permanent residents from the legislative scheme amounted to unfair discrimination. Applying the 'reasonableness test', the Court found the scheme's exclusion

⁷⁵ For the full text of the decision: <http://www.concourt.gov.za/judgments/2002/tac.pdf>

⁷⁶ For the full text: <http://www.concourt.gov.za/files/khosa/khosa.pdf>

of permanent residents to be unreasonable, stating that the importance of providing access to social assistance to all who live permanently in South Africa, as well as the impact upon life and dignity that a denial of such access would have, far outweighed the financial and immigration considerations on which the State relied.

Switzerland

*V v. Einwohnergemeine X und Regierungsrat des Kantons Bern*⁷⁷

Swiss Federal Court, BGE/ATF 121 I 367, 27 Oct. 1995

Keywords: social security rights – non-nationals – minimum core obligation

Facts: In September 1991, three brothers illegally re-entered Switzerland. It was impossible to re-expel the brothers since the now-Czech Republic had rescinded their citizenship.

Decision: The brothers were denied social support and welfare on the basis of their illegal status. The Court determined there was an implied constitutional right to *conditions minimales d'existence* (a basic subsistence minimum). The right was not to be equated to a minimum level of income, but rather the income necessary for a dignified livelihood that prevented an undignified beggar's existence. The right may be invoked by both Swiss citizens and foreigners since it is a fundamental right. The Court found that 'positive' claims upon State expenditure that arise from this right are justiciable if they may be normatively defined and the necessary means and procedures to concretise and implement such claims are available. The Court acknowledged its lack of legal competence to determine resource allocation, but said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights. The exclusion of three non-nationals from social welfare legislation was found to be a violation of the right.

United Kingdom

*South Bucks District Council & Anor. v. Porter (FC)*⁷⁸

United Kingdom House of Lords, 1 July 2004

Keywords: housing rights – illegal occupation – Gypsies

Facts: The appellant was a 62 year old Romany gipsy-woman who, having bought a site located in the Green Belt in 1985, had lived there ever since with her husband in breach of planning control. The appeal sought to reverse the quashing of a grant of planning permission by a planning inspector for the retention of a mobile home and outbuildings on the site. The Inspector had held that there had been a material change of circumstance since previous rejections of the appellant's application for planning permission. In the reasons for his decision, the Inspector had granted weight to status of the appellant as a gipsy, the lack of availability of an alternative site for her to go to and her chronic ill-health. The last two of these had not been the case previously and, in the inspector's view, constituted special circumstances such as to override development policies. The Council alleged that the inspector had given inadequate reasons for his decision and failed to have regard to the unlawfulness of the appellant's occupation of the land. The authority's appeal against the inspector's decision failed, but that decision

⁷⁷ For the full text: <https://www.bger.ch> (in German, with summaries in French and Italian), www.escri-net.ch (English).

⁷⁸ For the full text of the decision, go to: <http://www.bailii.org/uk/cases/UKHL/2004/33.html>

was overturned by the Court of Appeal, which held (i) that the inspector had not given adequate reasons for his decision; and (ii) that he had failed to have regard to the unlawfulness of the second defendant's occupation of her land in persistent breach of planning control as a material consideration in the case. The defendants appealed to the House of Lords, contending, *inter alia*, that the unlawful occupation of the site was not material.

Decision: Reversing the decision of the Court of Appeal, the House of Lords set out the conditions necessary to sustain a reasons challenge in the planning context and ruled that the inspector's reasons were clear and ample.

With regard to whether the prior unlawful use of the site was a material consideration militating against the grant of planning permission, the Court stated that where an occupier seeks to rely upon the very fact of his continuing use of land, it must be material to recognise the unlawfulness of that use as a consideration operating to weaken his claim. Whether or not the unlawfulness was material would depend on how the hardship claim was phrased. The Court stated that if the appellant had been relying on her long period of residence to assert that her removal from the site would cause her particular hardship beyond that resulting from removal after a substantially shorter period of occupation, "[s]uch a claim would seem ... to raise issues closely analogous to those arising on an Article 8⁷⁹ claim and to require substantially the same approach to the lawfulness or otherwise of the period of occupation as the European Court of Human Rights adopted in *Chapman v United Kingdom*".⁸⁰ In this case, however, the unlawfulness of the prior occupation was of little if any materiality, as the changed circumstances relied on by the inspector related to the lack of an alternative site and the appellant's ill-health - neither

