



United Nations  
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Social and Human  
Sciences Sector



# EMPOWERING THE POOR

Through **Human Rights** Litigation

Maritza Formisano Prada



Manual

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Author/Research and writing: Maritza Formisano

Edited by: David McDonald

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## Abbreviations and Acronyms

<b>ACHPR</b>	African Court for Human and People's Rights
<b>ACHPR</b>	African Commission for Human and People's Rights
<b>ACHPR</b>	African Charter for Human and People's Rights
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CRC</b>	Convention on the Rights of the Child
<b>ECOWAS</b>	Court of the Economic Community of West African States
<b>EFA</b>	Education for All
<b>ECHR</b>	European Court of Human Rights
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>ILO</b>	International Labour Organization
<b>NGO</b>	Non-Governmental Organization
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>PRSP</b>	Poverty Reduction Strategy Paper
<b>SP</b>	Social Protection
<b>UN</b>	United Nations
<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>UNDAF</b>	United Nations Development Assistance Framework
<b>UN-DESA</b>	United Nations Department of Economic Affairs
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United Nations Educational Scientific and Cultural Organization
<b>UNFPA</b>	United Nations Population Fund
<b>UN-HABITAT</b>	United Nations Human Settlements Programme
<b>UNHCR</b>	Office of the United Nations High Commissioner for refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>WHO</b>	World Health Organization

# PREFACE

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**The first of the Millennium Development Goals (MDGs) that 184 States approved in 2000 sets the priority to halve extreme poverty and hunger by 2015.**

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Consecutive reports on the achievement of the MDGs show that some of the poorest countries have made considerable improvements related to education, health, employment and civic participation, which tend to reduce extreme poverty. However, despite measurable progress, the most vulnerable and marginalized populations and groups –women, children, homeless, unemployed persons, people with disabilities, older people, indigenous people, migrants and displaced – remain marginalized and largely excluded from these achievements.

As an illustration, the 2011 Millennium Development Goals Report shows that it is the poorest children that have made the slowest progress in terms of improved nutrition, and that opportunities for full and productive employment remain particularly slim for women. This report also highlights the powerful influence of social and economic circumstances on life chances, as children from the poorest households, those living in rural areas and girls are the most likely to be out of school.

These results signal the need to re-orientate actions being taken to enable all people, especially the poor and marginalized, to benefit from improvements resulting from these new measures. In this sense, every action should be guided by a social inclusion approach based on the principle of non-discrimination, to ensure equal opportunity for all, regardless of background.

UNESCO is working to promote the formulation of policies and strategies committed to equity and social justice and which respect and value diversity. Projects and programmes are being developed with an integrated Human Rights Based Approach (HRBA) with a view to building more inclusive and just societies, and making 'social inclusion' the Organization's priority for the next biennium (2012–2013). Indeed,

mainstreaming human rights implies that all programmes, policies and technical assistance should further the realization of human rights as laid out in the Universal Declaration of Human Rights and other Human Rights instruments. It also implies that human rights principles and standards should guide the programming process in all fields and all stages, including the design, implementation, monitoring and evaluation of public policies. HRBA helps to explain the value of human rights in development and in National Programming Processes in order to define inclusive patterns in which everyone feels valued and has the opportunity to participate fully in the life of society.

Social exclusion is about resources, opportunities and capabilities. It concerns all groups that live in conditions of isolation and disconnection from society and development processes. In this sense the challenge is to re-connect these groups by means of targeted actions that enable and motivate them to become active citizens. This publication "Empowering the Poor: through Human Rights Litigation", views the addressing of legal provisions as the first step in generating social change.

Discrimination on the grounds of poverty often prevents access to the very tools needed to fight this condition. It is important to fight against recognized forms of discrimination which include race, ethnicity, religion, gender and others. Poor people are also often discriminated against on the basis of their socio-economic condition. The challenge is to overcome this major obstacle to their empowerment; otherwise, those trapped in poverty may fall into a vicious circle from which it is hard to break out.

In the struggle to defeat poverty, it is important not to forget that all human rights are universal and indivisible.

This means that political, civil, economic, social and cultural rights are connected and equally important for their mutual realization. In particular, economic, social and cultural rights have a crucial role to play in the fight against poverty. They constitute the first step to ensuring that access to all human rights is granted to each individual in order to attain universality. In this regard, the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 was an important advancement, as it enables individuals or groups of individuals to be entitled to any of the rights enshrined by this Covenant before the Committee on Economic, Social and Cultural Rights.

UNESCO supports the selection of good practices from organizations and Member States that have taken the lead in promoting social inclusion to serve as inspiration for other stakeholders. Furthermore, the Organization encourages the collection of data to evaluate and interpret the impact of national policies, laws and regulations on main policy areas such as active participation of youth, women, migrants, indigenous peoples and persons with disabilities. UNESCO is committed to understanding and addressing emerging

social and ethical challenges of excluded vulnerable groups of society and to turn these challenges into opportunities for social and ethical innovation.

This publication “Empowering the Poor: through Human Rights Litigation” aims at supporting these processes. It is a pedagogical tool that seeks to guide grassroots organizations as well as State authorities in their work to eradicate poverty. This manual seeks to contribute to the development of the capacities of both duty-bearers to meet their obligations and of rights-holders to claim their rights. It is a tool aimed at supporting advocacy and training initiatives as well as actions that share knowledge, reduce deprivation and preserve human dignity with the view to creating an inclusive culture of peace in which everyone has the freedom to imagine a better world and the tools to shape reality in this direction.

**Pilar Alvarez Laso**

*Assistant Director-General  
for Social and Human Sciences*

# INTRODUCTION

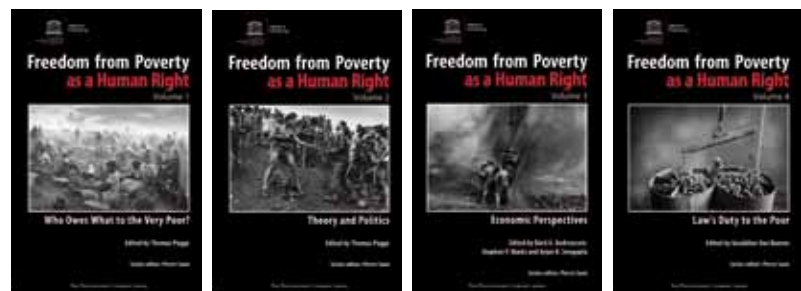
UNESCO's project on poverty has focused on a conceptual analysis of poverty within a human rights framework. Through this project, the Organization seeks to stimulate commitment within the international community to assume its moral obligation to take action for the eradication of poverty, and to contribute towards the realization of human rights for all peoples without discrimination of any kind.

Fundamental transformations in societies should be based on human dignity, freedom and equality. Democracies therefore have to enable the participation of all actors of the globalized world – meaning that men and women should be treated as equals. Poverty excludes human beings from participation in society and creates the conditions for material and legal marginalization. This is often intensified by a lack of concrete and pertinent policies addressing the needs of the poor, and the persistence of policies, processes and ideologies that enable poverty.

UNESCO's project is a response to this challenge. It advances the idea that linking poverty and human rights creates an opening where the former concept can be understood and addressed in terms of deprivation of **capabilities** or lack of **empowerment**, as a denial and even a **violation of human rights**, rather than in terms of income or charity. People living in poverty may lack formal rights or, where formal rights exist, be denied substantive, equitable access to the rights formally accorded to them. These people are placed in a situation of injustice, of vulnerability and are deprived of dignity – a core element of all human rights. When people are unable to enjoy rights such as adequate food, water, clothing, the highest attainable standard of health and adequate housing, they are unable to live decent lives. Poverty also places pressure on institutions and civil society to undertake legal courses of action to define effective public policies to fight against this threat.

UNESCO is devoted to this commitment and affirms the necessity of **international cooperation** in combating poverty from a human rights perspective. To this end, the Organization has published the collection **Poverty and Human Rights**, composed of four volumes *Poverty and Human Rights: Who Owes What to the Very Poor* (edited by Thomas Pogge); *Poverty and Human Rights: Law's Duty to the Poor* (edited by Geraldine Van Bueren); *Poverty and Human Rights: Theory and Politics* (edited by Thomas Pogge); and *Poverty and Human Rights: Economic Perspectives* (edited by Bård Andreassen, Stephen Marks and Arjun Sengupta). This first research phase has sought to uncover the core elements of poverty and to combat these using a multidimensional approach including philosophical, legal, political science and economic perspectives.

The second phase of the challenge is to link the above conceptual approaches concerning freedom from poverty with policy-oriented action. The creation of standards within legal frameworks on the reality of poverty is crucial to this endeavour. **Non-Governmental Organizations (NGOs)** are





among the main brokers between policy-makers and the poor, and have proposed innovative approaches to eradicate poverty. They occupy a unique position between the poor and marginalized sectors of society and institutions, where they focus on development, the causes of poverty and its consequences, social protection, empowerment, and so on. NGOs not only participate in the monitoring and follow-up of court decisions, but also bring cases with significant potential for the poor to national and international attention. UNESCO has therefore decided to develop a manual to assist NGOs in this endeavour —*Empowering the Poor : through Human Rights Litigation*<sup>1</sup>

## ➡ WHY A MANUAL?

The purpose of this manual is to collaborate with grass-roots organizations, in particular with NGOs, in defining the content of economic, social and cultural rights (ESC rights) and to empower the actions of NGOs working to tackle poverty in the field.

By highlighting the interpretation techniques used by judges throughout a series of landmark cases on ESC rights around the world, the manual elaborates standards for poverty eradication extracted from comparative case law. Indeed, the manual supports the approach that highlighting the interpretational efforts of courts will channel the voices of the poor and provide principles and precedents for action.

The manual is based on the idea that the enforcement of ESC rights will become a reality and will increase the clarification of rights for the right holder, the duty bearer and civil society as a whole. It will provide not only *locus standi* to NGOs, but empower their role in the field.

## ➡ WHAT APPROACH?

The manual does not accept the traditional denomination of ESC rights as second-generation human rights, contrasted with civil and political rights. This separation leads to misconceptions of the indivisibility of human rights and does not take into account the scope and nature of ESC rights and the current improvements that adjudication has provided for their definition. Such a division runs contrary to the principles

of the indivisibility and interrelatedness of all human rights and, as such, should be avoided.

Consequently, this manual focuses on the principles of interdependency and inter-relatedness, which recognize that the full enjoyment of any particular right depends upon the enjoyment of others. In this way, chapters related to ESC rights are connected to each other and feature key examples of case law that highlight their inter-dependency.<sup>2</sup> In addition to these principles, the chapters of this manual highlight the principle of universality, and special NGOs initiatives and legal decisions for vulnerable groups are discussed in this context.

This manual deliberately does not only concentrate on the leading principles of Human Rights Based Approach (HRBA). Instead, it proposes a wider approach to understanding and addressing poverty that includes assessment of the roots of power relations in societies. Power relations are assessed according to evidence of legal advancements in national adjudication of cases dealing with ESC rights as enabling legal mobilization strategies, as well as the full engagement of all stakeholders on these issues. The manual also underlines the critical role of NGOs in advancing ESC rights in the field.

## ➡ WHAT REASONING?

The manual has, as its starting point, the idea that one of the main obstacles to the justiciability of ESC rights under the International Covenant of Economic, Social and Cultural Rights (ICESCR) is ascertaining whether or not a State party has satisfied its obligations with respect to the rights enumerated in the treaty. The underlying reason for this challenge appears to be the concept of ‘progressive realization’, which explains how State parties continue to advance in fulfilling the right even if the right is not fulfilled in its entirety.

For several years, judges have developed, through their judicial decisions, standards for measuring the advancement of ESC rights. This manual seeks to provide concrete examples of rights enforcement and clarification of the relationship between the judicial enforcement of ESC rights and relief for the poor in reality. Indeed, comparative cases around the world provide evidence on how a human rights perspective can relieve poverty and heighten the empowerment of the poor.

1. *Empowering the Poor: Through Human Rights Litigation. Manual for NGOs*

2. For example, “housing rights can not be thought of as merely having four walls and a roof, but involves an intricate consideration of adequacy, health, security and the law”.

Since progressive social movements are inserting rights-based litigation strategies into their work, this manual is directed to NGOs and grassroots organizations. For this reason, court decisions represent strategic elements that can provide useful guidance to effectively advance the struggle for human rights for the poor.

## WHAT METHODOLOGY?

Following wide consultation among more than 200 NGOs worldwide, selected practices that have proved their worth in poverty eradication have been identified and integrated as text boxes. In addition, selected examples of case law have been systematized by human right, so that they can be understood together with strategies for ensuring the progressive realization of the right in question. In this sense, this pedagogical manual addresses the main ESC rights — which are inseparable from human dignity and lie at the heart of poverty eradication. In other words, the right to: adequate food, adequate housing, education, the highest attainable health, and access to safe drinking water and sanitation. It also proposes advancements in the definition of the right to benefit from scientific progress and its applications.

The cases included in the manual reveal the activism of courts in protecting the human rights of the most marginalized and vulnerable groups of society, including children, older people, people with disabilities, indigenous groups and minorities, and migrants. Women and youth are mainstreamed within each chapter as actors for social change. Selected cases on ESC rights quoted in the text have provided crucial core elements in the fight against poverty and have empowered communities in the combat against poverty.

The principles of **non-discrimination** and **equal protection** are present throughout the publication as indispensable duties of ‘immediate effect’, since they lie at the core of processes of power distribution, authority, capability and action responsiveness within society. Gender issues are also highlighted as a vital component to be mainstreamed in every anti-poverty action, programme or strategy. A gender perspective heightens the sensitivity of any intervention and leads to a focus on behavioural change in societies.

The three introductory chapters serve as framework material that grassroots organizations and practitioners may analyse and apply in concrete, oriented actions for specific focus areas developed in the subchapters.

This manual is a tool that aims to contribute to the discussion on best ways and means to eradicate severe poverty and on how to include all efforts in fighting this evil. Conceptualizing and clarifying the content of poverty through human rights is only a first step contributing to the debate. Other means, such as the design of targeted and inclusive public policies, as well as the elaboration of mechanisms in order to measure and monitor improvements – indicators and Index- shall be developed in order to create strong impact in drawing people out of marginalization. This manual should therefore be taken as a first effort in this research.

**Angela Melo**

*Director*

*Social and Human Sciences Sector*

**Maritza Formisano**

*Consultant for UNESCO*

## HOW TO USE THIS MANUAL

The manual comprises three chapters and six sub-chapters.

► **Chapter 1 “Poverty and human rights”** develops the conceptual framework for the concept of poverty and links it to notions of capability and vulnerability, as well as to human rights. It presents some examples of cash transfer programmes (CTPs) and related laws in order to support what is referred to as the ‘normalization’ of poverty.

► **Chapter 2 “The role of justiciability in the fight against poverty”** is dedicated exclusively to the clarification of justiciability and the challenges of justiciability as a tool for social transformation and inclusion of the most vulnerable. This chapter presents “justiciability” as one of the steps of a holistic strategy to overcome poverty. It defends the role of judges as guarantors of rights and freedoms of the most invisible members of society.

► **Chapter 3 “Conceptual clarifications of economic, social and cultural rights”** develops, in general terms, the notion of obligations in two senses: it presents the core obligations of ESC rights as well as the related state obligations (namely to respect, protect and fulfil). This general understanding of obligation is supported by case law and NGO activities that demonstrate how to connect the policy actions of grassroots organizations with standards derived from adjudication.

► **Sub-chapters** contained in the manual relate to the *right to education, adequate food, adequate housing, safe drinking water and sanitation, the right to enjoy the highest attainable standard of physical and mental health and the right to enjoy the benefit of scientific progress and its applications*. Each sub-chapter applies the notion of core obligations and state obligations to each right, and provides illustrative examples of case law to present comparative standards for the protection of the most vulnerable and respect of their human dignity.

Throughout this publication you will find information contained in two types of boxes:



Grey text boxes provide landmark examples of comparative case law provided by jurisdictional and non-jurisdictional bodies that have contributed to the clarification and implementation of ESC rights as well as conceptual and complementary information of core issues with the view to improving understanding.



Yellow text boxes illustrate activities of NGOs as well as policy oriented initiatives undertaken by other actors, including governments, working to eradicate poverty at national and local levels.

Each chapter includes practical exercises that reinforce the material presented. These exercises encourage the reader to go further and to apply the material to his or her own experience.

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1. In this paper we refer to the right to food and the right to adequate food indistinctly, in accordance with the interpretation provided by the Committee on Economic Social and Cultural Rights in General Comment n°12. According to this definition, the right to food includes the adequacy and sustainability of food availability and access.

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# Chapter I:

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- h. Indigenous people
- i. Lesbians, gays, bisexual and transgender people (LGBT)

# CHAPTER I: POVERTY AND HUMAN RIGHTS



## 1. DEFINING THE CONCEPT OF POVERTY

1] The concept of poverty has evolved over recent years. Today, poverty, not only refers to a lack of resources to live a life in dignity, but also to the concept of **capability**, which has been largely developed and influenced by the ‘capability approach’ of Amartya Sen.<sup>1</sup> This approach propounds a definition of poverty as a dynamic concept, along with a set of guidelines for the development of policies to focus on a **multidimensional approach**.

2] Poverty is therefore closely linked to the notion of **vulnerability** and to the necessity to provide tools to the poor by focusing in their assets. These assets give them power to move out from poverty and to change the rules of power in society. In this sense, the concept of poverty is not necessarily separated from its economic or political content, but is rather completed.

3] It is also linked to the notion of **dignity** insofar as it relates to the well-being of a person and to the things that this person can or cannot do. Consequently, it is also related to the **freedom of opportunities** necessary for achieving this well being.<sup>2</sup> As such, assets are identified as the basis of ‘agents’ power to act to reproduce, challenge or change the rules that govern the control, use and transformation of resources.

4] Poverty, in the concept of the Office of the High Commissioner for Human Rights (OHCHR) in the *Draft Guidelines on Human Rights approach to poverty reduction* can further be linked to ‘be[ing] well nourished, avoiding morbidity

and premature mortality, being adequately sheltered, having basic education, being able to ensure security of the person, having equitable access to justice, being able to appear in public without shame, being able to earn a livelihood and taking part in the life of the community.’<sup>3</sup> In terms of the High Commissioner, ‘anti-poverty policies are more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights.’<sup>4</sup>

5] This multidimensional approach to poverty has been conceptually developed by UNESCO in the collection ‘Freedom from Poverty as a Human Right’. This collection comprises four volumes,<sup>5</sup> defining the philosophical, economic, political and legal approaches to poverty.

In this sense, in relation to the philosophical debate, the **first volume** develops the nature of and relations between human rights, justice, positive and negative duties and obligations, social institutions, solidarity, dignity, causality, harm, identity and collective responsibility. It clarifies these concepts with a view to building a moral consensus within society on the right not to be poor.

The **second volume** addresses concepts such as: the need for a global theory of justice; ethics of distribution; the necessary definition of priorities among activities undertaken to eradicate poverty; the call to re-evaluate our social, political and economic structures, institutions and policies; and the role of courts and constitutions in the enforcement of economic and social rights. This volume examines the putting into practice of theories of justice and human rights.

1. Drawn up and expanded in the work of Amartya Sen. See: *Development as freedom*, Oxford, Oxford University Press, 1999; *Inequality re-examined*, Inequality Reexamined. Harvard University Press, 1995; *Comodities and capabilities*, Oxford, Oxford University Press, 1987; *Poverty and Famines: An Essay on Entitlements and Deprivation*, Oxford, Clarendon Press, 1982.

2. See OHCHR, *Human Rights and Poverty Reduction: a conceptual framework*, 2004, available at [www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf](http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf) (accessed 7 August 2009) and *OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, available at: [www2.ohchr.org/english/issues/poverty/guidelines.htm](http://www2.ohchr.org/english/issues/poverty/guidelines.htm) (accessed 7 August 2009).

3. See OHCHR *Draft Guidelines on Human Rights approach to poverty reduction*, para. 46.

4. Poverty and the International Covenant on Economic, Social and Cultural Rights: statement adopted on 4 May 2001 by the Committee on Economic, Social and Cultural Rights (E/C.12/2001/10), para. 13.

5. See UNESCO collection *Freedom from Poverty as a Human Right*, UNESCO Publishing, 2010: Vol. 1 *Who Owes What to the Very Poor* (edited by T. Pogge); Vol. 2 *Theory and Politics* (edited by T. Pogge); Vol. 3 *Economical Perspective* (edited by A. Sengupta, S. Marks and B. Andreassen); and Vol. 4 *Law’s Duty to the Poor* (edited by G. Van Bueren).



The **third volume** explores the interfaces of economic choices and priorities, and the promotion and protection of normative standards. This volume gathers the contributions of leading economists and social scientists, who apply their particular modes of analysis to the threat of poverty.

The **fourth volume** encompasses crucial notions such as social transformations, democracy, judicial enforceability and human rights as current legal practice. It also envisages how the right not to be poor could be included within a wider right to equality. Lastly, it looks to clarify the scope of state obligations derived from human rights frameworks in order to create new opportunities to tackle systemic poverty.

## 2. POVERTY AS A VIOLATION OF HUMAN RIGHTS

**6]** Approaching poverty as a violation of human rights, converts poverty into an unavoidable imperative. Indeed, human rights provide a framework for poverty eradication in different ways. Poverty is at the same time **the cause and the consequence of human rights violations: a cause** because the poor remain invisible and, thus, far from attempts to help them claim their rights, and because the manifestations of poverty are hunger, homelessness and illiteracy, among many others; a **consequence**, because poverty can derive from an action or omission, that is, a violation of a human right, such as the lack of access to basic healthcare resources and forced eviction for example. In other words, poverty reflects a violation of human rights where the poor are deprived of the enjoyment of those human rights, or simply have no rights at all. It is therefore consequently a violation of their human dignity.

**7]** But not all deprivation (lack of home, food or education, etc.) reflects a condition or situation of poverty. But a sustained and inhuman situation can lead to or exacerbate poverty. For this reason, the fight against poverty requires actions that prevent such sustained deprivation. The challenge is therefore to connect the powerless with the empowering potential of human rights and to bring new mechanisms to bear the eradication of poverty. As underlined by the UN Committee of Economic, Social and Cultural Rights (here after Committee on ESC Rights, the Committee or CESCR) in the *Statement on Poverty* (2001), 'Although human rights are not a panacea, they can help to equalize the distribution and exercise of power within and between societies'.<sup>6</sup>

**8]** Human rights and poverty are therefore **interrelated**. Poverty and human rights are not part of the same definition

but are elements of the same struggle: when fighting against poverty and extreme poverty, we advance in human rights protection and promotion and vice versa. Since human rights deficits today are concentrated among the poor, this approach no longer perceives poverty in terms of income or charity, but instead in terms of deprivation of capabilities and lack of empowerment – and therefore as a denial and consequently a violation of human rights.

**9]** The **interdependence** and **indivisibility**<sup>7</sup> of all rights are absolutely essential in the eradication of poverty. **Interdependency** has two aspects: the synergy for the individual between the protection of two different rights and the requirement to balance these rights. Indivisibility also has two meanings: it refers to the universality of human rights – that all human rights exist on the same footing and have the same emphasis – and that the state is required to implement all human rights for all members of society and take into account their expectations.<sup>8</sup> Therefore, only indivisibility can reinforce and legitimize universality.

**10]** In this context, with regard to the right to adequate food, the UN Committee on ESC Rights stated: 'the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all'.<sup>9</sup> Combating poverty thus requires holistic solutions, and ESC rights have that potential to empower people and communities living in poverty.

**11]** Applying the human rights perspective to poverty also establishes a relationship between strategies to fight against and reduce poverty and the overall framework of human rights and consequent **legal obligations and responsibilities**. The human rights framework offers poverty strategies a concrete parameter for providing **legal remedies** and **measuring state compliance** with international human rights obligations

**12]** In addition, a 'human rights-oriented' policy will indicate that States have to take into account the comprehensive human rights framework whenever formulating a policy for combating poverty. Indeed, the State would thus ensure that obligations and responsibilities derived from the human rights framework are inserted into the design, implementation and evaluation/monitoring of public policies to fight poverty. In this sense, fighting poverty becomes a goal of an overall process, and the concrete results cannot be measured only by

7. See para. 5 of the Vienna Declaration.

8. See A. Eide, Interdependence and indivisibility of human rights, in Y. Donders and V. Volodin (eds) *Human Rights in Education, Science and Culture legal Developments and Challenges*, UNESCO 2007, pp. 11–51.

9. See General Comment n°12.

6. See the 'Statement on Poverty' by the UN Committee on Economic, Social and Cultural Rights to the 3<sup>rd</sup> UN Conference on the Least Developed Countries of 2001, para 6. Available at: [www.unctad.org/conference](http://www.unctad.org/conference). See document E/C.12/2001/10 'Poverty and the International Covenant on Economic, Social and Cultural Rights'.

quantitative indicators. Thus, public policies in congruence with human rights will be more sustainable, will respect the principle of equal participation, and will be more inclusive (for example, human rights assessment).

In the cases *Kearney and Ors v. Bramalea Ltd and Ors, Board of Inquiry, Ontario Human Rights Code, 2000* related to the claims by three low-income women to whom access to available rental housing was denied, the Ontario Human Rights Board provided a decision on the basis of the concept of poverty as an effective ground of discrimination. The Tribunal stated that the regulation of the markets should be in accordance with international human rights obligations, in particular to the access to housing. The Tribunal stated clearly that it is not permissible to governments to refuse to rent to low income families.

In the case *Campaign for Fiscal Equity v. State of New York et al*<sup>1</sup> the State failed to devise and implement necessary reform of the public school financing system. The public policy regarding education was not fulfilled and the Court of New York ordered that an additional appropriation of US\$5.6 billion in annual operating expenses be provided within four years to ensure that the city's public school children will be given the opportunity to obtain the sound basic education. He also ordered that US\$9.2 billion in added funding for capital projects be provided over five years. The decision was upheld on appeal, ordering the legislature to provide New York City schools US\$4.7 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 courts-ordered reforms in relation to capital funding but budgets less than one-tenth of what the courts required in terms of operating aid increases.

1. 719 N.Y.S.2d 475.

**13]** Human rights provide a normative framework in which vulnerable groups are **empowered** and recognized as **principal actors** and subjects of law. They are not merely perceived as victims. Empowerment of the poor develops another dimension of poverty since 'empowerment is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives'.<sup>10</sup> In this sense, the participation of the poor offers examples on solving concrete cases of deprivation of minimum goods, which can in fact be translated into human rights violations.

**14]** Poor people become an active part of the design, implementation, evaluation and monitoring of public policies. They have also **the right to participate** in the law-making process, and should take part in propositions that will define the strategy to fight against poverty. Participation empowers their freedom to define or amend the norm or policy that concerns them. Participation is therefore linked to the enjoyment and indivisibility of human rights and includes engaging in public debate and dialogue, as well as

10. D. Narayan (ed.) Empowerment and poverty reduction. A sourcebook, World Bank, 2002, p. xviii, p. 235.

facilitating them with the necessary information and effective opportunities to contribute.<sup>11</sup>

In the case *Doctors for Life International v. The speaker of the National Assembly and others*,<sup>1</sup> the Constitutional Court of South Africa highlighted the important question of the role of the community in the law-making process and stated that their involvement 'enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice [...] participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist'.<sup>2</sup>

1. CCT (12/05) [2006] BCLR 1399.

2. Op cit, para. 115.

## a. Poverty at the UN system

**15]** Poverty has always been an issue on the human rights agenda of the UN System. The preamble of the UDHR states that all human beings should be free from misery and goes on to establish poverty as a human rights issue. At the Vienna World Conference the international community pointed out that 'the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community'.<sup>12</sup> From this moment, the fight against poverty became a primary goal for the international community.

**16]** It is for this purpose that the UN Secretary General has located the fight against poverty as one of the main goals of the international agenda, and has endorsed the multidimensional definition of poverty from a human rights perspective. To this end, the UN System has developed a framework to fight against poverty, in which poverty is considered as a violation of human rights, and has further endeavoured to make poverty, legal enforcement and social inclusion main priorities.

**17]** Reminding the international community and the UN Agencies of their duty to develop standards on the related state obligations derived from the human rights-based approach to poverty eradication, the international community adopted in 2000 the United Nations Millennium Declaration and defined the Millennium Development Goals (MDGs), which identified the issue of extreme poverty as a main objective: 'We will spare no effort to free our fellow

11. See J. Wrezinski, Culture et grande pauvreté (Culture and Extreme Poverty), Paris, Editions Quart Monde, 2004, p. 40. See also A. Wrezinski, Knowledge that leads to action, in X. Godinot and Q. Wodon (eds) *Participatory Approaches to Attacking Extreme Poverty Cases Studies Led by the International Movement ATD Fourth World*, World Bank working paper n° 77, 2006 Available at: [www.rcpla.org/pdf/per cent20download/Attackingper cent20Extremepoverty.pdf](http://www.rcpla.org/pdf/per cent20download/Attackingper cent20Extremepoverty.pdf).

12. Vienna Declaration and Programme of Action, Article 14.

men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.' MDG n° 1 is to 'end poverty and hunger'.<sup>13</sup>

**18]** UN Resolution 63/142 (5 March 2009) expressly asked UN Agencies to support national strategies by sharing best practices in the area of poverty eradication and the legal empowerment of the poor. With the view of strengthening international cooperation towards attaining the MDGs, the UN has launched two Decades for the Eradication of Poverty: the first under UN Resolution A/62/267, entitled 'Implementation of the First United Nations Decade for the Eradication of Poverty (1997–2006)', and the second under UN Resolution A/63/190, entitled 'UN Second Decade for the Eradication of Poverty 2009–2017' (which underlines how setting up national plans based on tangible goals are decisive steps towards giving poverty eradication due priority).<sup>14</sup>

**19]** In his report<sup>15</sup> related to the Observance of the International Day for the Eradication of Poverty, the Secretary-General underlined the necessity of social mobilization and emphasized that poverty is a violation of human rights:

The fact that poverty persists in many parts of the world points not only to an inequitable distribution of economic, social and political opportunities, but also to a violation of human rights. Often the condition of living in poverty also affects the ability of the most vulnerable and disadvantaged individuals, families and groups to defend their rights and responsibilities. The violation of human rights is thus both a cause and a consequence of poverty. People living in poverty are, by their condition, disempowered and excluded from society, and their capacity to secure their own rights is extremely limited by their situation.<sup>16</sup>

**20]** Although the ICESCR – which recalls the UDHR – does not explicitly mention the word poverty, it states that the enjoyment of ESC rights is a precondition to freedom and dignity. For this reason, it underlines the indivisibility of all human rights and its connectivity and effects with regard to poverty eradication.

**21]** This approach to poverty as a violation of human rights

13. See the UN Campaign to End Poverty by 2015 at [www.endpoverty2015.org](http://www.endpoverty2015.org). The campaign focuses on achieving the eight MDGs by 2015.

14. For an overall understanding of the evolution of UN Resolutions and reports on poverty and their relation to human rights, see the documents: A/RES/47/196 of 1992 and A/RES/28/183 of 1993 on the observance of an international day for the eradication of poverty; A/RES/52/134 of 1998 on international cooperation in the field of human rights. See also Human Rights Commission Resolution 1996/23 adopting the *Final Report on Human Rights and Extreme Poverty*, by the Special Rapporteur, Leandro Despouy (E/CN.4/Sub.2/1996/13) and resolution 2005/16 of 14 April 2005; as well as the reports of the independent experts on the question of human rights and extreme poverty, Ms. Lizin and Mr. Sengupta (in particular E/CN.4/2004/43, E/CN.4/2005/49 and E/CN.4/2006/43) and OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, among others.

15. Document A/61/308 paras 4–16 available at: [www.atd-fourthworld.org/IMG/pdf/Report\\_English\\_SG\\_Annan\\_Celebration\\_17oct-A61308EN.pdf](http://www.atd-fourthworld.org/IMG/pdf/Report_English_SG_Annan_Celebration_17oct-A61308EN.pdf).

16. Op.cit para. 6.

has been increasingly developed during recent years by the Committee on Economic, Social and Cultural Rights, which has endorsed the multi-dimensional definition of poverty from a human rights perspective and has provided guidance and developed standards in its General Comments, focusing on the concrete obligations of Member States to act in the case of alleged situations of deprivation.<sup>17</sup>

**22]** The Committee defines poverty<sup>18</sup> 'as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.<sup>19</sup> In short, in the Committee's view, 'poverty constitutes a denial of human rights'.<sup>20</sup> UNESCO has taken this one step further, stating that poverty is a *violation* of human rights and, as such, must be considered *illegal*, according to international law.

**23]** Finally, at the regional level, the revised European Social Charter of 1996, which prescribes in Article 30 a 'right to protection against poverty and social exclusion', is an important step towards the concrete *normalization* of poverty as a human right, and concretely urges States parties 'to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance'. It is important to emphasize that the revised European Social Charter includes the right to protection against poverty in Part II of the Charter, which presents a list of ESC rights and the correlated obligations for their full realization.

## b. A model of law to fight against poverty

**24]** A proposal to draft a model law to combat poverty, including the international obligations that should be respected by States, has been advanced at the national level. Indeed, on the basis of the experiences in the UN, some countries have seen in this scheme a sort of **normalization of the fight against poverty**.<sup>21</sup>

**25]** Examples of concrete *normalization* include the model law for combatting discrimination, or the UNAIDS model to fight against HIV-AIDS, which have inspired the creation of models of law in order to guide parliamentarians in the eradication of poverty. With regard to the issue of HIV-AIDS, for example,

17. UNESCO has developed several publications in relation to those approaches. All the articles are available at: [http://portal.unesco.org/shs/fr/ev.php-URL\\_ID=5149&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=465.html](http://portal.unesco.org/shs/fr/ev.php-URL_ID=5149&URL_DO=DO_TOPIC&URL_SECTION=465.html). See also the publication *Freedom from Poverty as a Human Right* (Vols I to IV), which develop the multidimensional dimensions of poverty.

18. UNESCO Consultation, *supra* note 7, at 2.

19. CESCR, *Statement on Poverty*, *supra* note 40, ¶ 8.

20. *Ibid.* at ¶ 1.

21. See elaboration of norms, document of the International Centre on Human Rights Policy [www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf).

UNAIDS and OHCHR have published International Guidelines on HIV and Human Rights,<sup>22</sup> which aim to improve the capacity for multi-sectoral coordination and accountability of governments, give support to law reforms, empower the marginalized groups, and increase the participation of the wider community in the fight against HIV-AIDS. This model has inspired national initiatives in the fight against HIV-AIDS and notably the elaboration of national laws in Benin, Togo, Mali, Sierra Leone and Niger among others, following the standards of UNAIDS proposals.<sup>23</sup>

**26]** The Committee of ESC rights has advanced the core elements to be inserted in relation to the elaboration of a framework law on the right to food and the right to health. In General Comment n° 12 related to the right to adequate food, the Committee has stated that ‘states should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food’. In this sense, the Committee has even defined the elements or guidelines of the framework law: (1) provisions on its purposes; (2) targets or goals to be achieved and timeframe to be set for the achievement of the targets; and (3) means to achieve the goals. It highlights the importance of collaboration with civil society and the private sector to achieving this, as well as with international organizations in order to move the processes forward. The chapter of this manual related to the right to adequate food provides additional information on this issue.

**27]** The same request is made in relation to the right to health. The Committee asks the States to ‘consider adopting a framework law to operationalize their right to health national strategy’. The Framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of actions.<sup>24</sup> The Committee also defines the core elements of this framework law as: (1) targets to be achieved; (2) time framework; (3) means to achieve health benchmarks; (4) collaboration with civil society; (5) institutional responsibility; and (6) recourse procedures. States are also tied to monitoring the implementation of the right and to identify obstacles that impede respect of their obligations.

22. See the consolidated report of 2006 at [www2.ohchr.org/english/issues/hiv/docs/consolidated\\_guidelines.pdf](http://www2.ohchr.org/english/issues/hiv/docs/consolidated_guidelines.pdf).

23. Benin: law 2005-31 of 2006; Togo: Law 2005-012; Mali: Law 06-28 of 29 June 2008; Sierra Leone: Law 2007; Niger: law 2007-08, 30 April 2007.

24. See General Comment n° 14 para. 56.

### c. Bill 112 of Quebec<sup>25</sup>

**28]** Quebec has undertaken a unique, collective and participatory effort in creating the **Law to Fight Poverty and Social Exclusion (Bill 112)**, thanks to the initiative of the Quebec Federation of Women Bread and Roses March, on the occasion of the March of Bread and Roses, June 1995. The law has been drafted from the bottom up, stemming from an initiative of the large community of NGOs and pluralistic social actors. Bill 112 intervenes on the causes of poverty rather than its effects.

**29]** The Law creates: (1) a national strategy to combat social exclusion, (2) a fund to support social initiatives; (3) an observatory to monitor the reduction of poverty; and (4) an advisory committee on the prevention of poverty and social exclusion.

**30]** In addition, it identifies five actions areas: (1) promotion of access to education and support of capacity-building and skill development; (2) improvement of incomes, work opportunities and individual assets, and expansion of social housing; (3) improvement of access to work and employment; (4) greater opportunities for the involvement of all social actors through local development; and (5) development of an institutional framework of information, evaluation, accountability, participation and coherence among all levels of intervention. Bill 112 institutionalizes the fight against poverty as a priority within the legal framework, as well as in public policies.

#### Campaign to translate the MDGs into a model law for poverty eradication

The Millennium Development Goals – a commitment of the international community – have become the core instrument in the fight against poverty. They also form the basis of national poverty reduction strategies. Despite all efforts, hopes of attaining the target of reducing extreme poverty by half in 2015 are dwindling fast. Poverty continues to increase year after year. According to the IMF/World Bank *Global Monitoring Report 2009*, **more than 50 million more people are projected to be in poverty in 2009**. The food, energy and financial crises, and the impacts of climate change, conflict and other forms of internal turbulence weigh heavily on the living conditions of vulnerable unprotected populations. Women and children are affected most: **legalizing the fight against poverty at the national level has today become an ethical imperative**.

Organization ACECI has launched a campaign in order to translate MDGs into rights titled *Translating MDGs into a model law on poverty reduction*.

25. For more information on the law see: [www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2002C61A.pdf](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2002C61A.pdf) and A. Noël, *Background paper: A Law against poverty: Quebec's new approach to combating poverty and social exclusion*, Canadian Policy Research Networks– Family network December 2002. Available at: [www.pauvrete.qc.ca/IMG/pdf/Noel-A\\_Law\\_Against\\_Poverty.pdf](http://www.pauvrete.qc.ca/IMG/pdf/Noel-A_Law_Against_Poverty.pdf).

[Campaign to translate the MDGs into a model law for poverty eradication]

The campaign is built on a human rights approach to guaranteeing minimum development for every human being (regarding satisfaction of vital needs) in conformity with the 1949 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, and is mounted by a consortium of north-south NGOs, and women movements in particular.

The human-rights approach draws the attention of national and international, private and public actors to the fact that non-application of the International Covenant on Economic, Social and Cultural amounts to a negation of human rights, and is synonymous to a violation of human dignity.

The model law on poverty reduction will form a source of inspiration for countries who wish to adapt it to the specificities of their national context, in a similar way as occurred with the 2004 model law on STD/HIV/AIDS in West and Central Africa.

This poverty reduction law will be the fruit of an inclusive participatory process (SCOs, parliaments and governments, with the support of international actors). It is not limited to MDGs or by the 2015 deadline. It includes:

- the notion of poverty as a human-rights violation
- the right of each country to determine its own development path
- MDGs adapted to the reality of each country, compensating for present gaps in the MDGs (e.g. production capacities and job creation)
- minimum human development as a right of every person, and ways to guarantee it
- mechanisms of impoverishment, and ways to neutralize them
- accountability for all development actors with respect to the population
- the principles of the Paris Declaration: ownership, harmonization, alignment, results-based management and mutual accountability
- the conception, implementation and follow-up procedures for action plans derived from the poverty reduction law
- the origins of the means necessary for the law's implementation
- the composition and functioning rules of an inclusive body designed for the monitoring and evaluation of the poverty reduction law and supervision of any future adjustments.

For more information or to support the campaign: visit [www.aceci.org](http://www.aceci.org) or contact GINETTE Karirekinyana, General Director, ACECI at: [info@aceci.org](mailto:info@aceci.org).

#### d. Cash transfer programmes as social inclusive policies

**31]** In recent years, a number of other strategies to combat poverty with a direct impact on the realization of human rights have been developed. These initiatives are called **Cash Transfers Programmes (CTPs)** and consist of a direct cash transfer to increase the income of poor households.<sup>26</sup> CTPs provide the financial means to facilitate access to basic goods

such as food, housing or education, for the most vulnerable. The UN Independent Expert on the question of human rights and extreme poverty emphasized the fact that CTPs have been identified as effective tools for poverty eradication due to their capacity to reduce economic inequalities and break the intergenerational transmission of poverty.<sup>27</sup>

**32]** CTPs have been developed today in more than thirty countries, especially in South Asia, Latin America and Africa, and have proved to have a substantial impact on supporting families, particularly those with children, by providing food, access to health and sustainable education.<sup>28</sup> Concrete examples of incremental increases in income and reductions in poverty have been demonstrated in Brazil through the Bolsa Familia Programme, Zambia, Malawi, Mozambique, Namibia and China.<sup>29</sup> As for example, studies have demonstrated that in the absence of CTPs provided through the Bolsa Familia Programme, poverty in Brazilian households would increase by 5.3 per cent.<sup>30</sup> The direct effect of CTPs is thought to combat short-term poverty.

#### Brazilian Programme 'Brazil End Poverty' 2011: an example of social inclusive policy

'Brasil Sem Miséria' ('Brazil End Poverty') is a National Poverty Alleviation Programme recently launched by the Brazilian Government. Its aim is to inject US\$13 millions until 2014 to empower the poorest Brazilian households to access health, education, employment opportunities, electricity, safe drinking water and sanitation, productive inclusion and other economic, social and cultural rights.

The programme aims to lift 16 million people out of poverty. The beneficiaries have been identified by a 2010 national census. People who have not benefited from the Bolsa Familia Cash Transfer Programme will be registered under the Brazil End Poverty programme.

**33]** Various forms of Cash Transfers have been implemented by different countries. The so-called **Conditional Cash Transfers Programmes (CCTPs)** consist of direct cash transfers, but the

27. See report of the independent expert on the question of human rights and extreme poverty, Ms Magdalena Sepúlveda Carmona, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, document A/HRC/11/9 27 March 2009. See also Samson, *Tackling Poverty with Social Transfers*, 2007.

28. See, for example, K. Chapman, *Using social transfers to scale up equitable access to education and health services*, London, DFID Policy Division, Scaling up Services Team, 2006; N. Schady and M. Caridad Araujo, *Cash transfers, conditions, school enrolment, and child work: Evidence from a randomized experiment in Ecuador*, 2006.

29. Brazil, through Bolsa de Família (Family Support Programme), for example, has attained the first MDG. The Kalomo Project in Zambia has reached a target group of 200,000 households who have received an amount of 30,000 ZMK and another 10,000 ZMK per child. In Malawi, the Mchinji pilot social cash transfer scheme introduced in 2006 reaches 11,170 beneficiaries and focuses on children, and orphans in particular. It supports the process of elaborating a national social protection policy for Malawi. The goal is to link the social cash transfer scheme to ongoing social and economic programmes and services, and complement the scheme with programmes that target poor households which are not labour constrained. In China, the DI Bao (Minimum Income Guarantee Scheme) was introduced in 1999 across the country, reaching 22 million people and costing 1 per cent of GDP. For more information, see: R. Künnemann and R. Leonhard, *A Human Rights View of Social Cash Transfers for Achieving the Millennium Development Goals*, Brot für Die Welt, EED, Fian International and Medico International, 2008.

30. See, for example, the studies of A. Barrientos and R. Holmes, *Social Assistance in Developing Countries Database*, Version 2.0, IDS, University of Sussex, March 2006.

26. F. Ariel and S. Norber, *Conditional cash transfers: reducing present and future poverty*, *World Bank Policy Research Report*, 2009.

*[Brazilian Programme 'Brazil End Poverty' 2011: an example of social inclusive policy]*

The basis of the programme is the creation of social inclusion in order to make growth sustainable at the national and regional level. For this purpose, the Programme will provide holistic responses to poverty by supporting training capacities and youth entrepreneurship with targeted action provided by food, nutrition and housing centres.

The programme will concretely:

1. Promote access to economic, social and cultural rights by providing subsidies
2. Provide infrastructure for the provision of social services
3. Provide capacity building and training sessions in order to increase participation of the most vulnerable
4. Support equality by breaking generational exclusion and empower female participation.

In order to link the families and the government, 7,000 Centres for Social Assistance have been created in each municipality in order to support the identification of needs, as well as the administration of funds.

The role of NGOs will be crucial in providing data and undertaking research on existing gaps and the needs of marginalized populations.

For more information, see: [www.brasilsemmiseria.gov.co](http://www.brasilsemmiseria.gov.co)

beneficiaries commit themselves to investing, in return, in child education, provision of food or health services (especially for HIV-AIDS), and gender empowerment, for example. Investment in these ESC rights provides a decent floor for poor persons and allows them to progressively access educational systems and healthcare services. CCTPs are a source of tacit obligations for beneficiaries to access ESC rights.

**34]** Gender approaches to CTPs have also been important to development. Examples demonstrate how CTPs have helped empower women by providing autonomy and equilibrating household members, especially in Asia and Africa. In Mexico, for example, women have reported having greater control over household resources as a result of the Mexican 'Progresas' Initiative.

**35]** General responses show that CTPs remain efficient in combating short-term poverty and elevating the standard of living to 'adequate' and 'decent' levels. From a long-term perspective, CTPs are not meant to work autonomously and are insufficient to replace adequate services and targeted public policies. As such, they do not ensure long-term empowerment of the poor. Therefore, CTPs should undoubtedly be accompanied by mechanisms aimed at supporting long-term access to services and providing a common floor for the enjoyment of human rights for vulnerable persons. In this way, long-term sustainable CTPs could be a tool for empowerment and should also work to ensure the participation of a wide list of actors.

**36]** For these reasons, CTPs are most effective when complemented by other social protection programmes and when

they integrate a human-rights approach. Their success depends largely on political will, administrative capacity and the availability of financial resources. In addition, it is crucial that local actors support the monitoring and transparency of those strategies. NGOs can play a huge role in their implementation and accountability. For example, the pilot above mentioned experience of the Malawi CTP<sup>31</sup> provided a good example of the crucial role played by NGOs in supporting food aid.<sup>32</sup>

### 3. TRANSLATING MDGs INTO RIGHTS

**37]** By adopting the Millennium Declaration, 191 UN Members agreed to adopt the Millennium Development Goals (MDGs), which include targets to be achieved by 2015. Reminding the international community and the UN Agencies of their duty to develop standards related to states' obligations, derived from the human rights-based approach to poverty eradication, the international community defined the first one of these goals as reducing poverty by one half by 2015, and identified the issue of extreme poverty as a main objective: *'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.'* MDG 1 is to 'end poverty and hunger'.<sup>33</sup>

**38]** To reinforce initiatives to attain the MDGs, the second Decade for the Eradication of Poverty 2008–2017 issued a demand for an integrated strategy to support national activities and actions to eradicate poverty, through the implementation of holistic policies with broad social protection impact. International cooperation aims to reinforce national strategies with a view to advancing the progressive realization of human rights and the attainment of the MDGs.

**39]** However, the MDGs would be achieved if we don't translate them into rights and therefore into actionable interventions with strong local impact. Human rights and MDGs both have a minimum standard which policies and programmes can be evaluated against. They should both be integrated at the beginning of the policy or programme design stage. Thus, linking MDGs to human rights will prevent MDGs from being merely *optional* and will help them to:

- (1) better address the question of the most vulnerable groups of society
- (2) include the notions of state *obligations* and progressive realization, and

31. [www.ipc-undp.org/publications/cct/africa/PilotingMalawiCT.pdf](http://www.ipc-undp.org/publications/cct/africa/PilotingMalawiCT.pdf).