R v. East Sussex County Council ex parte Tandy

House of Lords [1998] 2 All ER 769

Keywords: education rights -- resource allocation

Facts: The appellant was a sick child unable to attend school. From 1992 onwards, her local education authority had provided five hours per week home tuition for her. Originally, the tuition had been provided pursuant to a statement of special needs because the child was mildly dyslexic. From July 1995 onwards, however, assistance had been provided under section 298 of the Education Act 1993 (now re-enacted in section 19 of the Education Act 1996). According to section 298, each local education authority was required to make arrangements for the provision of suitable full-time or part-time education at school or otherwise than at school for those children of compulsory school age who, by reason of, *inter alia*, illness, might not otherwise receive suitable education. According to section 298, "suitable education', in relation to a child ... means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have". In October 1996, the education authority advised the appellant's parents that, for financial reasons, the maximum number of hours of home tuition provided under section 298 would be reduced from five hours per week to three hours per week. The appellant applied for judicial review of that decision, claiming, *inter alia*, that, in reaching its decision to cut the number of hours, the local authority took into account an irrelevant consideration.

Decision: The House of Lords held that on a true construction of section 298, the question of what was 'suitable education' was to be determined purely with reference to educational considerations, e.g., that

⁷⁹ For the use of the term 'Gypsy' here, see n. 20 above.

⁸⁰ See above.

the education had to be ‘efficient’ and ‘suitable to [the child’s] age, ability and aptitude’ and also suitable ‘to any special educational needs he may have’, and there was nothing in section 298 to indicate that the resources available were relevant to that determination. Moreover, the fact that there were other provisions in the law that referred expressly to the efficient use of resources supported that construction in the sense that if Parliament had meant such resources to be relevant for the consideration of what constituted ‘suitable education’ it would have made that point expressly. Accordingly, there was no reason to treat the resources of a local education authority as a relevant factor in determining what constituted ‘suitable education’ for the purposes of section 298. However, if there was more than one way of providing ‘suitable education’, the education authority would be entitled to have regard to its resources in choosing between different ways of making such provision. In this case, the decision of the education authority to reduce the hours of home tuition provided to the appellant for financial reasons was unlawful.

United States of America

*Campaign for Fiscal Equity v. State of New York et al.*⁸¹

State Supreme Court of New York, 719 N.Y.S. 2d 475

Keywords: education rights – remedies

Facts: The plaintiffs (students, parents and organisations concerned with education issues) challenged New York State’s funding of New York City’s public schools. They claimed, first, that the state had failed to assure that New York City’s public schools receive adequate funding to afford their students the ‘sound basic education’ guaranteed by the education article of the New York Constitution. Second, they asserted that the state’s funding mechanisms had an adverse and disparate impact upon the city’s minority public school students (who comprised 73 percent of the state’s minority students and approximately 84 percent of the city’s public school enrolment) in violation of specific implementing regulations of title VI of the US Civil Rights Act of 1964.

Decision: In January 2001, Justice Leland DeGrasse of the State Supreme Court of New York⁸² handed down his decision in the case of *Campaign for Fiscal Equity v. State of New York et al.*⁸³ He found that the defendants’ method for funding education in New York State violated the education article of the New York Constitution because the education provided to New York City students was so deficient that it fell below the ‘constitutional floor’ set by that article. He held that the state’s actions were a substantial cause of this violation. He stated that he would not prescribe a detailed remedy at this point; instead,

81 For the full text of the decision: www.lexis.com or the COHRE ESC Rights Litigation Programme.

82 Note that New York State is unique in that its ‘Supreme Court’ is actually a trial court of universal original jurisdiction — the lowest level state court. In every other US state, the State Supreme Court is the highest court.

83 719 N.Y.S. 2d 475.

84 100 N.Y. 2d 893.