32. Op. cit

33. See the UN Campaign to End Poverty by 2015 at [www.endpoverty2015.org](http://www.endpoverty2015.org). The campaign focuses on achieving the eight MDGs by 2015.

## TRANSLATING MILLENNIUM DEVELOPMENT GOALS (MDGs) INTO RIGHTS

GOALS	TARGETS	RIGHTS	RELATED ARTICLES
<b>MDG 1.</b> <b>Eradicate extreme poverty and hunger</b>	1.a. Reduce by half the proportion of people living on less than a dollar a day	Right to attain a decent standard of living Right to social security	Art. 22 and 22 of the UDHR Art. 6 ICESCR Art. 25 UDHR Art. 11 ICESCR
	1.b. Achieve full and productive employment and decent work for all, including women and young people	Right to work	
	1.c. Reduce by half the proportion of people who suffer from hunger	Right to food	
<b>MDG 2.</b> <b>Achieve universal primary education</b>	2. Ensure that all boys and girls complete a full course of primary schooling	Right to education	UDHR Art. 25(1) Arts 13, 14 ICESCR Art. 28(1) a CRC Art. 10 CEDAW Art. 5(e) ICERD
<b>MDG 3.</b> <b>Promote gender equality and empower women</b>	3. Eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015	Right to equality Right to education	UDHR Art. 25(1) Arts 13, 14 ICESCR Art. 28(1)a CRC Art. 10 CEDAW Art. 5(e) ICERD
<b>MDG 4.</b> <b>Reduce child mortality</b>	4. Reduce by two-thirds the mortality rate among children under five	Right to life	UDHR Art. 25 (1) Art. 6 and 24 (2)a CRC Art. 12(2)a ICESCR
<b>MDG 5.</b> <b>Improve maternal health</b>	5.a. Reduce by three-quarters the maternal mortality ratio	Right to life	Art. 25 UDHR Art. 12 ICESCR Art. 24 CRC Art. 12 CEDAW Art. 5(e)(iv) ICERD
	5.b. Achieve, by 2015, universal access to reproductive health	The right to the highest attainable standard of health	
<b>MDG 6.</b> <b>Combat HIV/AIDS, malaria and other diseases</b>	6.a. Halt and begin to reverse the spread of HIV/AIDS	The right to the highest attainable standard of health	Art. 25 UDHR Art. 12 ICESCR Art. 24 CRC Art. 12 CEDAW Art. 5(e)(iv) ICERD
	6.b. Achieve, by 2010, universal access to HIV/AIDS for all those who need it		
	6.c. Halt and begin to reverse the incidence of malaria and other major diseases		
<b>MDG 7.</b> <b>Ensure environmental sustainability</b>	7.a. Integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources	Right to environmental health	Art. 12 ICESCR Art. 14 CRC
	7.b. Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss		
	7.c. Reduce by half the proportion of people without sustainable access to safe drinking water and basic sanitation	Right to safe drinking water and sanitation	
	7.d. Achieve significant improvement in lives of at least 100 million slum dwellers, by 2020	Right to adequate housing	
<b>MDG 8.</b> <b>Develop a global partnership for development</b>	8.a. Develop further an open, rule-based, predictable, non-discriminatory trading and financial system	Right to development	Art. 22 and 28 UDHR Art. 2 (1) , 11 (1), 15 (4), 22 and 23 ICESCR Art. 4 , 24 (4) and 28 (3) CRC
	8.b. Address the special needs of the least developed countries		
	8.c. Address the special needs of landlocked developing countries and small island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly)		
	8.d. Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term	The right to the highest attainable standard of health	
	8.e. In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries	Right to enjoy the benefits of scientific progress and its implications	
	8.f. In cooperation with private sector, make available the benefits of new technologies		

Source: table created by the author on the basis of the information obtained at the website: [www.un.org/millenniumgoals/](http://www.un.org/millenniumgoals/)

- (3) promote an interdisciplinary approach to programming by integrating the interdependent nature of human rights.

## 4. MAINSTREAMING GENDER INTO POVERTY AGENDAS

**40]** Gender issues are today found at the heart of development, social, political and economic issues, as a matter of urgency. Women remain the poorest segment among the poor. It is estimated that women represent around 70 per cent of the world's poor.<sup>34</sup> Of the 113 million children not in primary schools 60 per cent are girls. More than 60 per cent of the world's estimated 876 million illiterate adults are women, and among refugees 80 per cent are women. In addition, their access to work opportunities and posts with responsibilities are limited.

**41]** A focus on women' rights has grown significantly, in part as a result of the 1995 Beijing World Conference on Women and its Platform for Action, and the Outcome Document of the special session of the General Assembly in Beijing+5. The Beijing Declaration and Platform for Action developed the notion of 'gender mainstreaming', highlighting the need to take gender perspectives into account in all social, legal and political frameworks, whenever a policy, strategy, plan or norm is formulated or implemented. As a result gender mainstreaming has been implemented in diverse initiatives around the world, but unfortunately this has not been enough to overcome persistent gender inequalities worldwide.

**42]** Millennium Development Goal 3 concerns the promotion of gender equality and the empowerment of women as a tool to combat poverty. Indeed, women's public participation is a human rights issue and it empowers their decision-making processes with direct effect in the communities and their families.

**43]** Both Article 3 of the ICESCR and ICCPR banish any kind of discrimination against women. In particular, the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) proclaims the equality of rights between men and women in all social, economic, political and legal spheres and encourage actions to modify patterns that create stereotypes and impede equality between men and women. The Convention appeals for equal access in education (Art. 10), employment (Art. 11), health services (Art. 12) and economic and social benefits (Art. 13) with special attention on rural women (Art. 14). The Optional Protocol to the Convention allows women victims to submit claims of violations of rights protected under the Convention.

<sup>34</sup>. Data and information from UNIFEM.

**44]** Trafficking and prostitution, violence and reproductive rights remain the major concerns in the protection of women. The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, and several ILO Conventions contain specific provisions relating to these issues. At the regional level, the Optional Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa mentions specific provisions against harmful practices, such as genital mutilation, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belém Do Pará) contains provisions on violence against women, among many others.



### Gender approach to access to justice

In order to provide visibility for gender policy initiatives and adjudication in the judicial system, the Inter-American Bank has launched a pilot project in Costa Rica, aimed at developing a programme on gender awareness-raising activities and supporting information to monitor and evaluate non-discriminatory practices in the judicial system. A training model on gender issues is being developed as well as a model to disseminate court decisions related to gender issues.

In Colombia, a project called Casas de Justicia (Justice Houses) promotes awareness of judicial decisions and legal support for women in situations of poverty by providing them with access to justice. The creation of Casas de Justicia has increased the accessibility of justice services for urban and rural populations; promoted relationships between public defenders, pro bono attorneys, police and judges; and promoted the access of marginalized Colombians, especially women and displaced population, to a range of remedies, ranging from title law to domestic law.

For more information, please see: [www.mij.gov.co/econtent/library/documents/DocNewsNo1775DocumentNo1770.PDF](http://www.mij.gov.co/econtent/library/documents/DocNewsNo1775DocumentNo1770.PDF)

## 5. PRIORITIZING VULNERABLE GROUPS

**45]** Vulnerable social groups are at the center of the strategy to eradicate poverty. The Committee has repeatedly announced which groups of society should be considered as 'marginalized' and 'vulnerable'. Some are discriminated against because of the historical and structural role of societies, some because of their physical, mental or sexual condition. Those groups are: children, older people, people with disabilities, people living with HIV-AIDS, migrants, displaced persons, indigenous people and lesbians, gays, bisexual and transgender people (LGBT).

**46]** Youth is presented here as a group that merits special attention as in recent years this age group has been particularly affected by high levels of unemployment, growing urban poverty, forced migration, family disintegration and



deteriorating health conditions. Among other challenging factors, the population density in cities accelerates the transmission of infections to which children and young people are especially vulnerable, including HIV/AIDS. Research also shows that young people are particularly affected by insecurity since this age group holds the highest level of involvement in violence situations, both as agents and as victims. When deprived of access to basic healthcare, education and job opportunities, among other things, marginalized young people are often stigmatized when trying to be part of society.

### a. Children

**47]** Children need special care and protection because of their particular vulnerability. The 1989 Convention on the Rights of the Child (CRC) protects his/her right to life, survival and development under the principles of **protection, provision and participation**. By applying the 'most favourable conditions clause', the Convention emphasizes the necessity of applying the most favourable conditions clause, whenever a clause of the CRC and a national provision are contravened.

**48]** Special provisions concerning economic, social and cultural rights are mentioned along with the right to health, clean water, sanitation, education, food, the prohibition of child labour and child abuse, and the freedom of children to express their opinions and to have a say in things that concern their life. The Optional Protocols to the Convention namely the Optional Protocol on the involvement of children in armed conflict<sup>35</sup> and the Optional Protocol on the sale of children, child prostitution and child pornography provide special protection against the worst forms of exploitation and contain provisions on street children, sexual exploitation, and children recruited by armed forces or belligerent organizations. The Committee on the Rights of the Child and the Human Rights Committee supervise both the respect of the obligations related to the Convention and its Protocols.

**49]** At the regional level, the African Charter on the Rights and Welfare of the Child, the Inter-American Conventions on Conflicts of Laws concerning the Adoptions of Minors and on the International Return of Children, and the European Social Charter reinforce protection.

### b. Youth

**50]** The United Nations define youth as persons between the ages of 15 and 24. Although young people represent more than 18% of the world's population and perform a crucial role as agents of change, most countries today have no public policy relating specifically to youth. Furthermore, even for

states that have developed such new forms of legislation, too often it is piecemeal and lacks a comprehensive approach thereby impeding participatory processes to integrate challenges faced by the younger generation, as well as possible solutions.

**51]** As young people today are particularly vulnerable to current social and economic challenges, they are now more present on the agendas of planners and decision-makers and – albeit still scarcely – in public policy outlines. In this context, UNESCO has developed a set of guidelines covering policy formulation, implementation and monitoring and evaluation on national youth policies and programmes without interfering with state priorities. The main priorities for confronting the challenges of social change are: preventing violence, inclusion of youth with disabilities, and fostering participation of young women and men. UNESCO has also developed initiatives including the Youth Development Index, an indicator used to measure the development of countries: the per capita GDP applied to youth. This Index highlights specificities within this age group according to the presence of youths in socially defined activities (work and school).

**52]** This manual focuses on youth as a vulnerable group whenever a violation occurs to a young people due to its lack of accessing a right. Youth are therefore considered as subject of vulnerability caused by a lack of access to resources, for example, or from dependency on public services, which may be the situation for young disabled people. Typically, what all these groups have in common is a lack of effective public voice and mitigation options, such as a dependable network of support or sufficient fungible assets.

### c. Older people

**53]** Older people often suffer limitations to their economic, social and cultural rights and related discrimination. However, no international human rights instrument is dedicated to older persons. Despite this, several instruments mention the necessity of avoiding any kind of discrimination against older people and the need to promote their participation, development, care and increase their social welfare. For example, the UN Convention on the Rights of Persons with Disabilities (CRPD) specifically mentions the necessity for States Parties to '*adopt immediate, effective and appropriate measures*' to combat stereotypes on the base of age (Art. 8.1b), and other instruments such as the African Charter prescribes the necessity of protecting their moral and physical needs (Art. 18).

### d. People with disabilities

**54]** People with disabilities suffer multiple forms of discrimination and need to be empowered in order to make

35. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002.

social integration a reality. The recent UN Convention on the Rights of People with Disabilities (CRPD)<sup>36</sup> contains a list of principles that aim to provide specific responses in relation to their rights to transportation, housing, health care and participation in public life.

**55]** Indeed, Article 3 of the Convention reaffirms the respect for inherent dignity, individual autonomy, non-discrimination, equality of opportunity and accessibility among others as guiding principles of the Convention, and Articles 6 and 7 mention specifically women and children with disabilities. Article 25 confirms the necessity of providing health care on the basis of free and informed consent and equality with others.

**56]** At the regional level, the African Charter on Human and People's Rights mentions handicapped children as groups exposed to specific vulnerability. The 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities recalls the need to ensure quality of services for disabled people as well as their independence. Specific instruments such as ILO 159 of 1983 and Recommendation (n° 168) and the United Nations Convention on the Rights of Persons with Disabilities concerning Vocational Rehabilitation and Employment, provide guidelines for policy on vocational rehabilitation in order to promote employment opportunities. General Comment n°5 of the Committee on ESC Rights is dedicated to people with disabilities.

### e. People living with HIV-AIDS

**57]** Despite the absence of an international binding instrument dealing with HIV-AIDS, most of the international human rights instruments provide special protection for people living with HIV-AIDS. Indeed, rates of HIV-AIDS infection are still on the rise in many countries in sub-Saharan Africa and some regions of Asia. Due to the discrimination they encounter, people with HIV-AIDS should be empowered in their access to health care protection, housing and education. Women are at greater risk of infection due to their historical cultural subordination and their sexual and reproductive rights.

### f. Migrants

**58]** International migration has become an intrinsic feature of globalization. Migrants live in states where they are not nationals, and are confronted with cultural, political and social changes that require adaptation to new values and practices. This adaptation can often be difficult and lead to exclusion and discrimination. Moreover, their limited access to employment, education, health care and housing, among

other rights, places them in a situation of vulnerability.

**59]** Poverty is sometimes the reason for migration, but is also an outcome of it. There is therefore a pressing need to recognize and implement the human rights of migrants and equality of treatment, and to ensure their recognition not only as workers, but as human beings with the same rights.

**60]** The 2003 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families aims to guarantee economic, social and cultural rights as well as civil and political rights, with a view to ensuring access to social goods in terms of equality and participation. Migrants are asked to retain contact with their country of origin and to return and participate in public life. In the case of irregular migrants, protection should also be given despite their undocumented situation.

### g. Displaced people

**61]** Displaced people are people who have been obliged to leave their homes due to natural, political or social events but have remained inside the border. Due to their forced displacement, they encounter discrimination and intolerance as well as exclusion from economic and social development processes. Therefore, States are obliged to provide the same treatment as is accorded to nationals, and especially in accessing human rights such as education, health care and social security and employment. The general framework of protection is given by the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

**62]** Refugees are also considered as displaced people, but with the difference that they have crossed borders and encounter, for the same reasons, exclusion. The 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the Resolution 2198 (XXI) adopted by the United Nations General Assembly constitute the main treaty bodies related to refugees.

**63]** At the regional level, the Convention Governing the Specific Aspects of Refugee Problems in Africa and the Addis Ababa Document on Refugees and Forced Population Displacements in Africa contain prescriptions to provide financial, material and technical assistance, as well as access to human rights such as food, water, shelter, sanitation and health care. The 1984 Cartagena Declaration on Refugees<sup>37</sup> as well as the San José Declaration on Refugees and Displaced Persons<sup>38</sup> are non-binding instruments serving as sources of guidance for the convergence between International Human

36. Adopted by General Assembly resolution A/RES/61/106, 13 December, 2006.

37. Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984.

38. Adopted by the International Colloquium in Commemoration of the Tenth Anniversary of the Cartagena Declaration on Refugees, San José, 5 December 1994.

Rights Law, International Humanitarian Law and International Refugee Law. The Cartagena Declaration, for example, calls for improving their *'self-sufficiency and integration into society'* as well as the enjoyment of their economic, social and cultural rights, while the San José Declaration reiterates the necessity of designing programmes to facilitate local integration, the issuance of essential documentation and the normalization of their migratory status. The Declaration insists on including gender-based criteria in the examination of claims for refugee status.

## h. Indigenous people

**64]** Indigenous people have historically been neglected and marginalized. They are also confronted with challenges created by globalization, markets dynamics and several violations of their lands, economic resources and environment. It is therefore necessary to promote human rights through culturally sensitive approaches in order to preserve cultural diversity.

**65]** The first Convention on tribal groups, ILO 107 (1957), which was revised and amended in 1989 by in ILO 169 Convention, defines tribal groups in its Article 1.1 as groups *'whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.'* In

addition, the United Declaration on the Rights of Indigenous Peoples, adopted in 2007, emphasizes the prohibition of any kind of discrimination and stresses their right to maintain their own institutions, cultures and traditions. States are invited to promote their effective participation in all matters that concern them.

## i. Lesbians, gays, bisexual and transgender people (LGBT)

**66]** The discrimination encountered by lesbians, gays, bisexual and transgender people (LGBT) is often linked to historic and religious reasons, and some countries have failed in according them equal rights and liberties. In this sense, the historic and recent UN Resolution A/HRC/17/L.9/Rev. 1 (15 June 2011) on human rights, sexual orientation and gender identity, marks the first step in recognition of the multiple human rights violations faced by LGBT people as a result of their sexual orientation, and constitutes a major step in ensuring equality. The Resolution requests the *'commission of a study listing and analysing the discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world'*. It also requests further elaboration on how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.

### EXERCISES

- 1) What are the core contents of the notion of poverty?
- 2) Why is poverty a violation of human rights?
- 3) Does the 1948 Universal Declaration of Human Rights integrate all vulnerable groups by affirming in Article 1 that 'all people are born free and equal in dignity and rights'?
- 4) Do you agree that vulnerable groups should receive special treatment? Justify your answer.
- 5) Please provide examples of how human rights can be addressed in order to include a 'cultural approach'. Is this contrary to the principle of universalism of human rights? Justify your answer.

# Chapter II:

## The role of justiciability in the combat against poverty

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### 1. Defining the concept of justiciability

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### 2. National frameworks for justiciability of ESC rights

– 29 –

### 3. The role of judges in the advancement of ESC rights

– 31 –

### 4. Correlations between justiciability and social justice: towards a transformative constitutionalism

- a. Justiciability providing relief to people and setting the basis for non-discrimination and recognition
- b. Justiciability providing relief to the most vulnerable through the redistribution of goods
- c. Justiciability transforming the reality of special attention groups

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### 5. What role for NGOs in advancing justiciability?

# CHAPTER II: THE ROLE OF JUSTICIABILITY IN THE COMBAT AGAINST POVERTY



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The arguments presented here develop the idea that justiciability reinforces the progressive realization of human rights. Justiciability provides relief by giving legal recognition to the rights of the poor. It promotes the existence of ESC rights assessment within the legal hierarchy while contributing to their realization. Other means contribute to the advancement of human rights as the implementation of public policies by independent bodies and the advocacy action of NGOs in their monitoring. So, justiciability is here taken as one of the necessary steps towards implementation of State accountability. This chapter examines the common ground shared by the concepts of social justice and justiciability, and explores how national and international litigation have a concrete impact on the promotion of social justice – building upon a broad definition of justiciability that implies the real transformative potential of human rights.

## 1. DEFINING THE CONCEPT OF JUSTICIABILITY

1] In the context of alleged violations of rights, justiciability refers to legal enforcement on behalf of the victims, by way of filing a claim before national – judicial and quasi-judicial – and impartial legal claims mechanisms, with a view to requesting a remedy or a redress of the alleged violation.<sup>1</sup> Some consider justiciability as one of the phases in the gradual development process of a right, with the first phase of advancement corresponding to its idealization, the second to its conceptualization, the third to its ‘positivization’, and the last to its (full) realization.<sup>2</sup> For others, since the courts aim to provide a remedy to an alleged violation in a particular case,<sup>3</sup> justiciability responds to the claim that there is ‘no right without a remedy’: that is, the right of a complainant to present a petition and get a remedy in return.

1. See Introductory remarks, F. Coomans (ed) *Justiciability of Economic, Social and Cultural Rights: experiences from domestic systems*, Intersentia, Antwerpen-Oxford, 2006, pp. 4–5. See also, R. Gargarella, P. Domingo and T. Roux, (eds) *Courts and Social Transformation in New Democracies: an institutional voice for the poor?* Ashgate, 2006.

2. See J. Donnelly, The West and economic rights, in S. Hertel and L. Minkel (eds) *Economic Rights: conceptual, measurement and policy issues*, Cambridge University Press, 2006, pp. 48–49.

3. See F. Viljoen, National legislation as a source of justiciable socio-economic rights, 6 *ESR Review*, N. 3, 2005, pp. 6–9; also see Y. Ghai and J. Cottrell, The role of the courts in the protection of economic, social and cultural rights, Y. Ghai and J. Cottrell (eds), *Economic, Social and Cultural Rights in Practice*, London: Interights, 2004.

2] The definition of justiciability has always been both complex and problematic in terms of distinguishing the level of realization of civil and political rights (CP) versus ESC rights. In fact, the general assumption is that CP rights are justiciable, while ESC rights are not. However, the empirical evidence, consisting of numerous case laws dealing with ESC rights in courts, shows that ESC rights have gained increasing legal recognition, and in terms of adjudication are now on an equal footing with CP rights. The justiciability of courts has thus played a decisive role in equilibrating CP and ESC rights.

3] In developing the latter, it is important to distinguish the two forms of implementation of legal standards: implementation *per se*, and justiciability by *adjudication*. The first is defined by law or by the constitutional provisions that provide immediate or self-execution of ESC rights, as well as direct access to courts; the second requires the development of argumentative considerations by courts through jurisprudence. Indeed, those two forms of implementation have been clarified and developed by national courts, which have shifted from a conservative to a more progressive level of activism in the protection of ESC rights.

4] The CESCR therefore argues, in General Comment n° 9 on domestic application of the Covenant, that there is no right which cannot be considered to possess at least

some significant justiciable dimensions. The CESR clarifies that it is important in this regard to distinguish between justiciability (matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). The CESCR reaffirms that 'there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions'. The Committee has affirmed that 'the Covenant norms must be recognized in appropriate ways within domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or groups and appropriate means of ensuring governmental accountability must be put in place'.<sup>4</sup>

## 2. NATIONAL FRAMEWORKS FOR JUSTICIABILITY OF ESC RIGHTS

**5]** It is today undeniable that adjudication of ESC rights has matured, as confirmed by national experiences in India, Colombia, the Philippines, Canada, and South Africa, among many others. These comparable experiences have demonstrated the crucial role of justiciability in setting standards for empowerment and building a legal basis for the attainment of social justice.

**6]** The **Indian Constitution**<sup>5</sup> states that only the right to life, the right to equality and the right to freedom of expression are justiciable rights, defining these as self-executive rights (justiciability *per se*). Nevertheless, *a posteriori*, developments in justiciability appeared in the 1970s when the Indian Supreme Court (Indian SC) linked the right to life<sup>6</sup> to human dignity, and defined an integrative theory in which the nature of fundamentality should be attributed to all rights that are linked to the right to life. The Indian SC states that 'the right to life includes the right to live with human dignity and all that goes with it'.<sup>7</sup> ESC rights have been included in the Constitution under Directive Principles, which although not justiciable, provide a guide for the Government on the implementation of ESC rights. However, in recent revisions, the court has used the Directive Principles to enlarge the scope of ESC rights.<sup>8</sup> The use of **Public Interest Litigation (PIL)** has contributed to providing relief to people and to

creating policy that states must follow.<sup>9</sup> The PIL has provided broad access to justice and judicial redress to all persons or class of persons that are in a position of poverty, vulnerability, disability and exclusion in genera. Any member of public can maintain an application for an appropriate direction, order or writ in the Indian High Court.

**7]** Along similar lines, the justiciability of fundamental rights was inscribed in the **Colombian Constitution** of 1991. The Constitution includes a list of fundamental rights, and states that the majority of civil and political rights are directly applicable and justiciable. However, the Constitution has no clear provision on the enforcement of social rights. Thus, developments in ESC rights as justiciable rights have been ruled through adjudication provided by the Colombian Constitutional Court (Colombian CC). Here, as in India, the 'connexity'<sup>10</sup> of ESC rights with a fundamental right is justiciable.

**8]** The Constitution of the **Philippines** of 1987 fixes the terms of justiciability for the Supreme Court.<sup>11</sup> Article VIII states that in order for a right to be justiciable it first has to pass an analysis of the nature of the controversy (the right and the violation) and the capacity, legitimacy or interest of the victim (*locus standi*). In the case of ESC rights, the same test is applied. However, two provisions seem to be self-executing: the non-discrimination and the equal protection clauses. The same Constitution also incorporates a Declaration of Principles and State Policies including twenty-eight sections that elaborate ESC rights, such as health, education, social services and housing. Nevertheless, the justiciability of ESC rights has been developed by jurisprudence. In several cases (**LLDA**,<sup>12</sup> **Oposa**,<sup>13</sup> **Tañada**<sup>14</sup> and **Kilosbayan**),<sup>15</sup> the Philippines Court defined the meaning of justiciability, as well as the role of courts in right-conferring statements and policies, declaring that 'these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of human kind'.<sup>16</sup> The Court has advocated for the implementation of ESC rights through judicial and quasi-judicial means.

**9]** In **Canada**, the Constitution Act of 1867 does not provide any specific provision related to justiciability of human rights. Yet, the Canadian Charter of Rights and Freedoms

4. General Comment n°9, The domestic application of the Covenant: 03/12/1998. E/C.12/1998/24, CESCR, para. 10.

5. Constitution of India of 1950.

6. Part III of the Indian Constitution of 1950 mentions the right to life, the right to freedom of opinion and expression and the right to equality, and defines them as fundamental. ESC rights are mentioned under Part IV, entitled 'Directive Principles of State Policy and Fundamental Duties (DPSP) of the Constitution', including the right to education and work. Those ESC rights, according to the DPSP, 'are not enforceable by the courts, but the principles on which they are based are fundamental guidelines for governance that the State is expected to apply in framing and passing laws'.

7. See *Kesavananda Bharati v. State of Kerala* 4 SCC 225, 1973; *Maneka Gnanhi v. Union of India*, 1 SCC, 248, 1978; *Municipal Council Ratlam vs. Vardhichand and others*, AIR 1980 SC 622 and *Bandhua Mukti Morcha vs. Union of India*, 1984 SC 802.

8. For example, *Olga Tellis v Bombay*, 1986.

9. See, in this chapter, the text box on the judicial enforcement of positive obligations.

10. The Connexity Doctrine has been developed by the Constitutional Court of Colombia to enforce ESC rights, while assimilating them to fundamental rights, thus, enabling a social right to be protected as fundamental.

11. Section I states: 'The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government'.

12. See *Laguna Lake Development Authority (LLDA) v. Court of Appeals*, GR n° 110120, 16 March, 1994.

13. See *Oposa v. Factoran*, 224, SCRA 792, 1993.

14. See *Tañada v. Angara*, 272 SCRA 18, at 54, 1997.

15. See *Kilosbayan v. Guingona*, 232 SCRA 110, 1993.

16. See *Oposa Case* op. cit 12.

of 1982 has provided a framework for adjudication of ESC rights. This Charter has expanded judicial review and set up important developments for the advancement of ESC rights. It enshrines various ESC rights such as the right to education, housing, health and social assistance, and labour rights. In the case *Chaoulli v. Quebec (Attorney General)*<sup>17</sup> related to the decision of the Supreme Court of Canada to struck down a Quebec law that banned the use of private insurance for publicly insured health services covered under that province's universal health care system, Medicare, the Canadian Court stated: 'When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities'.<sup>18</sup> Other decisions have supported this position and empowered the poor.<sup>19</sup>

**10]** In **South Africa** the justiciability of ESC rights was largely developed by the Constitution of 1996, which explicitly inserted the State's obligations to respect, protect, promote and fulfil,<sup>20</sup> and asks the State to accomplish their progressive realization.<sup>21</sup> In the case *Fose v. Minister of Safety and Security*,<sup>22</sup> the Constitutional Court of South Africa has defined the meaning of an appropriate and effective remedy, expressing that *"in our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal"*.

South Africa's role in the social rights adjudication debate is seen as revolutionary. The Constitutional Court has applied the *"reasonableness review"* of section 27(2) of the Constitution, in order to consider the reasonableness of legislative or other measures taken by the state in order to comply with its positive duties. The *"reasonableness review"* takes into consideration the context of the measures, including their purpose and their impact.<sup>23</sup>

### 3. THE ROLE OF JUDGES IN THE ADVANCEMENT OF ESC RIGHTS

**11]** The role of judges as the guardians of constitutions is crucial for the recognition, and clarification of the definition and enforcement of ESC rights, ensuring that they do not remain on paper alone. The judges assist with achieving the transformative potential of ESC rights, particularly in combating poverty at local levels.

**12]** Based on the traditional separation of powers, courts are responsible for the interpretation of the law. They have as a guiding principle the national constitution and international standards that are implemented directly or indirectly into the national framework. Courts provide remedies and redress situations concerning violations of human rights, as well as taking decisions that include legal obligations for governments and civil society, whenever their actions do not respect human rights principles and standards.

**13]** Arguments in favour of and against the role of courts providing interpretations of human rights lie at the centre of the debate. Indeed, so-called theories of 'democracy' have stressed the single most important argument against the enforcement of ESC rights by judges,<sup>24</sup> arguing that as judges are not elected by citizens, they should not be permitted a say in the advancement of ESC rights, since their decisions, in some cases, overrule pronouncements and priorities defined by the people's representatives, such as government authorities, parliamentarians, and so on.

**14]** The objections are embodied in two types of arguments:

- a. The anti-democratic character of judges: unlike governments and parliamentarians that are invested with public endorsement, judges are not elected and therefore should not decide on elements concerning political and economic models and priorities. In addition, judges impose a majority decision, instead of one that is broad and participatory (counter-majoritarian objection).
- b. The lack of technical capacities related to their competences in economy, political sciences: indeed, since ESC rights imply progressive policies with budgetary implications as well as the definition of concrete priorities and indicators, their competence in this matter has been much debated.

**15]** Concerning objections related to the financial impacts of judicial review, it has already been demonstrated that civil and political rights, as well as ESC rights, entail financial

17. S.C.R. 791, 2005 SCC 35.

18. *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35, para 87.

19. *Slaight Communications v. Davidson*, 1989 1 S.C.R. 1038, *Irwin Toy v. Attorney General Quebec*, 1989 1 S.C.R. 927, *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, 2002 A.S.C.R. para 82, and in the case *R. v. Ewanchuk* (1999) 1 S.C.R. 330, para 73.

20. Chapter 2 will provide clarification on the scope and content of these obligations.

21. The first landmark decisions related to the justiciability of ESC rights in South Africa are: *S v Zuma*, 1995 2 SA 642 CC y *S v Makwanyane*, 1995 3 SA 391 (CC).

22. [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

23. For the clarification of the *"reasonableness review"* and its difference with *"rationality review"* see *Khosa & Mahlauli v Minister of Social Development* 2004(6) BCLR 569 (CC).

24. See Y. Ghai and J. Cottrell, The role of the courts in the protection of economic, social and cultural rights, in Y. Ghai and J. Cottrell (eds) *Economic, Social and Cultural Rights in Practice*, London Interights, 2004. See also V. Abramovich and C. Courtis, Supporting justiciability of ESC rights, V. Abramovich and C. Courtis (eds) *Los Derechos Sociales como derechos exigibles*, 2<sup>nd</sup> edn, 2004; and COHRE, *Litigating Economic, Social and Cultural Rights: achievements, challenges and strategies*, 2003.

impacts. For example, the organization of regular elections or the management of a criminal justice system both have an impact on budgeting. As such, this line of argument does not represent a solid critique of judicial review of ESC rights.

**16]** As regards the expenses required to implement ESC rights, the financial implications in many cases are not enormous and largely imply the preparation of action plans, or occur only where a determined policy is impeded (for example, prohibition of forced evictions). However, where implementation is significant (vaccination campaigns, expensive healthcare services, extension of the scale of protection of the right to adequate housing or adequate food), the courts are capable of self-restriction or may even opt for a gradual advancement of the right. In South Africa, for example, the court has ruled that courts 'are not themselves directed at rearranging budgets',<sup>25</sup> but regardless, has supported progressive advancement of ESC rights.

**17]** Moreover, the CESCR has emphasized 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.'*<sup>26</sup>

**18]** It is important in this regard to distinguish between *justiciability* (which refers to those matters which are appropriately resolved by the courts) and *norms* which are self-executing (capable of being applied by courts without further elaboration). 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. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. For these reasons, such an argument should not impede the normal and regular adjudication of ESC rights. And this is why this manual supports the development of ESC rights as justiciable rights, as well as the arguments supporting their role in advancing human rights.

**19]** Four stages in the litigation process which demonstrate the enormous potential of judges can be underlined:<sup>27</sup> **voice, responsiveness, capability and compliance.** **Voice** relates to the ability of poor and marginalized people to voice their

claims; **responsiveness** is related to the willingness of the court to respond to the concerns of poor and marginalized people; **capability** is the legal effect of court decisions on rights that significantly affect the situation of marginalized and poor people; and finally **compliance** reflects the authority of the decisions of the courts and compliance with these by other branches, as well as their implementation through public policies.

**20]** This manual adopts this pro-poor approach, in which courts have a transformative capacity to change reality and provide standards to struggle against the most inhuman deprivations. Judicial decisions have accordingly an emancipatory impact since they propose ways of relief to marginalized people. Sometimes they even mark the beginning of social change. Justiciability is the first founding step for legitimacy. For full implementation, public policies and the participation of other actors, such as civil society, are also crucial.

## ► JUDICIAL ENFORCEMENT OF POSITIVE OBLIGATIONS

One of the lessons derived from the concept of positive obligations is that courts have been creative in developing new procedures, methods and remedies, in order to effectively advance human rights by the following *means and techniques*:

*Means that have provided direct adjudication of ESC rights include:* Public Interest Litigation (PIL)<sup>1</sup> and *direction orders and writs* in India,<sup>2</sup> the *Tutela*<sup>3</sup> or *amparo protection* in Spain, Mexico and Colombia, *recurso de proteccion*, public civil action in Brazil, and *injunctions* among others.

*Techniques that have expanded protection of ESC rights include:* the *reasonableness review*,<sup>4</sup> *proportionality*, *adequacy*, the *'theory of connexity'*,<sup>5</sup> *appropriateness*, the *vital minimum*,<sup>6</sup> the *basic structure doctrine*,<sup>7</sup> *unconstitutional states of*

1. PIL is a 'strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility of humanity'. Definition provided by S.P. Sathe, Judicial activism: the Indian experience, *Journal of Law and Policy*, 6 (2001). See also *People's Union for Democratic Rights v. India*, 1982 AIR (SC) 1473, 1476.

2. Articles 32 and 226 of the Indian Constitution give this prerogative to the Supreme Court of India.

3. Writ of protection of fundamental rights, presented to any Colombian judge, who will decide in a maximum of ten days the urgent matter of the plaintiff.

4. The reasonableness review is a technique by which the court adjudicates claims for the provision of social services and resources. The Courts asks itself 'whether a particular policy or programme can be justified, and it will be justified if it is reasonably related to a goal of providing access to the relevant socio-economic rights' (Grootboom case). Examples of the application of the reasonableness review by courts can be found in the cases *Grootboom* (South Africa) and *Chameli Singh and Ors v State of U.P. & Another*, JT 1995 (9) SC 380 (India), in which the court ordered the construction of shelters, allowing for growth and development in every aspect of life, and emphasized the right to life, stating that: '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 a decent environment and a reasonable accommodation to live in.'

5. Colombian theory developed by the Constitutional Court of Colombia, in which a right can be seen to be fundamental if linked to a fundamental right and to human dignity.

6. The vital minimum is a German doctrine that seeks to ensure minimum conditions of living to dignify the existence of the poor. The doctrine of the vital minimum has also been developed by the Constitutional Court of Colombia in rulings T 426/92 and T-011/1998, T-384/1998 and T-100/1999 SU-225/1994 among others.

7. The basic structure doctrine is an Indian doctrine by which the Constitution cannot be amended altering its general framework and basic structure. See *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala*, also known as the Kesavananda Bharati Case AIR (SC) 1973, 1461.

25. TAC, 2002 5 SA 721 CC para 38.

26. Thus, in General Comment n° 3 (1990) Article 3; Article 7, para (a)(i); Article 8; Article 10, para 3; Article 13, para 2 (a), para 3 and para 4; and Article 15, para 3 are cited, by way of example.

27. See this proposal from Siri Gløppen in *Courts and Social Transformation: an analytical framework*, in Roberto Gargarella, Pilar Domingo and Theunis Roux, editors: *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?*. Aldershot/Burlington: Ashgate, 2006, pp. 35-59.



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affairs,<sup>8</sup> Directive Principles of State Policy and Fundamental Duties (DPSP),<sup>9</sup> and the 'clause for the eradication of the present injustice'<sup>10</sup>, among others.

Making ESC rights justiciable for the poor would therefore incite the following positive consequences:

- (1) Increase visibility, (2) Give voice to right-holders, (3) Increase the accountability of duty bearers, (4) Provide protection, remedies or reparations for alleged violations, (5) Develop a means of compensation and redress, (6) Create the basis for a short, medium or long-term policy, and (7) Transform or adjust legal frameworks.

8. A procedure which incites authorities to correct inequalities, facilitate the inclusion and participation of the most vulnerable groups as well as a progressive obligation to develop material conditions for the most vulnerable groups.

9. Directive Principles are not justiciable *per se*, but justiciable by interpretation of a judge, when connected to the right to life and personal liberty. See op.cit. 6.

10. A procedure which incites the authorities to take concrete steps and actions aimed at eradicating the situation of injustice of determined vulnerable groups of society. This clause has been used in Colombia for the protection of displaced persons for example. This clause demands the active participation of all national authorities in order to stop de violation of the rights of minorities and marginalized populations as well as the respect of equality and human dignity.

21] On 10 December 2008, the UN General Assembly unanimously adopted an **Optional Protocol (OP) to the ICESCR**.<sup>28</sup> The OP will have important implications for the justiciability of ESC rights, securing redress for individual victims as well as developing jurisprudence and public policies, since it provides the Committee with the competence to receive and consider communications related to violations of ESC rights.

#### 4. CORRELATIONS BETWEEN JUSTICIABILITY AND SOCIAL JUSTICE: TOWARDS A TRANSFORMATIVE CONSTITUTIONALISM

22] The debate as to whether justiciability and social justice come together or not is a false dichotomy. Social justice naturally leads to a tension between rights and standards. The rights provide the basis for inclusion, recognition and participation in society, while the standards are to be seen as tools and ways to realize, defend, promote and express them. Justiciability is the voice of both since it provides legal recognition and development of standards for redress.

23] Therefore, recognizing the rights of the most vulnerable gives them the possibility to interact and participate in social

life, generating integration and parity. Legal adjudication breaks the cycle of misrecognition, and thus of subordination, and institutionalizes transformative strategies to remedy their human condition to establish a life with dignity. Justiciability provides standards to redistribute social goods such as non-discrimination, equality, access to rights and resources, as well as minimum standards of legal protection. Justiciability therefore becomes a tool of transformation and empowerment by altering structured inequalities in society and empowering social relations. Justiciability balances socio-economic patterns by combating cultural, social, sexual and racial discrimination.

24] We are today facing what is called 'transformative constitutionalism',<sup>29</sup> also known as a 'long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction'.<sup>30</sup> This transformative approach urges courts to develop a legal basis for open dialogue, recognition of the other and inclusion, and to transform needs into rights.

25] By providing affirmative action of redress, affirmation and transformation of reality, justiciability develops new standards of protection. Examples of redress and transformation provided by justiciability can be found worldwide and have demonstrated how justiciability provides relief to the poor and transforms realities of discrimination and marginalization. The following non-exhaustive section presents examples of such adjudication.

#### a. Justiciability providing relief to people and setting the basis for non-discrimination and recognition

26] Five founding cases in the mid-1950s in the **United States of America** marked a change in the way the judiciary guarantees equal protection by the law and their role in advancing social justice. The case **Brown et al v. Board of Education of Topeka et al** in 1954 (referred to as *the Brown case*), which consolidated opinion of five more cases,<sup>31</sup> established a new understanding of the power of law by declaring segregation at school based on racial arguments

29. The new paradigm of transformative constitutionalism and its correlation to social justice finds its basis in the theory of Nancy Fraser. In her work, Fraser has developed two main principles or strategies for remedying injustice: the affirmation of the other and transformation. She affirms that 'affirmative strategies for redressing injustice aim to correct inequitable outcomes of social arrangements without disturbing the underlying social structures that generate them. Transformative strategies, in contrast, aim to correct unjust outcomes precisely by restructuring the underlying generative framework'. In this sense, her theory embraces both a distributive conception and a recognition approach as a foundational basis for social justice, in N. Fraser and A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*, 2003, p. 74. In her later work, Fraser adds a third dimension related to justice: the political dimension underlying distribution and recognition are political since they are usually seen as requiring adjudication by the state, in *Scales of Justice: remaining political space in a globalizing world*, 2008, pp. 16-17.

30. K. Klare, *Legal culture and transformative constitutionalism* (1998) 10 27 SAJHR 146.

31. *Belton (Bulah) v. Gebhart (Delaware)*, *Bolling v. Sharpe [District of Columbia]*, *Brown v. Board of Education (Kansas)*, *Davis v. County School Board (Virginia)*, and *Briggs v. Elliott (South Carolina)*.

28. GA resolution A/RES/63/117.

unconstitutional. Its interpretation of the Fourteenth Amendment went beyond a formal reading and guaranteed equal protection of laws, placing all (blacks, whites, minorities) on an equal footing. By defining legal standards against racial segregation, the Brown case can be considered as the founding decision of the role of the judiciary in developing equal standards for protection and creating the legal arguments for social justice and transformation.

27] The judiciary in the **Brown** case stated that 'where the State has undertaken to provide an opportunity for an education in its public schools such an opportunity is a right which must be made available to all on equal terms'.<sup>32</sup> The Brown case overturned the jurisprudence of an earlier case, **Plessy v. Ferguson**,<sup>33</sup> which was founded on the 'separate but equal' doctrine. The judges revised the precedent established by the Plessy case and argued that in the field of education 'separate educational facilities are inherently unequal'.

28] A similar transformative decision can be found in **South Africa**, where transformation triggered by court decisions has been crucial with regard to racial segregation and discriminatory policies entrenched since the Apartheid period. In the landmark case **Premier, Province of Mpumalanga, and Another v. Executive Committee, Association of Governing Bodies of State-Aided Schools** (referred to as the **Premier Case**),<sup>34</sup> the Constitutional Court studied two important issues. The first was the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in South-African society. The second was the obligation of procedural fairness imposed upon the government in a case related to bursaries. After a profound revision of the need of transformation in educational systems,<sup>35</sup> the court affirmed that the Constitution dictated not only the end, which is the establishment of a non-racial, non-sexist democracy, but also regulated the means, including the obligation to observe procedural fairness.

29] The same argumentation was developed in **Bel Porto School Governing Body and Others v. Premier, Western Cape and another** (referred to as the Bel Porto case),<sup>36</sup> related to a policy concerning the employment and subsidies to teachers and their general assistants. The subsidies were based on an unequal educational scheme inherited from the segregation period. Stating that 'eradicating the racial discrimination

rooted in our education system is not a quick or easy task and [...] remains a complex challenge', the Court studied whether the differentiation constituted unfair discrimination against the appellants since they were assistants from a special school for disabled children. The Court ruled that the process of transformation shall be carried out in accordance with the provisions of the Constitution and its Bill of Rights and added that the transformation process will necessarily weigh more heavily on some members of the community than on others.

30] In the case **Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria**,<sup>37</sup> the Court of the Economic Community of West African States (ECOWAS) adjudicated a claim based on the right to education, even if such a right was arguably non-justiciable in domestic constitutional law in Nigeria. The ECOWAS Court dismissed the Government's contention that education is 'a mere directive policy of the government and not a legal entitlement of the citizens'. The ECOWAS Court affirmed that the rights guaranteed by the African Charter were justiciable before them, and supported the justiciability of the right to education in this particular case. The SERAP case has permitted NGOs to access the ECOWAS Court to seek the enforcement of economic, social and cultural rights.

31] In **Colombia**, similar kinds of transformative decisions providing recognition to segregated and marginalized people were decisive in changing the perception of the most vulnerable members of society. In a decision related to a case of deprivation of rights of displaced people, the Court provided a revolutionary decision ordering the immediate remedy of the 'unconstitutional state of affairs', and ordered the public authorities to develop and implement an Action Plan with the participation of the displaced people in all the policies and strategies concerning them. The Court further proposed that the recommendations be followed up.<sup>38</sup>

## b. Justiciability providing relief to the most vulnerable through the redistribution of goods

32] In the case **Mariela C. Vicomte v. Ministry of Health and Social Action**<sup>39</sup> the Argentinean Court of Appeal ordered the Argentinean Ministry of Health to organize a massive campaign of vaccination for 3.5 million people suffering from fever (positive obligation) and elevated the legal protection of the right to health by protecting millions of people, especially children, which created a massive social justice campaign.

33] In **South Africa**, in **Minister of Health v. Treatment Action Campaign (TAC)**,<sup>40</sup> the Constitutional Court ordered

32. Brown Case, p. 493.

33. Plessy case, 163 US 537.

34. *Premier, Province of Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools*. Eastern Transvaal 1999 (2) SA 91 (CC) and 1999 (2) BCLR 151 (CC).

35. In the *Premier case*, the South African Constitutional Court explained the roots of the segregation: under the former apartheid government, schools were generally racially divided with separate government schools for African, coloured, Indian and white children. Different ministries were responsible for the administration of these separate schools. In line with government policy, significantly more government funds were expended for each white child who attended school than were expended for each black pupil. As a result, schools for white children were generally well-equipped with classrooms, sports facilities and qualified teachers. Schools for black children were often dilapidated, with poor facilities and under-qualified teachers (paras 7 and 8).

36. *Bel Porto School Governing Body and Others v. premier, Western Cape and another* (hereafter Bel Porto case) 2002 (9) BCLR 891.

37. *Socio-Economic Rights and Accountability Project (SERAP) vs. Federal Republic of Nigeria and Universal Basic Education Commission*, n° ECW/CJ/APP/0808, 27 October 2009.

38. Ruling T 025/2004.

39. Argentinean Court of Appeal, 2 June 1998, Judgment n° 98.096.

40. *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

the Government to extend the availability of Nevirapine – an anti-retroviral drug for HIV-positive pregnant women that can avert tens of thousands of unnecessary infections and deaths – to hospitals and clinics, to provide counsellors, and to take reasonable measures to extend the testing and counselling facilities throughout the public health sector.

**34]** The same distributive decisions can be found in the 1998 **Colombian** ruling **SU-225 of 1998**, in which the Court ordered a free vaccination campaign for *poor children that are confronted with a higher risk of contamination of meningitis*. The Court ordered the implementation of the Immunization Plan. This decision laid the basis for future decisions.<sup>41</sup> Transformative decisions relating to the fair distribution of healthcare services were also given in another case (**T-760 of 2008**) in which the Court ordered a dramatic restructuring of the country's health system, and in the ruling **C-959 of 2000** through which the Court reviewed the economic legislation related to the calculation of mortgage debtors and tied the unit of constant acquisitive power (UPAC) to the rate of inflation. This ruling transformed housing financial legislation in Colombia.

**35]** In **India**, the formative case ***Azad Rickshaw Pullers Union (Regd.) Ch. Town Hall, Amritsar v. State of Punjab & Ors***<sup>42</sup> led to a transformative solution for the vulnerable and discriminated rickshaw pullers by empowering them to purchase their own rickshaw.

### c. Justiciability transforming the reality of special attention groups

**36]** Legal empowerment of women through judicial adjudication has provided important guidelines for the provision of recognition and adjudication of women's rights. Adjudication has set up important ladders in breaking prejudice and discrimination against women. For example, the landmark case ***Bi Hawa Mohamed v. Ally Sefu of Tanzania***<sup>43</sup> made important steps with regard to female equality, recognizing housework and childcare as marital contributions, counted by the spouse as matrimonial assets. This important case legally recognized the economic value of women's investments in marriages.

**37]** Other related decisions include: equal rights concerning years for retirement in Indonesia (***Nurhatina Hasibuan v. Pt. Indonesia Toray Synthetics and others n° 651/PDT/1988/PT.DKI Jakarta High Court***); women's rights to remarry after a divorce in Japan (***X1 and X2 v. Government of Japan Hiroshima High Court, 28 November 1991***); the need for the woman's consent to validate a marriage under Pakistani law (***Humaira Mehmood v. The State and others, 1999***); and

equality concerning a mother's guardianship of children after the death of the father (***Ms Githa Hariharan and another v. Reserve Bank of India and another with Dr and Vandana Shiva v. Jayanta Bandhopadhyaya and another, Air 17 February 1999, Supreme Court of India 1149***).

**38]** In South Africa, in the landmark case ***Bhe v. Magistrate Khayelitsha & Ors***,<sup>44</sup> which embraced two other cases (*Bhe*, SAHRC and *Shibi*), the Constitutional Court declared the African customary law rule of primogeniture unconstitutional and struck down the entire legislative framework regulating the estates of intestate deceased black South Africans.

**39]** A recent case in France, ***Siliadin v. France***,<sup>45</sup> analysed the scope of domestic labour and concluded that 'domestic slavery' of women still exists in Europe. A 15-year-old Togolese woman, unlawfully resident in France, was working every day from 7.30 am to 10.30 pm with no pay and forced to sleep in a coach with old clothes. The Committee against Modern Slavery (*Comité contre l'esclavage moderne*), alerted by a neighbour filled the petition. The case was studied by the European Court of Human Rights (ECHR). The Court noted that even though the provisions of the French Criminal Code related to 'the performance of services without payment', they did not deal specifically with the rights guaranteed under Article 4 of the European Convention, and were incompatible with human dignity. The Court stressed that such 'delivery of a child (...), with a view to the exploitation of her labour, was similar to the practice, analogous to slavery, referred to in Article 1(d) of the United Nations Supplementary Convention of 1956'<sup>46</sup> and that the situation had 'compromised her education and social integration'<sup>47</sup>. This case is particularly important, not because it relates to ESC rights, but because it provided an example of 'modern servitude', vulnerability and a state of dependence: The reasoning of the Court was the following: The Siliadin Case denounced such new forms of denigration of human dignity, as 'modern slavery' especially in the case of migrants.

**40]** A number of important cases have provided the basis for prohibition of child employment, forced or voluntary, even if caused by economic necessity. In the Indian cases ***M.C. Mehta v. State of Tamil Nadu and Ors*** and ***Bandhua Mukti Morcha v. Union of India***,<sup>48</sup> the Court highlighted that as a result of poverty, children and youth are subjected to many visible and invisible forms of suffering and disabilities, in particular, health, intellectual and social degradation and deprivation, and that this exploitation of their childhood is detrimental to democracy and social stability, unity and the integrity of the nation.

41. For example, ruling T-177 of 1999, ruling T-840 of 1999 and ruling T-772 of 2003, among others.

42. [1980] INSC 147 (5 August 1980), India.

43. Court of Appeal Case n° 19, Tanzania, 1983.

44. Case *Bhe v. Magistrate Khayelitsha & Ors*, 2005 (1) BCLR 1 (CC), 15 Oct. 2004.

45. Case *Siliadin v. France*, Application n° 73316/01, European Court of Human Rights (ECHR), Judgment, Strasbourg, 26 July 2005.

46. *Siliadin v. France*, para. 92.

47. *Siliadin v. France*, par. 95.

48. (1996) 6 SCC 756 and 21/02/1997, respectively.

**41]** The Court recalled that ‘welfare enactments made by the Parliament and the appropriate State Legislatures are only teasing illusions and a promise of unreality unless they are effectively implemented and make the right to the child driven to labour a reality, meaningful and happy’. It therefore prohibited child labour and asked that educational programmes, principles and policies for the progressive elimination of employment of the children below the age of 14 years be implemented. Along the same line, the decision *International Commission of Jurists v. Portugal of the European Committee on Social Rights* also had a strong impact in relation to child labour in Portugal: the Constitution was amended and the government adopted a plan to eliminate exploitative child labour.<sup>49</sup>

**42]** In the case *Sheela Barse And Others v. Union of India Others*,<sup>50</sup> the Supreme Court of India made an order which consisted of seeking the cooperation of non-governmental organizations to assist in the task of rehabilitating physically and mentally retarded and abandoned children jammed into ‘safe custody’ jails.

**43]** The following chapters will develop these premises. They will demonstrate that the direct impact and influence of judges’ decisions on social practices is complex and requires the participation of other actors responsible for implementation and monitoring at the local level. NGOs (and other actors, such as the media, for example) can fulfil this task and provide alternative solutions for the compliance of judges’ orders by developing legal channels in the field and through the ‘socialization of ESC rights’.

## 5. WHAT ROLE FOR NGOs IN ADVANCING JUSTICIABILITY?

**44]** In today’s globalized world, other actors in society have a role to play in revising constitutional and international standards, especially when these relate to ESC rights. We cannot talk about the reinforcement of ESC rights without including all such actors in the ‘transformative processes’. Indeed, as demonstrated above, ESC rights ‘imply a commitment to social integration, solidarity and equality and include tackling the issue of income distribution which is indispensable for an individual’s dignity and the free development of their personality’.<sup>51</sup>

**45]** For this reason, advocacy of ESC rights has become one of the main goals in the fight against poverty, impunity,

social exclusion and discrimination.<sup>52</sup> At the national level, five categories of interpretation and implementation of ESC rights can be mentioned:

- (1) The judicial level in which Courts define the rights and give effective remedy in the case of alleged violations of human rights, developed at length above.
- (2) The parajudicial level composed of other actors – Ombudsmen, public defenders and Human Rights Commissions – that are closer to civil society and act as ‘mediators’. They provide useful lobbying and advocacy.
- (3) The legislative branch, which translates the international human rights framework into national standards. Legislators create the legal framework within which human rights become a national goal.
- (4) The administrative branch which translates legal obligations into policies, programmes and projects.
- (5) Finally, the fifth category comprises NGOs, National HR Institutions and the academic community. All have a crucial role to play in the struggle against local poverty and for the advancement and definition of ESC rights, as a result of their composition, strategic position, lobbying capacities and monitoring. This category constitutes an ‘open community of interpreters’.

**46]** NGOs’ roles and tasks have increased in today’s world; they have become leaders in supporting policymakers, advancing advocacy and justiciability, providing a voice to the poor and acting as think tanks providing real knowledge. Their crucial role in giving legitimacy and voice to the grassroots in the fight against poverty is undeniable. They have founded the roots of a new form of governance from below.<sup>53</sup> NGOs have come up with different approaches<sup>54</sup> in the struggle against poverty: by focusing on development, the roots causes of poverty, the consequences of poverty, social protection and empowerment, they have become part of a multilateral system, which includes their work in all strategies, plans and normative actions.

**47]** As a result, their organizational structures have empowered their presence at political and local levels, allowing for better impact and visibility, especially in the field of combating poverty,<sup>55</sup> as for example through the establishment of campaigns, meetings, publication of parallel reports, studies and manuals among other initiatives.

**48]** In fact, if justiciability involves the process of adjudication of rights by judges, it also implies the

52. See P.J. Nelson and E. Dorsey, *New Rights Advocacy: changing strategies of development human rights NGOs*, Washington DC, Georgetown University Press, 2008.

53. It is important not to classify types of NGOs (for example, welfare NGOs, development NGOs, empowerment NGOs or social action groups) provide by K. Ranjani Murthy and Nitya Rao, *Addressing poverty: Indian NGOs and their Capacity. Enhancement in the 1990s* (New Delhi: FES, 1997), but rather to identify their structural organization and to understand their potential for empowering the poor. For the role of NGOs in new governance, see for example: J. Plache, *Société civile: un acteur historique de la gouvernance*, C.L Mayer, Coll. Dossier pour un débat, April, 2007.

54. P. Sparr and C. Moser, *International NGOs and Poverty Reduction Strategies: the contribution of an asset-based approach*, Global Economy and Development, Working Paper n° 8, Brooking Institution, Washington DC, 2007, p. 23.

55. A. Kumar, J. Aart Scholte, M. Kaldor, M. Glasius, H. Seckinelgin, H. Anheier, *Global Civil Society 2009: poverty and activism*, London, Sage, 2009.

49. *International Commission of Jurists vs. Portugal, European Committee on Social Rights*, September 9, 1999.

50. AIR 1986 SC 1773.

51. J.K. Mapulanda-Hulston, Examining the justiciability of economic, social and cultural rights, *International Journal of Human Rights*, 4, 2002.

responsibilities of other actors engaged in the implementation of principles and core elements of such rights. In this sense, the contributions and challenges of NGOs are enormous, since NGOs 'escort' the justiciability of ESC rights. Their contributions to the adjudication of ESC rights can be enumerated as follows:

- Capacity to hear, share and interpret the needs of disadvantaged people
- Legal representation for collective claims: the possibility to multiply the impact of an individual claim as part of a collective claim
- Community mobilization
- Broad membership
- Accurate and strategic litigation related to ESC rights
- Innovative interpretations of ESC rights
- Invaluable advocacy in the field of ESC rights
- Provision of exemplary good practices related to ESC rights
- Monitoring or follow-up of the decision derived from a claim related to human rights and especially ESC rights
- Greater funding capacity.

**49]** Examples of the participation of NGOs in justiciability are numerous. In the Argentinian case, *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social*<sup>56</sup> the support of a coalition of NGOs was crucial for the decision related to HIV medication in public hospitals. The Supreme Court stated that the State is obliged to provide the medicine for diagnosis and treatment, and the role of NGOs enabled this individual claim to be transformed into a collective claim. Another example is the intervention of a coalition of NGOs in the *Treatment Action Campaign* case. This provided a massive plan of action for access to HIV-AIDS treatments, and proved that access to accurate information on health while linking this information to rights, can form a basis for the empowerment of marginalized people, who begin to assume both a public voice and visibility.<sup>57</sup> In *Bandhua Mukti Morcha v. Union of India*, NGOs exercised direct advocacy in the abolition of child labour in India. A recent case, the *European Federation of National Organizations working with the homeless (FEANTSA) v. France*,<sup>58</sup> marked an important step in the advancement of the right to housing in France by providing the basis for transforming it into a justiciable right.

**50]** NGOs also played a crucial role in another case that opposed Nigeria and Social and Economics Rights Action (SERAC) and the Center for Economic and Social Rights (CESR) (*Serac and CESR v. Nigeria*)<sup>59</sup> over the obligations of a healthy environment and the massive violation of the right to shelter

of the Ogoni community. In Canada, in the case *Corporation of the City of Victoria v. Natalie Adams and others* relating to the right to adequate housing, the Centre of Poverty and Human Rights made a clear opening statement supporting the position of the respondents by quoting the link between poverty and human rights and the State's obligations derived from the right to adequate housing.<sup>60</sup>

**51]** NGOs' action for justiciability has also been particularly important in connection with the development of the recently adopted Optional Protocol of the ICESCR. Mentions and campaigns for justiciability of ESC rights have been numerous,<sup>61</sup> and have pushed forward the significant capacity and responsibility of court adjudication in providing consistency among human rights and in holding governments accountable.<sup>62</sup>

#### ▶ RECOMMENDATIONS TO NGOs IN RELATION TO THE PRINCIPLES OF NON-DISCRIMINATION AND EQUAL PROTECTION

1. Promote (lobby) the necessity for developing concrete legislation preventing discrimination
2. Develop awareness in the field on concrete actions to avoid all forms of discrimination
3. Develop regular training programmes and support inclusive activities
4. Recognize the right to Prior Consultation as a tool for creating inclusive laws to include all the needs of all right holders
5. Involve NGOs in adjudication, definition of core elements of ESC rights, and monitoring
6. Complement violation approaches with involvement in adjudication and definition strategies.

56. Argentinian Supreme Court, *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social, Estado nacional s/amparo*, 1 June 2000 or Argentinian Supreme Court, *Asociación de Esclerósis Múltiple de Salta c. Ministerio de Salud*, 18 December, 2003.

57. However, it would have been suitable to undertake accountability *a posteriori* since the TAC case was not implemented following the decision.

58. Complaint n° 39/2006, decision of Merits of 5 December, 2007.

59. Communication N 155/96, 13–27 October, 2001.

60. Case CA 36551 S.C.B.C. n° 05 4999. The intervention of the Poverty and Human Rights Centre is available at: [www.povnet.org/sites/povnet.org/files/PHRC%20Factum%20Adams.pdf](http://www.povnet.org/sites/povnet.org/files/PHRC%20Factum%20Adams.pdf).

61. See Fact Sheet n° 3 of the International NGO Coalition of an Optional Protocol to the ICESCR 'the justiciability of economic, social and cultural rights: national, regional and international experiences', available at: [www.icj.org/IMG/pdf/ESCRFactSheets.pdf](http://www.icj.org/IMG/pdf/ESCRFactSheets.pdf), pp. 6–10. See also *Litigating economic, social and cultural rights: legal practitioners dossiers*, COHRE, 2006, available at: [www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf](http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf).

62. See, for example, Fact Sheet n° 7, Coalition for an Optional Protocol to the ICESCR, 'The question of justiciability'.

**EXERCISES**

- 1) In your opinion, what is the role for judges in advancing human rights? Are they solely responsible for human rights monitoring? Justify.
- 2) Analyse the legal system of your own country. Does it allow strategic litigation on ESC rights? If not, what procedures aim at protecting human rights and ESC rights in particular?
- 3) Please provide concrete answers on how NGOs can effectively have a say in fighting against poverty by means of human rights. Give examples from your own experiences.

# Chapter III:

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# CHAPTER III: CONCEPTUAL CLARIFICATIONS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS



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The present chapter seeks to clarify the content of ESC rights, the State obligations that derive from their advancement, and their relation to civil and political rights. Since ESC rights and civil and political rights are indivisible and interdependent, they contain both positive and negative obligations. This chapter examines this tripartite division of state obligations and provides an explanation of the meaning and scope of the minimum core content of ESC rights, which provides a platform for anti-poverty strategies and adjudication. It highlights, in particular, the relationship between state obligations derived from ESC rights and the minimum core approach, which provides guidelines to judicial review. Last, this chapter explores the principle of progressive realization of ESC rights as a core element in the fight against poverty.

## 1. ECONOMIC, SOCIAL AND CULTURAL (ESC) RIGHTS AND CIVIL AND POLITICAL (CP) RIGHTS IN THE STRUGGLE AGAINST POVERTY

1] Increasing the levels of enjoyment and respect of ESC rights empowers the struggle against poverty, since those rights are directly linked to the right of decent living, thus to human dignity and an individual's worth. Poverty deprives human beings of their basic needs and places them in situations of vulnerability. People in poverty have no rights; this 'injustice' links poverty directly to the concept of dignity: when people are unable to enjoy their basic needs – such as food, clothing, medical care, water, adequate housing – they are unable to live a decent life or enjoy a level of well-being as human beings. It is undeniable that efforts made by governments to attain benchmarks on the development of education, access to water, adequate housing and access to adequate food, for example, constitute progressive steps in the recognition of human rights. But in order to be taken as effective advancements in fighting poverty, policies need to reach the poorest and excluded groups of the society.<sup>1</sup> As for example, in the *Indian Case Indra Sawhney v. Union of*

*India*,<sup>2</sup> the Supreme Court of India observed that in order to eradicate poverty, it is necessary to ensure 'free' medical care, education, access to employment, housing, land reforms and free water in order to eliminate inequalities.

2] ESC rights are therefore 'integral components of poverty reduction strategies', and it is in this sense that the High Commissioner of Human Rights has set out the human rights of particular relevance to poverty: the right to work, adequate food, adequate housing, health, education, personal security and privacy, equal access to justice, and political rights and freedoms. ESC rights address poverty by providing minimum essential levels of basic services, ensuring the respect of human rights directly linked to human dignity as well as minimum core obligations. For this reason, the advancement of ESC rights is expected to provide a common basis for mitigating poverty.

3] The interdependence and indivisibility of human rights has already been defined in Chapter 1. However, it was traditionally taken for granted that civil and political rights impose negative obligations, whereas economic, social and cultural rights impose positive obligations. However, it has subsequently been clarified that all human rights include negative and positive duties. This clarification has been

1. D.A. Reidy and M.N.S. Sellers (eds) *Universal Human Rights: moral order in a divided world*, Lanham (Md), Rowman and Littlefield, 2005.

2. 1997 supp (3) SCC 217.



provided through guidelines of the Committee on Economic, Social and Cultural rights in its general comments, as well as by the Maastricht Guidelines on violations of economic, social and cultural rights. The Committee has thus underlined the need to treat ESC rights and civil and political rights in an equal manner, stating that the adoption of a rigid classification of ESC rights and civil and political rights is arbitrary.

4] Indeed, as all human rights are independent and interrelated, they apply to all human beings and should be treated as equal by all human-rights actors and States. The upcoming **Optional Protocol (OP) to the ICESCR** also provides additional arguments for the consideration of ESC rights and CP rights on an equal footing. Moreover, as explored in Chapter 2, the justiciability of ESC rights constitutes an important advancement in the achievement of goals related to social goods. Simply put, all human rights are justiciable and can be claimed.

5] Categorizations of ESC rights and civil and political rights are thus undermined, as ESC rights are not only justiciable, but interrelated and indivisible from civil and political rights. Similarly, the latter have implications for ESC rights, since violations of civil and political rights are intrinsically linked to violations of ESC rights: For example in the case *Airey v. Ireland*, the European Court of Human Rights held that ‘there is no water-tight division between civil and political and economic, social and cultural rights’.<sup>3</sup>

6] In the case *Hijirizi et al v. Yugoslavia*<sup>4</sup> related to the burning of a Roma settlement, the Committee against Torture found that burning and destruction of houses constitutes, in the circumstances acts of cruel, inhuman or degrading treatment of punishment. Consequently, the failure of the state to provide protection to the Roma communities, as well as redress and compensation to the victims violated Article 16 of the Convention against Torture.

7] Following the assumption provided in Chapter I, legal empowerment through human rights is a tool that can assist people to move out of poverty. For this reason, it is imperative to adopt a unified approach to human rights, since the ‘ability to exercise one’s right to food, to housing, clothing medical care and education, through the exercise of a right to participation, expression and other civil and political rights, is vital for individuals if they are to move away from being poor, and for society to eradicate poverty.’<sup>5</sup>

8] This important statement on the relation between ESC rights and CP rights and their impact on the fight against poverty also constitutes a reaction against the categorization

mindset of the two visions of human rights contained in the adoption of two Covenants of 1966.<sup>6</sup>

## 2. STATES OBLIGATIONS<sup>7</sup>

9] Examining the nature and extent of States’ obligations under international and national human rights standards is essential in order to understand precisely what can and should be expected from States.<sup>8</sup> The **Limburg Principles** on the Implementation of the International Covenant on Economic, Social and Cultural Rights (adopted in 1986) as well as the **Maastricht Guidelines** (adopted in 1997), both elaborated by a group of experts on international law, have provided clarification on the nature and scope of the obligations of State Parties presented in Article 2 of the ICESCR.

10] Taking into account these proposals, ESC rights impose two kinds of obligations on States: the **obligation of conduct**, which demands that States take concrete steps towards the full realization of ESC rights and is applied immediately; and the ‘obligation of result’, which demands a specific effect and is often realized progressively. Within the obligation of result lies a discussion on available resources, which will be covered later.<sup>9</sup>

11] As to the first obligation, steps should be **deliberate, concrete and targeted**,<sup>10</sup> and often related primarily to the legislative measures desirable for the full implementation of ESC rights. ESC rights also embrace **administrative, financial, educational and social measures**<sup>11</sup> that take into account ‘all the appropriate means’, which include judicial remedies, according to General Comment n° 3.<sup>12</sup> It is here that courts, human rights institutions and NGOs play a part, since their actions can propose additional ways and means to assist the States in meeting their obligations.

12] The **obligation of result** requires the State to achieve a specific target, such as the reduction of child labour or maternal mortality. The progressive realization of ESC rights is usually tied to the obligation of result, giving the States

3. Case *Airey v. Ireland*, Application n° 6289/73, 9 October 1979, para. 26.

4. ECHR Communication n° 161, 2000.

5. See S. Skogly’s proposals in: Is there a right not to be poor? *Human Rights Law Review*, 2(1), 2002, pp. 59–80.

6. Ideological and political circumstances – such as the End of the Cold War – are invoked in order to understand the division into two covenants of civil and political and economic, social and cultural rights. For more details on the drafting history of the two covenants, see M. Sepúlveda, ‘The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights’, Intersentia, 2003 pp. 116–36.

7. See P. Alston and G. Quinn, ‘The nature and scope of State Parties: obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, 9(2), May 1987, pp. 156–229. See also Sepúlveda op.cit., Chapter IV, and A. Eide, C. Krause and A. Rosas (eds) *Economic, Social and Cultural Rights as Human Rights: a textbook*, Martinus Nijhoff, Dordrecht, 2001.

8. See The Limburg Principles (1986), especially principles 17 and 18, in UN doc. E/CN.4/1987/17, Annex; *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–35; and Maastricht Guidelines (1998).

9. The Committee has already stressed that no specific form of economic and political system is implied in this statement.

10. See para. 2 of UN General Comment n° 3 related to the ‘Nature of State Parties Obligations’.

11. Para. 7 of G.C. n° 3.

12. Para. 5 of G.C. n° 3.

more flexibility to ensure in a reasonable period of time the enjoyment of the rights. Yet, this requires financial and technical support, in addition to other types of effort, to ensure that the State may fulfil its duties.

**13]** These levels of obligations have been specified in a tripartite typology drawn up by the CESCR: to respect, protect and fulfil.<sup>13</sup> For some rights the obligation to fulfil includes two other duties: the obligation to **facilitate** and to **provide**, as affirmed, for example, in General Comment n° 12 related to the right to food. A fourth categorization of duties, the obligation to ‘promote’ aimed at achieving long-term goals, has also been proposed by academia. The different categorizations of State duties are therefore interdependent and interrelated. Hereafter, we will follow the tripartite typology since it has been developed by the Committee. In the following chapters, specifications concerning additional categorizations will be applied wherever necessary.

**14]** In a nutshell the three obligations can be described as follows: the obligation to **respect** requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires that States prevent violations of such rights by third parties. Finally, the obligation to **fulfil** requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights, understanding that the international doctrine has already accepted that legislative measures alone are not sufficient.<sup>14</sup>

### a. Obligation to respect

**15]** The **obligation to respect** requires that States do not interfere directly or indirectly with the enjoyment of economic or social rights. This obligation is essentially negative in nature, meaning that the State must not take any action that diminishes the enjoyment of any given economic or social right, unless there are justifications for doing so. The obligation to respect is of immediate effect (e.g., upon ratification of the ICESCR) and not subject to progressive realization. This obligation entails the following components:

- (1) Refraining from interfering with the existing enjoyment of ESC rights
- (2) Refraining from impairing access to ESC rights, and
- (3) Mitigating the impact of interference in the enjoyment of ESC rights.

13. This tripartite typology derives from the proposals of the political philosopher Henry Shue in his 1980 work *Basic Rights: Subsistence, Affluence and US Foreign Policy*. The author proposes three basic rights: physical security, subsistence and liberty. He further proposes three type of duties: to avoid depriving people of their rights; to protect them against such deprivation by others; and to aid those whose rights have already been deprived. This proposal was later adapted to the tripartite typology to respect, protect and fulfil.

14. See Maastricht Guidelines para. 6.

**16]** **Examples of refraining from interfering with the existing enjoyment of ESC rights** can be found in national experiences of adjudication. In South Africa for example in the case *Jaftha v. Schoeman and others*,<sup>15</sup> *Van Rooyen v. Stoltz and Other*,<sup>16</sup> related to a law which permits the sale in execution of peoples’ homes because they have not paid their debts, the court affirmed that the Magistrates’ Courts Act 32 of 1944, which deals with the sale in execution of property in order to satisfy a debt, violates the security of tenure, and the obligation to respect the right to have access to adequate housing. In the case *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social*,<sup>17</sup> related to access to medicine for people with HIV-AIDS, the Supreme Court of Argentina underlined the obligations of the state to abstain from interfering and to act positively to promote the enjoyment of the rights in such cases.

**17]** **Examples from refraining from impairing access to ESC rights** have been developed in the case *Minister of Health v. Treatment Action Campaign (TAC)*, in which the courts stressed that the State has a positive duty to provide access to medical assistance. The court ruled that the non-provision of Nevirapine available in public health facilities to prevent transmission of HIV from mother to child is unreasonable, and affirmed that State measures ‘failed to address the need of mothers and their newborn children who do not have access to the sites’ where nevirapine is available.<sup>18</sup>

**18]** Similar assumptions were made in the case *Khosa & Others v. Minister of Social Development & Others*.<sup>19</sup> In this case, the Social Assistance Act 59 of 1992 limited the entitlement to social grants for the aged to South African citizens, preventing children of non-South African citizens in the same position as the applicants from claiming any of the childcare grants available to South African children.<sup>20</sup> Another South African case, the *Residents of Bon vista Mansions v. Southern Metropolitan Council Citizens*, related to the right to access to water developed the same reasoning. The South African High Court held that disconnecting the service of water supply because of non-payment of charges was a violation of the obligation to respect the access to water of section 27 of the Constitution and the Water Services Act.

**19]** **Examples of mitigating the impact of interference in the enjoyment of ESC rights** include decisions concerning

15. These cases are particularly crucial for protecting the poor. In the Jaftha case, Mrs Jaftha is unemployed woman, with ill health (heart problems and blood pressure), poor and has a low level of education. She has two children and has applied for and was granted a state housing subsidy with which she bought a home. After several payments she stopped paying her debt, and following a hospitalization discovered that her house was to be sold in a sale of execution to pay her outstanding debt. In the second case, Mrs Van Rooyen was also a poor woman, without education, unemployed and with three children. She couldn’t pay her debt.

16. 2005 (1) BCLR 78 (CC).

17. Argentinian Supreme Court, *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social*, Estado nacional s/amparo, 06-01-2000.

18. See paras. 67 and 80.

19. 2004(6) BCLR 569 (CC); 4 March 2004.

20. See also the case *Mashava v. President of the Republic of South Africa*, 2004 12 BCLR 1243 (CC).

the obligation to provide alternative housing during or after an eviction. We can refer to the case *Modderfontein Squatters v. Modderklip Boerdery LTD*<sup>21</sup> which illustrates the State obligation to protect the right to housing of squatters by providing alternative housing. In the same way, in the case *Serac and CESR v. Nigeria (Ogoni Case)*,<sup>22</sup> the African Commission stated that the killing and destruction by government forces and agents of the State-controlled oil company violated Nigeria's duty to respect the right to life and dignity, the right to health, property, shelter and food, and the right to economic, social and cultural development of the Ogoni community.

### b. Obligation to protect

**20]** The obligation to **protect** requires States to prevent third parties or non-State actors or other States, including inter-governmental organizations, from violating the enjoyment of economic and social rights. Third parties or non-State actors include individuals, groups, landlords, corporations, other States or other entities as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative, regulatory and other measures to restrain such third parties and non-State actors from interfering or otherwise violating economic and social rights; investigating, prosecuting or otherwise holding accountable those entities that violated economic and social rights; and providing remedies to victims of such violations. The obligation to respect is of immediate effect (e.g., upon ratification of the ICESCR) and not subject to progressive realization. The duty to protect entails the following components:

- (1) The duty to protect the enjoyment of ESC rights against third-party interference
- (2) The duty to ensure access to legal remedies in cases of alleged violation of ESC rights by State and non-State actors, and
- (3) The preventive duty to avoid violations of ESC rights.

**21]** There are numerous examples of cases seeking protection from third-party interference, in particular, cases implicating private actors such as corporations, companies, employers or providers of services that impede the enjoyment of a right. In the *Ogoni case*, the State failed in its duty to prevent the pollution caused by the oil company. The failure of the duty to protect constitutes a violation of the right to a healthy environment. In the Indian cases *M.C. Mehta v. State of Tamil Nadu & Ors* and *Bandhua Mukti Morcha v. Union of India*, the Supreme Court of India protected poor children from child labour, highlighting the State's obligation to protect the vulnerable from such abuse. In the case *Z and*

*others v. United Kingdom*<sup>23</sup> related to the failure of social services in providing ill-treatment, the obligation to protect was developed, in particular, to clarify the duty of private health services.

### c. Obligation to fulfil

**22]** Under the obligation to **fulfil**, States are obliged to take steps to the maximum of their available resources to progressively realize the rights contained in the ICESCR. This obligation can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires States to take positive measures to assist individuals and communities to enjoy the right in question. The obligation to promote obliges the State to take steps to ensure that there is appropriate education concerning the right in question. States are also obliged to fulfil (provide) the right in question when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to fulfil entails the following components:

- (1) The duty to take steps to improve the realization of a right, and
- (2) The adoption of appropriate and adequate measures to enhance access.

**23]** The **realization** of a right provides the means for its full enjoyment. Yet, the duty to fulfil goes beyond a strict obligation-related approach and requires holistic and far-reaching integrative actions that include the existence of law reforms, independent national institutions, comprehensive national agendas, allocation of resources, monitoring, education, awareness-raising, training activities and the involvement of civil society. The Committee of the Rights of the Child has contributed to clarifying the content of this obligation, stating that the full realization of the children's rights necessitates putting in place legislative, administrative and other measures, including justiciability of rights, comprehensive national strategies, and monitoring and coordination at all levels.<sup>24</sup>

**24]** As to the appropriateness or adequateness of measures, courts play an important role in this difficult task by evaluating policies and developing justiciable standards in order to advance the promotion and protection of human rights. NGOs, in this context, are indispensable for monitoring the effective realization of human rights. In the already mentioned *TAC case*, the decision from the Constitutional Court of South Africa led the government to implement one of its largest programmes to prevent mother-to-child transmission of HIV-AIDS.

21. 2004 6 SA 40 (SCA).

22. Communication n° 155/96 October of 2001.

23. ECHR 2001.

24. See General Comment n° 5 of the CRC related to General Measures of Implementation for the Convention on the Rights of the Child.

**25]** In the *Khosa and Others v. Minister of Social Development case*, the South African Court stated that everyone has the right to have access to social security and concluded that the exclusion of permanent residents from the legislative scheme constituted a violation. This judgment has had an effect on the protection of the rights of at least 250,000 people in South Africa. The Bolivarian Republic of Venezuela reached the same decision in the case *Cruz Bermudez c. Ministerio de Sanidad y Asistencia Social*. The court analysed the State obligation to provide retro-viral medication to patients suffering from HIV-AIDS and held that not providing the drug was a violation of the right to health.

**26]** Another case reflected the obligation of the government to offer medical care for vulnerable persons. In the case *Free Legal Assistance Group and Another v. Zaire*,<sup>25</sup> the African Commission affirmed that insufficient medical and material care of persons detained in a mental health facility constituted a violation of the right to health. The Commission highlighted that governments should take steps towards the full realization of the right. In Colombia, the ruling *T-025 of 2004* of the Constitutional Court ordered the government to take steps in order to end the irregular situation of thousands of internally displaced people using the concept of the 'unconstitutional state of affairs' and ordering the correction of a situation of exclusion and violation of their rights.<sup>26</sup>

**27]** All of these obligations have been found to be in one way or another justiciable, and courts and other bodies have enforced both the positive and negative aspects of the different duties. Parallel to these duties, the principles of non-discrimination and equal protection forbid any distinction, limitation, exclusion or restriction in the execution of a State's obligations towards both public authorities and private individuals.

### 3. THE DUTIES OF NON-DISCRIMINATION AND EQUAL PROTECTION

**28]** When analysing elements relating to vulnerability, principles of non-discrimination and equal protection lie at the core of processes of power distribution, authority, capability and action responsiveness within society. The principles of non-discrimination and equal protection are duties of 'immediate effect' and constitute core elements in the realization of human rights.

**29]** Several instruments and treaty bodies mention the principle of non-discrimination. The UN Committee on

Human Rights has defined discrimination as any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>27</sup>

**30]** This definition has been transposed to regional HR systems, such as the African Commission on Human and People's Rights, which has established in a case related to an internal provision that provided that anyone who wants to contest the office of president has to prove that both parents are/were Zambians by birth or descent. The Commission stated that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason: equality or lack of it affects the capacity of one to enjoy many other rights.<sup>28</sup>

**31]** Or to the Inter-American Court in relation to discrimination, stating that: there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

**32]** The **principle of non-discrimination** reinforces the principle of equal protection and is composed of negative and positive obligations.<sup>29</sup> The negative obligations consist of refusing to create legal distinctions between groups of society or the refusal to adopt norms that profit specific groups. The positive obligations include all steps towards the elimination of any distinction (*de iure or de facto*) between groups (prejudice, conditions).<sup>30</sup> Nevertheless, not all differences in treatment are in themselves offensive to human dignity or constitute a source of discrimination.<sup>31</sup> In this sense, for example, some jurisdictions have stressed the principle of equality as a reflection of 'treating equals equally and unequals unequally'.<sup>32</sup>

27. UN, Human Rights Council (former UN HR Committee), General Comment n° 18, Non-discrimination, 10/11/89, CCPR/C/37, para. 7.

28. African Commission of Human and Peoples' Rights, Communication No: 211/98 – *Legal Resources Foundation v. Zambia*, para.63.

29. See General Comment n° 20 regarding non-discrimination in economic, social and cultural rights (Article 2, para. 2).

30. See the Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States related to the 'Juridical Condition and Rights of the Undocumented Migrants'.

31. See *European Court of Human Rights, Belgium v. Belgium* 'relating to certain aspects of the laws on the use of languages in education in Belgium', Judgment of 23 July 1968, Series A 1968, para. 10.

32. *Thlimmenos c. Grèce* [GC], n° 34369/97, CEDH 2000-IV, § 44.

25. (2000) AHRLR 74 (ACHPR 1995).

26. See Chapter 2, box on 'Judicial enforcement of positive obligations' and para 32.

**33]** In order to clarify the matter it is important to examine the different grounds when talking about discrimination, and combine such analysis with realization of ESC rights. This combination will help ascertain whether a discriminatory practice exists either *de iure* or *de facto*. Several examples of case law provide clarification on this matter. For example discriminatory actions in the field of education were studied in the case *Oliver L. Brown et al v. the Board of Education of Topeka (KS) et al*<sup>33</sup>, the Supreme Court of the United States declared that the discriminatory nature of racial segregation ‘violates the 14<sup>th</sup> amendment to the US Constitution, which guarantees all citizens equal protection of the laws’. This case established the foundation for decisive future national and international policies regarding human rights and non-discriminatory policies, as well as the social and ideological implications of legal practice.

**34]** Other examples include discriminatory policies in the workplace against women, as in the case *Yilmaz Dogman v. the Netherlands*.<sup>34</sup> The Committee on the Elimination of Racial Discrimination indicated that the State should punish discrimination, particularly against women, in private workplaces. Or discriminatory practices in relation to the right of people to access public places as in the case *Miroslav Lacko v. Slovakia* related to the denial of the owner of a restaurant to let Roma people to access.<sup>35</sup>

**35]** An important advance has been made in relation to sexual orientation grounds as a result of civil society advocacy. The adopted General Comment n° 20<sup>36</sup> of the UN Committee on Economic, Social and Cultural Rights included sexual orientation and gender identity as grounds for non-discrimination, stating that states should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights,’ and that ‘persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place or others’.

**36]** In addition to these examples, certain courts have examined the financial implications of a special measure for targeted groups on the basis of the non-discrimination clause. In the case *Egan v. Canada*, the court found that excluding a group from benefitting from the spousal allowance of the Old Age Security Act on the basis of sexual orientation was not necessarily a violation of the non-discrimination clause of Section 15 of the Canadian Charter. The court held that the financial implications, in this case, relating to extension of the benefits, could not serve as an argument to justify the existence of a violation. Conversely, in the case *Eldridge*

*v. British Columbia Attorney General*, the court held that not providing sign language interpretation in the case of medical services for deaf people in the State of British Columbia, which costs only 0.0025% of the provincial budget, constituted a violation of the right to health.

**37]** In relation to vulnerable groups such as children with disabilities (children with autism), the European Committee of Social Rights, in the case *International Association Autism Europe v. France*<sup>37</sup> found that the proportion of children with autism being educated in schools in France (special or general schools) was lower than that of other children, and that it would take 100 years to erase the deficit in the official waiting list of children in need. The Committee ruled that the government was permitted some flexibility but realization of social rights must occur within a “reasonable time, with measurable progress and to an extent consistent with the maximum available resources”. But concluded that the Government’s overall lack of progress in this area constituted a violation of the Charter on the right to education of children, of persons with disabilities, and of Youth, as well as the right of all persons to non discrimination.

#### ▶ RIGHT TO PRIOR CONSULTATION

The right to prior consultation was recognized in ILO Convention 169 on Indigenous and Tribal Peoples. It has significant implications for Latin American countries because of their multicultural and ethnic character. The Convention states that *Governments* must consult these peoples through appropriate procedures and representative institutions when applying the Convention’s provisions, and ensure their participation in the process of development. In order to achieve this, they must consult the community in order to ensure that indigenous and tribal peoples have the right to decide their own priorities. The consultation should be undertaken ‘in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures’.

This principle has been exported to national legal frameworks and integrated into judicial review strategies to fight discrimination and exclusion. The Constitutional Court of Colombia has widely developed prior consultation as a principle of integration in its rulings *T-131 of 2006* and *C-030 of 2008*, particularly in relation to minority groups.

**38]** The principle of equal protection has been related to reasonability in South Africa. Indeed, section 9(1) of the South African Constitution provides that: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’. In *Prinsloo v. Van der Linde and Another*,<sup>38</sup> the Constitutional Court defined the standard for testing the validity of differentiation, in terms of section 9(1), as that of rationality, and stated that the State is expected to act in a rational manner when presented with forms of differentiation

33. Case of 1954. Within this case, the Supreme Court of the United States combined five cases under the case of Brown. See also the case *Roberts v. City of Boston* in 1849.

34. Communication 1/1984 (29 September 1988). See also *F. H. Zwaan-de Vries v. The Netherlands*, Communication n° 182/1984, U.N. Document CCPR/C/29/D/182/1984 of 9 April 1987.

35. CERD/C/59/D/11/1998.

36. Adopted 25 May 2009.

37. International Association Autism Europe v. France, Complaint n° 13/2002.

38. [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

in order to avoid any arbitrary action or manifest 'naked preferences' that serve no legitimate governmental purpose. The court stated that the purpose of equality is to ensure that the State is bound to function in a rational manner. The same kind of approach has been developed in Canada through the developments of section 15 of the Canadian Charter<sup>39</sup> and throughout cases presented to the Canadian Supreme Court.<sup>40</sup>

**39]** In addition to the obligation to take steps to advance the realization of non-discrimination and equal protection, the CESCR has affirmed that the obligation of compliance with minimum core obligations is also considered as an obligation of immediate effect.<sup>41</sup>

## 4. THE MINIMUM CORE APPROACH TO ESC RIGHTS

**40]** The UN and the CESCR, in particular, developed the minimum core approach to clarify the obligations that derive from ESC rights. The minimum core approach is attached to the 'minimum essential levels' of such rights and describes a situation of well-being: a platform that means freedom from threats.<sup>42</sup> The obligations to protect, fulfil and promote are pertinent to defining the content of the rights. Once this content has been defined it is possible to establish the **minimum content**, which will embody the obligations imposed on the State. This relationship between content and obligation is one of the main focuses of this manual.

**41]** The Committee has developed the principle of '**minimum core content**', stating that this constitutes a minimum standard to be fulfilled by States,<sup>43</sup> no matter the situation of conflict, emergency or disaster. It should be effectuated even in cases of financial constraints, particularly in order to protect the most vulnerable groups of society.<sup>44</sup> Without this minimum, a right loses its *raison d'être*.

**42]** The Committee has begun defining the core obligations of rights, for example, in the case of the right to the highest attainable standard of health (developed further in the specific chapter of this manual). It is important to clarify that

39. Section 15 states that: '(1) Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. Paragraph 2 adds that 'subsection 1 does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.'

40. *Law v. Canada, Minister of Employment and Immigration* 1999 1 S.C.R. 497; *Grosselin v. Quebec* (Attorney General) case, (2002) 4 S.C.R. 429. *Andrews v. Laws Society of British Columbia* 1989 1 S.C.R.; *R v. Keegstra* 1990 3 S.C.R. 697; and *New Brunswick v. G* (J) 1999 3 S.C.R.

41. See Committee on Economic, Social and Cultural Rights, Report on the twenty-fifth, twenty-sixth and twenty-seventh sessions, UN Doc E/2002/22, para. 17.

42. See Andersen, quoted by Bilchitz p. 188, ref. 27.

43. General Comment n° 3, para. 10.

44. Ibid, paras 11 and 12.

the core content of ESC rights is not the same as the minimum State obligations. While minimum core obligations are related to the State party and to their compliance with international obligations framework, the minimum core content is related to the substance of the right.<sup>45</sup>

**43]** The theory of the minimum core content validates the definition of poverty as a human right. Since the core elements of a human right are intimately linked to human dignity, and poverty 'hits' the substance of the right, a violation of the core content of an ESC right would also provoke, in certain cases, an effect on poverty and poverty will also at the same time provoke a violation of human rights.

## 5. THE PROGRESSIVE REALIZATION OF ESC RIGHTS

**44]** ESC rights entail aspects that should be progressively developed towards full realization. Indeed, progressivity leads to an open-ended process which includes the concretization of different steps of advancement of the right. Progressive realization of ESC rights is the cornerstone concept of ICESCR. Furthermore, the progressive realization of ESC rights is a useful tool to measure and follow up the progress made in advancement of the rights. It is a planning tool for the development of policy and programme components to combat poverty. For example, this has been clearly demonstrated in the initiatives related to the advancement of the right to adequate food. The FAO in this sense, has developed this approach and affirmed that: 'the non-realization of human rights is not only a frequent result of poverty but also one of its major causes, which means that working to realize these rights is vital for combating poverty.'<sup>46</sup>

**45]** Article 2, para 1 of the Covenant of ESC rights recognizes the gradual achievement of the implementation of ESC rights by States, stating that each State party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to 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.

45. For further reading: A. Chapman, The status of efforts to monitor economic, social and cultural rights, in S. Hertel and L. Minkler (eds) *Economic Rights: conceptual measurement and policy issues*, Cambridge University Press, 2006, p. 154; A. Chapman and S. Russell (eds) *Core Obligations: building a framework for economic, social and cultural rights*, Antwerp/Oxford/New York, Intersentia, 2002.

46. FAO, 'the right to food in practice: implementation at the national level', Rome, 2006, p. 3.

**46]** From analysis of Article 2 the following elements can be derived:

- (1) Progressivity is linked to the effective enjoyment of the right. Progressivity thus requires the inclusion of all members of society which should enjoy the right. Nevertheless, progressivity is not achieved by adding numbers of persons to the realization but by integrating people in its realization.
- (2) Progressive realization requires time and efforts to move as expeditiously and effectively as possible towards full realization of the right. The State should aim to implement policies, programmes, plans and resources in order to achieve full realization. Measures should be thus deliberate, concrete and targeted.
- (3) Progressive realization implies the necessity of monitoring to measure achievements, and detect failures, gaps or retrogression. NGOs have a crucial role to play in identifying practices, covering lacks in State protection, gathering data, and providing first-hand relief, especially for marginalized and vulnerable groups.
- (4) Progressive realization also means strengthening cooperation. In its General Comment n° 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation – especially economic and technical – towards the full realization of the rights recognized in the Covenant. For example, the Voluntary Guidelines published in 2004 by the Food and Agriculture Organization of the United Nations (FAO)<sup>47</sup> provided an additional instrument to combat hunger and poverty, focusing on the progressive realization of the right to food. In order to accelerate the attainment of the MDGs, the Voluntary Guidelines represent an attempt by governments to interpret the right to food and include recommendations for actions to be undertaken in order to accelerate its realization.

**47]** It is important to underline that scarcity of resources does not excuse a State from undertaking steps towards the full realization of a right. The minimum core of a right, the non-discrimination and equal protection principles and non-retrogressive measures are excluded from the notion of available resources. They should be guaranteed with no limitation. The government should be able to demonstrate that it has effectively used the available resources in a manner that best realizes these rights. States will be therefore be monitored in relation to the progress made.

**48]** But how to measure progressive realization of the right? It is a difficult task to measure the progressive realization of a right. Some proposals have emerged relating monitoring of progressive realization to the obligations derived from Article 2 of the Covenant.

Proposals include evaluation of:

- Human rights monitoring (measures which permit policymakers and other actors to monitor the progressive realization of the rights);
- Adjudication: measuring ESC rights through analysis of case law that implements rights and advances interpretation of their content at the national level;
- Assuring non-discrimination, and
- Fixing accountability: statistics and tools to measure implementation.<sup>48</sup>

**49]** Others proposals include analysing the implication of Article 2 of the ICESCR for monitoring and accountability in relation to the progressive realization of ESC rights, and mention the following tools of measurement:

- The core obligation approach
- The violation approach<sup>49</sup>
- Budget analysis, and
- The role of indicators and benchmarks.<sup>50</sup>

**50]** NGOs have fully developed the violation approach. Nevertheless, their active participation in providing other kinds of knowledge should be supported to ensure their active participation in developing coordination of the advancement of ESC rights. NGOs provide useful developments and crucial know-how. Their work, knowledge and actions constitute a useful resource for clarifying and monitoring the progressive realization of ESC rights.

**51]** Today, interpretations of the progressive relation of rights are developed by courts, thus placing pressure on States to act with a view to the full realization of those rights. In the landmark case *Bhe v. Magistrate Khayelitsha & Ors.*,<sup>51</sup> which includes a total of three others cases (*Bhe, SAHRC, Shibi*) related to discriminatory legislation in South Africa, based on race, gender and origin, the South African Court struck down the legislative framework of regulation of intestate deceased estates of black South Africans. Progressive realization of the right constituted in this case a challenge since it entailed the building of an entire legal framework of protection.

**52]** The *Grootboom* case provides another clear example of the challenge of the concept of progressive realization. Taking into account the 2.2 million homeless in South Africa, the South African Constitutional Court stated in this regard that

48. See the author of this proposal, C. Apodaca, Measuring the progressive relation of economic and social rights, in S. Hertel and L. Minkler (eds) *Economic Rights: conceptual, measurement and policy issues*, Cambridge University Press, 2007, pp. 169–70.

49. The violation approach is criticized by A. Chapman in: A violation approach for monitoring the International Covenant of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 18(3) pp. 23–66; and A. Chapman and S. Russell (eds) *Core Obligations: building a framework for economic, social and cultural rights*, Antwerp/Oxford/New York, Intersentia; M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerp/Belgium, Intersentia, 2003, Alston 2005, who propose a obligation approach instead a violation approach.

50. Proposal of A. Chapman, The status of the efforts to monitor economic, social and cultural rights, in *Economic Rights: conceptual, measurement and policy issues*, op cit, pp. 151–64.

51. 2005 (1) BCLR 1 (CC), 15 October 2004.

47. Adopted by the 127<sup>th</sup> session of the FAO Council in November, 2004.

the right to housing could not be realized immediately for everyone, and noted that housing should be available not only for a larger number of people but to a wider range of people.<sup>52</sup> After clarifying the meaning of progressive realization, the court declared a violation of the right to adequate housing. But the court did not define a precise time period to implement a policy to redress the situation of the homeless. This led to a period of transition, prolonging the violation. In addition, the subsequent actions to ensure progressive realization of the right included only the Grootboom community, and not the wider homeless community.

**53]** Finally, the *TAC case* reveals the consequences of progressive realization of rights in a case related to restricted access – only by research and training sites – to the drug ‘Nevirapine’, which would prevent HIV/AIDS mother to child transmission at birth. The, Because of the more than 5 million persons attained by in South Africa, the TAC decision was crucial. The court concluded that the government programme was unreasonable and requested the modification of the entire policy, extension of access to the medicine, and the wide-scale enlargement of the testing and counselling facilities to institutions and hospitals. The court ordered the government to implement these actions and fulfil its obligations without delay.

**54]** However, progressive realization raises the question of the extent of the efforts and standards that should be undertaken by the State.<sup>53</sup> A violation of the right would still exist where the State does not take the necessary and effective measures in order to advance towards the full realization of the right.