85 The state failed to devise and implement a necessary reform of the public school financing system and, on 14 February 2005, DeGrasse proposed his own solution after receiving a report from a panel of special referees. He ordered that an additional US\$ 5.6 billion in annual operating expenses be provided within four years to ensure that the city’s public school children would be given the opportunity to obtain a sound basic education. He also ordered that US\$ 9.2 billion in added funding for capital projects be provided over five years. The state appealed. On appeal, the Appellate Division, First Department upheld the decision, ordering the legislature to provide New York City schools US\$4.7 billion to US\$5.63 billion in operating aid and US\$ 9.2 billion in capital funding by 1 April 2006. The 2006 New York State Budget Agreement makes significant strides towards securing the court-ordered reforms in relation to capital funding, but budgets less than one tenth of what the courts required in terms of operating aid increases. The New York State Court of Appeals subsequently ruled that the state must spend at least \$1.93 billion more each year on New York City’s public schools, far less than \$4.7 billion set by the lower courts. In doing so, it endorsed figure set by 2004 Governor-appointed commission. The majority of the Court justified its deference to the Legislature’s education financing plans in terms of respect for the separation of powers and the fact that the elected branches of government are in a better position to determine funding needs throughout the state and priorities for the allocation of the State’s resources.

he ordered the legislature and governor to devise and implement a reform of the state's public school financing system.

The decision in relation to the education article was subsequently upheld by the Court of Appeals, in *Campaign for Fiscal Equity et al. v. State of New York et al.*⁸⁴ The Court concluded that “the Education Article requires the opportunity for a sound high school education that should prepare students for higher education, or to compete in the employment market of high school graduates” and to enable them to function productively as civic participants. The Court of Appeals modified the lower court's holding, stating that, “in the course of reforming the school finance system, a threshold task that must be performed by defendants is ascertaining, to the extent possible, the actual costs of providing a sound basic education in districts around the State”. Instead, the Court of Appeals held that the State need only ascertain the actual cost of providing a sound basic education in New York City.⁸⁵

Brown v. Board of Education⁸⁶

Brown I, 347 US 483 (1954)

Brown II, 349 US 294 (1955)

Keywords: education rights – race and discrimination – equality and non-discrimination

Facts: State laws permitted or required the segregation of white and black children in public schools. A number of black children's representatives argued that the legislation violated the constitutional requirement of equal protection of laws even where schools for black children provided equal facilities and other ‘tangible factors’.

Decision: The Supreme Court held that the case must be determined in light of the present role and importance of education and not in that of the conditions existing at the time of the drafting of the equal protection clause — the history of which was in any case inconclusive. Since education is critical for success in life, the state, where it has undertaken to provide education, must make it available on equal terms. The Court found that “separate educational facilities are inherently unequal”. Even where physical facilities and other objective factors are equal, a segregated school system denies equal educational opportunities to the minority group.

In *Brown II*, the Court remanded the cases to the District Courts to “take such proceedings and enter such orders and decrees ... as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”.

Callahan v. Carey⁸⁷

Supreme Court of New York, Cot. 18, 1979, No. 79-42582

Keywords: housing rights – homelessness persons

Facts: The case was a class-action suit on behalf of homeless men in Manhattan requesting that the city provide shelter to any man who asked for it. The action was based on provisions of the New York State Constitution and other state and municipal laws, particularly Article XVII, section 1 of the state

⁸⁶ For the full text: <http://www.findlaw.com/cascode/> (Enter the case name in the search engine.)

⁸⁷ For the full the text of the decision: http://69.59.138.36/CaseLawDocs/44D_E_CALLAHAN%20v.htm

constitution, which provides that “the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine”.

Decision: A decision was reached through negotiations. The plaintiffs and defendants entered into a consent decree requiring New York City to furnish sufficient beds to meet the needs of every homeless man applying for shelter.

Edgewood Independent School District v. Kirby⁸⁸

Texas Supreme Court, 777 S.W. 2d 391 (Tex. 1989)

Keywords: right to education – equality

Facts: The petitioners challenged the State of Texas’s school financing system, which relied on local property taxes to fund schools. They alleged that the system violated the Texas Constitution, which declares that “a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools”.

Decision: The Texas Supreme Court held that the system violated the state constitution as it did not address disparities in the ability of different districts to raise revenue and did not assure every student receives an ‘efficient’ – meaning ‘productive’ or ‘effective’ – education as required by the Texas Constitution.

Goldberg v. Kelly et al.⁸⁹

397 US 254 (1970)

Keywords: economic development and poverty – social security rights

Facts: The state and city of New York adopted procedures for notice and hearing for recipients of Aid to Families with Dependent Children or the New York Program for Home Relief whose entitlement to these programmes had been terminated. The plaintiffs challenged the adequacy of these procedures.