## 6. THE PROHIBITION OF RETROGRESSIVE MEASURES

**55]** This obligation derives from the above-mentioned. The State is not allowed to adopt any measures that will reduce the already attained enjoyment level of the right. Nevertheless, this is a presumption that includes certain exemptions. When the State introduces retrogressive measures, it is invited to explain that those measures were adopted after examination of the wide range of possibilities, and that no other alternatives were available or applicable in the context of the full utilization of the maximum available resources.<sup>54</sup>

52. See *Grootboom case* op cit, para 45.

53. In relation to the progressive realization of rights and the correlative obligation of States in the *Grootboom* and *TAC* cases see, for example, M. Stuart, ‘Left out in the cold? Crafting Constitutional Remedies for the poorest of the poor’, *SAJHR*, 21, 2005, pp. 215–40; See also M. Heywood, Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health, 2003, 19 *SAJHR* 278 at 300.

54. General Comment n° 3, para. 9.

**56]** In cases where a policy or measure would reduce the enjoyment of the right, this will not instantaneously generate a violation of the right and constitute a retrogressive measure. States must have acted with intention, deliberately and with negligence. At the domestic level, for example, courts have established that decisions adopted by domestic bodies that could affect human rights should be duly justified. Otherwise, these would constitute arbitrary decisions.<sup>55</sup> In relation to the right to work, for example, in a case related to a pregnant worker woman subject to rotation, the Bolivian Supreme Tribunal stated that the rotation of a worker is a valid measure, but not diminishing his or her salary.<sup>56</sup> The Bolivian tribunal stated that the retrogressive measure in this particular case offered ‘inadequate’ conditions for the nasciturus.

## 7. MAXIMUM AVAILABLE RESOURCES CLAUSE

**57]** Due to the pervasive assumption that economic, social and cultural rights require the direct provision of resources by the State (progressiveness), the Covenant included a clause entitled the **maximum available resources clause** in the same Article 2, para. 1. ESC rights depend in some cases on the provision of services and goods by states. However, this clause provokes debate since it does not specified how much the word *maximum* demands, nor does it say what the word *available* means. Thus, determining the availability of resources can become a complicated task for governments since it demands political willingness, but also coherence and budgeting.

**58]** Nevertheless, courts have assessed the positive measures and ordered governments and other public institutions to take concrete steps and to allocate resources towards fulfilling those rights. In Latin America, for example, Constitutional Courts have defined the minimum requirements of benefit programmes, delineated steps, and ordered allocations in their jurisprudence.

**59]** But courts and tribunals encounter limitations on fostering justiciability since they do not necessarily possess the expertise required for developing justiciability of ESC rights. Courts still have a responsibility to uphold and protect fundamental rights, but need the collaboration of competent actors placed closer to the field.

**60]** The tension between the availability of resources and the realization of minimum core content of rights can be resolved

55. Cf. *Palamara Iribarne case*, supra note 72, para. 216 and *YATAMA case*, supra note 86, para. 152. Also, cf. *García Ruiz v. Spain* [GC], n° 30544/96, § 26, ECHR 1999-I; and Eur. Court H.R., *Case of H. v. Belgium*, Judgment of 30 November 1987, Series A n° 127-B, para. 53.

56. Constitutional Tribunal of Bolivia ruling 310/2000-R, 6 April 2000.



by viewing progressive realization as an open-ended process that will require continuous efforts. The European system provides examples on how intentional goals become minimum obligations for progressive implementation.<sup>57</sup> In the above-mentioned case, *International Association Autism Europe v. France*, the European Committee of Social Rights found that financial restrictions do not free the State from its obligations related to human rights.

**61]** The African Charter does not elaborate at length on the available resources clause and the progressive realization of rights in relation to ESC rights. Nevertheless, certain cases support the necessity of rendering the African Charter effective, and seem to impose obligations.<sup>58</sup>

**62]** Nevertheless, in the case *Purohit and Moore v. Gambia*,<sup>59</sup> related to a Gambian legislative regime for mental health patients, the African Commission analysed the right to enjoy the best attainable state of physical and mental health in relation to disabled persons, and stated that one cannot turn a blind eye to the scarcity of resources in Africa when defining and advancing ESC rights. The Commission, deeply aware of the poverty situation in African countries, expressed its concerns about the feasibility of dispensing healthcare and read into the right to health the qualification of available resources. The Commission asked the country of Gambia to replace the legislative health regime and urged the authorities to provide adequate medical and material care for persons suffering from mental health problems, stating

that the right to health facilities and access to goods and services shall be guaranteed to all without discrimination of any kind.<sup>60</sup>

**63]** The *Soobramoney case*<sup>61</sup> in South Africa forms the basis of a discussion on the meaning of this obligation. The case centred around an unemployed man suffering from heart and vascular diseases and chronic renal failure. Mr. Soobramoney asked the government to order the hospital to provide him with dialysis treatment. However, the court dismissed the plaintiff's appeal citing lack of availability of resources. It further stated that a favourable decision would generate a collapse of the health system, and that due to the limited resources the hospital had adopted a policy of admitting only those patients who could be cured within a short period of time.

**64]** The Colombian Constitutional Court (CC) developed the protection of ESC rights, such as the right to health, through the *tutela*,<sup>62</sup> by integrating previously excluded medical services or special medication into health plans.<sup>63</sup> The costs of healthcare services, however, have vastly increased, and although the Colombian CC still protects ESC rights, some have criticized the scarcity of resources resulting from these expenses, noting that they go beyond the maximum available resources.

57. See J. Donnelly, *The West and economic rights*, in S. Hertel and L. Minkler (eds) *Economic Rights: conceptual, measurement and policy issues*, Cambridge University Press, 2007, pp. 50–51.

58. For example, *Free Legal Assistance Group and Others v. Zaire*, SERAC case, among others.

59. AHRLR 96 ACHPR (2003).

60. See also the case *Autism Europe v. France*, 4 November 2002, related to the implementation by France of statutory instruments concerning provision of education to persons with disabilities. The European Committee of Social Rights stated that State Parties must take measures to advance the right even when its implementation is complex, and that States shall do so 'within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources'. The case represents the first collective complaint relating to the right to health facilities in Europe. See also the *Soobramoney*, TAC and the *Khosa* cases, among others.

61. *Soobramoney v. Minister of Health Province of Kwazulu-Natal* 1998 (1) SA 765 (CC) (hereinafter *Soobramoney case*).

62. Writ of protection of fundamental rights, presented to any Colombian judge, who will decide the urgent matter of the plaintiff within a maximum of ten days (see Chapter 2).

63. For example, providing special attention for people with HIV-AIDS in ruling T-328 de 1998, and for people with cancer in ruling T-283 de 1998, among others.

## EXERCISES

- 1) Explain this affirmation: *the duty of "progressive realization is a mixture"*.
- 2) Analyse the *Purohit and Moore v. Gambia* and the *Soobramoney* cases. What elements can be extracted in relation to the role of judges? What can be said about the "marge of appreciation" of the judiciary?
- 3) What are the legal, economic, and political consequences of the *maximum available resources clause*? Justify your arguments on the basis of the case *Minister of Health v. Treatment Action Campaign (TAC)*.

# The right to education

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## 1. Definition of the right to education

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## 2. Normative content of the right to education

- a. The 4A System
- b. Progressive realization of the right to education
- c. Non-discrimination and equal protection
  - Education without discrimination on grounds of race*
  - Education and nationality*
  - Education without discrimination based on gender*
  - Education of minorities*
  - Children with disabilities*
  - Education in conflict situation*
  - Education for people in poverty*
  - Equality of opportunity*

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## 3. Human rights approach to 'Education for All'

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## 4. Human rights education

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## 5. Strategies for justiciability

# THE RIGHT TO EDUCATION



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Despite international recognition of the right to education, a number of different legal regimes still define education as a service. In this chapter, education is defined and conceptually analyzed as a right. Today, the right to education is one of the most developed and well-defined ESC rights. As a human right in itself and indispensable for the exercise of other human rights, the right to education has close linkage with the right to development, and is a powerful tool in poverty reduction strategies. However, in spite of its level of recognition, this right is still denied to some 75 million children of primary school age, 55% of whom are girls.\* Millions of people around the world are still illiterate and exposed to poverty. The UNESCO Education For ALL (EFA) Global Monitoring Report 2010: Reaching the Marginalized locates education in the front line of the fight to combat inequality. Education is thus a precondition for the advancement of social justice, as those left behind face the prospect of diminished life opportunities in a variety of spheres, including employment, health and participation in political processes that affect them. The Education for All strategy on inclusive education is crucial to the fight against marginalization and exclusion of the most vulnerable. The avoidance of all forms of exploitation and forced labour of children, in particular, is of crucial importance. The right to education is an integral part of UNESCO’s mission, and central to EFA process. The Constitution of UNESCO expresses the belief of its founders in ‘full and equal opportunities for education for all’. The Organization actively supports the view that a rights-based approach to the development of education is a prerequisite for realizing EFA.

## 1. DEFINITION OF THE RIGHT TO EDUCATION

1] Education increases the number of possible ways of escaping poverty. Defining education in terms of rights enables a right-holder to know about his or her entitlements, and thus provides the capacity to claim for a violation of the right in situations of misrecognition or disrespect.

2] Education is described as an ‘**overarching right**’ because its enjoyment empowers other human rights. It comprises not only formal schooling, but also all learning processes provided by life experiences that enable a person to develop their skills, including capacities, talents, abilities and personality.

Education covers spiritual, cultural and intellectual learning processes.

3] Education is therefore both a civil and political right, and an economic, social and cultural right. Indeed, education as a civil and political right requires governments to allow the establishment of schools respecting freedom *of* and *in* education. Education as a social and economic right requires governments to ensure that free and compulsory education is available to all school-age children. Education as a cultural right proclaims the respect of cultural diversity with regard to the inclusion of minorities, their languages and an education in accordance with their customs and values. It is an obligation of Governments to promote the right to education which is universal and does not admit any exclusion or discrimination. It needs to be upheld more vigorously and its inclusive dimensions need to be brought into prominence

\* Education for All Global Monitoring Report 2009.

in order that all those who remain deprived of it become its beneficiary.<sup>1</sup>

**4]** Article 26 of the Universal Declaration of Human Rights (UDHR) established the foundations for the right to education, setting out the degrees of responsibility derived from each level of education. It stated that elementary education shall be free and compulsory, technical and professional education available and higher education equal accessible. This article also mentions the importance of human rights in education and prescribes the principle of parental freedom of instruction for children, also referred to as 'freedom of education'.

**5]** To affirm the right to education, States have also adopted a number of international instruments developing different dimensions of this right. Among them we can enumerate: The ILO Convention Concerning Indigenous and Tribal Peoples; The UNESCO Convention against Discrimination in Education; The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The Convention on the Elimination of All Forms of Discrimination against Women; The Convention on the Elimination of Racial Discrimination; The Convention on Intolerable Forms of Child Labour. The Convention on the Minimum Age for Employment; The Convention on the Rights of the Child; The Convention on Technical and Vocational Education the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Convention on the Rights of Persons with Disabilities, among many others.<sup>2</sup>

The legal framework of the right to education carries international obligations.

**6]** Among all the prescriptions related to the right to education, **Articles 13 and 14** of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as Article 3, 4 and 5 of the Convention against Discrimination in Education are among the most comprehensive. Indeed, not only do they develop the content of the right, but they also define the obligations derived from each level of learning. UNESCO played an important role in the drafting of these articles and places emphasis in particular on Article 13, setting international educational standards that develop and monitor the implementation of this right. Article 13 of the Covenant and Article 4 of the Convention impose compulsory free and available primary education for all. General Comment

n° 13 adds stating that 'States parties are obliged to prioritize the introduction of compulsory, free primary education'.<sup>3</sup>

**7]** Moreover, the Committee on Economic, Social and Cultural Rights (CESCR) has played an important role in developing the normative content dedicated to this right through its General Comments n° 11 and 13. The CESCR has also declared that both general comments should be considered jointly.

## 2. NORMATIVE CONTENT OF THE RIGHT TO EDUCATION

**8]** Like all human rights, the right to education imposes three levels of obligations on states: the obligation to **respect**, **protect** and **fulfil**. The obligation to **respect** requires states to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to **protect** requires states to take measures that prevent third parties from interfering with the enjoyment of the right to education. In turn, the obligation to **fulfil** incorporates an obligation to **facilitate** and to **provide**. **Facilitation** requires states to take positive measures that enable and assist individuals and communities to enjoy the right to education. States are aimed to **provide** primary education for all as an immediate duty of all States parties.<sup>4</sup> It is incumbent upon States to incorporate into domestic legal order their obligations under normative instruments and to give effect to these in national policies and programmes. In order to achieve EFA, it is imperative to intensify UNESCO's normative action and monitor more effectively the right to education.

**9]** The full realization of the right to education is dependant upon the effective enforcement of States obligations. When the right to education is violated citizens must have legal recourse before the law courts or administrative tribunals. Enforcement and justiciability of the right to education primarily depends upon national legal system. The judiciary has an essential role in upholding the right to education as an entitlement. Where they exist, national human rights institutions as well as Ombudsmen also have a role to play empowering the right-holders.

### a. The 4A System

**10]** The Committee has provided clarification on the scope and attributes of the right to education through the so-called **4A system framework**.<sup>5</sup> This framework analyses the obligations

1. Inclusive dimensions of the right to education: normative bases (UNESCO 2008).

2. The UNESCO Recommendation against Discrimination in Education (1960), the UN Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples (1965); UNESCO Declaration of the Principles of International Cultural Cooperation (1966); The UNESCO Recommendation concerning the Status of Teachers (1966); The UNESCO Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms (1974); The UNESCO Declaration on Race and Racial Prejudice (1978); The UNESCO Recommendation on the Development of Adult Education (1976); The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); The UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education (1993); The UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997); The UNESCO Universal Declaration on Cultural Diversity (2001); The UNESCO Revised Recommendation concerning Technical and Vocational Education (2001) and The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

3. See General Comment n° 13, at para. 51.

4. Ibidem.

5. See General Comment n° 13, paras 6 and 7.

related to the right by responding to four features in each level of learning: **availability**, **accessibility**, **acceptability** and **adaptability**. This 4A system has been further developed and specified by the former Special Rapporteur<sup>6</sup> who has added a fifth feature, **affordability**, which is sometimes incorporated within accessibility.

**11] Available** education relates to the obligation of the State to facilitate the right to education by providing sufficient quantitative institutions, teachers and programmes with a view to operationalization of the right. Availability includes: available infrastructures (schools with water and sanitation facilities, classrooms, libraries, etc); available educational materials and equipment (computer facilities etc.); and available teachers (salaries, trainings, etc.). Furthermore, availability requires the non-closure of private schools as well as the development of school systems.

**12]** An example of how the obligation of availability has been applied by Courts is analyzed in the case *Campaign for Fiscal Equity v. State of New York et al.*<sup>7</sup> According to the Supreme Court of the State of New York, the teaching within the State was inadequate: large class sizes negatively affected student performance in New York City public school and such schools were deficient in “instrumentalities of learning” (including libraries and computers). The Court further held that, whether measured by the outputs or the inputs, New York City school children were not receiving the constitutionally-mandated opportunity for a sound basic education. The Court ordered the defendants to take all necessary steps to implement an operational funding plan (including transportation costs, materials, methodology, capital facilities and school expenditures) to provide New York City with the minimum, gradual operations funding of US\$14.03 billion for Year 1 (2005–2006), US\$15.44 billion for Year 2 (2006–2007), US\$16.84 billion for Year 3 (2007–2008) and 18.25 billion for Year 4 (2008–2009) in no later than ninety days from the date of entry of the order. These steps were undertaken to ensure basic education for all.

**13] Accessible** education refers to the requirement that schools and educational systems should be accessible to all without discrimination of any kind and should place special emphasis on vulnerable groups. It requires the existence of a fellowship system to provide help to special groups on the basis of non-discrimination and equality. The CESCR has clarified that accessibility includes two elements: **physical accessibility** and **economic accessibility**. **Physical accessibility** relates to the ability to access education (transportation, existence of schools in rural areas, participation of the community, technology facilities, and online education). **Economic accessibility** refers to the affordability of education provision. States are obliged to provide primary education immediately

free of charge and to progressively provide free secondary and tertiary education. It is important to underline the point that indirect costs could be permissible. However the Committee has not specified what indirect costs mean.

**14]** In the case *Free Legal Assistance Group and Others v. Zaire*,<sup>8</sup> a claim brought by four NGOs against former Zaire (now the Democratic Republic of the Congo), the African Commission on Human and Peoples’ Rights (ACHPR) stated that government closure of universities and secondary schools as a result of a situation of financial negligence during a period of internal crisis violated the right to education under the African Charter on Human and People’s Rights (Article 17).

**15]** In the case *Unni Krishnan J.P. & Ors. v. State of Andhra Pradesh & Ors*<sup>9</sup> the Supreme Court of India, ruling on the basis of elements of Article 13 of the ICESCR, stated that the State’s obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate means. Consequently, after the age of fourteen, a person’s right to higher education is subject to the limits of economic capacity and development of the State.

**16]** In another case, the Court of India found that accessibility to education should be realized for all people, rich or poor. For this reason, the Court held that a private institution, tied by the same requirements of the State, cannot charge higher tuition fees than those established for ‘government seats’. The Court found thus that a ‘capitation fee’ in this case made education unaffordable and therefore not accessible to the poor, and that the system was arbitrary and contrary to the equality clause of the Directive Principle of State Policy (Article 14) (case *Mohini Jain v. State of Karnataka*).<sup>10</sup>

**17] Acceptability** relates to the appropriateness and quality of education. It refers to the standards that should be attained and constantly improved in curricula, teaching methods, educational programmes, tools and infrastructures. Acceptability also requires that teaching and learning be culturally appropriated so as to be appropriate for minorities in terms of language, content and methods.

**18]** The Court of the Economic Community of West African States (ECOWAS) found the Universal Basic Education Commission of Nigeria responsible for implementing education in the country in the recent case *SERAP v. Nigeria*.<sup>11</sup> The Court stated that the Commission failed to ensure quality education due to a lack of adequate implementation of Nigeria’s Basic Education Act and Child’s Rights Act of 2004

6. E.CN.4/1999/49; see also Katarina Tomasevski, Human Rights Obligations in Education: the 4A Scheme 7 (2006).

7. 719 N.Y.S.2d 475.

8. Comm. n° 25/89, 47/90, 56/91, 100/93.

9. Op cit.

10. 1992 AIR 1858.

11. *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, Suit no ECW/CCJ/APP/0808, 27 October 2009 (admissibility).

under the general framework of the African Charter on Human and Peoples' Rights (ACHPR). This case is important since it clarified the justiciability of the right to education, developed the right to quality education, and confirmed the *locus standi* of NGOs for bringing cases of public interest before the Court.

**19]** The **adaptability** of education consists of the obligation of governments to provide flexible curricula and plans for all communities. Its main goals are respect of human dignity and the development of the human personality to help people respond to changing societies. Education should respond and adapt to the best interests of each child. Adaptability involves the interrelatedness of all human rights through education and education through all human rights. It demands a constant effort to integrate educational strategies in all sectors, planning programmes and communities.<sup>12</sup>

**20]** In a recent case concerning a massacre in Guatemala<sup>13</sup>, which affected hundreds of displaced victims of the internal war, the Inter-American Court of Human Rights ordered reparation measures that included measures of satisfaction such as establishing development programs (on health, education, and infrastructure) in the affected communities. Such programs included providing such communities with educational programs in the native language of the victims (*maya achi*).<sup>14</sup> Authorities from Guatemala are required to "supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities".<sup>15</sup> The Court gave a five-year period for the full-implementation of the reparation program. It also established that the state would report each year on the developments in the implementation of the measures ordered.<sup>16</sup>

**21]** The Supreme Court of India stated, for example, that the right to education was linked to the dignity of life by reasoning that to sustain life a human being requires the fulfillment of all the enabling rights. For this reason, in the case *Mohini Jain v. State of Karnataka*,<sup>17</sup> the Court stressed that people are only able to obtain a dignified life in India through education.

**22]** In the recent case *D.H. & Ors v. the Czech Republic*, supported by the NGOs Interights and Human Rights Watch, the European Court of Human Rights (ECHR) examined a

complaint of racial discrimination related to the assignment of Roma children to 'special schools' for the mentally disabled following psychological tests designed to assess their intellectual capacity. The applicants alleged that they had been discriminated against in the enjoyment of their right to education by reason of their race, ethnic origin and colour as a national minority. They pointed out that Roma children are systematically segregated to special schools whose educational standards are substantially inferior to those of primary schools in the enjoyment of the right to education. The ECHR ruled in favour of the applicants and noted that Roma people have a "turbulent history and constant uprooting". The Court also argued that indirect discrimination – whereby a general policy or measure has a disproportionate prejudicial effect on a particular group – is prohibited by the European Convention in the same way as direct discrimination and confirmed a violation of article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, combined with Article 2 of its Protocol 1.

#### ▶ CORE OBLIGATIONS OF THE RIGHT TO EDUCATION

- Equal and non-discriminatory access to the right to education
- Free, compulsory and universal primary education
- Accessibility to secondary education in its different forms as well as technical and vocational education which should be made generally available
- Capacity- based access to higher education
- Opportunities for continuing education and literacy programme and life long learning
- Minimum international standards of quality education and teaching profession-Principle of parental freedom of education -The obligation to take steps towards the full realization of the right by designing and implementing a detailed National Strategy (Educational Plan) including a defined time schedule for implementation of the right to education.

#### b. Progressive realization of the right to education

**23]** The progressive realization of the right to education is an important factor for achieving universal access to education. As underlined in Chapter III of this manual and by the Committee on ESC rights, the progressive realization of a right imposes a duty to move as expeditiously and effectively as possible towards the full realization of the right. Consequently, progression of the right to education means that free and compulsory education should be progressively expanded to secondary and tertiary education. Any different interpretation would imply a reduction of the full recognition of the right to education in which all levels should be effectively provided and realized.

12. UNESCO Convention on Technical and Vocational Education (1989) contains in its Article 3 the idea that education programmes need to be adapted to the characteristics of the receiving population groups: 'The Contracting States agree to provide and develop technical and vocational education programmes that take account of ... the educational, cultural and social background of the population concerned and its vocational aspirations'. It also puts forth the idea that education programmes shall be directed to the 'protection of the ... common heritage of mankind'.

13. Inter-American Court of Human Rights – *Plan de Sánchez Massacre v. Guatemala* – 19 Nov. 2004.

14. *Mónica Feria*, *Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, *Human Rights Quarterly* – Volume 29, Number 2, May 2007, pp. 431-459.

15. *Plan de Sánchez Massacre v. Guatemala*, op.cit para. 110.

16. *Ibidem* para. 111.

17. (1992 AIR 1858).

24] Accordingly, the immediate obligation for states in relation to primary education is to:

- (1) Provide universal, free and compulsory primary education, and
- (2) Draw up an Action Plan to define a framework for the implementation of the right to primary education.

25] The general obligation consists of providing secondary and tertiary education and ensuring tertiary education is provided in an equal and accessible way. This does not mean that secondary and tertiary education should not be available in the same way as primary. The only difference of interpretation is based on the fact that primary education constitutes the bare minimum in the sense that it should be immediately provided, be compulsory and free of charge. Secondary and tertiary education should progress towards the same goal of universality. Such an interpretation is in line with the principles of Education for All and the Indian case *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi*,<sup>18</sup> which stated that the right to education at the secondary stage was a fundamental right.

26] Following on from Article 14 of the ICESCR, states will progressively ensure their duty by adopting an educational plan of action within *two years* of the Covenant's entry into force in the State to secure free, universal and compulsory primary education.<sup>19</sup> The implementation of the plan should take place within a reasonable period of time and should be measured by indicators and benchmarks defined in the National Education Strategy. For example, in the case *International Association Autism Europe v. France*,<sup>20</sup> the European Committee on Social Rights stressed that when the realization of a right is 'exceptionally complex and particularly expensive',<sup>21</sup> a government is permitted some flexibility. However the realization of social rights must occur within a 'reasonable time, with measurable progress and to an extent consistent with the maximum available resources'.

27] Even in the case of financial crisis and economic recession, states cannot disregard their obligations and should continue to undertake efforts towards providing universal, free and compulsory primary education. Moreover, international cooperation should play an essential role by assisting states in situations of crisis. The participation of civil society is vital at all stages: in the conception of the plan, to provide guidance at the design and implementation levels, and to ensure permanent accountability.

18. [(1991) 2 SCC 716].

19. See General Comment n° 11 (1999).

20. European Committee on Social Rights, Complaint n° 13/2002, Decision 4 November 2003.

21. *International Association Autism Europe v. France* para. 53.

## c. Non-discrimination and equal opportunities in education

### *Education without discrimination on grounds of race*

28] The Supreme Court of USA in the cases *Brown v. Board of education*<sup>22</sup> stated that a segregated school system denies equal educational opportunities to minority group. And the South African case *Province of Mpumalanga Bel Porto School Governing Body v. Premier of the Western Cap Province*,<sup>23</sup> concerned analysis of the validity and effects of implementation of an educational policy that introduced reallocation of staff by a provincial authority between black and white schools. The case was presented by the appellants from a white school on the basis of racial equity in educational systems. The appellants argued that the policy was not well implemented and caused inequality within the white schools. Even though the judges did not conclude that discrimination had occurred with the implementation of this policy in white schools, this decision provided an important precedent for promoting equality and tolerance among new generations in South Africa.

### *Education without discrimination based on nationality*

29] Children, in particular, face situations of vulnerability and discrimination, as in the Case of the Inter-American Court *Dilcia Yean and Violeta Bosica v. The Dominican Republic*.<sup>24</sup> This was one of the first cases in which violations of the right to education were heard by a Court in relation to a case on the right to education and the right not to be discriminated on grounds of national origin. The petitioners were two girls with Haitian origins but who were born in the Dominican Republic. Despite their place of birth the authorities denied them Dominican nationality. The petitioners argued that this lack of nationality exposed them to the imminent threat of expulsion. The Court asked the Government to facilitate access to free elementary education by overcome the historical barriers created by discriminative laws in birth record and educational systems. The Inter-American Court ordered that enjoyment of the right be guaranteed regardless of a child's background by adopting precautionary measures. It further imposed supervision of the decision by asking the State to submit to the Court a report on the measures adopted.

### *Education without discrimination based on gender*

30] In Hong Kong, a case clearly stated that discrimination in educational systems in any form is not permissible, even

22. *Brown I*, 347 US 483 (1954) and *Brown II*, US 294 (1955).

23. (2002) 9 BCLR 891 (CC).

24. 8 September 2005.

when a State argues that such discrimination is based on difference of educational aptitudes between girls and boys. Indeed, in the case *Equal Opportunities Commission v. Director of Education*,<sup>25</sup> three educational systems in Hong Kong, namely the SSPA system, which evaluates and places children into corresponding secondary schools, Internal Assessment (IA) and an Academic Aptitude Test (AAT) that place them into secondary schools, were shown to evaluate students based on sex. The Court held that these actions violated the Sex Discrimination Ordinance as well as the international human rights obligations inscribed in the Convention on the Elimination on All Discrimination of Women (CEDAW). This precedent provided the basis for interpreting sex discrimination under the standards established by CEDAW. Following this decision in 2001, over 100 female students were transferred to more favourable schools, and following 2002, the rankings and seat allotments were no longer based on gender.

### **Education of minorities**

**31]** In Canada, a State which protects minority-language education rights, the Supreme Court upheld the claim of Francophone parents living in five school districts in Nova Scotia who applied for an order directing the authorities to provide, out of public funds, homogeneous French-language facilities and programmes at the secondary-school level. In the case *Doucet-Boudreau v. Nova Scotia, Minister of Education*,<sup>26</sup> the Supreme Court imposed the duty on the State to provide facilities for minority groups speaking their own language and to report back on the progressive implementation of these facilities.

### **Education of children with disabilities**

**32]** In the above mentioned case *International Association Autism Europe v. France*,<sup>27</sup> related to people with disabilities, France acknowledged the failure to provide adequate special educational services for people with disabilities, accepting that the financial system did not take into account the number of persons on the waiting list. Despite the existence of programmes and allocations currently being implemented, the petitioner, in this case the Association Autism-Europe, found that it would take 100 years to erase the deficit on the official waiting list. For this reason, the European Committee on Social Rights found that France failed to provide the necessary special education and argued that the definition of autism was too restrictive and avoided integrating all people with disabilities within the financial educational system.

**33]** In Argentina, the case *Lifschitz, Graciela Beatriz y otros c. Estado Nacional s/sumarísimo*<sup>28</sup> involved the claim of a low-income family with a disabled child to whom access to school was denied because of lack of vacant places. The petitioner asked for special financial support to allow access to private and special education for her son. The Supreme Court decided in favour of a disabled child and ordered the Government to provide a special subsidy to allow him access to a private and special school.

### **Education in conflict situation**

**34]** In the decision *T-215 of 2002*, the Constitutional Court of Colombia protected the right to education of displaced children for whom inscription in educational institutions had been rejected due to their condition of displacement. The Court highlighted the existence of an “unconstitutional state of affairs” and ruled to protect the rights of the child in special cases of internal displacement.

### **Education of people in poverty**

**35]** In the decision *C-560 of 1997* dealing with vouchers issue, the Constitutional Court of Colombia held that they limit access to education when they exceed the moderate and proportional payment. It also held that everyone has the right to access to education without discrimination included on the basis of its economical capacity. The Court clearly affirms the equality of opportunity in access to school. An excessive economic request to be admitted in school violates the right to education while pupils can be excluded only on an economical basis.

**36]** In the Case of *Edgewood Independent School District v. Kirby*<sup>29</sup> the Supreme Court of Texas studied the education financial systems in Texas and concluded that the poor schools lacked funds to ensure the right to education. The Court observed that the wealthiest districts had 700 times more property wealth per student than the poorest and concluded that this constituted a violation of the Constitution of Texas. The Court stressed that the financial systems did not permit an efficient or effective education for every student and concluded that there was a need to develop a new legal framework to correct this disparity.

### **Equality of opportunity**

**37]** In India, a petition was submitted under a Public Interest Litigation (PIL), for the education of the children of prostitutes in the case *Gourav Jain v. Union of India*.<sup>30</sup> The Supreme Court held that the children of prostitutes have

25. N° 1555 of 2000.

26. 2000, 185 N.S.R. 2d, 246 (NSSC) and 2003 3.S.C.R. 3 (SCC).

27. European Committee on Social Rights Complaint n° 13/2002.

28. Argentinian Supreme Court in Lifschitz, Graciela Beatriz y otros c/ Estado Nacional, 15-06-2004.

29. 777 S.W. 2d 391 (Tex. 1989).

30. *Gourav Jain v. India*, A.I.R. 1997 S.C. 3021.



the right to dignity, equality of opportunity, care, protection and rehabilitation without stigmatization. For this reason, the Court ordered the creation of a Committee to draft a plan focusing on the rehabilitation of such children and child prostitutes, with periodic reports to be submitted to the Court.

**38]** In Argentina, the Administrative Court of Buenos Aires, ruling in the *Santoro* case,<sup>31</sup> stated that a decision related to the transfer of a student between two schools was arbitrary. In addition, the Supreme Court of Argentina revised a collective claim related to non-compliance of a province with the Federal Educational Act, which develops standards related to equality in education.<sup>32</sup> The Argentinean province did not comply with the Federal Act and maintained its own educational rules and standards. This resulted, for example, in the invalidity at national level of diplomas issued by the province's educational scheme. The Court stated that this scheme was not in accordance with the Federal Act and that this would affect the right to education of children as well as their right to access to working opportunities.

**39]** In the Indian case *UnniKrishnan J. P v. State of Andhra Pradesh*,<sup>33</sup> related to the obligation of the State to provide education facilities within the economic capacity and development of the citizens, the Indian Court declared that education was a fundamental right and particularly stressed that education of children up to the age of 14 years old was fundamental. Through this decision, the Court could define broader standards for State compliance in another sphere as the eradication of child forced labour and encouraged the advancement of the right in the landmark case *M.C. Mehta v State of Tamil Nadu & Ors.*<sup>34</sup>

### 3. HUMAN RIGHTS APPROACH TO 'EDUCATION FOR ALL'

**40]** Education for All (EFA) is an international initiative first launched in Jomtien, Thailand, in 1990 to bring the benefits of education to 'every citizen in every society.' In order to realize this goal, a broad coalition of national governments, civil society groups, and development agencies, such as UNESCO and the World Bank, committed to achieving six specific education goals:

(1) Expand and improve comprehensive early childhood care

31. Buenos Aires Administrative Court of Appeals, Santoro, Francisco Roberto y otro v. GCBA s/amparo, 05-14-2002.

32. Argentinian Supreme Court, Ferrer de Leonard, Josefina y otros c. Superior Gobierno de la Provincia de Tucumán, s/amparo, 08/12/2003.

33. 1993, 1 SCC 645.

34. *M.C. Mehta v State of Tamil Nadu & Ors* (1996) 6 SCC 756; AIR 1997 SC 699 where the Court called for the enforcement of legislation prohibiting child labour. The Supreme Court directed that children should not be employed in hazardous jobs in factories for the manufacture of matchboxes and fireworks, and that positive steps should be taken for the welfare of such children and to improve the quality of their life.

and education, especially for the most vulnerable and disadvantaged children.

- (2) Ensure that by 2015 all children, particularly girls, those in difficult circumstances, and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality.
- (3) Ensure that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes.
- (4) Achieve a 50 per cent improvement in adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults.
- (5) Eliminate gender disparities in primary and secondary education by 2005, and achieve gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality.
- (6) Improve all aspects of the quality of education and ensure the excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

**41]** In 2000, the international community reaffirmed its commitment to EFA at the World Education Forum in Dakar, Senegal, and adopted two EFA goals which are also Millennium Development Goals (MDGs). The Dakar Framework for Action pledges to expand learning opportunities for every child, youth and adult, and to meet targets in six areas by 2015. The world education framework adopted the Dakar Framework for Action including six specific goals:

- (1) Expand early childhood care and education
- (2) Provide free and compulsory primary education for all
- (3) Promote learning and life skills for young people and adults
- (4) Increase adult literacy by 50 per cent, especially for women
- (5) Achieve gender parity by 2005 and gender equality by 2015, and
- (6) Improve the quality of education.

**42]** In order to reach these goals a rights-based approach to education for all has been defined in order to encompass:

- The right of access to education, which comprises three elements: the provision of education throughout all stages of childhood and beyond, the provision of sufficient, accessible school places or learning opportunities, and equality of opportunity.
- The right to quality education, which includes a broad and inclusive curriculum, rights-based learning and assessment, and a child-friendly, safe and healthy environment.
- The right to respect within the learning environment, including respect for identity, integrity and participation rights.

**43]** On the same occasion, the international community recognized the central role of civil society in the achievement of the EFA goals and committed to 'ensure the engagement and participation of civil society in the formulation, implementation and monitoring of strategies for educational development'.<sup>35</sup> The call for a genuine partnership, launched at the Dakar Forum, through which civil society would be fully associated with all stages of the realization of the EFA goals, has therefore effectively given momentum to the structuring and consolidation of EFA networks. Thus, more and more countries now have national coalitions, often grouped into regional and international networks. The launch of the Global Campaign for Education, which contributed to stronger collaboration and dialogue between NGOs and teachers' unions, has certainly contributed to the rapprochement that has mainly taken place in Africa, but also in the Asia and the Pacific, and Latin America and Caribbean regions.

**44]** For this purpose, UNESCO created a thematic mechanism entitled the Collective Consultation of NGOs on EFA (CCNGO/EFA) to reflect the recommendations of the Dakar Framework for Action, and to facilitate reflection, permanent dialogue and joint action between NGOs and UNESCO in the area of Education for All (EFA). It ensures the follow-up of activities and serves as the interface between the Dakar follow-up programmes and mechanisms and CCNGO/EFA. At its annual meeting CCNGO/EFA presents a report on ongoing activities and initiatives in the region.

**45]** In the framework of UNESCO's mandate concerning intellectual cooperation in the field of education and its coordinating role of EFA partners, the purpose of CCNGO/EFA is to foster partnership between NGOs and UNESCO with the aim of:

- Contributing to broadening the concept of EFA
- Reinforcing knowledge of NGO roles and experiences in EFA and promoting its dissemination
- Facilitating collective expression and cooperation among the NGOs in the field of EFA
- Facilitating the capitalization of conceptual contributions and experiences of NGOs so that these are taken into account in education content and policy formulation
- Facilitating the consideration and mainstreaming of NGO conceptual contributions and experiences in EFA programmes
- Facilitating the participation of NGOs in monitoring and evaluating EFA goals
- Reinforcing NGO technical and institutional capacities, particularly at the local level.

The Convention against Discrimination in Education has been recognized by UNESCO as a key pillar of EFA.

35. Para. 8 of the Dakar Framework for Action.

#### ▶ UNESCO GUIDELINES ON INTERCULTURAL EDUCATION FOR EFA

Intercultural Education is a response to the challenge to provide quality education for all. It is framed within a Human Rights perspective as expressed in the Universal Declaration of Human Rights (1948): *Education shall be directed to the full development of 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 and religious groups, and shall further the activities of the United Nations for the maintenance of peace.*

The challenge for Intercultural Education is to establish and maintain the balance between conformity with its general guiding principles and the requirements of specific cultural contexts. For this purpose, The 'Rabat Commitment,' formed as a result of the Rabat Conference on Dialogue among Cultures and Civilizations through Concrete and Sustained Initiatives (Rabat, Morocco, 14–16 June 2005), recommends the preparation of 'guidelines on Intercultural Education, building on the research, publications and practice already carried out'. The UNESCO Guidelines on Intercultural Education (2006) contain the following principles:

**Principle I:** Intercultural Education respects the cultural identity of the learner through the provision of culturally appropriate and responsive quality education for all.

**Principle II:** Intercultural Education provides every learner with the cultural knowledge, attitudes and skills necessary to achieve active and full participation in society.

**Principle III:** Intercultural Education provides all learners with cultural knowledge, attitudes and skills that enable them to contribute to respect, understanding and solidarity among individuals, ethnic, social, cultural and religious groups and nations.

For more information on the Guidelines see the UNESCO website <http://unesdoc.unesco.org/images/0014/001478/147878e.pdf>

## 4. HUMAN RIGHTS EDUCATION

**46]** Human rights education is defined as any learning, education, training and information efforts aimed at building a universal culture of human rights.<sup>36</sup> Human rights education is an integral part of the right to education. It embraces all education levels and all forms of teaching and learning. For this reason, in developing human rights education, the state is compelled to adopt the same scheme of human rights obligations for the right to education. Human rights education responds to the dialectic between the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms for the promotion of understanding, tolerance and friendship among nations and for the maintenance of peace.<sup>37</sup>

36. Plan of action for the second phase (2010-2014) of the World Programme for Human Rights Education (A/HRC/15/28), as adopted by Human Rights Council resolution 15/11, para. 1.

37. Article 26 para. 2 of the UDHR.

**47]** Indeed, following the World Conference on Human Rights held in Vienna in 1993 and based on the achievements of the **United Nations Decade for Human Rights Education** (1995–2004) the General Assembly of the United Nations proclaimed on 10 December 2004, **the World Programme for Human Rights Education (WPHRE)** (2005–ongoing).<sup>38</sup> The goal of this Programme is to promote a common understanding of the basic principles and methodologies of human rights education, to provide a support for policy-oriented action, and to strengthen partnerships and international cooperation. This programme aims to advance the implementation of human rights education programmes in all sectors.

**48]** During the first phase (2005–2009) of the WPHRE, governments, in adopting the plan of action for the first phase<sup>39</sup>, committed themselves to focus on primary and secondary levels of education, to analyse the current situation of human rights education in primary and secondary school systems; to set priorities and develop a national implementation strategy; to implement and monitor planned activities, and to evaluate the outcomes of national implementation.

**49]** At the international level, the United Nations Inter-Agency Coordinating Committee on Human Rights Education in School System (UNIACC),<sup>40</sup> was mandated to ensure United Nations system-wide support to national implementation of the plan of action. Within this framework, UNESCO was actively involved in the follow-up to the first phase and developed the practical tools for teaching and learning as well as for policy planning related to human rights education in general, and with focus on the specific questions such as learning to live together, prevention of violence in schools, gender, etc. Partnership with NGOs is considered critical in developing contents and methodologies relevant to learner's everyday life as well as in outreach.

**50]** At the conclusion of the first phase, a global evaluation of national implementation of human rights education in the school system was undertaken and the related UNIACC evaluation report, submitted to the General Assembly, revealed that there was particularly notable progress in making human rights education part of national curricula. There are also a number of national initiatives in terms of policy and action to foster a culture of respect for human rights in daily school life. Certain gaps in implementation remain, which suggests the need for a more comprehensive and systematic approach at the national level.<sup>41</sup>

38. For more information about these two initiatives, please see [www2.ohchr.org/english/issues/education/training/index.htm](http://www2.ohchr.org/english/issues/education/training/index.htm).

39. Plan of action for the first phase of the World Programme for Human Rights Education (A/59/525/Rev.1). as adopted by the United Nations General Assembly resolution 59/113 B.

40. The United Nations Inter-Agency Coordinating Committee on Human Rights Education in School System was established for the duration of first phase and was composed of the following agencies: ILO, OHCHR, UNAIDS, UNDG, UNDP, UNDP/UNEP, UNESCO, UNFPA, UNHCR, UNICEF, UNRWA and the World Bank.

41. Final evaluation of the implementation of the first phase of the World Programme for Human Rights Education (A/65/322).

**51]** The Human Rights Council decided, in its resolution 12/4 (October 2009), that the second phase of the WPHRE focus “on human rights education for higher education and on human rights training programmes for teachers and educators, civil servants, law enforcement officials and military personnel at all levels” for five years, 2010-2014 (paras. 2 and 4). The resolution also “Encourages States that have not yet taken steps to incorporate human rights education in the primary and secondary school system to do so, in accordance with the Plan of Action of the first phase of the World Programme” (para.3).

**52]** The Council requested the Office of the UN High Commissioner for Human Rights to “prepare, within existing resources, in cooperation with relevant intergovernmental organizations, UNESCO and non-governmental actors, consult States on and submit for consideration to the 15<sup>th</sup> session of the Human Rights Council (September 2010), a plan of action for the second phase of the World Programme (2010-2014), (...)” (para.4). This new plan of action was developed by OHCHR in consultation with UNESCO and many other stakeholders, and was adopted, as contained in A/HRC/15/28, by the Human Rights Council resolution 15/11 (30 September 2010).

**53]** As the lead agency on education, UNESCO has set forth milestone instruments that have guided its work, as well as other international agencies, on human rights education. These include: the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (1974). This Recommendation, which was adopted by UNESCO's General Conference in 1974, provides normative framework for promoting human rights education by detailing guiding principles and formulating a global approach. It provides for action in various sectors of education and underlines the need for understanding and respect for all peoples, their cultures, civilizations, values and ways of life as well as the responsibility of Member States for providing human rights and fundamental freedoms.

**54]** Indeed, UNESCO Member States are invited on a regular basis to submit national periodic report on the measures taken to implement this Recommendation.<sup>42</sup> The objective of monitoring the implementation of this Recommendation is to monitor the process whereby human rights materials and principles have been progressively incorporated into the legal, administrative, educational and teaching tools that guide the daily practice of education. Member States are invited to consult relevant stakeholders and in particular the national human rights institution.

42. In accordance with 34 C/Resolution 87, document 182 EX/35 “Results of the Fourth Consultation on the Implementation of the 1974 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms” was submitted to the 18<sup>th</sup> session of the Executive Board (September 2009) and to the 35<sup>th</sup> session of the General Conference (October 2009).

55] At the UN level, Member States are invited to provide information on any measures taken to ensure adequate education and training in human rights for a wide range of professional categories, including teachers, based on the framework of the Harmonized Guidelines for reporting under international human rights treaties, adopted by the 18<sup>th</sup> Meeting of Chairpersons of the Human Rights Treaty Bodies in June 2006. States should submit information on any measures taken to promote respect for human rights through education and training in general, and within schools in particular.<sup>43</sup> NGOs are invited to support Member States in this task.

56] In following up Human Rights Council Resolution A/HRC/6/10 adopted in September 2007, a drafting group was set up within the framework of Human Rights Council's Advisory Committee for elaborating the proposed "UN Declaration on Human Rights Education and Training". One of its main tasks was to collect information on normative instruments and key initiatives that relate to HRE, most of which came out of the recent UN Decade for Human Right Education (1995-2004). The Committee also took into account other existing initiatives such as the UN World Programme for Human Rights Education (WPHRE, 2005-ongoing). In order to enhance the long-term awareness of human rights education, UNESCO actively contributed to the drafting process of this UN declaration. National Commissions for UNESCO as well as UNESCO Chairs and partner NGOs were invited to share their experiences and lessons learned on several occasions. The draft declaration was finalized by the Open-ended Intergovernmental Working Group on the draft United Nations declaration on human rights education and training (10-14 January 2011) and subsequently adopted by the Human Rights Council in its resolution 16/1 (23 March 2011).

57] Concretely, NGOs are invited to participate by sending pertinent information on the inclusion of human rights education and training in their activities.<sup>44</sup>

43. Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents, UN document HRI/GEN/2/Rev.6 (2009) available at: [www2.ohchr.org/english/bodies/coredocs.htm](http://www2.ohchr.org/english/bodies/coredocs.htm).

44. See, for example, *Human rights education in the school systems of Europe, Central Asia and North America: a compendium of good practices*, OSCE, CoE, OSCE/ODIHR, UNESCO and OHCHR, 2009.

## 5. STRATEGIES FOR JUSTICIABILITY

58]

- Focus on education as a human right and not as a service.
- Preserve public interest in education
- The right to education is justiciable as an independent right. It does not need to be linked to another human right.
- Prioritize the principle of the best interests of the child in public policies and legal frameworks
- Universal right to education is also related to the universality of rights: education is closely linked to all rights including food, housing, the right to have a family, work etc.
- Policies and plans as well as financial, macro and micro-economic strategies should be analysed in order to define the potential impact they will have on children.
- Children lack a political voice – they depend on adults to present their claims – but are a priority of the legal system. The Convention on the Rights of the Child stresses that all children should have guaranteed access to education regardless of their legal status or that of their parents. For this reason, publicly-funded children's advocates, NGOs, special counsels, public defenders or ombudsmen are required to represent their claims.
- Ensuring equal educational opportunities for all in law and in fact. It is important to place greater emphasis on action at national level for universalizing access to quality education for all without discrimination or exclusion. Positive measures and affirmative action could be necessary for mitigating inequalities in educational opportunities. Equity, quality and financing are key areas in pushing forward the EFA agenda.
- Financing of education: developing a legal framework
- Measuring impact of awareness raising

### EXERCISES

- 1) Identify **obligations** (respect, protect, fulfil) and **violations** (fees, compulsory nature, teachers training; groups: women and girls, minorities, emergencies, extremely poor) related to the right to education.
- 2) Identify what role for States representatives, NGOs and judges on advancing the implementation of the right to education.
- 3) Provide elements for a human rights-based approach to budgetary analysis applied to education.

# The right to adequate food

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# THE RIGHT TO ADEQUATE FOOD



It is barely credible that millions of people around the world are still suffering and dying from malnutrition, hunger and starvation. This situation will not be alleviated unless the roots of hunger and poverty are addressed. Key priorities for any poverty alleviation strategy should include strengthening the effective implementation of policies and the development of a clear definition of the right to food, as an autonomous right. This chapter presents the challenges facing the operational aspects of the right to food and the arguments for this human right to be implemented as a justiciable right. It underlines the necessity of developing human rights-based legislative frameworks for recognizing the right to food as a right of all people. It also presents examples of NGO activities in the field that have played a crucial role in providing first-hand solutions for those most vulnerable to hunger and poverty, in particular, women and children.