Decision: The Court decided that, when threatened with termination of their benefits, welfare recipients are entitled to procedural due process, including an opportunity to present evidence orally and confront adverse witnesses. They should be provided with adequate notice of the date of termination, the reasons for such termination and an impartial decision-maker. While it is not necessary that the complainant be provided with legal counsel, counsel should be permitted where the complainant chooses. The Court stated that recipients’ interests in the ongoing receipt of services and the state’s interest in providing services to those in need outweighed the state’s interest in minimising costs and administrative burdens.

⁸⁸ The full text of the decision is available through the COHRE Litigation Programme.

⁸⁹ For the full text of the decision, go to: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=397&invol=254>

Estelle v. Gamble⁹⁰

United States Supreme Court, 429 US 97 (1976)

Keywords: prisoners and detainees – health rights

Facts: A prison inmate brought a civil rights action against the state corrections department medical director and two correctional officials, claiming that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States for inadequate treatment of a back injury sustained while he was engaged in prison work.

Decision: The Supreme Court held that deliberate indifference of prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment. On the facts of the case, however, the plaintiff had not suffered from such indifference, and thus there had not been a violation of his rights under the Eighth Amendment.

Boehm II v. Superior⁹¹

Court of Appeals of California, Fifth Appellate District Court, 178 Cal. App. 3d 496, 1986

Keywords: social security rights – minimum subsistence

Facts: The plaintiffs alleged that welfare payments for food and shelter did not adequately 'relieve and support' Boehm County's indigent population, as required by state law.

Decision: The Court held that the county had acted arbitrarily and capriciously in fixing the welfare grant without considering the recipients need for clothing, transportation and medical care allowances. The Court referred to Article 25 of the Universal Declaration of Human Rights and stated that "it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation and medical care". The Court concluded that the welfare payments fixed by the county must include an appropriate allowance for each of the basic necessities of life: food, clothing, housing (including utilities), transportation and medical care.

Venezuela

Cruz Bermudez et al. v. Ministerio de Sanidad y Asistencia Social

Supreme Court of Justice of Venezuela, Case No. 15.789, Decision No. 916, 15 July 1999

Keywords: health rights – HIV/AIDS – right to life – positive obligations

Facts: An *amparo* action was brought by more than 170 people living with HIV/AIDS who alleged that the Ministry of Health had failed to supply prescribed anti-retrovirals. It was claimed that this failure had led to a violation of the petitioners' rights to life, health, liberty and security of the person, equality and benefits of science and technology.

⁹⁰ For the full text of the decision:

http://supct.law.cornell.edu/supct/search/display.html?terms=estelle%20&url=/supct/html/historics/USSC_CR_0429_0097_ZO.html

⁹¹ The full text of the decision is available through the COHRE Litigation Programme.

Decision: The Court dismissed the claims based on the rights to liberty, security of the person and equality. However, it stated that the right to health and the right to life of the petitioners were closely linked to the right to access the benefits from science and technology. The Court made orders directing the Ministry to provide anti-retrovirals, medications necessary for treating opportunistic infections and diagnostic testing, free of charge for all Venezuelan citizens and residents. The Ministry was also ordered to develop the policies and programmes necessary for the treatment and assistance of affected patients and to make the budget reallocations necessary to carry out the Court's decision.

Note: After a series of such actions, the Court decided that the *amparo* remedy need not be limited to the specific petitioners, but would be extended to benefit all those in a similar situation.

Zimbabwe

Chihowa v. Mangwende

Supreme Court of Zimbabwe, 1987 (1) ZLR 228 (SC)

Keywords: women's rights – inheritance rights – customary law – discrimination

Facts: The deceased was survived by his two daughters, one of whom was the respondent in this case. He left no will. She brought her claim for succession to her deceased father's estate to the community court. The community court appointed her the intestate heiress to her father's property. The father of the deceased was dissatisfied and appealed, but the community court's decision was upheld by the provincial magistrate of Harare, arguing, *inter alia*, that the magistrate erred in his finding that the Legal Age of Majority Act had repealed the provisions of Shona Custom providing for only male issue to inherit from a male line of succession.