## 1. DEFINITION OF THE RIGHT TO ADEQUATE FOOD<sup>1</sup>

1] Although the right to food was the first human right studied within the framework of the UN System, it has advanced and been explored only relatively recently in comparison with other economic, social and cultural (ESC) rights. The content of this right has been developed at the national level over the last two decades, but above all in terms of its relationship to other human rights, such as the right to life,<sup>2</sup> work and income<sup>3</sup> (especially in relation to the element of procurement), education, housing or health. The right to food thus constitutes an example of the interrelatedness and interdependency of human rights: it is defined through other human rights at the same time as it provides elements for

the content of other rights.<sup>4</sup> Today, however, numerous cases show how the right to food is being increasingly recognized at the national level as a justiciable right.<sup>5</sup>

2] As mentioned in the chapter on the right to adequate housing, **Article 25 of the Universal Declaration of Human Rights (UDHR)** mentions the right to adequate food as part of the right to a standard of living.<sup>6</sup> As with the right to adequate housing, adequate food is indispensable for the fulfillment of other human rights. In its article 11, the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines the right to adequate food and provides the main direction on states obligations at national level.<sup>7</sup> The Special Rapporteur on the right to food, in his first annual report to the Human Rights Council,<sup>8</sup> emphasized that this human right needs to focus on the beneficiaries, and that the needs of the

1. In this paper we refer to the right to food and the right to adequate food indistinctly, in accordance with the interpretation provided by the Committee on Economic Social and Cultural Rights in General Comment n° 12. According to this definition, the right to food includes the adequacy and sustainability of food availability and access.

2. Examples of the interrelation of the right to food and the right to life include *India Maneka Gandhi v. Union of India* AIR 1978 SC 597, where the Supreme Court stated: 'Right to life enshrined in Article 21 means something more than animal instinct and includes the right to live with human dignity, it would include all these aspects which would make life meaningful, complete and living.' Similarly, in *Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 SCC 520, the Supreme Court stated: 'The right to life is guaranteed in any civilized society. That would take within its sweep the right to food'. In *Chameli Singh v. State of U.P.*, AIR 1978 SC 597 states that the right to life is guaranteed in any civilized society implying the right to food, water, decent environment, education, medical care and shelter among others.

3. Since employment is linked to purchasing power and therefore to food security, the right to work is crucial for realizing the right to food.

4. See, for example, Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, where the Supreme Court protected the access to food and water of indigenous communities who died due to a lack of access to food and water. See also the case *Sawhoyamaya v. Paraguay*, 2006, of the Inter-American Court of Human Rights, in which the Court protected the right to food of the *Sawhoyamaya* indigenous community by protecting their right of life.

5. See, for example, *Right to Food and Access to Justice: examples at national, regional and international levels*, FAO, 2009.

6. See Chapter related to the Right to adequate housing, footnote 1.

7. Article 11 of the ICESCR states: '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 cooperation based on free consent.' Many other international instruments mention the right to food including the Convention on the Rights of the Child (Article 24).

8. Olivier De Schutter took office on 1 May 2008, report A/64/170.

most marginalized groups should be prioritized, including in particular smallholders in developing countries.

**3]** The Committee on Economic, Social and Cultural Rights (CESCR) clarified the content of the right in **General Comment n° 12**,<sup>9</sup> affirming that adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.<sup>10</sup> The CESCR established that this definition should not be understood in a restrictive manner which refers only to a minimum package of calories, proteins and other specific nutrients. The right to food should be understood as a broader concept requiring a progressive implementation. Nonetheless, the core definition of this human right relies on two main elements: availability and accessibility to food. The accessibility can be attained either by economic means (income) or by direct access to food (direct food provision). In that sense, the Committee has stressed that the problem of malnutrition and the availability of food is linked to accessibility of food, underlining the connection with poverty.<sup>11</sup>

**4]** The progressive realization of the right to food encompasses immediate and long term measures. It imposes an obligation on States to take the steps necessary to mitigate or alleviate hunger and starvation in all situations, by adopting measures to enable the poorest to have access to balanced and nutritious food ensuring the fulfillment of the core aspects of this human right.<sup>12</sup> In the long term, the **Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines)** adopted by all FAO member states, address in a comprehensive and holistic way the measures that should be taken to build an enabling environment where people can feed themselves, a system of assistance to those who are unable to feed themselves, and measures to enhance accountability of all state actors.<sup>13</sup> In concrete terms, Voluntary Guideline n° 7, for example, focuses on the existence of independent and protective legal mechanisms to allow vulnerable groups access to effective remedies when their right to adequate food is violated. This recommendation goes further since it requires dissemination of information regarding the entitlements of vulnerable groups to this right. Furthermore, the Right to Food Guidelines encourage states to ensure the progressive realization of the right to food through a growth strategy which is consistent with human rights objectives and obligations and should focus on the most vulnerable (impact assessments-safety

net programmes, etc). In the development of policies aiming to enhance livelihoods' protection, the implementation of a food security system which facilitates sustainable strategies to an adequate access to food is fundamental and no budget restrictions should undermine this human right.<sup>14</sup>

### Zero Hunger Programmes: the experiences of Brazil and Nicaragua

The Brazilian authorities created a Food and Nutritional Policy with a national food security programme entitled the **Zero Hunger Programme**. A National Council for Food and Nutritional Security (CONSEA) enables NGOs and government authorities to share experiences and put in place strategies for the implementation of food strategies.

The Programme includes the following multidimensional components: **(1) A design of a new economic model** based on **income improvement** (including income and employment; generation policies level; previdenciary expansion and agrarian reform); **(2) A better income distribution**, based in the **increase of Basic Food Supply** (including support to familiar agriculture; incentives to self-consumption; food production and agricultural policy); **(3) A Domestic Market Growth**, based on **Emergency Actions** (including food coupons; basic food basket; children's free-food-in-school; special programs; food bank and food security stocks; and finally; **(4) More employment and better Salaries**, based on **Food Cheapening** (including popular restaurants; agreements between supermarkets and in-natura food Markets; alternative trade channels and public equipment. See more information of the project in:

[www.brasembottawa.org/downloads/en/PROGRAMA.PDF](http://www.brasembottawa.org/downloads/en/PROGRAMA.PDF)

In line with the Brazilian Zero Hunger programme, **Nicaragua**, one of the poorest countries in Latin-America launched the same initiative for 2008-2012, focusing on mother-and-child health, food for education and food for training for 225,000 beneficiaries. The current programme covers 70 percent of the needs identified by vulnerability analysis and mapping.

See for more information: 2009 report of FIAN International, *El Derecho a la Alimentación y la lucha para combatir el hambre en Nicaragua: Un Año del Programa Hambre Cero* available at: [www.bvsde.paho.org/texcom/nutricion/alimen\\_nic.pdf](http://www.bvsde.paho.org/texcom/nutricion/alimen_nic.pdf)

and also

Plan of Action between the government of Nicaragua and UNDP 2008-2012 available at: [www.undp.org/latinamerica/country-docs/CPAP%20Nicaragua-2008-2012.pdf](http://www.undp.org/latinamerica/country-docs/CPAP%20Nicaragua-2008-2012.pdf)

**5]** Progressive protection is a complex challenge that addresses food priorities and the management of food production and distribution through food systems. This can only be achieved through the implementation of a broad strategy involving diverse actors and activities, including: plans for procurement and buffer stock, diversification of crops, the role of the private sector, decentralization policies, plans for farmers, incentives, subsidies, implementation of nutrition and employment programmes.

9. UN Document E/C12/1999/5.

10. See G.C. n° 12 para. 6.

11. G.C. n° 12 para. 5.

12. See, for example, M. Borghi and L. Postiglione Blommestein (eds) 2005, *The right to adequate food and access to justice*, Fribourg, Switzerland, Editions Universitaires.

13. Adopted during the 127<sup>th</sup> session of the FAO Council in November 2004. Section 5 of this chapter develops the content of the Voluntary Guidelines. Concerning the progressive realization of this right, Voluntary Guidelines n° 5 related to Institutions (7) on legal frameworks and (17) on monitoring, indicators and benchmarks are especially pertinent for ensuring its progressive implementation. More information on the Voluntary Guidelines will be given in the section related to implementation of the Right to Food.

14. See for more information: FAO, *The right to Food: Putting it into practice*, Brief 2, Economic Development Policy available in: [www.fao.org/righttofood/download\\_2008/briefs\\_EN.pdf](http://www.fao.org/righttofood/download_2008/briefs_EN.pdf)

6] The right holders are numerous. It involves urban and rural populations, from which producers and providers, such as farmers, workers and plant breeders. The accessibility and availability of food depends on the means of procurement created by markets, food schemes, state strategies for distribution and the role of private actors. Regulation and monitoring are therefore crucial for its respect and expansion.

## 2. STATES OBLIGATIONS UNDER THE RIGHT TO FOOD

7] The tripartite typology explained in Chapter III related to the generic obligations to **respect**, **protect** and **fulfil** has been expanded in General Comment n° 12, which establishes two dimensions within the obligation to fulfil, namely, the obligation to **facilitate** and to **provide**.<sup>15</sup>

8] The obligation to **respect** relates to the duty to respect the existing access to adequate food. This obligation requires that States do not take any measures that impede such access.<sup>16</sup> Voluntary Guideline 8.1 clarifies that 'states should protect the assets that are important for the people's livelihoods'. The case *Kishen Patttnayak & another v. State of Orissa*,<sup>17</sup> the first Indian case related to right to food, expresses the importance of access to food in alleviating poverty. The case, brought before the Supreme Court of India, dealt with the situation of extreme poverty of the people of Kalahandi in Orissa, where hundreds were dying due to starvation, and where children in particular were vulnerable. The Indian Supreme Court gave directions to the government regarding measures to be taken for preventing deaths due to poverty and starvation, but no specific measures were issued to end the situation itself.

9] Furthermore, in the case *Taito Rarasea v. State*,<sup>18</sup> in Fiji, the lack of food for a prisoner serving a long sentence was considered as cruel, inhuman and degrading treatment. The High Court of Fiji invoked both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR), and found that reducing the portion of food stated in the Prison Act, and using food as a mean of control, constituted a violation of the right to adequate food. This case constitutes an important basis for the indivisibility of civil and political and economic, social and cultural rights.

15. Supra note 21, GC 12 para. 15.

16. See G.C. n° 12, para. 19.

17. A.I.R. 1989 S.C. 677.

18. Criminal Appeal n° HAA0027 of 2000, 12 May 2000. See also the cases of the Human Rights Committee related to the right to food of prisoners: *Mukong v. Cameroon*, Communication 458/1991, 1994 and *Lantsova c. Fédération de Russie*, Communication n° 763/1997, 2002.

10] In the *Kenneth George case*,<sup>19</sup> artisanal fishing communities presented a class action to the High Court of Cape of Good Hope Province in South Africa, and asked for the protection of their fishing rights as well as the protection of their right to food. They alleged a violation of the obligation to respect the right to food caused by a retrogressive measure of blocking access to the sea for traditional fishing communities, which would cause poverty among artisanal fishing communities who depend on traditional fishing practices. In addition, they accused the existing fishing policy of exclusivity, obliging them to integrate a commercial fishing industry in their practices or face exclusion from legal fishing operations. In its decision, the High Court ordered the drafting of a new law with the participation of the community and in accordance with international and national legal obligations.

11] The obligation to **protect** the right to food imposes a duty to regulate activities related to access to food, ensuring that third parties (private actors or individuals) do not impede accessibility. In the case *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*<sup>20</sup> for example, the action of state authorities destroying and threatening food sources of the Ogoni people in Nigeria constituted a violation of the duty to protect. Indeed, the complaint was lodged by two non-governmental organisations: the Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR). The communication dealt with a number of human rights violations provoked by the alleged action of the military government of Nigeria in one hand, and by the Nigerian National Petroleum Company (NNPC), in a joint venture with Shell Petroleum Development Corporation (SPDC) in another hand. Activities in the Ogoni region caused important environmental degradation, as well as the destruction of homes, burning of crops, killing of animals and health problems among the Ogoni people. The latter, resulted from the contamination of the environment, and in particular, a contamination of soil, water and air, the destruction of homes, the burning of crops and killing of farm animals. The protect obligation was violated because of the state's omission to undertake any action to stop the private party from destroying the food sources of the Ogoni. This violation occurred by the use of a variety of means including the participation of state authorities in an irresponsible oil development that poisoned part of the soil and water upon which Ogoni farming and fishing depended. This situation caused destruction of farmlands and crops, poisoning of rivers and animals, and created malnutrition and starvation among Ogoni communities.

12] The obligation to **facilitate** implies any initiative aimed at strengthening access to and utilization of resources and

19. *Kenneth Georges and Others vs. Minister of Environmental Affairs and Tourism*, 05 02 2007.

20. African Commission on Human and People's Rights, October 27, 2001 Communication n° 155/96.



means to ensure livelihoods, including food security. It includes also all the variety of measures that the authorities should develop in different areas of action (legal, policy, institutions, programmes, strategies, etc. The duty to **provide** rather concerns the obligation of states to ensure that people with special limitations can enjoy the right to adequate food, it is thus applicable in all circumstances in which people are unable to feed themselves by their own means. The CESCR has added that this obligation has special significance in the case of situations of natural disasters.<sup>21</sup>

### 3. CORE OBLIGATIONS UNDER THE RIGHT TO FOOD

**13]** A core obligation under the right to food is to immediately ensure freedom from hunger, meaning in practical terms to provide minimum basic resources to enable individuals to be free from threats to their survival. The aim of freedom from hunger relates to two core elements: **adequacy** (which includes both quantitative and qualitative dimensions), and **accessibility**. **Adequacy** and **accessibility** are therefore in terms of the CESCR core elements of the right to food. Furthermore, the CESCR mentions two other principles upon which depends the long-term maintenance of adequacy and accessibility: the **availability** and **sustainability** of food.

**14]** In relation to immediate targets, **adequacy** means that food (including solid foods but also the nutritional aspects of drinking water) or diet should be appropriate.<sup>22</sup> This element has been particularly important in national jurisdictions in relation to special protection for vulnerable people. In the landmark Indian case *People's Union for Civil Liberties (PUCL) v. Union of India and Others*,<sup>23</sup> initiated by the domestic NGO Human Rights Law Network (HRLN) and popularly known as '*the PUCL case*' or '*the Right to Food case*', the Supreme Court of India elaborated on the concept of adequacy in relation to the right to life.<sup>24</sup> The Court explored the meaning of the portion of the diet and monitored the supplied nutrition elements for pregnant women, children, girls and adolescents. The Court affirmed that 'food [should be] provided to the aged, infirm, disabled, destitute women and men who are in danger of starvation, pregnant and lactating women, destitute children, especially in cases where they or members of their family do not have

sufficient funds to provide food for them'. The Court ordered the immediate use without delay of food stocks in order to prevent hunger and starvation. After, the Court asked the states to identify families below the poverty line (BPL) in order to identify targeted food schemes. Based on PUCL, the Indian Supreme Court passed more than twenty 'interim orders'<sup>25</sup> ordering the government to: **(1)** introduce cooked midday meals in all primary schools, **(2)** provide 35 kgs of grain per month at highly subsidized prices to 15 million destitute households under the Antyodaya component of the PDS, **(3)** double resource allocations for India's largest rural employment programme (Sampoorna Grameen Rozgar Yojana programme), and **(4)** universalize the Integrated Child Development Services. The Court was also able to identify the minimum quantity of nutrition and food to be made available. For a malnourished child the diet should comprise 600 calories and 16–20 grams of protein; a child up to 6 years old should have 300 calories including 8–10 grams protein; and for an adolescent girl, 500 calories and 20–25 grams of protein.

#### Right to Food Campaign

The **PUCL case**, which had at first an impact in Rajasthan, gained a broader scope, and today encompasses almost all national Indian food schemes. As a consequence, a genuine and effective Right to Food Campaign was implemented with the support of NGOs. They disseminated the following entitlements derived from the PUCL case: the National Rural Employment Guarantee Act (NREGA), the Integrated Child Development Services (ICDS), Mid-day Meals (MDM) scheme, and the Public Distribution System (PDS).

As a consequence, a genuine and effective **Right to Food Campaign** was implemented with the support of NGOs, which disseminated a number of entitlements derived from the PUCL case. Additionally, the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food & Public Distribution, have prepared a draft National Food Security Bill that is actually under discussion. This case is crucial for understanding how an assistance programme became a national strategy, supported by legal protection of the right to adequate food for the poor. It underlines how NGOs can actively participate in this recognition (for more information, see [www.righttofoodindia.org](http://www.righttofoodindia.org)).

**15]** **Accessibility** of food is a requirement composed of two elements: **physical accessibility**, which gives access to all people and especially vulnerable people who cannot supply food for themselves. In this regard, the G.C. mentions expressly the victims of natural disasters, ill and terminally ill people, indigenous people and children. The second element is **economic accessibility**, which is related to income which is the basis for food purchase.

21. See G.C. para. 15.

22. The diet should also contain the necessary mix of micronutrients for physical and psychological growth according to gender and occupation. It should be free of unfavorable or toxic substances, meaning that it should be safe (as regards contamination of foodstuffs, adulteration or environmental conditions) and should respond to cultural or consumer acceptability: it should fit into a dietary culture and provide accessibility of food supplies. See G.C. n° 12 para. 14.

23. 2004(2) SCC 476. Writ Petition (Civil) 196 presented in 2001 through a PIL and based on Article 21 of the Indian Constitution. The petition focuses on the general need to uphold the right to food, especially the distribution of food to areas where starvation deaths were occurring in India.

24. Some mentions also relate to the right to work.

25. Interim orders are tools for prompt action in order to stop a violation and to hold governments accountable. They are applicable during the duration of the case and can be incorporated in the final judgment.

**16]** Certain cases have provided clarification in relation to physical accessibility. The Argentinean Court ordered that an ill and highly vulnerable person suffering from cancer be included within a food plan.<sup>26</sup> However, in the case *C.M.D. y otros c. GCBA*<sup>27</sup> dealing with the arbitrary exclusion of a woman and her children from a food programme, the Argentinean Court ruled against the petitioner and did not accept her inscription in an alternative food programme, instead ordering that the petitioner and her children be provided with adequate food as a temporary solution against malnutrition. A similar decision was given in India in the above mentioned case *People's Union for Civil Liberties (PUCL) v. Union of India*, in which the Court ordered an increase in the number of centres supplying food to children (Agawandi Centers (AWCS)) within three months following the decision.<sup>28</sup>

**17]** In ruling *T-602 of 2003*<sup>29</sup> related to the right to food for displaced children, the Colombian Constitutional Court ordered the protection of a displaced and old woman, mother of two children. The Court had studied the entire system for protecting displaced populations and cited programmes, projects, rural plans, subsidies and food security initiatives to protect victims of situations of displacement. The Court insisted upon economic accessibility, stressing that financial supports are essential to help people escape from poverty, and decided that the public policy for displacement was not appropriate. The Court decided that the right to food was part of the right of an adequate standard of living and ordered the implementation of an integral food programme for displaced children.<sup>30</sup> The importance of this decision lies in the fact that the Court ordered the authorities to include the petitioners within a 'productive, integral and viable' food security plan within the following six months of the decision and to cover its expenses.

**18]** As noted above, two concepts of long-term maintenance relate to the immediate duties of states: the **availability** of food, which relates to the possibility of feeding oneself directly from natural resources and productive land, as well as the production, distribution and market systems which place the food where it is needed, and **sustainability**, which relates to the long-term availability and existence of food between generations and to food security. Guaranteeing the sustainability of the food produced and consumed requires the full utilization of a wide and complex array of knowledge in

the fields of technology, agriculture, environmental sciences, health, food safety and social sciences among others.

## 4. DUTIES OF EQUAL PROTECTION AND NON-DISCRIMINATION

**19]** The implementation of inclusive food strategies requires the integration of the **PANTHER principles**, in particular the principle and right of non-discrimination and equal protection.<sup>31</sup> Even in situations where food is made available, discriminatory policies, plans and distribution systems can completely undermine the right to food. Indeed, equal access to food should also be guaranteed through access to land, property, credit and technology. Discrimination can be disguised in a variety of ways, for example: discrimination by law in which the poor or vulnerable people and their rights to food are not recognized by the legal framework; discrimination as a cause and consequence of ancient cultural patterns which sometimes exclude women or groups of the population from access to a certain right; forms of discrimination including exclusion by bad administration, the holding of stock surplus, or the exclusion of sections of the population through marketing strategies.

**20]** In addition, a gender approach to food is crucial. Inadequate food for women, especially pregnant women, as well as their exclusion from production processes is a violation of their right. **Voluntary Guideline 8.6** explicitly mentions the principle of equal access by women to productive resources, stating that: "*States should promote women's full and equal participation in the economy and, for this purpose, introduce, where it does not exist, and implement gender sensitive legislation providing women with the right to inherit and possess land and other property. States should also provide women with secure and equal access to, control over, and benefits from productive resources, including credit, land, water and appropriate technologies*".<sup>32</sup>

26. Buenos Aires Administrative Court n° 4, Gonzalez Rayco, Artidoro c. GCBA s. amparo, 05/19/2005 s. de amparo, Juzgado Contencioso Administrativo y Tributario n° 3 Buenos Aires 11/03/03.

27. S/ de amparo, Juzgado Contencioso Administrativo y Tributario n° 3 Buenos Aires 11/03/03. The petitioner was excluded from the food programme 'Vale Ciudad'. Due to this arbitrary exclusion, her children suffered notable weight loss and were treated in a hospital for malnutrition. The Court ordered that she be provided with packages of food, but stated that she could not legitimately be inscribed in a food programme.

28. See op.cit. par. 14.

29. Colombian Constitutional Court Ruling T-602 of 2003, Ana Zárate de Bernal c. Red de Solidaridad Social y INURBE.

30. See also the joint survey undertaken by the World Food Programme (WFP) and ICRC, *Identifying Food and non food needs of the internally displaced in Colombia*, 27 December 2004 available at: [www.reliefweb.int/library/documents/2004/wfp-col-27dec.pdf](http://www.reliefweb.int/library/documents/2004/wfp-col-27dec.pdf)

31. PANTHER (principles) is an aide-mémoire formulated by FAO, which stands for the human rights principles of Participation, Accountability, Nondiscrimination, Transparency, Human dignity, Empowerment and Rule of law. A deliberate application of these principles allows development planners to design integrated, holistic and targeted strategies of empowerment, equality and inclusion, to redress human rights violation and advance accountability processes.

32. Supra notes 13 and 14, Voluntary Guideline 8.6. This gendered approach to food security has been incorporated for example in Article 15 of the recent Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa, which states that in the framework of the right to food security, states should: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; and (b) establish adequate systems of supply and storage to ensure food security.

## 5. VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY – RIGHT TO FOOD GUIDELINES

21] The **Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Right to Food Guidelines)**<sup>33</sup> are one of the first intergovernmental documents dealing with the operationalization of an ESC right. Although the Right to Food Guidelines are adopted by states and are not compulsory, they have an authoritative character and can be effective tools for a large range of practitioners. They focus on the effective implementation of ESC rights as human rights in equal standing with civil and political rights. They evoke the access to productive resources as well as assistance for those who are not able to access or provide from themselves. These guidelines also constitute a resource for legislative authorities and public policies since they translate a right into recommendations and make request the development of institutional and legislative frameworks. They also constitute a valuable advocacy and monitoring tool for use by civil society.

22] The **Right to Food Guidelines** contain nineteen provisions<sup>34</sup> which incorporate much of the content of General Comment n° 12. However, they include additional provisions that should be taken into account by Members States, NGOs and other actors responsible for the advancement of the right to food at the national level. Despite their non-binding nature, the Right to Food Guidelines mention some state obligations contained in the ICESCR which are binding.<sup>35</sup>

23] Supported by the principle of **interdependency** of human rights, the Right to Food Guidelines propose five steps for implementing the right to food.

(1) **Advocacy and training.** Advocacy empowers populations to claim their rights as well as access to legal mechanisms: it provides visibility and gives a voice to the poor. The poor already exist within the legal system and can become subjects of entitlements rather than victims. In addition, capacity-building provided by NGOs, media and other stakeholders make available tools and knowledge aimed at

empowering communities to help them understand what the right to food means and constitutes. Trained state authorities can improve awareness and understanding of the necessity of providing legal empowerment of marginalized and poor people in this process. The use of accurate education materials combined with real-school feeding programmes is helpful.

(2) **Information and assessment.** This relates to the identification of right-holders including people living in poverty, children, women (especially pregnant women), older persons, minorities, people with disabilities among many others. In relation to women and children, special attention should be given to cultural practices which place them in a position of less concern (eating last, eating leftovers, or going without).

(3) **Access to justice.** Access to human rights claim mechanisms combined with monitoring mechanisms is crucial at the national and international level. Specific legislation devoted to this goal and in accordance with the Right to Food Guidelines will frame the practical application of the Right to Adequate Food. Indeed, the elaboration of comprehensive model or framework laws in accordance with the Right to Food Guidelines, as envisaged by UN General Comment n° 12, constitutes a priority for clarification of what level of responsibilities derive from this right.

(4) **Effective action: strategy and coordination.** Comprehensive actions including a National Food Strategy, as well as definition and selection of benchmarks and mechanisms to ensure accountability, comprise the basic legal framework for a compulsory right to food strategy. But achieving food security goes beyond this: it relates also to economic growth, addressing inequalities, education, natural disasters, agricultural production and distribution, extreme poverty and lack of good governance among many other factors. For this reason, coordination among state authorities and civil society, including the private sector combined with access to markets, rehabilitation of agriculture (off-farm opportunities including employment opportunities) and good governance are core elements for an effective and comprehensive strategy.

(5) **Durable impact: applying rights-based monitoring** is a determinant factor for all policies related to the realization of the right to food at the national level. Institutional capacity, budgeting and human rights based indicators are crucial, such as the ones developed by OHCHR in collaboration with other actors and UN Agencies as well as the right to food checklist recently developed by FAO.<sup>36</sup>

24] NGOs are well-placed to monitor the implementation of the right to food at the local level. NGOs have provided their own methodologies for assessing the impact of the

33. Adopted during the 127 th session of the FAO Council in November 2004.

34. The nineteen guidelines deal with the following thematic and policy areas: (1) Democracy, good governance, human rights and the rule of law; (2) Economic development policies; (3) Strategies; (4) Market systems; (5) Institutions; (6) Stakeholders; (7) Legal frameworks; (8) Access to resources and assets, (8a) Labour, (8b) Land, (8c) Water, (8d) Genetic resources for food and agriculture, (8e) Sustainability, (8f) Services; (9) Food safety and consumer protection; (10) Nutrition; (11) Education and awareness raising; (12) National financial resources; (13) Support for vulnerable groups; (14) Safety nets; (15) International food aid; (16) Natural and human-made disasters; (17) Monitoring, indicators and benchmarks; (18) National human rights institutions; and (19) International dimension.

35. See for example the publication providing some guidance for indigenous peoples in [www.fao.org/righttofood/publi09/rtf\\_guidelines.pdf](http://www.fao.org/righttofood/publi09/rtf_guidelines.pdf)

36. See for example: [www.fao.org/docrep/011/i0349e/i0349e00.htm](http://www.fao.org/docrep/011/i0349e/i0349e00.htm); [www.fao.org/docrep/011/i0351e/i0351e00.htm](http://www.fao.org/docrep/011/i0351e/i0351e00.htm); [www.fao.org/righttofood/publi08/assessment\\_guide.pdf](http://www.fao.org/righttofood/publi08/assessment_guide.pdf)

implementation of the right to food, as in the cases of India and Brazil.

**25] Budget monitoring** by NGOs has been particularly important in relation to this right. In **India**, for example, budgeting mechanisms have been implemented following the orders of the Supreme Court of India. Within the framework of the Right to Food campaign, Commissioners involved NGOs in the budget-planning processes to recalculate the financial allocation and include additional provisions in the case of children under the age of six months. Some of these provisions include: advocating advancement of legislation on the prevention of promotion of breast milk substitutes, promotion of breast-feeding programmes, implementation of facilities for women especially from rural areas among others.

**26] In Brazil**, NGOs have played a crucial role in assisting the National Food and Nutrition Security Council (CONSEA) of Brazil with the identification of policy priority areas. CONSEA started by listing programmes with an activity related to food security, for example, the Cash Transfers of the Bolsa de Familia programme dedicated for poor households; once the priorities were identified the related budget was established.<sup>37</sup>

## 6. DEVELOPING LEGISLATIVE FRAMEWORKS FOR RECOGNIZING AND IMPLEMENTING THE RIGHT TO FOOD AS A JUSTICIABLE RIGHT

**27] National strategies** to build upon the right to food are necessary in order to increase public awareness and combat hunger and starvation at the local level. A framework law is consequently indispensable. For this reason, several initiatives have been undertaken in order to build a framework law to improve justiciability and advance the right to food security.

37. See chapter 1 and the summary on the programme Bolsa Familia. The amount of US\$16.3 billion was allocated for the following seventeen priorities: (1) Food marketing and storage; (2) Food access; (3) Structural interventions (employment, small-scale production in poor communities, small businesses); (4) Smallholder agriculture; (5) School feeding; (6) Healthy foods promotion, surveillance and healthcare; (7) Biodiversity and traditional populations; (8) Collection and processing of recyclable waste in rural and urban areas; (9) Public policies management (monitoring, mobilization and education activities); (10) Water resources and infrastructure for food security; (11) Fisheries and aquaculture; (12) Agrarian reform, credit and conservation; (13) Food and nutrition security of afro-Brazilian populations; (14) Food and nutrition security of indigenous populations; (15) Potable water and sanitation; (16) Income transfers; and (17) Food and nutrition security in semi-arid regions.

### Examples of domestic laws on the right to food

The **Indonesia** Food Act n° 7 of 1996 was developed with the support of the Development Law Service of the FAO. It contains fourteen chapters including provisions related to food quality and nutrition, food production and processing, institutional responsibilities and community participation.

In Latin America, **Guatemala** was the first country to create a domestic law on the right to food. The law entitled 'Ley del Sistema Nacional de Seguridad Alimentaria y Nutricional (SINASAN)' was jointly drafted in 2005 with national authorities, representatives of NGOs, and representatives of International Organizations. In its Article 5, the law creates a National Council for Food and Nutritional Security (CONASAN) in charge of analysis and recommendations for policies and strategies related to food security. Mozambique is willing to present a project of law related to food in 2010.

In **Brazil**, Federal law n° 11346 from 15 September, 2006, created the National System for Food and Nutrition Security as well as the National Council on Food and Nutrition Security (CONSEA), which monitors Brazilian policy on food and nutrition security and is composed of thirty-six representatives of civil society alongside representatives of state ministers.

In **Quebec**, the Act to Combat Poverty and Exclusion of 2002 included mention of assisting dignified access, for persons living in poverty, to a 'food supply that is both sufficient and nutritious, at reasonable costs, and simple and reliable information enabling those persons to make enlightened dietary choices'.<sup>1</sup> This national strategy aims to progressively reduce poverty in Quebec, with the target of having the least number of persons living in poverty among industrialized nations by 2013.

A number of other initiatives are developing legal frameworks for the right to food including the **Regional Programme on Food Security for Centro America (PRESANCA)** – an initiative supported by the European Union, which aims to strengthen capacities for food security.

1. See Act to Combat Poverty and Social Exclusion, Article 9 related to *Strengthening of social and economic safety net*, 2002, c. 61, s. 9.

**28] Before designing a framework law**, it is necessary to identify vulnerable groups and the location of food insecurity, and then, to analyze the context and reasons for food insecurity in order to understand the existing organizational structure and its capacity to coordinate a future food security policy in the economic context of the country. This assessment is crucial for deciding whether to re-design the existing legal food security legal framework or build a new legal framework. Once this evaluation has been undertaken, the design of a holistic legal framework should include the following elements:<sup>38</sup>

- focus on vulnerable groups
- respect and incorporation of international human rights obligations related to the right to food

38. See in particular: [www.fao.org/righttofood/publi09/guide\\_on\\_legislating.pdf](http://www.fao.org/righttofood/publi09/guide_on_legislating.pdf), pages 59 and 60.

- creation of a National Strategy or Plan of Action on food security
- incorporation of monitoring mechanisms for progressive realization of the right
- strengthening of institutional cooperation and participation, and
- inclusion of recourse mechanisms.

## 7. STRATEGIES FOR JUSTICIABILITY

29]

- Develop the judicial protection of all components of the right to adequate food
- Approach the justiciability of the right to adequate food and include the participation of all actors involved in its procurement, regulation and monitoring. The complexity

of the wide range of actors and activities linked to the right to adequate food should be seen as an opportunity for advancing its justiciability.

- Increase sensitivity on the real situations regarding the fulfilment of the right to adequate food at a short and large-scale
- Support judges in giving an impulse to the implementation of the right to food despite the lack of its recognition as an independent right in national frameworks.
- Enhance the participation of civil society in the monitoring of the right to adequate food.

### EXERCISES

- 1) What is the difference between the fundamental right to be free from hunger and the right to adequate food?
- 2) How can the overall economic gains from trade benefit those who are most likely to be suffering from food insecurity?
- 3) Please kindly list the laws and strategies related to the recognition and implementation of the right to food and food security at the national level. Analyse the gaps and obstacles. Advance possible solutions.

# The right to adequate housing

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## 1. Definition of the right to adequate housing

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# THE RIGHT TO ADEQUATE HOUSING



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Adequate housing is not only satisfied by providing shelter and security of tenure but goes beyond. It entails the necessity of fulfilling psychological and social needs in order to allow each individual to be part of a space in which he could enjoy privacy and at the same time be able to build a family and a communal life. However, migration, conflicts and displacement, often result in a widespread violation of the right to adequate housing. They create a situation in which informal settlements such as slums and ghettos become the permanent resident of *squatters*. The homeless are therefore targets of vast vulnerability and exclusion. This chapter aims at analyzing the core elements of the right to adequate housing. It gives particular attention to the most vulnerable and marginalized people of society as well as the necessity of mainstreaming gender into housing issues. The chapter links the right to adequate housing to the right to safe drinking water and sanitation and the right to education. It provides specific guidelines for advocacy and justiciability.

## 1. DEFINITION

1] The right to adequate housing has a solid conceptual basis provided by international and national legal frameworks. The **Universal Declaration of Human Rights (UDHR)** notably defines the right to housing as a part of the right to a standard of living, and in relation to other rights such as food, clothing, medical care and necessary social services.<sup>1</sup> UN treaties have developed this definition and included particular provisions in relation to the right to housing and the prohibition of all forms of discrimination, and specific considerations related to racial and ethnic minorities, refugees, children, women, migrants and workers, persons with disabilities and indigenous people among others.<sup>2</sup>

1. UDHR, Article 25.1 states that: 'Everyone has the right to a standard of living adequate for the health and well-being of himself 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.'

2. Among the UN Treaties we can find: Article 21 of the Convention relating to the status of refugees (1951); Article 5(e)(iii) Convention on the Elimination of all forms of Racial Discrimination (1965); Article 14.2(h) Convention on the Elimination of All Forms of Discrimination against Women (1979); Article 16.1 and Article 27.3 of the Convention on the Rights of The Child (1989); Article 43.1 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990); Article 2, Article 5.3, Article 9.1(a), Article 19(a), Article 22.1, Article 28.1 and Article 28.2(d) of the Convention on The Rights of Persons with Disabilities (2008); Article 10, Article 21.1, Article 23, Article 26, Article 27, Articles 28 and Article 32 of the Declaration on the Rights of Indigenous Peoples (2007); Article 5(b) of the International Labour Organisation (ILO) Convention 161 concerning Occupational Health Services (1985); Article 2 and Article 5.2 of the International Labour Organisation (ILO) Convention 117 Concerning Basic Aims And Standards Of Social Policy (1962); Article 88.1 of the International Labour Organisation (ILO) Convention 110 Concerning Conditions of Employment of Plantation Workers (1958) and International Labour Organisation (ILO) Recommendation 115 concerning Workers' Housing (1961) among others.

2] Moreover a broad definition of the right to adequate housing comprises additional provisions of the Global Strategy of Shelter adopted by the General Assembly in 2000,<sup>3</sup> which states that adequate housing also includes adequate privacy, space, security, lightning and ventilation, basic structure and adequate location at a 'reasonable cost'. The **WHO Health Principles of Housing** as well as UN Habitat through its *Global Campaign for Secure Tenure* has provided clarifications. Additionally, NGOs such as the Centre on Housing Rights and Evictions (COHRE), the International Union of Tenants (IUT), People's Movement for Human Rights Learning (PDHRE), Amnesty International and the Centre for Equality Rights in Accommodation (CERA), among others, have developed important materials related to this right.<sup>4</sup>

3] The most comprehensive provision on the right to adequate housing is provided by Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: *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,*

3. Resolution A/RES/43/181 20 December 1988 stated in its Article 2 that the main objective of the strategy was: 'to facilitate adequate shelter for all by the year 2000, that the main focus should therefore be on improving the situation of the disadvantaged and the poor, and that the following fundamental objectives and principles should form the basis of the Strategy'.

4. See for example: *Litigating Economic, Social and Cultural Rights: achievements, Challenges and strategies, Featuring 21 case studies*, COHRE, Geneva, Switzerland, 2003; *Litigating Economic, Social and cultural rights: legal practitioners Dossier*, COHRE, Geneva, Switzerland, December 2006.

*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 cooperation based on free consent.'*

4] The Committee on Economic, Social and Cultural Rights (CESCR) has provided clarifications and further elaborations in **General Comment (GC) n° 4** and, in particular, developments related to forced evictions in **GC n° 7**. According to the CESCR, the right to housing has to be interpreted in the light of current conditions, which means that it should be interpreted in a broad sense and goes beyond having a roof over one's head. Rather, it constitutes a right to live in security, peace and dignity<sup>5</sup> and applies to everyone.<sup>6</sup> The CESCR definition therefore highlights two particular elements: the right to housing cannot be subject to any form of discrimination and this is intimately linked to human dignity.

5] The right to adequate housing underlines the allied element of '**adequacy**'; this means that it is not sufficient to implement the right to housing if this does not include adequate shelter, adequate services and all related factors and conditions that will permit the respect of human dignity. Adequacy reveals and is therefore measured by economic, social, cultural and environmental factors. Nevertheless, the Committee has proposed a series of elements which constitute the core elements of adequacy: legal security of tenure, availability of services, material and infrastructure, affordability, habitability, appropriate location and cultural adequacy. These elements will be explained in detail in the following section.

6] Adequate housing cannot consequently be viewed in isolation. It is intimately linked to civil and political rights, as well as economic, social and cultural rights, such as the right of freedom of opinion and expression, the right of association, the right to take part in cultural life, the right to take part in public decision-making and even the right to health. The **WHO Health Principles of Housing** have therefore underlined the close connectivity between health and housing, drawing attention to the fact that adequate housing is also healthy housing. Housing should, in this sense, include protection against communicable diseases through water and sanitary supplies, reduction of psychological and social stress including individual and family security, privacy, access to comfort, recreation and amenities against noise. The right to adequate housing thus incorporates individual, family and social dimensions.

7] The right to adequate housing has to be developed **progressively**. This does not entail a larger number of people having houses; rather it is linked to the progressive development of the minimum core of the right to housing

and steps towards improvement in levels of adequacy. In this sense, Habitat Agenda<sup>7</sup> in Article 39 has stated that progressivity means improving dwellings and neighborhoods, as well as improving living and working conditions on an equitable and sustainable basis, so that everyone has access to adequate shelter that is healthy, safe, secure, accessible and affordable. This also includes basic services, facilities and amenities, and the enjoyment of freedom from discrimination in housing, as well as legal security of tenure. However, certain State obligations related to housing rights have an immediate effect, including the obligations to respect and to protect to right generally and the obligation to respect, protect and fulfill the right without discrimination (see section 4 below).

## 2. NATIONAL IMPROVEMENTS IN THE DEFINITION OF THE RIGHT TO ADEQUATE HOUSING

8] National developments on adequacy have defined the elements which require advancement in order to realize the right. In the **Grootboom** case, the South African Constitutional Court proposed that 'for a person to have access to adequate housing all of these conditions need to be met: there must be land, services, a dwelling.'<sup>8</sup> It has also underlined that access to housing should be ensured for all, especially for the poor who 'are particularly vulnerable and [whose] needs require special attention.'<sup>9</sup> Nevertheless, no specification related to quality has been provided for adequacy.

9] The South African Constitutional Court has therefore underlined three key elements relating to the right to housing, consisting of: the obligation to 'take reasonable legislative and other measures' (meaning coherent and comprehensive programmes – also balanced and flexible policies to provide effective remedies for homelessness); 'the achievement of the progressive realisation of the right', and both 'within available resources'. The Court of South Africa has also tied the right to land to the right to adequate housing, stating in the case **Port Elizabeth Municipality v. Various Occupiers**<sup>10</sup> that 'the stronger the right to land, the greater the prospect of a secure home'.

10] In India, the concept of adequacy is also linked to the concept of a 'reasonable residence' and includes all means

5. GC n° 4 para. 7.

6. GC n° 4 para. 6.

7. Habitat Agenda derived from the United Nations Conference on Human Settlements (Habitat II), 3–14 June, 1996 (UN Doc. A/Conf. 165/14, 14 June, 1996). Article 3 of the Habitat Agenda states 'access to safe and healthy shelter and basic services is essential to a person's physical, psychological, social and economic well-being and should be a fundamental part of our urgent actions for the more than one billion people without decent living conditions'.

8. See Government of the Republic of South Africa & Ors v Grootboom & Ors 2000 (11) BCLR 1169. (CC), para. 35 (*Grootboom* case).

9. See *idem*, para. 36.

10. 2004, para. 19.



of having a decent existence.<sup>11</sup> Furthermore, adequacy of shelter has been also defined in the case *Shantistar Builders v. Narayan Khimalal Totame*<sup>12</sup> as a suitable accommodation which would allow a person to develop the physical, mental and intellectual and other aspects of his development. The Court clearly stated that:

The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect – physical, mental and intellectual

**11]** In *Chamelli Singh v. State of U.P.*, the Indian Supreme Court additionally stated that adequate housing should develop the spiritual aspects of a human being, and has provided elements to define the right to shelter. Shelter comprises an adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity and sanitation, as well as other civic services such as roads. It underlined that this does not constitute only the right to a roof, but also infrastructure that enable the development of a person as a cultural beings. A year later, the Court went even further including the right to residence and settlement as part of the definition of the right.<sup>13</sup>

**12]** The Canadian Court has stated in the case *The Corporation of the City of Victoria v. Natalie Adams and Others* that the right to shelter is a component of the right to life.

**13]** In order to define the elements of adequacy, it is necessary to define the core elements proposed by CESCR so as to clarify exactly what the ‘minimum core of adequate housing’ means.

### 3. MINIMUM CORE OBLIGATIONS RELATED TO THE RIGHT TO HOUSING

**14]** The definition of the core elements of the right to adequate housing by the CESCR has permitted the building of a bulwark against violations. Indeed, the core elements, for example, habitability, have been crucial when analysing policies and plans related to housing in the event of natural disasters or situations of internal displacement. The following elements have been also crucial to build safeguarding provisions for vulnerable people, creating a basis for gender initiatives and protecting people with disabilities. Since these groups of

people are the most excluded and marginalized, their situation becomes even more vulnerable during catastrophes.<sup>14</sup>

**15]** Adequate housing should therefore comprise the core elements determined in **GC n° 4** by the CESCR, defined as such:

**a. Legal security of tenure:** consisting of legal protection and security against forced evictions, owner-occupation, harassment and other types of features including public and private rental accommodation, cooperative housing, lease, emergency housing and informal settlements.

**b. Availability of services, material and infrastructure:** these are related to health, security, comfort and nutrition. Availability includes access to safe drinking water and sanitation, energy for cooking, washing facilities, heating and lighting, food storage, refuse disposal, drainage and emergency services.

**c. Affordability of housing:** this relates to housing prices commensurate with income levels. The committee has invited States to create incentives (for example, subsidies) to ensure affordability of housing.

**d. Habitability:** this relates to the structural capacity of housing to ensure the physical safety of the occupants and provide protection from cold, heat, damp, wind, rain etc. The CESCR also encourages Members States to apply the Health Principles of Housing prepared by WHO as well as the Global Strategy for Shelter (2000). In the *Delfino Case*, the Argentinean Court<sup>15</sup> analysed the conditions of a private hostel on the basis of habitability, and asked the local authorities to provide an adequate shelter for homeless families.<sup>16</sup>

**e. Accessibility:** this is especially applicable for disadvantaged groups, such as children, and, in particular, people with disabilities, HIV-positive individuals, older persons, mentally ill persons, and victims of natural disasters.<sup>17</sup>

**f. Appropriate location:** this relates to the availability of facilities relating to employment, schools, healthcare services and childcare centres. It also includes the avoidance of housing persons in polluted areas.

**g. Cultural adequacy:** this relates to the respect of the expression of cultural identity, the respect of cultural diversity which should be permitted by the type of structure and the materials used for its construction regardless of the economic development of the country.

11. See also *Chameli Singh v. State of U.P.* (1996) 2 SCC 549, Nawab Khan's case (*Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors* (1997) 11 SCC 121) among others.

12. (1990) 1 SCC 520.

13. *PC Gupta v. State of Gujarat and Ors* (1994).

14. For more information on the effects of adequate housing for women, see the report on Women and Adequate Housing, UN Doc. E/CN.4/2006/118, paras 58-65, by the Special Rapporteur on the right to adequate housing, Miloon Kothari.

15. *Jorge Alberto Delfino and Others v. GCBA* (amparo), 6 November 2004, Buenos Aires Administrative Court of Appeals, Chamber 1.

16. See also *Victor Perez y otros c/GCBA*. Cam CAyT Sala I. 25 January 2001.

17. Accessibility in the *Grootboom* case was defined by the Court as comprising legal, administrative, operational and financial hurdles, which should be examined and, where possible, lowered over time. Accessibility means ‘for a larger and wider range of people’ (*Grootboom* para. 45).

16] In terms of services, materials and infrastructure, CESCR suggests that these include access to clean drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

17] In addition to those elements, the former Special Rapporteur for adequate housing<sup>18</sup> has defined *nine* additional elements consisting of: access to land, water and other natural resources; freedom from dispossession, damage and destruction; access to information; participation; resettlement, restitution, compensation, non-refoulement and return; privacy and security; access to remedies; education and empowerment and freedom from violence against women.

18] In addition to these elements, the right to adequate housing in national case law comprises an element known as the *'housing ladder'*. This consists of the degree of continued guaranteed housing, starting from emergency housing, which usually should be for a short period of time only, to transitional and communal housing, and finally social or independent housing. Several examples of the importance of this concept have been seen at the national level: in the case *City Cape Town v. Rudolph and Others*, citizens of Valhalla Park were placed on the housing waiting list for more than ten years without an effective decision being made by the municipality; here, the housing ladder provided an important argument for analysis of an alleged violation of the right.

19] Another exemplary case is provided by ruling *T-025 of 2004* of the Constitutional Court of Colombia, which encompassed 108 files of 1150 displaced families who asked the Court for relief of their housing needs and protection of their land. The displaced families argued that due to the forced displacement their children did not have food, education and health. The Colombian Constitutional Court judged that the policies for displaced persons had not produced results and had not provided adequate answers to this situation, which was termed by the Court an 'unconstitutional state of affairs'. The Court thus decided in favour of the applicants. The housing ladder provided a tool for measuring the adequacy of the answers given by the government, and gave the Court an opportunity to fix a period of time for implementation of the Action Plan and Programme for displaced families.

#### 4. STATES OBLIGATIONS RELATED TO THE RIGHT TO HOUSING

20] Following the tripartite typology of state obligations given in Chapter 3, the obligations deriving from the right to adequate housing could be defined as the following: in relation

to the obligation of **respect**, the governments shall refrain from interfering in the enjoyment of the right to adequate housing, and shall facilitate the enjoyment of the right.<sup>19</sup> (For example, they should refrain from forced evictions.)

##### a. Obligation to respect

21] The obligation to **respect** requires that States do not interfere directly or indirectly with the enjoyment of economic or social rights. This obligation is essentially negative in nature, meaning that the State must not take any action that diminishes the enjoyment of any given economic or social right, unless there are justifications for doing so. The obligation to respect is of immediate effect (e.g., upon ratification of the ICESCR) and not subject to progressive realization.

22] In the case *SERAC and CESR v. Nigeria*, the government and its agents failed to ensure the respect of the right to housing of the Ogoni communities by destroying the Ogoni houses and villages and the use of the security forces. The African Commission affirmed the violation of the right to adequate housing and stated that the obligation to respect also consisted of respect of the right to housing of rights-holders, including the free use of resources to satisfy their needs.<sup>20</sup> State obligation thus required abstaining from 'carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual'.<sup>21</sup>

23] In relation to the obligation to facilitate the enjoyment of the right, the cases *Jaftha v. Shoeman and others and Van Rooyen v. Stoltz and others*<sup>22</sup>, which dealt with the existence of an item of legislation in South Africa including a provision authorizing the sale of a person's home without judicial supervision in order to cover a debt, were also, in the view of the South African CC, a violation of this obligation to respect. Other examples of obligation to respect are provided in the case *Despatch Municipality v. Sunridge Estate and Development Corporation*,<sup>23</sup> in which the High Court of South Africa overturned a section of the Prevention of Illegal Squatting Act.

24] The obligation not to prosecute occupants of state-owned lands forms part of the obligation to respect. As affirmed in the Argentinean case *Bermejo*,<sup>24</sup> criminal prosecution of homeless persons with irregular housing is a violation of the right to

18. E/CN.4/2006/118 para. 11.

19. General Comment n° 19 para. 43.

20. Ogoni case para. 45.

21. Ogoni case para. 61.

22. *Jaftha v. Schoeman and Others and Van Rooyen v. Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).

23. 1997 4 SA 596 (SE).

24. *Bermejo* case, Buenos Aires National Criminal Trial Court n° 11, 2004. For more information on this case see: UN-Habitat, *Forced eviction: towards solutions*, First report of the Advisory Group on forced Evictions to the Executive Director of UN-Habitat, 2005, pp. 58–65.

housing and will also increase poverty levels.<sup>25</sup> Finally, States should refrain from the eviction of homeless persons even in cases where such persons are living in public or private properties. Eviction is incompatible with the requirements of the Covenant and can only be justified in certain exceptional circumstances, which will be elaborated below.

25. As stated in *Pottinger v. City of Miami*,<sup>26</sup> there is sometimes an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets. However, the government has been restrained and ordered not to evict people living near the railways in Kenya in the cases of *Nidery and Others v. Kenya Railways Corporation* or *Kirwa and Others v. Kenya Railways Corporation*; or living in parks in the Canadian case of *The Corporation of the City of Victoria v. Natalie Adams and Others*; or in the case of Bangladesh, any informal settlement in the case of *ASK (Ain o Salish Kendra) v. Government of Bangladesh*,<sup>27</sup> or slums.<sup>28</sup>

UN-Habitat along with several NGOs, such as COHRE, the International Union of Tenants (IUT), People's Movement for Human Rights Learning (PDHRE), Amnesty International and CARE, among others, are monitoring the effective implementation of housing policies and participating in the administration of funds, in order to ensure compliance with the decisions. (For example, for the NGO monitoring of the **Bermejo case**, see UN-Habitat, *Forced eviction: towards solutions*, First report of the Advisory Group on forced Evictions to the Executive Director of UN-Habitat, 2005; for the situation of **slums**, see the last report of Amnesty International on Nairobi, *Insecurity and Indignity: Women's experiences in the slums of Nairobi*, Kenya, 2010, report released within the framework of the campaign 'Demand Dignity').

### b. Obligation to protect

26] The obligation to **protect** requires States to prevent third parties or non-State actors or other States, including inter-governmental organizations such as the World Bank, from violating the enjoyment of economic and social rights. Third parties or non-State actors include individuals, groups, landlords, corporations, other States or other entities as well as agents acting under their authority. The obligation includes,

25. A contrary situation is presented in the case of the Philippines, *Simon vs. Commission on Human Rights 229 SCRA 117 1994*, in which the Supreme Court refused a temporary injunction ordered by the Philippine Commission on Human Rights, in relation to a demolition of stalls and shanties. The Supreme Court stated that ESC rights were not self-executing, did not accept to analyse the validity of the demolition in relation to the protection of housing rights, and refused the injunction.

26. 810 F. Supp. 1551 at 1554, S.D. Fla. 1992.

27. Supreme Court of Bangladesh, 1999.

28. See last report of Amnesty International, *The Unseen Majority: Nairobi's Two Million Slum Dwellers*, 12 June 2009, report released in the framework of the campaign Demand Dignity, available at: [www.amnesty.org/en/library/asset/AFR32/005/2009/en/3b6e7351-8e08-4b61-9d7b-6e3b86eb0057/af320052009eng.pdf](http://www.amnesty.org/en/library/asset/AFR32/005/2009/en/3b6e7351-8e08-4b61-9d7b-6e3b86eb0057/af320052009eng.pdf)

*inter alia*, adopting the necessary and effective legislative, regulatory and other measures to restrain such third parties and non-State actors from interfering or otherwise violating economic and social rights; investigating, prosecuting or otherwise holding accountable those entities that violated economic and social rights; and providing remedies to victims of such violations. The obligation to respect is of immediate effect (e.g., upon ratification of the ICESCR) and not subject to progressive realization.

27] The **SERAC** case mentioned above also provides an example of the necessity to protect the right to housing from interference by third parties – in this case an oil company that provoked contamination of soil, water and air, as well as the destruction of homes. Obligation to protect also entails the obligation to provide alternative accommodation for homeless persons in the case of forced eviction.

28] Other decisions have acted to protect women in particular, applying a gender perspective to conflict situations and the impact of violence on displaced women<sup>29</sup> or displaced children.<sup>30</sup>

### c. Obligation to fulfil

29] Under the obligation to **fulfil**, States are obliged to take steps to the maximum of their available resources to progressively realize the rights contained in the ICESCR. This obligation can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires States to take positive measures to assist individuals and communities to enjoy the right in question. The obligation to promote obliges the State to take steps to ensure that there is appropriate education concerning the right in question. States are also obliged to fulfil (provide) the right in question when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

30] The obligation to **fulfil** demands that the governments adopt measures aimed at the full realization of the right consisting of plans and national housing strategies, legislation, compensatory measures<sup>31</sup> and 'whatever steps as necessary'<sup>32</sup> to provide relief. It is important to emphasize the point that States should prepare and implement extensive and inclusive consultations with all civil society, including and especially homeless persons and all affected, in order to provide an effective response to housing needs.<sup>33</sup> Broad coordination is required to ensure holistic solutions.

29. Colombian Constitutional Court ruling T-721 of 2003.

30. Colombian Constitutional Court ruling T-215 of 2002.

31. GC n° 4 para. 11.

32. GC n° 4 para. 12.

33. See, for example, COHRE Report, *Listening to the poor: housing rights in Nairobi, Kenya*, 2005.

**31]** National housing plans and programmes are subject to the notion of progressive realization of the right; they should be duly implemented and should provide an effective response to the situation. For this reason, the State should aim to provide temporary shelter whenever a natural disaster or a grave situation occurs.<sup>34</sup> These decisions imply important budgetary and economic costs. Availability of resources cannot be an excuse for not implementing a plan or programme.<sup>35</sup>

**32]** In the groundbreaking *Grootboom* case, the reasonability approach of the Court was applied to housing programmes: the SA Court stated that a programme related to housing rights should include provisions for the poor, especially those who don't have access to the land and for such that have no roof, people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.<sup>36</sup>

**33]** Sometimes States are indirectly tied to obligations with relation to legislation that impairs the ability of persons to benefit from adequate housing. In Colombia, the '*UPAC (Unity of Constant Acquisitive Power) case*<sup>37</sup> was marked by discussions on the impact of court involvement in the financial system. After a recession and poor public policies, 800,000 debtors with repayment loans on homes found themselves unable to continue repayments, with some close to losing their home. The Constitutional Court of Colombia (Colombian CC) ordered recalculation of the mortgages, tied the UPAC to inflation, and provided relief to the debtors. In addition, the Colombian CC ordered the creation of a law to regulate the housing financial systems over the seven months following the decision. The ruling modified the entire Colombian system on housing finance.

**34]** In the Canadian case *The Corporation of the City of Victoria v. Natalie Adams and Others*,<sup>38</sup> the Court found the City in violation of the right to shelter under the Parks Regulation Bylaw and the Streets and Traffic Bylaw. It concluded that Victoria does not have sufficient shelter spaces for homeless persons and that large numbers of homeless people are therefore left to seek shelter on public property. It underlined the sensitive nature of the situation due to the prevalence of illness. The City had prohibited the erection of temporary shelters in the form of overhead protection, thereby exposing homeless people to the risk of significant health problems or even death.<sup>39</sup> For these reasons, the Court

stated that the prohibition on taking a temporary bode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people.

**35]** In a recent case *Budayeva and Others. v. Russia*,<sup>40</sup> the European Court of Human Rights stated that serious administrative flaws had prevented the implementation of land-planning and emergency relief policies, which had resulted in the death of the alleged victim and injuries to his wife and members of their family. The Court concluded that there had been no justification for the Russian authorities' failure to implement these policies in the hazardous area of Tynauz, and that they had therefore failed in their duty to establish a legislative and administrative framework.

**36]** The Inter-American Court of Human Rights has incorporated implementation of a five-year housing plan into obligations arising from the duty to make reparations, stemming from the indemnification of a group of homeless persons in Guatemala in the case *Masacre Plan de Sánchez c. Guatemala s/ Reparaciones*.<sup>41</sup>

## 5. FORCED EVICTIONS

**37]** The prohibition on forced evictions derives from the element concerning security of tenure, mentioned above. The Committee has stated that 'instances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with relevant principles of international law'.<sup>42</sup> The CESCR has dedicated G.C. n° 7 to this issue.

**38]** For evictions to be justified under the ICESCR, they must (1) only be carried out in **exceptional circumstances**; (2) after **all feasible alternatives** to eviction that address the exceptional circumstance are explored **in consultation with the affected community**; and (3) after due process protections are afforded the individual, group or community. There are two exceptions to this general rule. First, evictions should never be carried out in a discriminatory manner. Second, evictions should never render someone homeless or vulnerable to other human rights violations. What follows is some general language that lays the foundation for this test as well as the precise language that establishes this test.

**39]** General Comment n° 7 defines forced eviction as "the permanent or temporary removal against their will of

34. Cases in which an order has been issued to a government to provide temporary relief include, among others: *The Corporation of the City of Victoria v. Natalie Adams and Others*; *Olga Tellis And Others v. Bombay Municipal Corporation*; *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another* 2001(3) SA 1151; 2001(7) BCLR 652 (CC) at para. 102, Colombian ruling T-025-2004; *Grootboom* case para. 52.

35. *Grootboom* para. 40: the Court stated that 'the national sphere of government must assume responsibility for ensuring that laws, policies, programs, and strategies are adequate to meet the States 26 obligations'.

36. See *Grootboom* case para. 52.

37. See, for example, rulings C-383 of 1999 and C-700 of 1999.

38. 2008 BCSC 1363.

39. See also the Canadian case *R. v. Morgentaler*, (1988] 1 S.C.R. 30.

40. 8 March 2009.

41. Sentence of 19 November 2004.

42. General Comment n° 4 para. 18.

individuals, families and/or communities from the homes and/or lands which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”

**40]** General Comment n° 4 requires that “notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently 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.”

**41]** General Comment n° 4 states that “instances of forced eviction are *prima facie* incompatible with the requirements of the [International] Covenant [on Economic, Social and Cultural Rights] and can only be justified in the *most exceptional circumstances*, and in accordance with the relevant principles of international law.”

**42]** General Comment n° 7 outlines that for an eviction to be carried out lawfully, “States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, *that all feasible alternatives are explored in consultation with the affected persons*, with a view to avoiding, or at least minimizing, the need to use force.” Alternatives to eviction include onsite upgrading of informal settlements.

**43]** Even if exceptional circumstances exist and there are no feasible alternatives to meet those exceptional circumstances other than eviction, General Comment n° 7 requires due process protections. These due process protections are: (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.

**44]** Finally, General Comment n° 7 states that, in any event, evictions should not be undertaken in a discriminatory manner nor should they render persons homeless or vulnerable to other human rights violations and that “where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

**45]** The UN has developed a list of principles and guidelines that also describe states obligations related to forced evictions, and which state that forced evictions should be:<sup>43</sup>

- (a) authorized by law
- (b) carried out in accordance with international human rights law
- (c) undertaken solely for the purpose of promoting the general welfare
- (d) reasonable and proportional
- (e) regulated so as to ensure full and fair compensation and rehabilitation, and
- (f) carried out in accordance with the present guidelines.

**46]** In addition, the development of preventative measures is required, in particular for disadvantaged groups such as older persons, children, women and persons with disabilities.

**47]** In this context, three types of obligation pertain to forced evictions, relating to the time at which the forced eviction is either announced or undertaken:

**i. Prior to forced evictions**, states should:

- (a) give appropriate notice and propose plans and alternatives solutions for accommodation
- (b) ensure effective dissemination of relevant information particularly for vulnerable groups
- (c) allow a reasonable period of time for public review
- (d) facilitate the provision of legal, technical and other advice to affected persons about their rights and options
- (e) hold a public hearing.

**ii. During the forced eviction**, authorities should:

- (a) respect the dignity and security of victims
- (b) ensure the principles of proportionality, opportunity (not during religious festivities, at night or prior to elections) and necessity of the measures
- (c) ensure that the process is non-discriminatory.

**iii. After the forced eviction**, authorities should:

- (a) provide immediate relief or allocation (including alternative accommodation with access to essential good, medical services, safe drinking water and medical services)
- (b) ensure the participation of women, in particular, in post-eviction processes

43. See the UN Principles and Guidelines on development-based evictions and displacement, document A/HRC/4/18, 5 February 2007, Annex 1, available at: [www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf), in particular, para. 21.

- (c) provide an effective remedy: consisting of an allocation or subsidy.

**48]** Immediate obligations related to forced evictions will facilitate the enjoyment of the right for marginalized and vulnerable groups, as well as the abstention from certain practices that could affect the realization of the right. The effective monitoring of the situation should be undertaken immediately, in particular, in relation to homeless persons and those subject to forced evictions.

**49]** Regional human rights bodies have adjudicated forced evictions. For instance, the African Commission has addressed factual situations involving forced eviction and destruction of housing in the case of *Social and Economic Rights Action Centre and Center for Economic and Social Rights – Nigeria (SERAC and CESR)*.<sup>44</sup> *SERAC* and *CESR* dealt with, *inter alia*, forced evictions and housing destruction by both Government of Nigeria military troops and private security forces belonging to the Shell Petroleum Development Corporation. The African Commission held that these acts violated Article 14 of the African Charter on Human and Peoples' Rights as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is implicitly guaranteed by Articles 14, 16 (protection of the best attainable state of physical and mental health) and 18(1) (protection of the family). Similarly, in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* the African Commission stressed that instances of forced evictions were *prima facie* incompatible with human rights protection afforded under the African Charter and other instruments, and they could only be justified in the "most exceptional circumstances" and after "all feasible alternatives" to eviction have been explored in consultation with the affected community.<sup>45</sup>

**50]** The European Committee of Social Rights has dealt with forced evictions under both the original and Revised European Social Charter. With respect to the former, in 2004, the European Committee of Social Rights considered a collective complaint dealing with discrimination against Roma in Greece. In its decision, the Committee held that the systematic eviction of Roma from sites or dwellings considered to be unlawfully occupied by them was a violation of Article 16 of the original European Social Charter (the right of the family to social, legal and economic protection).<sup>46</sup> Under the Revised European Social Charter, the Committee found the systematic forced evictions of Roma in Italy from sites or dwellings ostensibly

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 (prohibition on discrimination).<sup>47</sup>

**51]** The European Court of Human Rights has found that forced evictions violate Article 8 (respect for the home) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 1 of Protocol 1 (peaceful enjoyment of possessions) to the European Convention. In the case of *Selçuk and Asker v. Turkey*,<sup>48</sup> for instance, the European Court found that the destruction of the applicants' homes by Turkish military forces was, *inter alia*, a violation of their rights to respect for the home as well as a violation of guaranteeing peaceful enjoyment of their possessions.

**52]** In 2006, the Inter-American Court dealt with forced evictions in Colombia and relied on similar rights as those protected under the European system. In the case of *the Massacres of Ituango v. Colombia*, decided on the merits by the Inter-American Court of Human Rights on 1 July 2006, dealt with the forced eviction, displacement and housing destruction in the villages of Ituango, La Granja and El Aro in Colombia by paramilitaries aligned with the Government of Colombia. The Inter-American Court found that the forced evictions and destruction of housing violated Article 11(2) (the right to be free from arbitrary or abusive interference with the home) and Article 21 (the right to property). In its analysis of Article 11(2), the Court relied on the jurisprudence of the European Court of Human Rights which has previously held that similar rights under Article 8 of the European Convention prohibited such acts. Consequently, the Court held that the forced evictions and housing destruction violated Article 11(2) read in conjunction with Article 21 of the American Convention on Human Rights.<sup>49</sup>

**53]** National decisions also provide a framework for forced evictions, which still remain exceptional. This practice has affected the poor in particular, as in the cases *Jaftha v. Schoeman*<sup>50</sup> and *Van Rooyen v. Stoltz and Other*,<sup>51</sup> as well as displaced peoples, migrants and refugees.

**54]** In South Africa, the Case *Port Elizabeth Municipality v. Various occupiers* concerned forced evictions without an order. The case involved an eviction application by the Port Elizabeth Municipality against sixty-eight people ('occupiers'), who had occupied private land (most having being evicted

47. European Committee of Social Rights, *ERRC v. Italy*, Collective Complaint n° 27/2004.

48. *Selçuk and Asker v. Turkey*, European Court of Human Rights, (1998) 26 EHRR 477.

49. Inter-American Court of Human Rights, *The Massacres of Ituango v. Colombia* (1 July 2006).

50. These cases are particularly pertinent to protection of the poor. In the *Jaftha case*, Mrs Jaftha was unemployed, in ill health (heart problems and blood pressure), poor and with a low level of education. She has two children. She applied for and was granted a state housing subsidy with which she bought a home. After several payments she stopped paying her debt, and after being hospitalized discovered that her house was to be sold in a sale of execution to pay her outstanding debt. In the *Van Rooyen case*, Mrs Van Rooyen was also a poor woman, without education, unemployed and with three children. She couldn't pay her debt.

51. 2005(1) BCLR 78 (CC).

44. African Commission on Human and Peoples' Rights, Decision 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights – Nigeria* (27 May 2002). Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, Done at the 31<sup>st</sup> Ordinary Session of the African Commission held from 2<sup>nd</sup> to 16<sup>th</sup> May 2002 in Pretoria, South Africa.

45. African Commission on Human and Peoples' Rights, Decision 276/2003, Twenty-seventh Annual Activity Report of the African Commission on Human and Peoples' Rights (2009).

46. European Committee of Social Rights, *ERRC v. Greece*, Collective Complaint n° 15/2003.

previously from other lands) within the municipality area. They had been living on the land for periods ranging from two to eight years. The court insisted on the importance of taking into consideration the situation of the vulnerable people subject to the eviction. After also taking into consideration the discussions and mediation, as well as the willingness of the victims to accept an alternative solution and the reasonableness of an alternative accommodation, the Court did not confirm the eviction, and instead proposed concrete relief citing the obligation to procure alternative accommodation for the poor people concerned.

**55]** In the *Grootboom* case, the eviction was executed with an order, and after deliberation the court concluded that the current housing programme for providing relief to people in need had failed and that a reasonable part of the national housing budget should be devoted to providing such relief. If this was not done, the state's housing programme could not be considered as reasonable in relation to Section 26(2) of the SA Constitution.<sup>52</sup> In the *Grootboom* case the victims included children, therefore, the court stated that the direct obligation would apply primarily in cases where children were removed from their families, orphaned or abandoned.

**56]** Subsequently, in 2004, in the case of *City of Cape Town v. Rudolph and Others*,<sup>53</sup> the Cape High Court listed the following additional relevant circumstances to be taken into account in an eviction situation in the case of 'unlawful occupiers': the possibility of making the land available for the occupiers, the reallocation of the occupier and the rights of children, older persons, people with disabilities and households headed by women.

**57]** In 2005, in the case of *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd and Others*, known as the *Modderklip* case, 40,000 people moved onto private land owned by *Modderklip Boerdery (Pty) Ltd*. The landowner failed to seek assistance from various State organs to assist him in enforcing the eviction order granted by the Pretoria High Court. The Constitutional Court decided that since the occupiers had no access to alternative land, they could legitimately occupy the property until alternative accommodation was made available.

**58]** Alternative accommodation is also justiciable under Scottish legislation. The Housing (Scotland) Act 1987 provides the right to two kinds of accommodation: immediate or alternative accommodation for homeless persons and long-term accommodation for some defined categories of victims.

52. Section 26(2) mentions that everyone has a right of access to adequate housing and obliges the state to take reasonable measures, within its available resources, to make sure that this right is realized progressively.

53. The case related to the community of the Valhalla Park; the Metropolitan Municipality of the City of Cape Town brought an application for the eviction of residents of this community. Some of their members were placed on the housing waiting list for more than ten years; and after from accommodation owned by the City and after ten years of waiting and the intolerable conditions of living pushed them to move into vacant land owned by the City.

**59]** In the recent 2009 case, *Ekurhuleni Municipality v. Dada NO and Others Case*,<sup>54</sup> the Supreme Court of Appeal (SCA) overturned a High Court judgement. The High Court stressed that between the period of the lodging of the eviction application and the date of the hearing, the municipality had remained inactive and did not take any appropriate measures to ensure the effective location of the affected people. For this reason, the High Court requested that the Ekurhuleni Municipality purchase the land, which had been unlawfully occupied by about seventy-six families (the occupiers). The Supreme Court of Appeal upheld the judgement that the municipality had not provided any concrete and effective remedy to marginalized people, but stated that the decision of the High Court to order the acquisition of the land by the municipality lay outside of the judge's competence. The Supreme Court of Appeal stressed this point in para. 14: *The Judge was perhaps right in coming to the conclusion that the municipality had not dealt with the problems of the informal settlement on the property with the measure of alacrity which could reasonably be expected of them. But that did not justify his adopting a solution which was well outside the limits of his powers.*<sup>55</sup>

**60]** This case illustrates the difficulties that poor people face in accessing housing and the judicial challenges for Courts in applying the guiding principles mentioned above.

#### Domestic violence as a source of forced eviction

Since forced eviction is a permanent or temporary removal of individuals against their will from the home or land they occupy, without the provision of legal or other forms of protection, we can affirm that a removal from an accommodation as a result of domestic violence can be compared to a forced eviction. A link between domestic violence and forced eviction has been proven by studies which have demonstrated that violence against women is related to lack of access to housing.<sup>1</sup> Indeed, affordability and quality of habitation are of crucial importance in terms of prevention of domestic violence against poor women.<sup>2</sup>

The Case *A.T. v. Hungary examined under the optional protocol to the CEDAW*, has provided an important support regarding the relation between housing rights and domestic violence and the state obligations derived from it. The author of the communication claimed to be a victim of severe domestic violence, but explained the impossibility in her case of leaving home, as Hungarian shelters were not equipped to cope with her disabled child. CEDAW (Committee on the Elimination of Discrimination against Women) stated that authorities *should* 'guarantee the physical and mental integrity of the author and her family', ensure that she was provided with a safe place of residence to live with her children, and provide 'child support, legal assistance, and compensation in proportion to the physical and mental harm and the violation of her rights'. (CEDAW Communication 2/2003, Views adopted on 26 January 2005).

54. Case n° 280/2008 (SCA) (*Ekurhuleni Municipality case*).

55. See [www.saflii.org/za/cases/ZASCA/2009/21.pdf](http://www.saflii.org/za/cases/ZASCA/2009/21.pdf)

[Domestic violence as a source of forced eviction]

The European Court of Human Rights is a recent landmark case law *Opuz v. Turkey* in 2009 has for the first time protected the applicant and her mother stating that domestic violence is a form of discrimination.

The monitoring role of institutions is crucial in this matter. The National Centre against Violence (NCAV)<sup>3</sup> in Mongolia and NGOs in South Africa have provided transitional and emergency shelters for poor women who are victims of violence and their children. The choice of shelter depends on the financial capacity of the victim and the urgency of the situation. They ensure a transitional period of three to six months during which women victims receive training programmes, legal counselling and psychological support. The operational costs are sometimes subsidized by local authorities (this is the case in provincial departments for social development in South Africa).

Amnesty International's campaign 'It is in our hands: stop violence against women' has provided useful information and advocacy on women's housing issues and domestic violence. For more information see: [www.amnesty.ca/campaigns/svaw\\_overview.php](http://www.amnesty.ca/campaigns/svaw_overview.php)

1. See article of H. Combrink, 'Access to housing for women who are victims of gender based violence' in *ESCR Review*, (10)2, July 2009.

2. See S. Liebenberg and K. Pillay, 'Poverty and Human Rights Report of the National "Speak Out on Poverty", Hearings', March to June 1998, convened by SANGOCO, the CGE and the SAHRC, SANGOCO: Johannesburg.

3. [www.owc.org.mn/ncav/eng\\_index.htm](http://www.owc.org.mn/ncav/eng_index.htm)

For more information on the relationship between domestic violence and housing rights see: UN Special Rapporteur Report: UN doc E/CN.4/2005/43, paras 41 and 43. UN doc E/CN.4/2006/118, para. 32.

## 6. DUTIES OF EQUAL PROTECTION AND NON-DISCRIMINATION

61] Several issues emerge from housing rights since poor and particular groups (for example, migrants, minorities, internally displaced people, women and children) are the most discriminated in terms of access and preservation of their right to adequate housing. In this context, the International Convention on the Elimination of All Forms of Racial Discrimination states in its Article 5(e) the obligation of States parties to: 'prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of economic, social and cultural rights in particular [...] the right to housing'. This is upon reinforced with the equal right of men and women to the enjoyment of all economic, social and cultural rights.<sup>56</sup>

56. Article 3 of the International Covenant on Economic, Social and Cultural Rights.

62] However, there is a significant gap between housing necessities and the land available to provide housing to everyone. Discrimination is also present in the form of laws, policies, regulations, access to mortgage systems and lack of institutional or financial capacity, as well as failure to provide an effective response in terms of housing necessities.

63] For this reason, the Special Rapporteur developed guidelines for States to ensure the prevention of discrimination in relation to the right to adequate housing. They outlined strategies for addressing existing obstacles linking the right to housing to the right to property, and defined guidelines to address discrimination based on race, origin or gender.

64] The right to housing is of particular importance for people with disabilities since this right provides independence, participation and social integration. The United States Supreme Court has stated that legislation forbidding the establishment of special houses for people with disabilities was discriminatory.<sup>57</sup>

65] Solidarity and social inclusion has been invoked in several cases by the European Social Charter in relation to minorities, in particular, migrants and ethnic groups. In relation to the Roma community, for example, the European Committee of Social Rights confirmed that States must respect difference and ensure that social arrangements effectively lead to inclusion of social groups.<sup>58</sup> The European Committee also highlighted the responsibility of the State to collect data pertaining to problems related to housing of Roma communities. Similar responsibilities were stressed in the case *European Roma Rights Centre v. Italy*,<sup>59</sup> related to the accommodation of the Roma community in camping sites that were inadequate, scarce and a source of racial segregation and discrimination. But the obligation of States goes beyond this, since in the Committee's view, obligations relating to non-discrimination against any community impose an obligation to take into due consideration the relevant differences and act accordingly. This obligation constitutes the implementation of positive action measures aimed at promoting effective social integration.<sup>60</sup> In the case *Ms. L.R. et al v. Slovakia*,<sup>61</sup> the Committee on the Elimination of Racial Discrimination also stated in relation to Roma that the revocation of a housing policy, based in this case on grounds of ethnic origins, was discriminatory.

66] A historic decision has been provided by the European Committee in the case of the European Federation of National

57. United States Supreme Court, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 US, 432 (1985).

58. *ERRC v. Greece*, Complaint 15/2003, Decision on the Merits of 8 December 2004, § 19.

59. N° 27/2004, Decision on the merits of the complaint to the Parties and to the Committee of Ministers on 7 December 2005. See also other decisions of the European Committee on Social Rights: *European Roma Rights Centre vs. Greece*, complaint n° 15/2003; *European Roma Rights Centre v. Bulgaria*, complaint 31/2005.

60. ECSR, *European Roma Rights Centre v. Bulgaria*, complaint 31/2005, decision of merits 18 October 2006, para. 42.

61. Communication 31/2003, 10 March 2005.



Organizations working with homeless persons – *FEANTSA v. France*<sup>62</sup> – in which the Committee went further and explained the scope and extension of state obligations. The Committee recalled that even if state obligations related to housing rights cannot be interpreted as obligations of result, they should imply operational, financial and legal means as well as monitoring activities, in order to review housing policies and adapt them, if necessary, in order to provide effective relief to all categories of persons. States must establish a timetable and not defer indefinitely the adoption of measures.

**67]** Women are the most vulnerable group living in poverty, and as such constitute the segment most touched by housing programmes. Women’s historical, social and economic realities should therefore be taken into account when ensuring the full and equal enjoyment by women of their housing rights.<sup>63</sup> Specific changes have been made following the UN Resolution 2000/13, ‘Women’s Equal Ownership of, Access to and Control over Land and the Equal Rights to Own Property and Adequate Housing’, which developed crucial grounds for women’s empowerment and recognition.<sup>64</sup>

**68]** Taking into account the legal framework for discrimination against women relating to housing, land and heritage, the Special Rapporteur proposed a definition of the right to housing with an explicit gender approach: the right to housing is ‘the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity’ (E/CN.4/2001/51, para. 8).

**69]** Gender approaches have proved extremely important in analysis of the *Grootboom* case, since Grootboom principles are often used to construct gendered frameworks for interpreting women’s housing rights in South Africa. They have also been used to define the limits of the relation between housing rights and the right to work. In the Canadian case *Godbout v. Longueuil (City)*,<sup>65</sup> a woman hired by the police was obliged to sign a declaration fixing her residence inside the city. The Canadian Supreme Court ruled that the declaration constituted a violation of her right to housing.

**70]** Important decisions relating to displaced people<sup>66</sup> reinforce the housing rights of populations that are hard-pressed to leave their homes, either because of situations of internal violence or natural disasters, as in the Colombian rulings T-919 of 2006 and T-585 of 2006 and injunction 027 of 2007.<sup>67</sup> In Nepal,

the case *Bhim Prakash Oli et Al. v. Government of Nepal et al*<sup>68</sup> confirmed the obligation of the state to implement and monitoring holistic plans and programmes to integrate displaced populations into existing housing priorities.

**71]** Taking into account the recurring violations of cultural traditions, property and housing rights of indigenous communities, a number of important decisions have been taken with regard to such communities in Latin-America. In the case of the Inter-American Court of Human rights *Moiwana Community v. Suriname*,<sup>69</sup> the Court ordered to ensure the property rights of the members of the Moiwana community and of their traditional territories, and to develop special measures including mechanisms for delimitation, demarcation and titling of said traditional territories.

## 7. THE ROLE OF NGOs IN ADVANCING THE RIGHT TO HOUSING

**72]** NGOs can contribute to the empowerment of marginalized groups with regard to housing rights by undertaking the following steps:

- providing legal advice/advocacy
- raising awareness of gender sensitive approaches to housing rights in legislation and public policies
- advocating for harmonization between international standards and provisions inserted in international human rights instruments and treaty bodies and national religions and customary laws
- involving the media
- providing transitional and emergency accommodation
- developing training programmes to support women and children during reconstruction processes.

**73]** The advocacy role of NGOs has had enormous impact with regard to accessing international jurisdictions and promoting crucial developments in national laws, as referenced in the *FEANTSA* and *Movement ATD Quart Monde* cases mentioned above. This advocacy role has been particularly important in the European Committee of Social Rights, to which NGOs have presented several complaints while defending the most vulnerable groups of society.

**74]** Several initiatives have been implemented in relation to gender approaches to housing rights or even housing rights and HIV/AIDS. Indeed, Global Coalition on Women and AIDS (GCWA), launched by the Joint United Nations Programme on HIV/AIDS (UNAIDS), is a worldwide alliance of civil society

62. Complaint n° 39/2006, decision of Merits of 5 December 2007. See also *movement ATD Fourth World v. France*, complaint 33/2006, decision of merits of 5 December 2007.

63. Comment 16 notes that ‘women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination’.

64. See also UNCHR Resolution 2001/34 *Women’s Equal Ownership of, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing*, UN Doc E/CN.4/RES/2001/34 (20 April 2001); see also UNCHR Report E/CN.4/2002/53 2002.

65. (1997) 3 S.C.R. 844.

66. Walter Kälin, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (A/HRC/10/13), and Addendum Protection of Internally displaced people, see doc. E/CN.4/2006/118, p. 20.

67. Colombian Constitutional Court, 1 February 2007.

68. 8 February 2006.

69. *Moiwana Community vs. Suriname*, 15 July 2005 paras 107–212. See also *Sawhoyamaya Indigenous Community v. Paraguay*, 29 March, 2006.

groups, networks of women with HIV and AIDS, governments and United Nations organizations, with a view to highlighting the impact of AIDS on women and girls and mobilizing action at global, regional and national levels. The International Centre for Research on Women (ICRW) has developed important research related in particular to the link between security of tenure in the mitigation of HIV spreading and costs.<sup>70</sup> Other examples include the Habitat International Coalition – Housing and Land Rights Network (HLRN), the People’s Movement for Human Rights Learning (PDHRE), the Amnesty International “It is in our hands: stop violence against women” campaign and the Global Coalition on Women and Aids (GCWA). In 2008 the Centre for Equality Rights and Accommodation (CERA)<sup>71</sup> developed an advocate’s guide for housing rights especially for marginalized and poor people in Canada.<sup>72</sup>

70. See the research [www.icrw.org/docs/2004\\_paper\\_haveandhold.pdf](http://www.icrw.org/docs/2004_paper_haveandhold.pdf).

71. [www.equalityrights.org/cera/](http://www.equalityrights.org/cera/)

72. Human rights in housing in Canada An Advocate’s Guide, Centre for Equality Rights in Accommodation (CERA), 2008 Available at [www.equalityrights.org/cera/docs/National%20Guide%20English%20Final.pdf](http://www.equalityrights.org/cera/docs/National%20Guide%20English%20Final.pdf).



### Monitoring the Right to Housing

In relation to the role of monitoring, UN-Habitat has developed a set of indicators for the full and progressive implementation of the right of adequate housing, ‘Monitoring Housing Rights: developing a Set of Indicators to monitor the Full and Progressive Realization of the Human Right to Adequate Housing’.<sup>1</sup> Also of relevance are the reports presented by the FoodFirst Information and Action Network (FIAN), in particular, the parallel report for the second to fourth periodic reports of the Philippines submitted to the CESCR, 41<sup>st</sup> session ‘Philippine State’s Obligations to its Citizens Right to Adequate Food and Right to Adequate housing’.<sup>2</sup> COHRE has developed crucial information and prepared high level reports monitoring the housing rights all over the world<sup>3</sup> as well as material specifically addressing the legal enforcement of housing and related rights.<sup>4</sup> COHRE also directly litigates housing rights before international and regional fora as well as intervenes as *amicus curiae* before national courts.

1. 2003 available in: [www.sheltercentre.org/sites/default/files/UNOHCHR-HABITAT\\_monitoringHousingRights.pdf](http://www.sheltercentre.org/sites/default/files/UNOHCHR-HABITAT_monitoringHousingRights.pdf).

2. UN Doc. E/C. 12/PHL/4 available in/ [www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIAN\\_Philippines41.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIAN_Philippines41.pdf).

3. See, for example, Housing rights in Nicaragua: see joint report (COHRE WCCN and CENIDH) 2003: [www.sheltercentre.org/sites/default/files/COHRE\\_NicaraguaHousingRightsinHistoricalComplexities.pdf](http://www.sheltercentre.org/sites/default/files/COHRE_NicaraguaHousingRightsinHistoricalComplexities.pdf).

4. See, for example, COHRE, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, COHRE: 2006, COHRE *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, COHRE: 2002; see also [www.cohre.org/litigation](http://www.cohre.org/litigation).

### EXERCISES

- 1) Analyse the framework of the right to housing in your country. Which groups are suffering from culturally inadequate housing?
- 2) What housing options are there for low-income and minimum wage earners in your country? In the case of existing subsidies, are they getting the most disadvantages?

# The right to enjoy the highest attainable standard of physical and mental health

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1. Definition of the right to enjoy the highest attainable standard of physical and mental health

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2. Core obligations

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3. Duties of equal protection and non-discrimination

4. Health of women

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6. State obligations

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7. Specific protection for marginalized and vulnerable groups

a. Children and Youth

b. Persons with disabilities

c. People with HIV-AIDS

d. Older persons

e. Migrants

f. Displaced people

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8. Strategies for justiciability

# THE RIGHT TO ENJOY THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH



The right to enjoy the highest attainable standard of physical and mental health (right to health) is central to the strategy for attaining MDGs and is at the core of the fight against poverty. The right to health is essential to enjoy a life with dignity. However, the right to health has been always at the core of discriminations and prejudices in relation to groups of the population to whom access has been diminished. The World Health Organisation (WHO) has developed a framework for justiciability and provided guidelines in all aspects of this right taking into consideration the necessity of protecting the especial groups of the population. The following chapter describes the main guidelines in order to protect the right to health for all and tries to elucidate the core obligations and state obligations in order to pursue the respect of human dignity, at the core of this right.

## 1. DEFINITION OF THE RIGHT TO ENJOY THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH

1] The right to enjoy the highest attainable standard of physical and mental health (right to health) was defined in the preamble to the 1946 Constitution of the World Health Organization (WHO), which states that the ‘enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’. Although the preamble adds that health encompasses ‘a state of complete physical, mental and social well-being’,<sup>1</sup> this definition has been criticized since the State cannot be obliged to provide for everyone the right to health, and cannot protect everyone against every possible cause of ill health.<sup>2</sup> The right to health is therefore more complex and multidimensional than first presumed.

2] The right to health has been recognized in numerous international human rights instruments.<sup>3</sup> The first guidelines to the right to health were provided in the **Universal Declaration of Human Rights**, which stated that: ‘Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.’<sup>4</sup>

3] The fullest definition however, which includes not only the elements necessary to live a healthy life, but also the entitlements required to give the right an economic, social, cultural significance and dimension, is provided by Article 12 of the ICESCR, which states:

- (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of health.
- (2) The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-

1. Preamble of the Constitution of WHO (1946).

2. CESCR, General Comment n° 14, ‘The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’, E/C.12/200/4 (11 August 2000) para. 8; OHCHR Draft Guidelines, para. 116.

3. See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination (1966), Article 5(e)(iv); Convention on the Elimination of All Forms of Discrimination Against Women (1979), Articles 11.1(f) and 12; United Nations Convention on the Rights of the Child (1989), Article 24; European Social Charter (1961) as revised, Article 11; African Charter on Human and Peoples’ Rights (1981), Article 16; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Article 10.

4. Universal Declaration of Human Rights (1948), Article 25(1).

- 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 which would assure to all medical service and medical attention in the event of sickness.

This list of State obligations in Article 12(2) is illustrative and non-exhaustive.<sup>5</sup>

**4]** Based on this definition, the Committee has developed a broad description of the right to health, including a package of interrelated rights. The CESCR states that this: *'is the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health. The right includes both health care and the underlying determinants of health, including access to potable water, adequate and safe food, adequate sanitation and housing, healthy occupational and environmental conditions, and access to health-related information and education.'*<sup>6</sup>

This description symbolizes the interrelation and interdependency of all human rights.

**5]** The Special Rapporteur on the right to health further proposes the addition of the 'right to an effective and integrated health system, encompassing health care and the underlying determinants of health, which is responsive to national and local priorities and accessible to all.'<sup>7</sup>

**6]** In this sense, the right to health encompasses both freedoms and entitlements: it requires the exercise of civil and political rights as well as economic, social and cultural rights. The freedoms include, for example, the right to make decisions about one's health, including sexual and reproductive freedom,<sup>8</sup> and the right to be free from interference, such as the right to be free from non-consensual medical treatment.<sup>9</sup> The entitlements include the right to a health system that provides the basis for everyone to enjoy the highest attainable standard of health.<sup>10</sup>

**7]** Two important aspects are also mentioned: the right to access and enjoyment of both health services and the determinants of health; and the right to enjoy social conditions for the safeguarding of public health, such as prevention, treatment against epidemics, sanitation and adequate water conditions, and so on.

5. CESCR General Comment n° 14, supra note 112, para. 7.

6. Ibid. See also CESCR General Comment n° 14, supra note 112, para. 9, 11.

7. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, P. Hunt, E/CN.4/2006/48 (3 March 2006) ¶ 4.

8. See also Article 16(1)(e), of CEDAW.

9. Ibid.

10. Ibid.

**8]** Finally, the right to health must respect the **principles of equality and non-discrimination** and realized, in particular, for the most vulnerable sectors of society.<sup>11</sup>

## 2. CORE OBLIGATIONS

**9]** The Committee on Economic, Social and Cultural Rights has further explained Article 12 and the normative content of the right to health in General Comment n° 14.<sup>12</sup> Based on these documents, the right to health also contains four inter-related and essential features or determinants representing essential components of the right to health and related entitlements: (1) **Availability**, (2) **Accessibility**, (3) **Acceptability** and (4) **Quality (AAAQ)**. While these essential elements are often described in connection with healthcare services, programmes and goods, they also apply to the underlying determinants of health as the right to safe drinking water and sanitation or the right to adequate housing.

**10]** The **AAAQ framework** is explained further in General Comment n° 14 and is summarized here: **Availability**. Health facilities, goods and services must be available in sufficient quantity within the State party. This includes, for example, hospitals, clinics, trained health professionals and essential medicines, as well as underlying determinants, such as safe drinking water and adequate sanitation facilities.<sup>13</sup>

**11]** **Accessibility**. Health facilities, goods and services must be accessible to everyone without discrimination, with a particular focus on vulnerable or marginalized people. They must be **physically accessible**, meaning within safe physical reach of all sections of the population, including people with disabilities and people in rural areas. They must be **economically accessible**, meaning affordable to all. In this sense, procurement of healthcare should respect the principle of equity and should prioritize the most vulnerable groups of society. Moreover, accessibility includes the right to seek, receive and impart information on health.<sup>14</sup> In the Indian Case *Indra Sawhney v. Union of India*,<sup>15</sup> for example, the Supreme Court observed that in order to eradicate poverty and to eliminate inequalities, it is necessary to ensure 'free' medical care, education, access to employment, housing, land reforms and free water.

**12]** Following the proposals of **General Comment n° 14**, access to health includes: "access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of

11. General Comment n° 1, paras 18 and 19.

12. See, generally, CESCR General Comment n° 14.

13. Ibid. para. 12(a).

14. Ibid. para. 12(b).

15. 1997 supp (3) SCC 217.

prevalent diseases, illness, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.<sup>16</sup> WHO further clarified that these provisions should be implemented at all levels, including primary, secondary and tertiary healthcare.

**13] Access to health information** is also an essential aspect of the right to health and is linked to the concept of accessibility.<sup>17</sup> Indeed, health information enables people to promote their own health and to claim quality health facilities, goods and services from the State and others.<sup>18</sup> Therefore, States must ensure that health information is available and accessible to all, and that it is provided in local languages.<sup>19</sup> The right to health also includes the freedom of all people to seek, receive and impart information concerning health issues.<sup>20</sup> Indeed, other essential aspects of the right to health, such as meaningful participation and effective accountability, depend upon having access to information, as well as the right to express views freely.<sup>21</sup> While health information must be made available, personal health data must be treated with confidentiality.<sup>22</sup>

**14] CEDAW** considered the case of a violation of the right to information in relation to a sterilization of a woman patient member of the **Roma Community** and mother of three children; that had not given previous consent for this intervention. Indeed, before the surgery, Mrs A.S. was asked by the doctor to fill out some consent forms that she did not understand. After the surgery, she realized that she had been the subject of a sterilization procedure. She argued that she would never have agreed to it as she has strict Catholic religious beliefs that prohibit contraception of any kind, including sterilization. CEDAW Committee concluded that violations [had taken place] of the right to an informed consent as well as the right to information on family planning, the right to appropriate services in connection with pregnancy and the post-natal period and the right to determine the number and spacing of her children, of the Convention on the Elimination of Discrimination Against Women in the case **A.S. v. Hungary**.<sup>23</sup> As a result the Hungarian Government modified the Public Health Act in relation to the right to be informed in the case of this type of medical procedures.

**15] In the case *K.H. and Others v. Slovakia*,**<sup>24</sup> eight Roma women were unsuccessful in conceiving again after receiving gynaecological and obstetric treatment. They were also asked to sign documents prior to discharge from the hospital without

being unable to identify the contents of the documents. The Slovakian health authorities stated that there was no right to photocopy medical records. However, the European Court of Human Rights found that access to files containing one's personal data must be allowed in order to respect the right to prior and proper consultation for health care.

**16] Acceptability.** Health facilities, goods and services must be respectful of medical ethics, including the right to confidentiality, and they must be sensitive to cultures, communities and gender. Furthermore, health information must be provided in local languages.<sup>25</sup>

**17] Quality.** Health facilities, goods and services must also be scientifically and medically appropriate and of good quality. Furthermore, the underlying determinants of health must be appropriate and of good quality too.<sup>26</sup> Thus, for example, water and health education, in addition to hospitals and medicines, must be of good quality.

#### ► CORE OBLIGATIONS OF THE RIGHT TO HEALTH (BASED ON GENERAL COMMENT N° 14)

- Access to healthy facilities, goods, services on a non-discriminatory basis and with particular focus on vulnerable and marginalized groups
- Access to minimum essential food, which is nutritionally appropriate, adequate and safe, to ensure freedom from hunger for everyone
- Access to basic shelter, housing and sanitation and a supply of safe and potable water
- Access to essential drugs as defined in the WHO Action Programme on essential Drugs
- Equitable distribution of all health facilities, goods and services
- Adoption and implementation of a national public health strategy and plan of action (designed and approved on a participatory basis, including benchmarks indicators, and periodic review, adjustments and updates).
- Ensure reproductive, maternal (pre and post-natal) and child healthcare
- Provide immunization against major infectious diseases.
- Take measures to prevent, treat and control epidemic and pandemic diseases.
- Provide education and access to information concerning the main health problems in the community, including methods for prevention and control.
- Provide training for health personnel including education on health and human rights.

16. See General Comment n° 14, para. 17.

17. Ibid. para. 12(b)(iii).

18. Report of the Special Rapporteur 2006, supra note 114, para. 49(c)(iii).

19. See *ibid.* See also CESCR General Comment n° 14, para. 12(b)(iv).

20. CESCR General Comment n° 14, supra note 112, para. 12(b)(iv).

21. Report of the Special Rapporteur 2006, supra note 113, para. 49(c)(iii).

22. CESCR General Comment n° 14, supra note 112, para. 12(b)(iv).

23. Communication n° 4/2004, CEDAW /C/36/D/4/2004.

24. ECHR Application n° 32881/04, 2009.

25. Ibid. para. 12(c).

26. Ibid. para. 12(d).

### 3. DUTIES OF EQUAL PROTECTION AND NON-DISCRIMINATION

18] It is important to emphasize that non-discrimination and equality are central to the right to health. The right to health proscribes any discrimination in access to or provision of healthcare and the underlying determinants of health.<sup>27</sup> Moreover, special attention must be paid to promoting the equality of women and men, and of vulnerable and marginalized groups.<sup>28</sup> For example, in the above mentioned-case, *A.S. v. Hungary*, the CEDAW Committee urged the State party to take a holistic approach in order to eliminate multiple forms of discrimination against women and, in particular, to ensure material equality among Roma girls.<sup>29</sup>

19] Additionally, careful consideration of health resource allocations is required to ensure that health policy and spending promotes equality rather than contributing to or perpetuating inequalities.<sup>30</sup> The obligation to ensure non-discriminatory treatment also requires the removal of obstacles that impede the enjoyment of health (*de iure* and *de facto*). On this basis, equality is immediately enforceable.<sup>31</sup>

20] One further important aspect of the right to health 'is the participation of the population in all health-related decision-making at the community, national and international levels'.<sup>32</sup> Participation implies, among other factors, the rights to seek and impart health-related information, the right to express views freely, and the right to basic health education, as well as transparency in policy-making processes. Full participation on a non-discriminatory basis also requires special attention to sharing information with and seeking the views of both women and men, as well as the views of vulnerable and marginalized people.<sup>33</sup>

### 4. HEALTH AND WOMEN

21] Women face health issues differently as men. For this reason, biological and socio-cultural factors on the right to health of men and women should be taken into account when talking about women's right to health.<sup>34</sup>

27. Ibid. para. 18. Discrimination is prohibited 'on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health'. Ibid.

28. See *ibid.* para. 18.

29. See Concluding Comments of the Committee on the Elimination of Discrimination against Women: Hungary, CEDAW/C/HUN/CO/6, 10 August 2007.