Decision: The Supreme Court held that one of the consequences of the Legal Age of Majority Act is that a woman who has reached the age of 18 may be validly appointed as intestate heiress to her father's estate with the same rights and duties as those that devolve to a male person under customary law. "The Legislature, by enacting the Legal Age of Majority Act, made women who in African law and custom were perpetual minors majors and therefore equal to men who are majors." Among other effects, the judgment focused on the duty of respondents to administer their respective estates for the benefit of their father's dependants according to African custom and usage. The Court observed that, "some of the traditional anchors and obligations of African society have broken down and are being intentionally abused by those who want to derive benefit from the old situation". The Court continued to quote from a work by celebrated commentators, stating: "The classic scenario of such abuse is that of the widow and/or widows of a deceased African male being denied support from the deceased estate by the heir". The passage referred further to such heirs 'stripping' the deceased's residence: "[the male heirs] claim that under customary law they are entitled to the deceased's property by right, to do as they see fit, free of any obligation to the deceased's immediate family". The Court approvingly quoted the view that "most of these problems are the result of the breakdown of the agrarian traditional family base and with it the structural framework on which customary law depends for its efficacy". In doing so, the Court acknowledged the changing circumstances of Zimbabwean society and seemed implicitly to recognise that, in this altered environment, customary law may no longer effectively provide the protection to minors and other dependants that it was traditionally presumed to do.

21 CONTACTS

An increasing number of lawyers and experts are working on ESC rights litigations and COHRE has prepared a list of individuals and organisations by country and expertise, which is available online at www.cohre.org/litigation/contacts in both html and pdf format.

In addition, a wide range of individuals and organisations working on ESC rights are listed in the directory provided by ESCR-Net at www.escri-net.org.

GLOSSARY OF ACRONYMS

| | | | |
|--------------|---|------------------|--|
| ACHPR | African Commission on Human and Peoples' Rights | ICRMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| AU | African Union | ICJ | International Court of Justice |
| COHRE | Centre on Housing Rights and Evictions | ICCPR | International Covenant on Civil and Political Rights |
| CESCR | Committee on Economic, Social and Cultural Rights | ICESCR | International Covenant on Economic, Social and Cultural Rights |
| CEDAW | Committee on the Elimination of Discrimination against Women | FIDH | International Federation of Human Rights Leagues |
| CERD | Committee on the Elimination of Racial Discrimination | ILO | International Labour Organisation |
| CMW | Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on Migrant Workers) | NCP | National Contact Point (the OECD mechanism) |
| CRC | Committee on the Rights of the Child | NGO | non-governmental organisation |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women | | OECD Guidelines for Multinational Enterprises |
| CRC | Convention on the Rights of the Child | OECD | Organisation for Economic Co-operation and Development |
| ESC | economic, social and cultural ('ESC rights') | OAU | Organisation of African Unity (see African Union) |
| ECSR | European Committee of Social Rights | OAS | Organisation of American States |
| EHRR | European Human Rights Report | ICCPR-OP2 | Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty |
| ERRC | European Roma Rights Centre | | |
| ESC | European Social Charter (adopted in 1961, revised in 1996) | UNESCO | United Nations Educational, Scientific and Cultural Organisation |
| HRC | Human Rights Committee | OHCHR | Office of the United Nations High Commissioner for Human Rights |
| IACHR | Inter-American Commission on Human Rights | UDHR | Universal Declaration of Human Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination | UNTS | UN Treaty Series |

The Centre on Housing Rights and Evictions (COHRE) is an independent, international, non-governmental human rights organisation committed to ensuring the full enjoyment of the human right to adequate housing for everyone, everywhere.

The ESC Rights Litigation Programme aims to support and initiate legal efforts to bring social and economic justice to the poor, particularly in the area of housing. It does so through the provision of legal advice, filing of cases, provision of legal resources and campaigns for improved complaint procedures.

The Legal Practitioners Dossier The Legal Practitioners Dossier provides a user-friendly but comprehensive reference guide for lawyers and advocates wanting to plead economic, social and cultural rights ('ESC rights') in courts and before other adjudicatory bodies. Part I contains an extensive overview of the legal issues commonly faced by those seeking to litigate rights, examination of the right to legal aid for rights litigation, in-depth analysis of four ESC rights and a special case study on the economic and social rights of children. Parts II and III provide guidelines on using international and regional human rights procedures and Part IV summarises many of the leading cases in the area and provides contact details for those working in the field. The book will serve as a valuable resource for any litigation effort that seeks to protect the victims of violations of ESC rights.



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