30. See *ibid.* para. 19.

31. General Comment n° 16, paras.6, 29 and 30.

32. Ibid. para. 11 (emphasis added).

33. See, for example, *ibid.* para. 54 (discussing the right of individuals and groups to participate in decision-making processes for developing any policy, programme or strategy related to the right to health).

34. See General Comment n° 14 page 12-13.

22] Rural women as well as displaced, indigenous women, women with disabilities, women living in poverty and suffering HIV-AIDS face a double discrimination and exclusion. Concerning rural women as per example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in its art. 14 affirms that States Parties shall take all appropriate measures to eliminate discrimination against rural women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care and family planning. In relation to women with disabilities, it is important to note that they suffer clearly a double discrimination and in some cases, women who suffer domestic violence are treated that way because of their condition of disability.

23] Sexual and reproductive rights, pregnancy and issues related to birth planning ask especial action in order to avoid limitations to their right. In Colombia, several jurisprudence has protected pregnant women as 'subjects of especial protection' when private health care institutions discontinue de provisions of health care services based on the non payment of the charges.<sup>35</sup> The protection has also covered the case of pregnant women working in domestic places,<sup>36</sup> the protection of the right to health of displaced women<sup>37</sup> and the social integration of women with disabilities.<sup>38</sup>

### 5. PROGRESSIVE REALIZATION

24] In addition to AAAQ, **other concepts** are crucial to the right to health. First, the right to health is subject to progressive realization. Many States do not currently possess the resources necessary to fully implement the right to enjoyment of the highest standard of attainable health for all people. Nonetheless, States must take deliberate and concrete steps toward the full realization of the right to health for all.<sup>39</sup> The corollary to the obligation to progressively realize the right to health is that 'there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible'.<sup>40</sup>

25] While the right to health is subject to **progressive realization**, States have an immediate core obligation that constitute, at the very least, minimum essential levels of primary healthcare, food, housing, sanitation and essential

35. Tutela n° 088/08, Constitutional Court of Colombia, 5 February 2008. See also: T-106 of 1996, T-694 of 1996, T-662 of 1997 and T-844 of 2002.

36. Tutela n° -730/99 Constitutional Court of Colombia, 1 October 1999.

37. SU-1150 of 2000, T-1635 of 2000 and T-327 of 2001; T-045 of 2010 among others.

38. SU-1167 de 2001.

39. Ibid. paras 30-31.

40. Ibid. para. 32.

drugs.<sup>41</sup>This core obligation also includes adopting and implementing a national health strategy and plan of action.<sup>42</sup>

**26]** The **Constitutional Tribunal of Peru** analysed the inaction of the Peruvian authorities in providing medication for HIV patients in the case *Azanca Alhelí Meza García*.<sup>43</sup> The tribunal underlined that the State authorities were unable to provide full medical treatment to a HIV positive patient who was not able, due to financial constraints, to obtain this high cost medication. The Tribunal underlined that people with HIV/AIDS are especially vulnerable and should be particularly protected based on the principles of solidarity and human dignity. The Tribunal concluded that the State did not comply with its duty to take concrete measures in order to provide antiretroviral treatment to HIV-positive adults in the framework of Article 7 of the Peruvian National Law n° 26626 on HIV/AIDS.<sup>44</sup>

**27]** The same analysis was developed by the **Supreme Tribunal of Justice of Venezuela** who asked the national authorities to develop a preventive plan and education programmes to assist persons living with HIV/AIDS. The Court went further and even ordered the President to adjust the amount of the allocation for HIV/AIDS treatments in the case *Cruz del Valle Bermúdez y otros c. MSAS s/amparo*.<sup>45</sup>

**28]** The right to health requires access to effective mechanisms of **accountability**, including judicial remedies at both the national and international level.<sup>46</sup> Victims of violations of the right to health are 'entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition'.<sup>47</sup> In addition to judicial remedies, national ombudsmen and human rights commissions should also address violations of the right to health.<sup>48</sup>

## 6. STATE OBLIGATIONS

**29]** The right to health imposes an **obligation to respect**, entailing an immediate, enforceable obligation on States to refrain from interfering with the existing enjoyment of rights, in this case, the right to health.<sup>49</sup> It includes refraining from imposing discriminatory practices, limiting equal access to all persons, limiting access to sexual and reproductive health or to sexual education and information, promoting unsafe

drugs, and acting against safe environmental conditions.<sup>50</sup> The suspension of legislation that upholds the enjoyment of the right to health or enactment of a law that interferes with the enjoyment of the right to health constitutes a violation of this obligation.<sup>51</sup>

**30]** The **obligation to protect** entails the obligation to avoid the infringement of third parties of the right to health. In order to respect this duty, States have to ensure the protection of the population from any practice detrimental to health. They have to secure equal access to healthcare and health services, control the marketing of health equipment and medicines by third parties, and ensure that health practitioners follow ethical codes of conduct and meet appropriate standards of education. States are responsible for the protection of the population from harmful traditional practices that interfere with access to pre and post-natal care and family planning. Particular mention is made of female genital mutilation. States should take action to ensure the protection, in particular, of older people, children and women, and vulnerable and marginalized groups. The privatization of health services does not violate, per se, the obligation to protect. Finally, the obligation to protect also entails the obligation to avoid limitations to health information and services.<sup>52</sup>

**31]** The Case *Yanomani Community v. Brazil*<sup>53</sup> of the Inter-American Commission of Human Rights relates to the implementation of a plan of exploitation of the vast natural resources in the Amazon region, which impacted the territory of the Yanomami Indians. The plan compelled the community to abandon their habitat and seek refuge in other places, and exposed them to epidemics. The Commission stated that this action constituted a violation of the obligation to protect and concluded that a violation of the right to the preservation of health and to well-being had taken place (Article XI of the American Declaration of the Rights and Duties of Man).

**32]** In relation to the obligation to **fulfil**, States are required to take the necessary steps to ensure the realization of the right to health. In this sense,<sup>54</sup> according to General Comments nos. 12 and 13 in concordance with General Comment 14, the obligation to fulfil incorporates three obligations: an obligation to **facilitate** related to a state duty to take positive measures in order to enable and assist individuals and communities to enjoy this right; an obligation to **provide** through which the State will ensure that the population will realize their right and will provide facilities for this purpose; and an obligation to **promote**.<sup>55</sup> The Committee has stated in this regard that promoting includes: (i) fostering recognition of factors favouring positive health results, e.g. research and

41. Ibid. para. 43.

42. Ibid.

43. Azanca Alhelí Meza García, EXP. n° 2945-2003-AA/TC, Lima, Peru.

44. Op cit, para. 24.

45. Expediente n° 15.789. Sentencia n° 196.

46. Ibid. para. 59.

47. Ibid.

48. Ibid.

49. General Comment n° 14 para. 33.

50. General Comment n° 14 paras 34–35.

51. General Comment n° 14 paras 34 and 50.

52. Ibid. paras 35 and 51.

53. Case 615, Decision of 5 March 1985, resolution 12/85, Annual Report 1984–1985.

54. Ibid. paras 36, 37 and 52.

55. See para. 33, General Comment n° 14.



provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.<sup>56</sup>

**33]** In the case *Viceconte, Mariela c. Estado Nacional*, the Federal Court of Argentina upheld a violation of the right to health and the duty of the State to fulfil in a case related to an epidemic of hemorrhagic fever that threatened and affected more than 3.5 million people. The Court held that the Minister of Health and Public Services did not take specific and appropriate measures and that the government failed to develop a vaccine, since this was not widely available and profited the private sector. The Court found a violation of the right to health and ruled that the government should take more action to fulfil the right to health.<sup>57</sup>

## 7. SPECIFIC PROTECTION FOR MARGINALIZED AND VULNERABLE GROUPS

### a. Children and youth

**34]** Children and young people, in particular, are protected under the right to health, which demands special action on the part of States in order to make the principle of the best interests of the child a reality, and to avoid infant and child mortality. The Committee on the Rights of the Child has stated, for example, that adolescents face particular physical health and mental health risks, including violence, drug use and alcohol abuse and sexually transmitted infections (STIs). The increasing number of teenage pregnancies and the number of very young mothers are particularly alarming, and are more common in the case of adolescents living in poverty and in rural areas.<sup>58</sup>

**35]** The Committee recommends that State Parties pay particular attention to adolescent health, taking into account the Committee's General Comment n° 4 of 2003 on adolescent health and development in the context of the Convention on the Rights of the Child. This protection becomes stricter when it relates to children or young people from ethnic minorities or with disabilities, since these groups face various forms of discrimination. It is therefore indispensable

to analyze the relation between the right to health and the components necessary to ensure a life in good health, such as adequate food, clothing, adequate housing, safe drinking water, sanitation, a proper environment, as well as pertinent educational and informative initiatives for the effective enjoyment of the right.

**36]** For example, the Civil Court of the Province of Neuquen in Argentina studied the case of children of the community of Paynemil that were poisoned by contaminated water in the case *Menores Comunidad Paynemil*. The Civil Court upheld the petition of the applicant and stated that the Executive Provincial Power failed in its duty to protect the population since it did not take financial steps or implement any concrete policy to stop the violation. As a result of the case, the Court ordered that the necessary treatment to supply 250 litres of safe drinking water per habitant be instituted, and that the necessary steps to preserve the environment be taken.<sup>59</sup>

**37]** The importance of protecting the right to health of children was highlighted again in the landmark case *Minister of Health v. Treatment Action Campaign* presented by the NGO Treatment Action Campaign (**TAC case**)<sup>60</sup> to the High Court of South Africa. The Court assessed the reasonableness of the South African government policy of impeding the AIDS pandemic through prevention of Mother-to-Child Transmission (MTCT) through breastfeeding. The devised programme by the SA government dealt with MTCT using a medication called Nevirapine. However, availability and access to this medication was restricted to only two medical sites in each province, named Pilot Sites, which served only 10 per cent of the total population. As a result of this policy, only private clinics who worked as research and training sites were allowed to prescribe the medication, whereas public hospitals were not. The government argued that the administration of Nevirapine was reasonable, explaining that budgetary constraints affected the expansion of the availability of the medication to all medical sites, and further stated that the lack of clean water in rural areas could make the Nevirapine useless. Arguments related to concerns regarding the efficacy and safety of Nevirapine were also raised by the government.

**38]** The Court rejected these arguments and noted that the medication would save many lives among the South African population. The Court further stated that these policies were not reasonable since the restrictions on Nevirapine were too rigid and limited the access of mothers and children to the medication. The Court underlined the point that the right to health included also family care, and that it is a duty of the State to help parents attain access to healthcare when they are unable to afford it. Affirming that the justiciability of ESC rights improves the live of poor people and disadvantaged segments of society and emphasizing the tripartite typology

56. See para. 37 General Comment n° 14.

57. Ministerio de Salud y Ministerio de Economía de la Nación/ Acción de Amparo, Causa n° 31.777/96 (1998).

58. See, for example, UN Committee on the Right of the Child, Concluding Observations: Ecuador, CRC/C/15/Add.262.

59. S/acción de amparo, Argentina 19 May 1997. See also Mariela Viceconte op cit. 52.

60. *Minister of Health v. Treatment Action Campaign*, 2002 (5), SA 721 (CC).

of State obligations and the progressive realization of ESC rights, the Court ordered that Nevirapine be made available in all centres, further stated that budgetary constraints could not be an excuse for governments, and ruled that the previous measures were therefore unreasonable.

## b. People with disabilities

**39]** Disability has a particularly pernicious relationship with poverty since poor access to health care can rapidly lead or exacerbate it. On the basis of the Convention on the Rights of Persons with Disabilities and its Optional Protocol adopted in 2006, States are particularly obligated to accomplish all necessary steps to ensure equality, to design inclusive policies to facilitate their integration in society, and to ensure their effective participation in all levels of life. The Convention establishes where adaptations are necessary in order to allow them to effectively exercise their rights.

**40]** The Supreme Court of Canada, relying on the principle of equality, studied medical care in the province of British Columbia in the case *Eldridge v. British Columbia*.<sup>61</sup> The healthcare system operates through two primary mechanisms: the Hospital Insurance Act and the Medical and Health Care Services Act. However, neither programme pays for sign language interpretation for the deaf. The appellants were all born deaf and preferred sign language as a means of communication. For this reason, they argued that the absence of interpreters impairs their ability to communicate with their doctors and other healthcare providers, and thus increases the risk of misdiagnosis and ineffective treatment. The Supreme Court stated that the provincial government failed to provide sign-language interpreters as a part of the publicly-funded healthcare system and argued that the effects of discrimination are especially relevant in the case of disability. The Court concluded that the health system was discriminatory since it infringed upon their right to equal benefit under the law without discrimination and prevented the most vulnerable members of society from taking advantage of healthcare benefits.

**41]** In a Brazilian case related to a young man suffering from mental illness who received inhuman treatment from medical staff, the Inter-American Court stated that special obligations for care and protection of people with disabilities must be provided (*Damião Ximenes Lopes v. Brazil*).<sup>62</sup>

**42]** The European Court of Human Rights provided a ruling on a similar case, *Storck v. Germany*, stating that: “With regard to persons in need of psychiatric treatment in particular, the Court observes that the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the Convention. For this purpose there are hospitals run by the

*State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals. [...] The Court finds that, similarly, in the present case the State remained under a duty to exercise supervision and control over private psychiatric institutions. Such institutions, [...] need not only a licence, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified.”*<sup>63</sup>

**43]** In another case, the African Commission on Human and People’s Rights examined the legislative framework for mental health (Health Acts) in Gambia in the case *Purohit and Moore v. The Gambia* related to people in a psychiatric hospital. The applicants alleged that they had not given their consent for treatment and that the conditions of the hospital were not optimal. Additionally, they were not allowed to vote. The facts also show that people detained in the psychiatric hospital were picked up from the streets and were most likely poor people; moreover, that African countries are ‘generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right’.<sup>64</sup> The Commission concluded that on the basis of the principle of non-discrimination and equal protection, the State should provide medicines, adequate material and medical care for people suffering mental health problems, even in the case of resource constraints, and asked that the cases of all persons detained under the Health Acts be reviewed.<sup>65</sup>

## c. People with HIV-AIDS

**44]** In general, people with HIV-AIDS are protected by tribunals, which consider them as a group entitled to special protection. However, special considerations appear in relation to the access to and availability of medication, non-discrimination measures for people suffering from this virus, and the financial considerations in relation to the cost of drugs and treatment for treating those living with HIV-AIDS.

**45]** In the case of *Azanca Alheli Meza Garcia*,<sup>66</sup> related to an ‘amparo’ presented in order to request the provision of full HIV-AIDS treatment, the Peruvian Constitutional Tribunal underlined the importance of the content of social rights for the effective protection of civil and political rights. The Tribunal stressed the intrinsic connection of the right to health with the right to life, particularly in the case of people with HIV-AIDS. It added that the State should comply with its obligations within a reasonable time as an indispensable condition for realizing the progressive realization of the right of health and implementing public policies, regardless of the

61. (Attorney General) 1997 SCR 624.

62. *Damião Ximenes Lopes v. Brazil*, Case 12.237, Report N° 38/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 174 (2002).

63. Application n° 61603/00, judgment of 16 June, 2005, p. 103.

64. See *Eldridge* Case para. 84.

65. Communication n°241/2001, 16<sup>th</sup> Activity Report 2002 2003, Annex VII, 2003.

66. Expediente n° 2945-2003-AA/TC.

amount of available financial resources. The Tribunal clarified that financial resources are means to providing services and realizing goals (social investment) and not a goal in itself (expenditure).<sup>67</sup> As an outcome of this decision, the Tribunal asked the Minister of Health to provide medication to the applicant and to advance the implementation of Article 8 of Law n° 28243, 2004, which focuses on the necessity of giving priority to budget resources for people with HIV-AIDS and living in extreme poverty.<sup>68</sup>

**46]** In the case *Cruz del Valle Bermudez y otros c. MSAS*<sup>69</sup> *s/amparo*, the Constitutional Court of Venezuela stated that the refusal to deliver drugs needed to treat HIV-AIDS virus constituted a violation of the right to health. The Venezuelan Constitutional Court requested the implementation of a preventive National Health Plan in conjunction with complementary educational policies. The Court ordered modifications to the budget to provide more available resources and to undertake a study to clarify the minimum needs of the population suffering from HIV-AIDS in order to develop a preventive holistic programme. In a later case in 2001, the Constitutional Court of Venezuela ordered the government to ensure a regular supply of drugs for HIV-AIDS sufferers and, further, linked the right to health to the right to benefit from scientific progress. Based on the need to increase the benefits from scientific progress and medication, the Court extended the effects of the decision to all persons suffering from the virus and requesting the Social Security System (Instituto Venezolano de Seguridad Social-IVSS) to cover their treatment and medical test costs.<sup>70</sup>

**47]** The Inter-American Commission in the case *Case Jorge Odir Miranda Cortéz of 2001* understood the right to health as part of the Article 26 of the American Convention on Human Rights related to the Progressive Development of economic, social and cultural rights,<sup>71</sup> and requested the adoption of precautionary measures for groups of persons living with HIV-AIDS on the basis of the 'right to personal integrity' (Article 1 of the American Declaration/5.1 and 5.2. of the American Convention). Affirming that ESC rights contain not only negative but positive obligations, the Inter-American Commission declared that States must respect their obligations to protect people with HIV-AIDS, who are in a position of vulnerability, and compared their situation to that of cruel, inhuman and degrading treatment. The Commission also added that the behaviour at the health authorities was particularly discriminatory since the applicant underwent

discriminatory practices, consisting of the use of special red bags for laundry, special cups marked with XXX, and other practices that resulted in the stigmatization of patients suffering from HIV-AIDS. In consequence, the Commission asked the State of El Salvador to elaborate a framework law on HIV-AIDS incorporating the State obligation to provide antiretroviral medication, and ordered the modification of all care practices (medical and nursery) so as to avoid discriminatory behaviours.

#### d. Older persons

**48]** Older people shall be entitled to protection, promotion and support in various areas of care protection including medical and health services. States shall provide programmes and long term strategies for the support of informal care within the private sphere, the community based system and specialized institutions. Care services should be adapted to older people.

**49]** Last 28-30 September 2011, The First International Conference on Age-friendly Cities took place in Dublin, Ireland, from 28 to 30 September 2011, to strengthen the WHO Global Network of Age-friendly Cities and advance thinking and approaches on how to make cities more age-friendly. It brought together a broad range of leaders and senior managers from existing members of the Global Network, senior managers of municipal authorities, CEOs interested in or already championing an Age-friendly City initiative, civil society organizations as well as senior professionals across the public, private and voluntary sectors in areas such as transport, urban planning, health care, housing, research and academia

#### e. Migrants

**50]** Migrants are routinely victims of a wide range of limitations to their economic, social and cultural rights, particularly, those related to social security and healthcare due to their precarious status and lack of documentation. Despite these restrictions, courts have advanced the protection of migrant children, women and workers, surmounting obstacles for their protection and applying the principles of non-discrimination and equal protection.

**51]** The Committee of Social Rights of the Council of Europe in the decision *International Federation of Human Rights Leagues (FIDH) v. France* recognized the right of access to medical care for migrants, stating that 'legislation, practice which denies entitlement to medical assistance for foreign nationals, within the territory of a State Party, even if they are illegally, is contrary to the Charter'.<sup>72</sup> As a consequence,

67. Ibid. paras 35 and 44.

68. Ibid. para. 48.

69. *S/amparo*, Expediente n° 15.789 Sentencia n° 196.

70. *Case Lopez Glenda y otros v. Instituto Venezolano de los Seguros Sociales (IVSS) s/accion de amparo*, Expediente 00-1343, Sentencia n° 487.

71. Article 26 of the American Convention on Human Rights states: '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.'

72. See case *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint n° 14/2003, 3 November 2004, para. 32.

France changed its policy by publishing the 2005 CIRCULAR DHOS/DSS/DGAS and included treatment to all minors residents in France who are not effectively beneficiaries under the State medical assistance scheme.

**52]** In the case of migrant workers, the European Court of Human Rights protected an undocumented female domestic employee in the decision *Siliadin v. France*.<sup>73</sup> The Court considered that she was the subject of domestic slavery since her documentation was retained and she was asked to work seven days per week without payment. Although the case did not rule on the right to health of migrant workers, the decision reveals the necessity of respecting migrant workers in legislation, including access to health insurance and healthcare.<sup>74</sup> In another case, the European Court stated that the abrupt removal of medical treatment due to the deportation of a migrant to another country exposed him to the risk of distressing circumstances, comparable to inhuman treatment.<sup>75</sup> Finally, the Constitutional Court of Spain has stated that all migrants have the right to register as a requirement for access to healthcare services, and that all undocumented migrants should have access to all ESC rights.<sup>76</sup>

## f. Displaced people

**53]** Art 18 and 19 of the Guiding Principles on Internal Displacement (GPID) affirm that authorities should provide access to essential food and portable water, basic shelter and housing, appropriate clothing and essential medical service and sanitation, as well as access to psychological services, with especial attention to women, and to the prevention of diseases, including HIV-AIDS.

**54]** Affirming that internal displacement is the cause of multiple human rights violations and that displacement

73. 26 July 2005, Application N° 73316/01.

74. European Court of Human Rights (2005), Case *Siliadin v. France*, Application n° 73316/2001, judgment 26 July 2005 page 71.

75. European Court of Human Rights, *D v. United Kingdom*, Judgment of 2 May 1997, 24 EHRR 423, paras. 53-54. See also Human rights Committee (HRC), *C. v. Australia*, CCPR/C/76/D/990/1999, 28 October 2002, para. 6. See also CRC (2009 and 2004), *Concluding Observations: France*, CRC/C/FRA/CO/4, 11 June 2009, § 30; CRC/C/15/Add.240, 30 June 2004, § 18.

76. Constitutional Court, Spain, Judgment 236/2007, 7 November 2007.

causes “*extreme vulnerability*”, the Constitutional Court of Colombia, in its decision **SU-1150 of 2000**, affirmed that the allocations to displaced people are more critical than other public expenses.<sup>77</sup> The Court has also protected the right to health of indigenous people forced to abandon their land due to internal displacement.<sup>78</sup> In decision T 1134 of 2008, the Court stated that displaced people should receive a “minimum subsistence” consisting on including food, safe drinking water, housing clothing and access to health services and sanitation.

## 8. STRATEGIES FOR JUSTICIABILITY

**55]**

- Support the right to health as a justiciable right as itself, independently of its connection to the right to life.
- Establish a national plan with health protection for special groups of the population, including subsidies for people suffering HIV-AIDS, for internally Displaced People and indigenous communities.
- Follow of inclusive policies, with especial emphasis on vulnerable people, integrating a holistic approach to health, including preventive and curative measures as access to health care, medication and psychological support
- Follow up the implementation of special health measures
- Support the establishment of “adapted” measures related to health care for people with disabilities.
- Support the creation of mechanisms to deal with displacement
- Promote health education and community involvement in Special health measures/mechanisms to deal with displacement, women, indigenous communities
- Support clinical training of health professionals

77. See also Constitutional Court of Colombia Decisions T-268 of 2003, T-025 of 2004 and T 1135 of 2008 among others.

78. Constitutional Court of Colombia Decision T-1105 of 2008.

### EXERCISES

- 1) Should health care be provided to everyone? If yes, in what conditions? Please justify.
- 2) Kindly analyze and compare the reasoning in the cases *Soobramoney v. Minister of Health KwaZulu Natal* and *Minister of Health v. Treatment Action Campaign* (TAC case) in relation to the right to health and in particular, the right to everyone to receive emergency medical treatment.
- 3) What is, in your opinion, the relationship between **medical ethics** and **human rights**? Please clarify.

# The right to safe drinking water and sanitation

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# THE RIGHT TO SAFE DRINKING WATER AND SANITATION



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In July 2010, the UN General Assembly officially recognized the right to water and sanitation as a human right (GA/10967). This decision came after the 3<sup>rd</sup> World Water Forum held in Kyoto in 2003, at which the right to water was declared an essential right. Furthermore, it has been the result of many important developments, such as the General Comment n° 15 of the Committee on Economic, Social and Cultural Rights (CESCR), resolutions by the Human Rights Council (HRC), declarations by several international fora, legal and judicial advancements in various countries as well as the nomination and the work of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. MDG 7 “Ensure environmental Sustainability” integrates water and sanitation as a major goal and seeks through its Target 10 to halve the proportion of people without sustainable access to safe drinking water and basic sanitation. But despite legal recognition, an estimated 884 million people, the majority of them in Africa, still do not have access to safe drinking water. More than 2.5 billion people live without basic sanitation and some 1.5 million children under 5 die each year from sickness caused by water-borne diseases. The degradation of water quality in rivers, streams, lakes and groundwater systems has a direct impact on ecosystems and human health. As the lead UN agency for water sciences and education, UNESCO is implementing an array of programmes to further expertise in this field. UNESCO’s International Hydrological Programme (IHP) is actively engaged in fostering science and knowledge to protect the quality of surface waters and groundwater systems. Likewise, UNESCO is an active contributor to the monitoring of the state of the world’s freshwater resources and promotes capacity building for better management of water resources through water centres and chairs operating under its auspices in many parts of the world.

## 1. EVOLUTION OF THE RIGHT TO SAFE DRINKING WATER AND SANITATION

**1]** In the face of major human and environmental crises, the international community has made efforts to recognize the human right to water and sanitation and to clarify its normative content. This right is indeed referenced – implicitly and explicitly – in a number of international and regional treaties and declarations.<sup>1</sup> In July 2010, the UN

General Assembly officially recognized the right to water and sanitation as a human right (GA/64/292) and declared that the human right to safe and clean drinking water and sanitation is essential for the full enjoyment of life and all human rights. On 30 September 2010 the Human Rights Council adopted Resolution A/HRC/RES/15/9 in which it affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living enshrined in art. 11 of the ICESCR.

**2]** The lack of access to water has been recognized as a key obstacle to improving human well-being, fostering education and eradicating poverty. In order to implement the universal right to water and sanitation, locally adapted solutions

1. For additional information on the evolution of the right to water, see, for example: *Outcomes of the International Expert’s Meeting on the Right to Water*. UNESCO, UNESCO Etxea, 2009, pp. 2-4.

are necessary and require exchange and dialogue among stakeholders and practitioners at all levels, often from diverse cultural backgrounds and different countries.

**3]** Fostering cooperation to prevent and resolve conflicts is therefore a paramount task for water governance, and must include intercultural dialogue on water issues. As the lead UN agency for science (including water sciences), culture, the human sciences, communication and education, UNESCO represents a scientific resource for Member States, upon which they can rely to address the societal and technical challenges arising from the situation, and to achieve progress in attaining the MDG targets related to water.

**4]** Inequality in accessing water resources is a historic problem. Today, millions of people still suffer from inequitable distribution. Poverty, division of power, privatization and exclusion are among the causes of the problem and the current water and sanitation crisis. In addition, water is intrinsically related to environmental health and ecosystems, reinforcing the urgent need for its protection.

**5]** This crisis will dramatically affect the attainment of all MDGs by 2015 – not just MDG 7, which seeks to *‘Ensure Environmental Sustainability and halve the number of people without sustainable access to safe drinking water and basic sanitation by 2015’*, but all MDGs that have an inevitable connection to it.

**6]** The right to water and sanitation is implicitly mentioned in the International Covenant of Economic, Social and Cultural Rights (1966). Articles 11 and 12 specify a number of rights that are indispensable for the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The wording of these two articles of the Covenant indicates that this catalogue of rights is not intended to be exhaustive. Since the right to water and sanitation is a precondition of securing an adequate standard of living, it is implicitly enshrined in these articles.<sup>2</sup>

**7]** The Committee has previously mentioned the human right to water in relation to other human rights in General Comment n° 6 (paragraphs 5 and 32) and in General Comment n° 14 on the right to health, stating that *‘the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and potable water, an adequate supply of safe food, nutrition and housing’*. Despite these recognitions, States were reluctant and avoided to apply a human rights based approach to water and sanitation.

**8]** Following recognition of this right, in March 2008 the UN Human Rights Council decided to appoint, under resolution 7/22, an Independent Expert on the issue of human rights obligations related to access to safe drinking water and

sanitation. The mandate of the Independent Expert was established and an Independent Expert was appointed in September 2008. The mandate was renovated as Special Rapporteur on the human right to safe drinking water and sanitation (HRC res 16/2). This renovation of the mandate confirms the will of clarifying the content and advancing towards an implementation of the human right to safe drinking water and sanitation.

## 2. NORMATIVE CONTENT

**9]** It is General Comment n° 15 on the right to water that clarifies the scope of the right linking it to adequate standard of living and the right to health. General Comment n° 15 states that: *‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’* and adds that the right to water *‘contains both freedoms and entitlements’*. Freedoms comprise the right to maintain access and freedom from contamination, the protection against arbitrary disconnections and the non-discrimination in access, while entitlements refer to allowing all people equal opportunities to enjoy the right to safe drinking water and sanitation as well as participation in related decision making-processes.

**10]** In addition, the Guidelines for the realization of the right to drinking water supply and sanitation, adopted in 2005 by the UN Sub Commission on the Promotion and Protection of Human Rights (Sub Commission Guidelines),<sup>3</sup> clarify the element of **sanitation** including at least a latrine. Sanitation concerns the existence of appropriate facilities and behaviours. It reduces exposure to disease by providing a clean environment in which people can enjoy a healthy standard of living in a hygienic environment. Sanitation also increases security and privacy between men and women and has a special role in educational institutions: separated sanitation for girls and boys at school ensures a safe and healthier learning environment.

**11]** But today sanitation is recognized as a distinct right. Indeed, following the Sub Commission Guidelines, the Independent Expert chose to focus on the human rights obligations related to sanitation. She presented a report to the Human Rights Council in September 2009. In November 2010, the CESCR issued a statement on the right to sanitation,<sup>4</sup> which further explained the nature of this right. Sanitation is defined as “a system for the collection, transport, treatment and disposal or re-use of human excreta and associated hygiene”, States must ensure that everyone, without discrimination, has physical and affordable access to sanitation, “in all spheres of life, which is safe, hygienic, secure, socially and

2. This interpretation has been developed by the CESCR in its General Comment n° 15.

3. UN document E/CN.4/Sub.2/2005/25.

4. Available at: [www.ohchr.org/EN/Issues/WaterAndSanitation/SRWWater/Pages/Sanitation.aspx](http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWWater/Pages/Sanitation.aspx)

culturally acceptable, provides privacy and ensures dignity". The Committee is of the view that the right to sanitation requires full recognition by States parties in compliance with the human rights principles related to non-discrimination, gender equality, participation and accountability.

**12]** In accordance with the General Comment and the Sub Commission Guidelines, water should also be supplied in an **adequate and sustainable** manner, so as to respect human dignity. Adequacy of water should be interpreted extensively and the level fixed should take into account the conditions and necessities of the populations, including religious, social and cultural elements, as well as economic. Furthermore, sustainability requires that access to water be preserved for future generations to the extent possible.

**13]** In addition, **adequacy** refers to the following preconditions in relation to the right to water and sanitation: **Availability:** refers to the sufficient and continuous supply of safe water and sanitation for personal and domestic use (drinking, cooking, washing and sanitation). But what constitutes the sufficient amount of water to be provided? General Comment n° 15 does not define a specific amount of water, but instead endorses conformity with World Health Organisation (WHO) guidelines, noting that some individuals or groups may require additional amounts due to health, climate or work conditions.

**14]** The Independent Expert document on the issue of human rights obligations related to access to safe drinking water and sanitation, *Climate Change and Human Rights for Water and Sanitation*, provides clarification on the **meaning of availability:** "The most widely used indicator of water scarcity is water availability less than 1,000 cubic meters per inhabitant a year. This is used as a threshold below which it is assumed that the social demand for water cannot be addressed. Nevertheless, the water for domestic use is only calculated as a small part of the water used in total, less than 10% of the global average, while agriculture and industry are much larger water users (70% and 20% respectively in the global average). If you assume that a quantity of 100 litres per capita per day is needed to cover the right to water, this amounts to 36,500 litres or 36.5 cubic meters per capita and per year. This is just a fraction of the water available even in the most arid regions. In this regard, the IPCC underlines that 'access to safe drinking water is more dependent on the level of technical infrastructure of the water rather than the quantity of runoff.'

**15]** **Accessibility** to water and sanitation means access at various places, within, or in the immediate vicinity of each household, educational institutions, professional places and wherever necessary to protect human dignity and public health. Accessibility includes the following aspects:

- **Physical accessibility:** safe drinking water and sanitation should be reachable for all groups of the population. Because of their role in managing water

resources inside communities, accessibility of water has a special meaning for women who are often obliged to walk kilometres in order to access sources of drinking water. According to the WHO, in order to have access to a minimum of 20 litres per day, the distance of the source of water should be between 100 and 1000 meters or between 5 to 30 minutes total collection time.<sup>5</sup>

- **Economic accessibility:** people should have access to safe drinking water and sanitation without depending on their capacity to pay. However affordability does not mean free of charge, except in those situations in which the beneficiaries are not able to pay for it.
- **Non-discrimination:** The non-discrimination clause in relation to water and sanitation demands that access to water be ensured for all, without distinction on any basis. Special attention should be given to poor and marginalized people living in rural areas where sanitation is often neglected and water is not sufficient or of dubious quality. For this reason, positive actions should be undertaken to ensure access to safe drinking water and sanitation for all human beings. And
- **Information:** access to information empowers participation in the administration and enjoyment of water resources.

**16]** **Quality** of water refers to the fact that water should be clean to be safe in taste, odour and colour as well as not polluted and free from microbes and parasites, chemical and radiological substances.

**17]** The Indian case *Attakoya Thangal v. Union of India W.P.*<sup>6</sup> describes how clean water is related to environmental issues and the right to life. The petitioners claimed that a scheme for pumping up groundwater to supply potable water to the coral isles of Lakshadweep in the Arabian Sea would disturb the freshwater equilibrium, leading to salinity in the available water resources and causing greater long-term harm than short-term benefits. The Kerala High Court, recognizing the fundamental importance of the right to water, requested that the Central Ground Water Board further investigate the claim, monitor the process, and present a report. The Court recognized the right of people to clean water as a right to life enshrined in Article 21, observing that: 'The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. (...). *The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself.*'<sup>7</sup>

**18]** Water and sanitation should be **affordable**, which means that direct and indirect costs and charges associated with

5. See "table summary of requirement for water service level to promote health" in Guy Howard and Jamie Bartram, Domestic Water Quantity: Service level and Health, in available at: [www.who.int/water\\_sanitation\\_health/diseases/WSH03.02.pdf](http://www.who.int/water_sanitation_health/diseases/WSH03.02.pdf)

6. 1990 KLT 550.

7. See also case law from India on the right to water connected to the right to life: in *M.C. Mehta v. Union of India and Others Case (1988)*, *Virendra Gaur and others v State of Haryana (1995)* and *Vellore Citizens Welfare Reform v. Union of India*.



securing water must be affordable by any beneficiary without causing a substantive diminution of his or her capacity to afford essential goods. People are not entitled to free water and sanitation services, but rather are expected to contribute financially, and in a reasonable way, to their supply. Any payment for water services has to be based on the principle of equity. The Committee has clarified the content of the affordability of water and sanitation and the relation to the obligation to fulfil. This will be explained under the section on the obligation to fulfil.

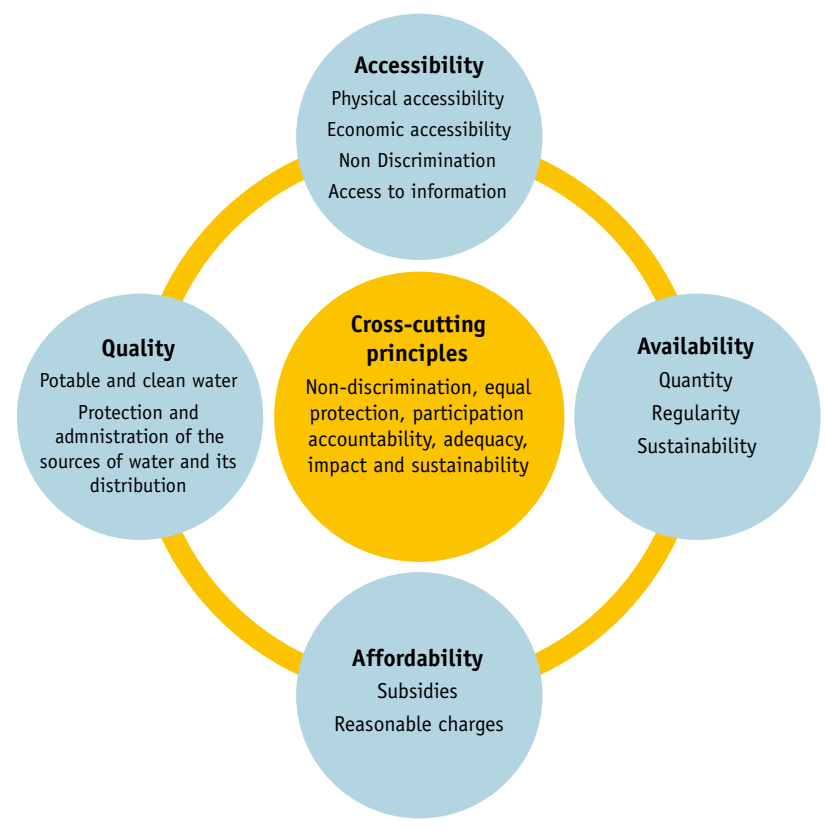
**19]** Water should be **accountable**: access to justice and effective remedies should be available and easily claimable by any person who has been denied access to water and sanitation. This includes access to judicial and non-judicial mechanisms.

**20]** Despite this framework, difficulties appear when fixing the level of water sufficient to live a life in dignity. For example, the *Human Development Report 2006* states that 20 L/person/day constitute sufficient water. Moreover, WHO Guidelines quantify basic access to water saying that: 20 l/d has a high impact on health and from 50 l/day to secure all health requirements and from 100 l/d access is considered optimal. However, these indicative amounts should be adjusted depending on the needs of particular groups, their situation of vulnerability and the related environment (indigenous groups, pregnant women, ill people, older people or people with HIV-AIDS).

**21]** The Committee followed this approach, fixing an amount of approximately 50 litres of water per day, with 20 litres as a minimum. However, the Committee was aware that marginalized and poor people would need more litres of water, and stressed the importance of ensuring that 'disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems'.

**22]** The case *Mazibuko v. City of Johannesburg*, the first decision on this issue in South Africa,<sup>8</sup> is one of the most interesting cases related to the right to water. The decision

#### COMPONENTS AND SUB COMPONENTS OF THE RIGHT TO WATER AND SANITATION



was the result of jointly efforts of a number of grassroots organizations including the Centre on Housing Rights and Evictions ("COHRE"), the Coalition against Water Privatization (CAWP) and the Centre for Applied Legal Studies ("CALS") at the University of Witwatersrand. The victims, a poor community living in a suburb of Soweto alleged a violation of the right to water arguing that the basic water policy violated art. 27(1) of the Constitution and that the installation of prepaid meters was discriminatory and administratively unfair. The petitioners solicited to increase the minimum from 25 to 50 litres per day. Indeed, for many years the petitioners piped an unmetered and unlimited supply of water charged R68.40 (about US\$9) per month on the basis of a deemed monthly consumption of 20 kiloliters of water per household. However monthly consumption attained 67 kiloliters/month and habitants from Soweto did not pay the charges. After the implementation of a new plan in Soweto aiming at reducing water losses and improving rate payment, the suburb of Soweto was selected in 2004 as the area for first implementation of the project. A system of pre-paid meters was installed which would provide each household with 6 kiloliters of free water per month or 25 liters per person per day. Habitants who will consume more should pay in advance. However the system, in the view of the Soweto habitants appeared to be discriminatory since the pre-paid system was not established for other "non-payers" much of them from governmental institutions. A discrimination against the

8. In South Africa, the Bill of Rights (1996) states that 'Everyone has the right to have access to (...) sufficient food and water' (Sec. 27) and the Water Services Act (1997) defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.

poorest was argued and as a result, the petitioners asked the Courts to declare the free basic water policy unconstitutional.

23] Contrary the decisions of the lower Courts, the Constitutional Court of South Africa decided that the water policy of 25 liters per person was “reasonable” with article 27(1) of the Constitution and that the procedure was fair and legal, thus not discriminatory. High Court and the Supreme Court of Appeal fixed respectively a minimum of 50 and 42 liters per person per day as the minimum to meet basic requirements for the households. The Constitutional Court rejected this approach based on the “minimum” amount of water and instead ruled on the basis of what was “reasonable”. The arguments based on the “reasonable approach” of the Court were the following: the amount of 6 kiloliters of free water was allocated to rich and poor alike and the city was not obliged to provide a specific amount of water but rather to progressively fulfill the right.

### 3. STATES OBLIGATIONS

24] The tripartite division of state obligations to **respect, protect and fulfil** is discharged, when it comes to the right to water and sanitation, in the following manner:

25] The obligation to **respect** corresponds to the government’s duty not to interfere with access to water. It includes refraining from interfering in equal access to adequate water; and arbitrarily interfering with customary or traditional arrangements for water allocation. Disconnection or contamination of water supply would in certain cases – when unfairly, unjustified and arbitrary – also constitute a violation of the obligation to respect.

26] The Committee clarified that a disconnection should meet the following conditions: respect the due process and appropriate form of procedural protection. Numerous jurisprudence has provided specific content. In the case *Residents Bon Vista Mansions v. Southern Metropolitan Local Council*,<sup>9</sup> the High Court of South Africa stated that disconnecting the water supply constituted a violation of the right to water. The High Court ordered the municipality to reconnect the water supply since the disconnection was not ‘fair and equitable’ in accordance with Section 4(3) of the South African Water Services Act 108 (1997), since reasonable notice was not given to the residents of the Bon Vista Mansions. Following this jurisprudence, the Implementing Regulation of Water Services Act, Section 3(b) of 2001 clarified that the minimum quantity of potable water should correspond to 25 litres per person per day or 6 kilolitres per household per month in the following three

situations: (a) at a minimum flow rate of not less than 10 litres per minute; (b) within 200 metres of a household; and (c) with an effectiveness such that no consumer is without a supply for more than seven full days in any year. The Court, though, decided that disconnection of an existing water supply constituted a violation of the obligation to respect the right of access to a water supply.

27] However, in the case *Manqele v Durban Transitional Metropolitan Council in South Africa, Durban High Court* (2002), Ms. Manqele, an indigent and unemployed mother of seven children, suffered the disconnection of her water supply as a result of non-payment of a water invoice for an outstanding amount of R10,000 (about UD\$1,400). Ms. Manqele alleged a violation of the Water Services Act 108 of 1997 due to the disconnection of water sources, which for her was unlawful and prejudicial to her dependants. The South African Water Services Act 108 prescribed a minimum standard of water supply services on quantity and quality for households, including informal households. As no guideline or regulation defining the quantity existed at that time, the Durban Transitional Metropolitan Council set a level of 6 kilolitres of water/month for free for domestic use as the amount that would fulfil obligations related to water under the Act. However, Ms Manqele’s consumption far exceeded the 6 kilolitres. Since no guidance or regulation existed to interpret the content of the right to water in this specific case, the Court found that it was unenforceable. Durban Metro Council therefore was forced to temporarily reconnect her water supply. This case underlines the necessity of comprehensive regulation and national legislation on the right to safe drinking water and sanitation in order to clarify the minimum core contents that will allow enforcement of the right to water.

28] The obligation to **protect** means that governments are obliged to take action in order to impede third parties from infringing water and sanitation rights. This obligation includes, for example, the obligation to avoid water pollution and to control the unaffordable increase of prices of water and sanitation supply. The Committee mentions the responsibility of the private sector in relation to this obligation. Indeed, it affirms that States should follow up private actions with democratic principles, as well as respect of the right to participate in the design and implementation of policies. Poor populations are forced to rely on informal water supply systems and this micro dimension should be included when addressing the responsibility of States.

29] In the case *Menores Comunidad Paymenil s/acción de amparo*<sup>10</sup> the indigenous Mapuche community of Paymenil presented an injunction through the Public Defender of Minors of Neuquen against an oil company that polluted their water supply and environment with lead and mercury.

9. 2001 (App. n° 12312).

10. Cámara de Apelaciones en lo Civil de Neuquen, Sala II, 19 de mayo de 1997.

The Public Defender stressed that since access to water is a fundamental right, and since the right to health can be guaranteed through access to water, the Government neglected to protect the health of the population, especially children. After analysing the evidence, the Court of Appeal considered that the government of Argentina failed to act upon the considerable warnings given by other authorities on the situation of pollution and sustained the injunction, ordering them to:

- (1) Supply 250 litres fresh water daily/habitant within two days of the decision
- (2) Ensure the supply by any appropriated mean within forty-five days of the decision
- (3) Identify the damages and provide necessary treatment
- (4) Take appropriate actions to preserve the environment.

**30]** As a result of these orders, and taking into account that the measures were not taken in their totality by the Government, the Public Defender of Minors of Neuquen submitted the case to the Inter American Commission on Human Rights (*Mapuche Paynemil and Kaxipayiñ Communities*).<sup>11</sup> The Commission, alleging failure to comply with the court decision, ordered the State to supply the indigenous community of Paynemil Mapuche, which had been exposed to water contaminated with lead and mercury, with safe drinking water, and to ascertain damages and provide necessary medical treatment (obligation to protect and to fulfil).

**31]** In the case *Centre on Housing Rights and Evictions (COHRE) v. Sudan*,<sup>12</sup> the African Commission on Human and People's Rights has for the first time elaborated on the right to water under the African Charter on Human and People's Rights. The case deals with forced eviction, destruction of public facilities, and killings and rapes in the Darfur region of the Sudan against black African tribes, in particular, members of the Fur, Marsaleit and Zaggawa tribes. After analysing the forced evictions and the failure of the government to protect its citizens by providing effective remedies, the Commission recalled its reasoning in the SERAC Case and stated that the right to water is also guaranteed by the African Charter in its Articles 4, 16 and 22. The Commission affirmed that '*being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur Region*<sup>13</sup> caused a violation of the right to a highest attainable standard of health'. The Commission also confirmed the violation of the right of all peoples to their economic, social and cultural development.

**32]** The obligation to **fulfil** asks governments to provide necessary resources in order to progressively implement the

right to safe drinking water and sanitation and ensure universal access. In the case of the right to water and sanitation, this obligation is disaggregated into the obligation to **facilitate**, **promote** and **provide**.

**33]** The Committee has clarified the content of this obligation as follows: the obligation to **facilitate** requires the State to assist individuals and communities to enjoy the right to water. The obligation to **promote** compels the State party to take steps in order to ensure appropriate education regarding the hygienic use of water as well as the protection of water sources. And the obligation to **provide** obliges States parties to provide water whenever individuals or groups are unable.<sup>14</sup>

**34]** States are obliged to **fulfil** their obligation by implementing legislative measures to ensure access to safe drinking water and sanitation, and are compelled to adopt a national water strategy, a plan of action and to monitor the realization of the right.

35. In order to ensure the affordability of the right, States parties must use: (a) a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements.

#### ► CORE OBLIGATIONS ON THE RIGHT TO WATER AND SANITATION

- Ensure access to the minimum essential amount of water, sufficient and safe for personal and domestic use
- Ensure the right to access to water and water facilities and services on non-discriminatory basis with special emphasis on marginalized and vulnerable groups
- Ensure physical access to water facilities – namely regularity, sufficiency and proximity of households – as well as personal security
- Ensure equitable distribution of water and sanitation facilities and services
- Adopt and implement a national plan of action and strategy on participatory and transparent basis including indicators and benchmarks with special emphasis on marginalized and vulnerable groups
- Monitor the implementation of such a plan of action and strategy
- Adopt low targeted water and sanitation programmes.

11. Case n° 12.010.

12. African Commission on Human and People's Rights, Communication 296/2005.

13. Op. cit. para. 126.

14. See paras. 27 and 28.

► CORE ELEMENTS FOR A STRATEGY OR PROGRAMME TO ENSURE THE RIGHT TO SAFE DRINKING WATER AND SANITATION

Any programme or strategy to ensure access to safe drinking and sanitation should (a) be based upon human rights law and principles; (b) cover all aspects of the right to water and the corresponding obligations of States parties. It should aim to:

- (a) Reduce depletion of water resources through unsustainable extraction, diversion and damming
- (b) Reduce and eliminate contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta
- (c) Monitor water reserves
- (d) Ensure that proposed developments do not interfere with access to adequate water
- (e) Assess the impacts of actions that may impinge upon water availability and natural ecosystems watersheds, such as climate change, desertification and increased soil salinity, deforestation and loss of biodiversity
- (f) Increase the efficient use of water by end-users
- (g) Reduce water wastage in distribution
- (h) Create response mechanisms for emergency situations
- (i) Establish competent institutions and appropriate institutional arrangements to carry out the strategies and programmes
- (j) Provide systems of accountability for citizens, NGOs and grass roots organizations in general, and
- (h) Assist other States through international cooperation.

#### 4. DUTIES OF EQUAL PROTECTION, NON-DISCRIMINATION AND SPECIAL ATTENTION TO VULNERABLE AND MARGINALIZED GROUPS

**36]** Everyone, without discrimination, is entitled to have access to safe drinking water and sanitation. However, the Covenant underlines the groups of population that might be discriminated in relation to access to water, and asks for prioritizing vulnerable and marginalized groups such as children, women, ethnic communities as well as refugees, older persons, poor, rural and nomadic communities who suffer from scarcity or non-access to water resources and water supply. The Covenant thus proscribes any form of discrimination on any grounds and asks the State to take appropriate measures to facilitate and invest in water resources, in order to empower people in achieving the right to proper water and sanitation.

**37]** General Comment n° 15 pays special attention to women, people suffering from HIV/AIDS and ethnic communities. These constitute the most discriminated-against population

groups, due to their historic exclusion from decision-making processes.

**38]** In relation to children, Article 24 para. 2 of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition *‘through the provision of adequate nutritious foods and clean drinking water’*. Educational institutions should supply children with adequate drinking water and sanitation as a matter of urgency.

**39]** States should therefore provide sufficient water but also water facilities. In the case *City Council of Pretoria v. Walker*,<sup>15</sup> the Constitutional Court of South Africa analysed the non-discrimination clause in a decision related to water charges between different municipalities in South Africa. Mr. Walker, the respondent, resident in a white area called Old Pretoria, owed to the City Council of Pretoria, an amount of R4753.84. Without denying he owed the charges, he argued that the electricity and water charges were levied on a differential basis by the Council of Pretoria. He argued that the white area of Old Pretoria was differently charged in relation to the black, composed of the cities of Atteridgeville and Mamelodi. Indeed, the residents of Old Pretoria were taxed on a tariff based on actual consumption whereas residents of the black, poorly developed in terms of infrastructure for municipal services, were levied on the basis of a uniform rate (*flat rate*) for every household. Mr Walker argued that this differentiation meant that the residents of Old Pretoria were subsidizing the two cities. In addition, the council adopted a policy of selective enforcement against defaulters. The Council took legal action to recover arrears from residents of Old Pretoria but failed to take similar action in the townships, where a culture of non-payment for services existed.

**40]** The Court analysed whether the differentiation meant discrimination and concluded that in relation to the policies adopted, they were rationally connected to the governmental objectives, so no discrimination was implicit. However, the Court stated that the differentiation between black and white residents constituted an indirect violation of Section 8(2) of the Interim Constitution of South Africa, and called to mind that under apartheid differentiation was based in particular on geographic and racial grounds. The Court ruled that Mr. Walker was discriminated against as a racial minority. The Courts affirmed therefore that no racial group should be made to feel that the legal framework is likely to be applied against its members.

**41]** In Colombia, two decisions concerning the protection of displaced people and indigenous communities highlighted the necessity to elevate the status of the right to water to that of an autonomous right. Indeed, the Constitutional Court in the case **T-025 of 2004** affirmed the right of displaced people to have access to safe drinking water and sanitation on an

15. (CCT8/97) 1998 ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998).

equal basis. In the case **T-760 of 2008** urgent action was ordered to provide water access in a situation of malnutrition, which led to the death of several members of an indigenous community, including children.

#### ▶ WOMEN, WATER AND SANITATION

Generally, women are responsible not only for managing the water supply in households but also providing this supply. At the 2<sup>nd</sup> World Water Forum in The Hague (2000) it was recognized that, in addition to being prime users of 'domestic water', women used water in their key role in food production, and that women and children are most vulnerable to water-related disasters.

Restricted access means that women spend a large amount of their time collecting water, time which could be spent on income-generating activities or other family activities. Girls who are responsible for collecting water may be unable to attend school because of this duty. Collecting water may also be dangerous and expose women and girls to the risk of sexual and gender-based violence. In areas where water is only available in public settings, these should be properly lit and centrally located in the community, to avoid the need for women to enter unsafe areas. Women's central role in the provision of water means that they should also be involved in all decision-making processes involving water supplies for the community.

Cultural obstacles aggravate the situation, such as exclusion from land ownership, heritage law or structural composition of the community, which preventing women from being recognized as citizens with equal rights.

Unsafe water supplies also constitute a serious health problem. The absence of clean water significantly increases the impact of HIV/AIDS. Bad hygienic conditions affect women and men living with HIV who need healthy living conditions, including a safe water supply. Women affected by HIV/AIDS are not able to walk long distances to collect water and are more exposed to additional diseases.

Sexual and reproductive health is also directly related to sanitation and water issues, and can be affected by infections transmitted by unsafe water.

**42]** NGOs have a role to play in advocating for a comprehensive anti-discriminatory legal framework, monitoring the provision of legal remedies, and promoting the design of targeted public policies that refrain from discrimination.

## 5. LIMITS TO THE RIGHT TO SAFE DRINKING WATER AND SANITATION

**43]** Misunderstandings in relation to the content on the right to water and sanitation and its related State obligations, as well as economic and profit motives impede its total recognition as an autonomous human right. Indeed, in different national legal frameworks, the right to water is still linked to the right to life, to an adequate standard of

living and to adequate food, but not as a human right with freedoms and entitlements. There is therefore an urgent need to advance its recognition and inscription in constitutional and legal frameworks.

**44]** Recourse to the courts is only one of several means to implement the right, since administrative measures and public accountability should lead to its fulfilment, implementation and dissemination as a human right.

**45]** The **privatization** of water services has been controversial since water supply, especially for basic needs, has been identified primarily as a public good. Privatization often relies on market profit and commercial priorities rather than the respect of human rights. Privatization often results in reduced access to basic social services by the poor living in slums and squatter settlements. When effective it improves sanitation, but results in an increase in tariffs. Higher prices for water mean the poor have to use less or go without. It might also lead to interruptions of the supply or to deterioration in the quality of water.

**46]** The **privatization of services** does neither presume that the State is no longer responsible for the fulfillment of rights, nor that its primary responsibility has been substituted for by a private entity. The State continues to be primarily accountable and responsible for the progressive realization of the right even when the provider of the service remains responsible. Privatization cannot reduce accountability and local control. There is a need to strengthen participatory monitoring mechanisms, as it is extremely difficult to reverse privatization once implemented. For this reason, the respect of human rights should be incorporated into privatization processes and services in order to maintain inclusion, participation and quality of services, and increase welfare.

**47]** Examples of participatory monitoring systems applied to privatization are increasingly effective. For example, the **case of the privatization of water services in Cochabamba**, Bolivia, during the so-called 'Water War' of 2000, clearly showed how privatization became a burden for low-income families, who were not able to pay the charges after receiving bills double and triple their former amount. Following civil society protests, media involvement and the significant participation of women, civil society rejected the water law formulated by the government, and asked for the modification of Bill 2029 on *Drinking Water and Sewage Law* and the revocation of the contract with the private company.<sup>16</sup> Civil society movements succeeded.

**48]** The case of the Indian NGO Tarun Bharat Sangh (TBS) in the state of Rajasthan in India is a good example of how the community participation can improve people's lives. The NGO

16. For more information see: Juan Barrera Cordero, *La Guerra del Agua en Cochabamba*, en *Investigación Ambiental*, 2009, I (1), pages 91-100, available at: [www.revista.ine.gov.mx/article/viewFile/22/17](http://www.revista.ine.gov.mx/article/viewFile/22/17).

supported the villagers by providing water services linked to big dams. Villagers were able to eat several times a day (rather than just once), and women had the opportunity to contribute to community life with less time-consuming tasks. People of the community were also taught how to conserve water and use rainwater harvesting. The NGO has motivated a social and environmental transformation at low cost for the farmers of the region.

- Integrate a gender perspective in water issues
- Create public policies congruent with the elements of the human right (availability, accessibility, affordability and quality of water) and with special emphasis on non-discrimination and equal protection
- Share appropriate knowledge and technologies
- Encourage the participation of stakeholders, water user associations and experts, women, and NGOs in the planning, management and conservation of water
- Increase international aid, especially for those countries who suffer from lack of access to safe drinking water and sanitation.

## 6. STRATEGIES FOR JUSTICIABILITY

**49]** The following actions aim to increase effectiveness in the implementation of the right to safe drinking water and sanitation. The role of grass roots organizations in this respect is crucial, as independent actors with a strategic role to play between communities and the supply provided by public and private actors:

- Draw up short, medium and long-term strategies for guaranteeing the right to access safe drinking water and sanitation
- Update water regulations
- Include the right to access safe drinking water and sanitation in all institutional documents, laws and strategies as an enforceable right
- Integrate the issue of cultural diversity in water management

### End Water Poverty

**End Water Poverty: sanitation and water for all**, is an international campaign led by the NGO Water Aid, and driven by a growing coalition of like-minded organizations, that calls for immediate action for the benefit of the poorest and most vulnerable people, including disabled people, older people and women. It argues that access to affordable services is a fundamental right. The campaign relies on key principles for the eradication of poverty, the sustainability of services, the accountability of governments to their citizens and equal distribution. It highlights the roles of water, sanitation and hygiene education as key building blocks for development and seeks to achieve real policy change to improve the lives of developing communities globally.

For more information see: [www.endwaterpoverty.org](http://www.endwaterpoverty.org).

### EXERCISES

- 1) Kindly analyze the legal framework on the right to water in your country: who holds water rights? And who enforces them? Please develop.
- 2) What is water scarcity? How to balance the daily increasing demands with the limited supplies in terms of fulfillment the right to safe drinking water and sanitation?
- 3) Analyse the assertion *“Water scarcity is responsible for the internal displacement of millions of people through water conflicts and environmental conditions such as drought”* in light of the so called *“cluster approach”*.

# The right to enjoy the benefits of scientific progress and its applications

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### 5. Strategies for justiciability

# THE RIGHT TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND ITS APPLICATIONS



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Each day the world becomes more interconnected, a transformation accentuated by the speed of modern globalization. Science and technology play a central role in global and local linkages and advancements. Science and its applications have transformed our understanding of the world we inhabit and the ways in which we live in it. The right to enjoy the benefits of scientific progress and its applications seeks to ensure equitable distribution of the knowledge and tools that impel social advancement. At its essence it is a powerfully egalitarian proposition that comprises both individual and collective dimensions. These dimensions, in turn, create entitlements that require significant international cooperation in relation to the sharing of the knowledge, technical advancements and scientific resources necessary for this right to be fully realized. Until recently, neither the scientific nor human rights communities had given this right much consideration; however, its implications are now being investigated and its potential discussed.

## 1. DEFINITION OF THE RIGHT TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND ITS APPLICATIONS

**1]** The right to enjoy the benefits of scientific progress and its applications is expressly granted under international human rights law. It is specified in both the Universal Declaration of Human Rights<sup>1</sup> (Article 27) and in the International Covenant of Economic Social and Cultural Rights<sup>2</sup> (Article 15(1)(b)). To date, it is a right that has carried little weight in political decision-making or the human rights movement, apart from mention in international instruments concerning genetic data, biodiversity and states' economic duties: for example, Articles 9 and 13 of **The Charter of Economic Rights and Duties of States**, adopted by the UN General Assembly on 12 December 1974; Article 19 of **The International Declaration on Human Genetic Data**, passed by the UNESCO General Conference on 16 October 2003; and Article 15 of **The Universal Declaration on Bioethics and Human Rights**, passed by the UNESCO General Conference on 19 October 2005.

**2]** Article 27 of the Universal Declaration of Human Rights (UDHR) contains two paragraphs related to science. The first stipulates that everyone is entitled to share in scientific advancement. The second deals with the rights of scientists to the protection of their moral and material interests in any discovery or development they make or produce.

**3]** Following the UDHR, the International Covenant of Economic Social and Cultural Rights (ICESCR), legally speaking the strongest enumeration of state obligations concerning such issues, recognized that it is the 'right of everyone to enjoy the benefits of scientific progress and its applications'. Here, the right is linked with two other provisions on intellectual property and cultural participation.

**4]** There have been few substantial attempts to interpret the right to enjoy the benefits of scientific progress and its applications. The lack of a consensus as to what the right to scientific benefits entails has made, and continues to make, implementation difficult. However, the neglect of the right can be juxtaposed with its potential to reshape research agendas and development programmes and, in general, to do much good.

**5]** Under the auspices of UNESCO, three expert meetings have taken place on the right. These meetings have reflected upon the role such a right plays in today's world which is dependent

1. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217A(III).

2. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations.



upon science and technology.<sup>3</sup> The most comprehensive analysis of the right took place at a meeting in 2009 and produced the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications.

**6] The Venice Statement** holds that the right to enjoy the benefits of science is applicable to all fields of science and its applications. Therefore, scientific progress in pharmaceuticals, agriculture, food production, space engineering, environmental management, electronic communication and all other fields of science are to be shared with everyone. Furthermore, **the Venice Statement** proclaims that the right to science is a right that can be enjoyed both individually and **collectively**. An example of an **individual** entitlement could be the access to pharmaceutical facilities. A collective entitlement in an environmental setting could be where a development project is proposed for an area previously unexposed to development. Here, the local community would hold a collective entitlement to knowledge gained through environmental as well as public health impact assessments, based on scientific knowledge of how industrialization is impacting human and environmental health.

**7]** The convergence of the right to scientific benefits, protection of intellectual property and the entitlement to participate in culture seems to make an unusual and uneasy partnership. The tension between a collective entitlement to scientific benefits and the individual ownership provided for by intellectual property regimes is one example of the seeming peculiarity in grouping these provisions. There is therefore a need for deeper reflection upon these issues. The grouping perhaps indicates that the right to science could be used to influence and modify intellectual property law to be more considerate of human rights implications. It should be noted that none of these rights are absolute and that they must be balanced against other human rights obligations.

**8]** The right to science embodies the idea that progress leads to improved social conditions and therefore requires that the applications and benefits created by scientific progress be shared with everyone, not just those who contributed to the developments.

**9]** The terms of the right which are important to any construction of a definition are:

- a. Science.** The search for discovery of new knowledge as an end in itself sets scientific research apart, and has been used to differentiate between science and other areas of culture and innovation.
- b. Its applications.** Controversially, the applications of science today are commonly viewed in terms of technology. The distinction between technology and application is arguable; however, some in the scientific realm assert

that technology is distinct from science as it uses existing knowledge to develop solutions to practical problems with the aim of seeking profit. As such, some may argue that technological developments are not covered by the right to science. Most advocates agree, however, that such a limited interpretation cannot apply and technological developments should be included within any definition of 'its applications' when considering the right to science. The UN Committee on Economic, Social and Cultural Rights (the UN Committee) is yet to provide guidance on the issue.

**c. Enjoyment of the benefits.** These are understood to be material benefits that can be enjoyed by individuals in day-to-day life. To construct an exhaustive list of all benefits brought by science and its applications would be virtually impossible. Generally, benefits from scientific progress can be either direct or indirect and arranged into three broad groups: short-term, long-term and public benefits.

**Short-term benefits** include upfront payments or employment and research opportunities available to communities or participants involved in the scientific endeavours. For example, if the development of biological resources, such as nutritional products, is conducted in accordance with the right to science, then the members of local communities should be trained and substantively participate in the development processes, resulting in another short-term benefit – improvement of in-country technical and institutional capacity.

**Long-term benefits** that are not public benefits normally occur when a successful application is derived from research. In this instance, intellectual property rights generally result and bring monetary gains. This can also result in income from cultivation and supply of material. However, under the current economic structure access to successful applications for marginalized nations, communities and individuals have been difficult to secure. The main barrier is cost which restricts access to a beneficial scientific application. The right to the benefits of scientific progress could therefore be utilized to reinforce calls for more equitable access to medicines and seeds for small-scale agricultural farming.

The **public benefits** of science, such as the development of medicines to address disease, better infrastructure, and machinery to improve water management, food production and protection against natural disasters and so on, should be enjoyed by all under the right to science.

**10]** The right to the benefits of scientific progress should also be defined in terms of setting the agenda for scientific progress. That is, the needs of the marginalized, poor and those traditionally excluded from science should be placed on the research and development agendas of scientific communities in a meaningful, participatory and engaged manner to ensure that the benefits of science hold **practical** benefits for their lives and assist in poverty eradication.

3. Amsterdam (2007), Galway (2008) and Venice (2009).

## 2. NORMATIVE CONTENT

**11]** In spite of difficulties encountered in evolving a definition of the right to the benefits of science, discussions concerning the normative content of the right have begun. Any discussions or hypothesis on normative content should consider the fundamental principles of human rights, in particular non-discrimination, with the aim of fostering the development of an enabling and participatory environment for scientific progress, which would ensure protection from abuse and the adverse effects of science and its applications.<sup>4</sup>

### a. Progressive realization

**12]** The belief that communities can attain respect for all human rights through economic, scientific and social progress is a strong, recurring theme in the ICESCR, reflected in the principle of **progressive realization**.<sup>5</sup> States obligations are to be achieved incrementally by drawing upon the maximum of a nation's available resources.

**13]** The right to the benefits of science embodies the idea that progress leads to improved social conditions and therefore requires the applications and benefits created by scientific progress to be shared with everyone, not just those who contributed to the developments. Scientific developments or applications that can greatly improve social conditions should therefore be **adapted** to become **available, accessible** and **appropriate** so that everyone can enjoy the benefits. Otherwise minority and marginalized communities are left behind.

**14]** One area where scientific progress could be adapted is electronic communication and technologies. At present, under 30 per cent of the world's population has access to the internet and computer technology. Computer illiteracy is also a barrier to obtaining employment. There is therefore a need and indeed an obligation under the right to the benefits of science, for nations to assist in surmounting the cost of such technologies so as to make them accessible to and appropriate for communities affected by poverty. Programmes need to be developed and implemented that consider the notion of 'available resources', and which also ensure that segments of society are not excluded from enjoying the right.

**15]** In high to middle-income countries programmes should be implemented to ensure that indigenous, immigrant and rural communities have access to computer technologies. In countries where access to computer technologies is low, programmes need to draw on available resources to increase

general access and availability. The *Hole-in-the-Wall project*, for example, refurbishes old computers and installs them along with free internet access in disadvantaged communities in rural India to allow residents to gain computer and internet skills.<sup>6</sup>

**16]** International technical assistance is also emphasized in the ICESCR and should be used to bolster poorer nations' access to the benefits of scientific progress and assist in progressive realization. Richer nations should develop or assist the development of low-cost alternatives for communications and computer technologies, so as to increase their use in poorer nations. Such developments are occurring on an individual level. For example, the founder and director of the Massachusetts Institute of Technology (MIT) Media Laboratory, Nicholas Negroponte, has developed a laptop at very low production cost. The laptop incorporates solar power and other technologies to neutralize the cost of use so that the poorest families can gain access to computer technology.<sup>7</sup> Steps to establish national frameworks and international partnerships to secure and share such developments would be advocated by the right to science.

### b. Science and human rights principles

**17]** The right to enjoy the benefits of scientific progress must be interpreted and applied consistently with fundamental human rights principles, such as **respect for human dignity, non-discrimination, gender equality, accountability** and **participation**, and with particular attention paid to the needs and position of disadvantaged and marginalized groups.

**18]** Human dignity, in relation to interpreting the right to the benefits of scientific progress, can be used both as a standard for scientific research to ensure informed, autonomous consent is obtained and as a constraint regarding scientific policy.<sup>8</sup> Governments must therefore appraise the implications of development and availability of science and technology on **human dignity**. Such appraisals should consider the frameworks of distribution of positive contributions and protection from damaging or dangerous repercussions. Indeed, science can constitute a challenge or an affront to human dignity (for example, during the Second World War when scientific experiments were performed on political and civilian prisoners).

**19]** An area of scientific progress that has received significant international attention is research involving the human genome. Civil society and some national governments have raised serious concerns about the possibility of discriminatory practices in and around genetic research and development. As a result of growing concerns UNESCO prepared the

4. The Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, can be accessed through the United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, France: UNESCO (2009). (Venice Experts' Meeting Report).

5. ICESCR Article 2(1); The United Nations Committee on Economic Social and Cultural Rights (General Comment n° 17) paras 25–27.

6. Details of The Hole-in-the-Wall Project can be found at [www.hole-in-the-wall.com/about.html](http://www.hole-in-the-wall.com/about.html).

7. Details of the project can be accessed at <http://one.laptop.org>.

8. A.R. Chapman, 'Towards an understanding of the right to enjoy the benefits of scientific progress and its applications', *Journal of Human Rights*, 8 (2009) p. 12.

**Universal Declaration on the Human Genome and Human Rights** to provide parameters for this new scientific field. The Declaration underscores the importance of all genetic research being conducted with respect for human dignity and freedom and in compliance with human rights.

**20]** When advocating for the right to the benefits of scientific progress, a central argument is that the right requires that **precaution** be exercised when researching, developing and distributing scientific endeavors, so as to be as certain as possible that negative and harmful impacts that undermine a person's dignity do not occur, particularly in already marginalized communities.

**21]** The right to enjoy the benefits of scientific progress and its applications applies equally to everyone, without discrimination of any kind. Achieving equitable access to the opportunity to benefit from science is therefore central to the realization of the right. In order to practice the right in a **non-discriminatory** manner, both protective measures prohibiting discrimination and active measures such as positive discrimination for groups traditionally excluded from scientific endeavors must be taken.

**22]** The UN Committee has provided explicit and repeated guidance emphasizing that the realization of every human right must be sought with **special attention paid to women, minorities, the poor, indigenous peoples, rural and remote communities and other disadvantaged groups**. The right to the benefits of scientific progress must therefore be interpreted to ensure emphasis is given to:

- (i) the needs of these groups in particular, especially in the setting of research agendas
- (ii) ensuring access and distribution of the benefits and application to these groups, and
- (iii) creating opportunities for participation and involvement in science at an individual and community level for these groups.

**23]** The **UNESCO L'Oréal Awards for Women in Science** encourage and recognize women's contributions to scientific progress. Since 1998, five awards are presented annually to outstanding women researchers who have contributed to scientific progress. The awards alternate biannually between life and material sciences, across five regions (Africa and the Middle East, Asia-Pacific, Europe, Latin America and the Caribbean and North America). In addition, fifteen young female scientists employed in exemplary and promising research projects are awarded two-year fellowship funding. Similarly targeted programmes are urgently required if the right to the benefits of scientific progress is to be fulfilled in a non-discriminatory manner.

**24]** **Participation** is a key element in all human rights. It is a means of empowering individuals and communities and

a tool that increases accountability. In relation to the right to science, participation translates into societal involvement (at the least) in setting priorities for and the planning of scientific progress. UNESCO advocates the use of a more inclusive relationship dynamic to involve and empower people and communities in decisions about science and technology priorities and policies. Such changes to social governance could utilize scientific advancements such as the internet and mobile phone applications to raise and discuss issues in a public, transparent and accountable forum.

**25]** Natural resource management is a contemporary and rapidly evolving arena where scientific research is fundamental to public policy, corporate actions and the quality of life, enjoyed by each of us. Community participation is a growing phenomenon that draws upon a collection of international legal instruments from both human rights and environmental law. The development of **prior free and informed consent** as a requirement before development or industrial activities take place on indigenous lands is one embodiment of the principle of participation. However, the quality of community participation must be examined and protected. The magnitude of natural resource use and management across the globe should not distract from endeavors to focus on details of local human rights enactment in an environmental context.

**26]** The right to the benefits of scientific progress could play a protective role in securing meaningful community engagement with natural resource management, ensuring that communities gain access to the latest scientific knowledge to throw light on the impacts of coal, mineral or diamond mining, oil drilling or logging of carbon dense forests. Such a development would strengthen arguments for precaution in proceeding with short-term, rapid, industrial development where the environmental consequences are uncertain.

### c. A human rights-based approach to science

**27]** It is the nature of basic scientific research that it generally directs science toward the pursuit of knowledge and not the objective of human betterment.<sup>9</sup> Yet inside the paradigm of human rights the re-orientation of the sciences towards consideration of the disadvantaged can occur. It is a commitment the international community has already made, in pledging to end discrimination and vowing to realize human rights via the UN Charter and other international human rights instruments. As long as all the guiding principles established for scientific research and development respect the necessities for scientific freedom, being freedom of movement, association, expression and communication (which are all respected and protected human rights in-and-of-themselves), as well as access to data, information and

9. A.R. Chapman, 'Towards an understanding of the right to enjoy the benefits of scientific progress and its applications', *Journal of Human Rights*, 8 (2009) p. 7.

research materials, then the right to science will serve as a positive influence in re-shaping the way our world progresses.

**28]** In the modern era, scientific research is split between publicly funded institutions and private enterprise, with the majority of research and development occurring inside big business. This structure leaves out the needs of the poor and other marginalized groups. The sheer cost of research and development has been a driving factor in the industrialization of science, which has seen state contributions to science level off or diminish and often become focused on military developments. Secrecy and property rights therefore hold ever-increasing importance in the world of science. Critical research in areas of health, agriculture, environmental management and development of appropriate technologies are neglected because they do not present lucrative pursuits. The right to the benefits of scientific progress should be interpreted to give precedence to researching applications which assist the disadvantaged and contribute to the fight against poverty.

**29]** Incorporating a human rights approach to innovative thinking is not as difficult as it may first seem. The main prerequisites are awareness and time. For example, Google engineers are directed to spend 20 per cent of their time working on things about which they are passionate.<sup>10</sup> If even only 5 per cent of that time was to be devoted to projects that could contribute to the promotion of human rights, then perhaps technological advancements would be more applicable, available and appropriate for the world's poor and disadvantaged. The possibilities for achievement could increase even further if such projects were to be rolled out across the scientific professions.

**30]** At the global level, implementation of the right to the benefits of scientific progress requires the introduction of a human rights-based approach to agenda-setting for science research and development. Currently, the national budgets of states in the Global South are small and often dependent upon aid for the delivery of social programmes. These nations do not have the means to invest in the infrastructure, technical training and educational and human capital necessary for high-level scientific research. The implementation of the right on a global scale would mean that southern Asian and African nations – likely to be most affected by increasing water shortages, growing levels of desertification and salinization of crop lands – would hold an entitlement to the technologies developed, which could contribute to lessening their environmental afflictions. Furthermore, under the right intellectual property constraints of such technologies should be moderated to allow for free or low-cost access as, on balance, human rights imperatives to enable immediate use outweigh the property rights of creators.

**31]** Translating the promise of human rights into

scientific targets has already occurred in relation to the implementation of agendas for the Millennium Development Goals (MDGs). **MDG 7(c)**, to halve the proportion of people without sustainable access to safe drinking water and basic sanitation, represents one such instance.<sup>11</sup> Setting similar agendas in relation to the broader human rights spectrum is a necessary step to guiding development projects. For example, a plausible target in relation to health aid funding would be that the right to the benefits of scientific progress dictate that vaccinations not requiring cold-chain storage be chosen over vaccinations that require controlled, continuous refrigeration.

**32]** Scientific freedom is not and never has been absolute; it is currently constrained by Intellectual Property (IP) law, economic imperatives and political power. The restrictions upon the inquiries of science and motivations behind scientific progress are contorting research and development away from a human rights approach with concerning results.

### 3. CORE OBLIGATIONS

**33]** In relation to the right to enjoy the benefits of scientific progress, the core minimum obligations are grounded in scientific policy, legal and social management of knowledge resources, and identification of accountability for violations. Other economic, social and cultural rights can be grouped into the obligations of a state to **respect, protect and fulfil**. The trichotomy of obligations includes both national and international aspects.

**34]** The obligation to **respect** human rights attaches to all laws, institutions, offices and branches of state parties to human rights treaties. In this regard, states which have ratified the ICESCR must ensure that their laws and policies respect the freedom necessary for scientific research to occur both individually and collectively. Any interference by the government that constrains or ideologically constructs research should be limited to promoting the quest for socially beneficial applications, and needs to comply with the general principles prescribed for imposing limitations upon a human right. The interference/restriction must:

- (i) be prescribed by law
- (ii) be necessary in a democratic society
- (iii) meet specific objectives such as protection of public morals, public safety or national security, and
- (iv) be a proportionate response imposed in the least intrusive manner.<sup>12</sup>

10. Google Corp, 2009, electronically accessed.

11. See [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals).

12. ICESCR Article 4; General Comment n° 17 para. 22.

**35]** Any measures that prevent the release of research because it conflicts with political decisions of the state would constitute a **violation** of the right to science. An example of such behaviour occurred in Mexico when the government sought to prevent the publication of research exposing environmental concerns about toxic dumping occurring under the auspices of the North American Free Trade Agreement (NAFTA).<sup>13</sup>

**36]** The freedom to communicate between scientists is essential to scientific progress. Computer and electronic communication has greatly increased the abilities of scientists to communicate, however physical travel is sometimes necessary. Authoritarian and democratic governments alike have been guilty of refusing to allow scientists to exit or enter into their country. This prevents the presentation of scientific views at meetings and conferences and quashes collaboration between scientists at various research institutions. An example of this is the hostility and difficulties Cuban scientists have encountered in obtaining permission to enter the United States.<sup>14</sup>

**37]** A more controversial aspect of controlling scientific investigation and progress is the role intellectual property (IP) regulations play in restricting the sharing of data and in thwarting cooperative innovation. The negative impacts/influences that IP law has on human rights form an ongoing debate. The debate is complicated by the cost of scientific research, predominately borne in contemporary society by the private sector, and the prominence given by the international community to private international trade activities as a means of economic development. At a minimum, however, the law should hold that IP rights, which are not absolute, must not be implemented in a manner that breaches human rights.<sup>15</sup>

**38]** The obligation to **protect** applies both to **acts of commission** and **acts of omission**. Therefore a state is obliged not to commit an act which violates the right to science, but must also take steps to prevent third parties from committing such a violation. The state's obligation to protect against development of harmful applications of scientific knowledge or the utilization of science to the detriment of human rights, fundamental freedom or human dignity,<sup>16</sup> at first seems to be simple and uncontroversial. However, the practicalities concerning such a duty become more complicated when determining how to apply it to inherently harmful technologies such as weaponry and other military machinery.

**39]** The core obligation to protect could therefore require the enactment of the precautionary principle. 'Precaution is a strategy for addressing risk ... [which] necessitates

the capacities to identify hazards and opportunities, to forecast scenarios and their associated outcomes, and to take anticipatory measures to manage causes before adverse outcomes occur'.<sup>17</sup> In short, precaution requires contemplation, assessment and planning for all adverse scenarios, and where there is high likelihood of an adverse outcome it seeks to restrain and amend behaviour. Therefore, the right to scientific progress could require that statements of compatibility or assessments of implications for human right, be conducted before a scientific research and development operation takes place.

**40]** Fulfillment of the right to enjoy the benefits of scientific progress requires first and foremost an explicit commitment to the development of science and technology for the benefit of humankind. In this regard, a state could draw on **the Venice Statement**. A state could then adopt legal and policy frameworks which promote the diffusion of science and its applications. Here, transnational obligations contained in the right to science again arise. The belief that science should be used for beneficial ends for all people is the basis of the right to the enjoyment of scientific progress and its applications, creating a common goal. It is a goal all Member States to the United Nations have agreed to indirectly by pledging to the aims of promoting peace, development, higher standards of living, and universal respect for human rights in the UN Charter. States that have ratified the ICESCR have directly and explicitly agreed to work towards such a goal.

**41]** The core obligations to **fulfil** require that significant cooperative efforts be made between nations, regions, private and public sectors. The fundamental human rights principles of participation, non-discrimination and protection from abuse and adverse effects must shape the implementation of the right to the benefits of scientific progress. Attention must be given by all actors particularly to the needs of the most vulnerable, who often bear the uneven brunt of damaging effects caused by progress and technology. The design of development assistance programmes must therefore incorporate securable access to beneficial scientific technologies. Arguably, under such obligations, companies should provide beneficial technologies at cost to poorer communities, or pass on the necessary scientific information to enable generic production.

**42]** The **transnational obligations** and extraterritorial influence of the right to scientific progress, can be used to guide not only the research agendas of environmental science and climate change, but also govern the distribution of technologies developed to address the problems. The right to the benefits of scientific progress is a human rights elucidation of the principle of common but differentiated responsibilities. It captures the reality that not every nation

13. Audrey R. Chapman, 'Towards an understanding of the right to enjoy the benefits of scientific progress and its applications', *Journal of Human Rights*, 8, pp. 1-36 (2009).

14. For more information see <http://shr.aas.org/rtt/report/one.htm>.

15. General Comment n° 17 para. 2.

16. The Declaration on the Use of Scientific and Technological Progress (1975) Article 8.

17. J.B. Wiener, 'Precaution', in D. Bonansky, J. Brunnée and E. Hey (eds) *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007). p. 598.

will have the resources and advantages of scientific progress to assist in easing the burdens of environmental predicaments and realizing human rights. Therefore, the right needs to supercede national patent and IP laws and regulations when the applicable innovations/technologies are essential to preventing or alleviating human rights failures within the environmental context.

**43]** Such problems disproportionately impact the poor, who have the least means to adapt or develop. Environmental problems are also expected to increase and are unlikely to be resolved quickly. Significant investments, both financial and political, therefore, need to be made in the area of environmental sciences. From a **human rights-based approach**, it is imperative that the agenda be set from a needs-based perspective, to prioritize those without the ability to move from barren lands, or without the resources to gain food, water, shelter or income from any means other than the lands on which they live.

**44]** Such action is reflective of the obligations to protect and fulfil the right to scientific progress. A dynamic understanding of the right to science, encompassing contemporary financial and environmental truths, recognizes the difference in the contributions various nations and communities can make to scientific progress; however, each is part of a common aim – the progress of humankind.

#### ► CORE OBLIGATIONS

##### Respect:

- Respect and enable the freedoms indispensable for scientific research
- Respect scientific and academic autonomy
- Respect and enable scientific collaboration
- Ensure measures are taken to minimize the use of science in a manner which is inconsistent with the enjoyment of other human rights.

##### Protect:

- Prohibit acts of commission and omission which violate the right to science
- Regulate the behavior of third parties in the field of scientific research to protect against exploitation of research participants
- Require that all research participants give free, prior informed consent
- Recognize that the risks presented by technologies vary across and within societies
- Acknowledge that globalization carries significant implications on scientific endeavors and consider how to ensure a more equitable distribution of the benefits and minimize the negative impacts affecting those communities afflicted by poverty.

#### [Core Obligations]

##### Fulfil:

- Make explicit commitments to the right to science and adopt a policy framework to promote the equitable diffusion of science and technology
- Develop national plans to redirect scientific research and development agendas
- Prioritize the needs of the poor and disadvantaged
- Establish and secure strong and inclusive scientific education programmes
- Enable science to engage positively with all segments of society.

## 4. HUMAN RIGHTS

**45]** The **Vienna Declaration** asserted that all human rights are ‘universal, indivisible, interdependent and inter-related’.<sup>18</sup> The right to enjoy the benefits of scientific progress is intimately connected with a number of other human rights. Academic and scientific freedom must be granted along with freedom of expression and the right to seek, receive and impart information, in order for scientific investigation and progress to be made. An example of a violation of these rights occurred in Serbia in 1998 when the Serbian Parliament enacted a law that gave the government control to appoint rectors, deans and the governing boards of all public universities without input from university faculty. All faculty members were required to sign new contracts, nullifying existing employment agreements, including tenured positions. Academics who expressed views that criticized or opposed the government were summarily dismissed.

**46]** The importance and influence of scientific investigative processes and thinking in today’s world is paramount. The right to science and the right to education mandate the provision of effective opportunities for individuals from disadvantaged social position to access scientific education and institutions. At the individual and educational level aggressive steps should be taken to ensure that all science students are informed and trained to understand the complexity of the bond between science and human rights. A small number of scientific schools have started such programmes, for example, the ‘Science in the Service of Human Rights’ course run at Princeton University.<sup>19</sup>

**47]** The right to development is also intimately linked to the right to science. A basic example is sanitation, the

18. Vienna Declaration and Programme of Action, 1993, para 5.

19. The course outline can be found at [http://shr.aaas.org/coalition/syllabi/general/Claude\\_2002.pdf](http://shr.aaas.org/coalition/syllabi/general/Claude_2002.pdf).

increased provision of which has been set as MDG 7(c). Science and technology can play a major role in addressing sanitation difficulties. Research and development involved in the natural sciences, engineering, renewable energy and water services can all provide the scientific applications to improve excrement disposal and treatment, and also minimize the use of water in improved sanitation facilities, especially as water scarcity increases. The research and development being undertaken by corporations, in treating and purifying wastewater, is a prime example of where cooperation with governmental programmes could contribute greatly to rapid improvement of the world's water management and use. Better sanitation builds a healthier population who can spend more time making economic contributions to a community rather than fighting disease.

#### ▶ HEALTH, HIV-AIDS AND SCIENTIFIC PROGRESS

The right to health is closely linked to the realization of the right to enjoy the benefit of scientific progress and its applications. This human right is perhaps the less known of all human rights but is, paradoxically, the more and more pertinent in our technologically-driven society. Many important developments in biotechnology, bioethics and biology have improved techniques to prevent, treat or cure a wide variety of diseases. However these developments have neglected diseases which primarily affect people living in poverty in developing countries.

The ICESCR imposes in relation to the right to health, an obligation on States to take steps necessary for: "the prevention, treatment and control of epidemic, endemic, occupational and other diseases" (Article 12 (2)(c)). And to give effect to the right to enjoy the benefits of scientific progress, States have an obligation to: "take steps necessary for the development and diffusion of science." (Article 15). States are therefore asked to support the development and diffusion of science for the prevention, treatment and control of disease and to make essential drugs available in order to fulfil both human rights. This includes the role of private sector and pharmaceutical companies that have a corporate social responsibility (CSR) in order to ensure sustainable economic development. In relation to HIV-AIDS management for example, measures taken to increase availability and accessibility and awareness of HIV-AIDS for example are indispensable for enhancing awareness and acceptance of this disease in order to improve their quality of life and to facilitate and reinforce the commitment of the pharmaceutical industry with innovative solutions in order to fight against.

Some jurisprudence can be mentioned on this. The Court of the Bolivarian Republic of Venezuela granted an *amparo* action and stated the existence of a violation of the right to health and the right to benefit from scientific progress and its applications in a case related to people suffering from HIV-AIDS who had no social insurance and no economic capacity to provide themselves with special medication (*Cruz Valle Bermudez y otros c. MSAS s/amparo, 1999, Expediente n° 15.789 Sentencia n° 196*). The Court ordered the Health and Assistance Ministry (HAM) to supply to the applicants the drugs on a regular basis and order a preventive policy be developed and to correct the budgetary allocations to be given to people suffering HIV-AIDS.

#### [Health, HIV-AIDS and Scientific Progress]

As a consequence of this decision, and on the basis of the subsequent decision *López Glenda y otros c. Instituto Venezolano de los Seguros Sociales (IVSS) s/ acción de amparo, 2001, Expediente 00-1343, Sentencia N° 487*, the Venezuelan Health policy was modified.

**48]** There are also obvious links with the right to food and the right to health. The biomedical and bio-agricultural boom that has captivated much of scientific research and development over the last two decades must be balanced and modified by human rights perspectives to ensure that scientific progress does not again compromise human dignity. The results of the 'bio-boom' have been a rapid growth in the number of patents being placed on plant, genetic and other micro-organic data. A segment of business, with the aid of some scientists, has engaged in bio-prospecting in the search to discover the next natural alleviation for sunburn or 'revitalizer' for dry and damaged hair. The term bio-piracy has also been coined to describe the use of indigenous peoples' traditional knowledge, covering the possible uses of plants, other natural objects and DNA for commercial exploitation, without the appropriate consent being gained or the provision of adequate compensation.<sup>20</sup>

**49]** The experience of indigenous peoples from the Amazon concerning the patenting of the sacred Yagé plant highlights the problem of how IP regulations sometimes inhibit the enjoyment of the direct and indirect benefits of science. It can be further asserted that IP regulations (in this form) enable violations of human rights such as privacy and non-discrimination, as they fail to provide for collective ownership. In 1996, Loren Miller (a scientific researcher) was granted a patent over the Yagé plant after showing the difference between his sample of the plant and a variety growing naturally in Hawaii. However, the International Plant Medicine Corporation of the United States of America, who issued the patent, were not informed that the peoples of Amazonia had in fact been cultivating the variety 'invented' by Miller for generations.<sup>21</sup>

**50]** The right to the benefits of scientific progress is also central to developing means to address and overcome the environmental challenges and dilemmas increasingly being encountered across the globe. Litigation involving human rights and the environment is highly avant-garde in its attempts to secure protection of human dignity and environmental balance. Justiciability of economic, social and

20. A. Jacanimijoy, 'Initiatives for protecting rights holders of traditional knowledge, indigenous peoples and local communities', UN Doc. WIP0/INDIP/RT/98/4E, 15 July 1998.

21. R.P. Claude, 'Scientists' Rights and the human right to the benefits of science', in A.R. Chapman and S. Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp and Oxford: Intersentia (2002), p. 255.

cultural rights as well as environmental considerations has been difficult to secure and slow to advance.

**51]** The development of the **Maastricht Guidelines on Violations of Economic, Social and Cultural Rights**<sup>22</sup> helped greatly in providing guidance for structuring economic, social and cultural rights claims. Combining human rights with environmental concerns, has also proven to be a good litigation tool, drawing scientific evidence into the courtroom to establish the cause and apportion responsibility for human rights violations triggered by environmental changes. In its report on the relationship between human rights and climate change the International Council on Human Rights Policy (ICHRP) said: *Lawsuits draw attention to harmful effects that might otherwise remain below the public radar, put a name and face to the otherwise abstract suffering of individuals and provide impetus and expression to those most affected by the harms of climate change. They can thus mobilise public opinion in support of policy change.*<sup>23</sup>

**52]** Court cases involving the human impact of climate change effects will increasingly be brought before courts. This will force consideration of environmental science and human entitlements into courtrooms. Petitioners will identify the policy decisions of governments as being the acts that caused or contributed to the harm, from which they are seeking relief.

**53]** The leading international case in relation to this area is the **Inuit Case**.<sup>24</sup> This case was brought by a coalition of Inuit peoples from Canada and the United States before the Inter-American Commission of Human Rights. The petition was filed in December 2005, and called for 'obtaining relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States'.<sup>25</sup> Causation was a central issue during the hearing of the petition. The petitioners had to establish that government policy enabled and contributed to climate change – a complex allegation – if they were to be successful. Scientific knowledge would be essential to prove causation. During the public hearing the Commissioners questioned counsel for the petitioners repeatedly on the manner through which liability for a particular state could be established when other states acted in a similar manner. In effect, this line of questioning was seeking a delineation of the causal chain and guidance on the apportioning of fault. Scientific evidence is central to establishing the balance of probability on such delineation and apportionment.

22. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997.

23. International Council on Human Rights Policy, *Climate Change and Human Rights a Rough Guide*, Vernier: ATAR Roto Press (2008).

24. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada, (7 December 2005). The petition can be found at [www.earthjustice.org/library/legal\\_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf](http://www.earthjustice.org/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf) (consulted on 7 May 2010).

25. Ibid.

**54]** The right to enjoy the benefits of scientific progress is important in establishing, as the ICHR put it, 'complex causal chains that underline climate change harm'.<sup>26</sup> It is necessary that freedom of scientific investigation and information be protected. The ICHR asserted that despite not succeeding: *The Inuit case suggests how human rights tribunals might borrow, as they have done on other issues, from general principles of tort or civil rights litigation. For example, it is common in environmental litigation, where there are numerous polluters, for a court to shift the burden of proof and hold the defendant liable unless he or she can mitigate responsibility by proving the proportional liability of other wrongdoers. Under theories of joint and several liability, each wrongdoer is held responsible for the entire harm in some circumstances. Such doctrines serve to deter pollution by all and ensure greater likelihood of redress for victims.*<sup>27</sup>

This also demonstrates how scientific knowledge is central to understanding the impact of humankind upon the environment and apportioning responsibility for the harm caused.

## 5. STRATEGIES FOR JUSTICIABILITY

55. The right to science faces a number of obstacles in its implementation which contribute to difficulties in obtaining justiciability. Central to this is the lack of an agreed definition. There is therefore a need to construct a body of work that provides guidance on how the right is to be defined and interpreted. To this end the following actions are suggested:

- a. Advocate for a day of general discussion and the development and publication of a General Comment by the UN Committee on Economic, Social and Cultural Rights on the right to enjoy the benefits of scientific progress.
- b. Call for specialized agencies, such as FAO, ILO, OECD, UNDP, UNEP, UNICEF, WHO, WIPO, and other regional agencies to issue positions or statements on how the right to the benefits of scientific progress relates to their field of competence.
- c. Request directives and explanations from the European Union, WTO and other trade partnerships on how the right to the benefits of scientific progress is applied through their trade agreements.
- d. Advocate policies and plans as well as financial, macro and micro-economic strategies, across all levels of governance, that expressly consider the implications of scientific and technological progress within and between societies.

26. International Council on Human Rights Policy, *Climate Change and Human Rights a Rough Guide* (2008), p. 43.

27. Ibid. p. 41.



**56]** Civil society, especially those engaged in advocacy around health, water, housing, education, freedom of communication and sustainable development, can draw attention to the right to the benefits of scientific progress as a human right – rather than as benefits accessible only to those with the ability to pay. The following actions are recommended:

- a.** Lobby both public and private scientific research and development operations to prioritize the needs of the poor and marginalized in any scientific agendas, and ensure substantive community participation.
- b.** Encourage educational institutions to provide basic science classes and to discuss the relationship between science and human rights.
- c.** Build partnerships with scientific institutions to enable substantive community participation in research and development.
- d.** Raise awareness of the important role that science plays in development and addressing climate change, and advocate for the implementation of a human rights approach to the framing and roll-out of any assistance and research programmes.
- e.** In the context of preparation of shadow reports to treaty bodies, raise matters concerning violations or concerns around the implementation of the right to the benefits of scientific progress.

#### EXERCISES

- 1) How to develop an integrated method in order to tackle the emergence of a common responsibility approach as to sharing the benefits of scientific progress? Justify.
- 2) How to balance the complexity of accessing and sharing of scientific progress and its applications with the scarcity of resources? Justify.
- 3) How to balance intellectual property regimes and, in particular, intellectual property protection, with the necessity of encouraging and developing international cooperation in the scientific field?

# ANNEXES:

– 107 –

Optional Protocol to the ICESCR

– 113 –

Form to be sent to UNESCO by practioners and NGOs that would like to complete, add or update information

# OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The General Assembly adopted resolution A/RES/63/117, on 10 December 2008

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## *The General Assembly,*

**Taking note** of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

1. **Adopts** the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the text of which is annexed to the present resolution;
2. **Recommends** that the Optional Protocol be opened for signature at a signing ceremony to be held in 2009, and requests the Secretary-General and the United Nations High Commissioner for Human Rights to provide the necessary assistance.

## Preamble

### *The States Parties to the present Protocol,*

**Considering** that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

**Noting** that the Universal Declaration of Human Rights<sup>1</sup> proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

**Recalling** that the Universal Declaration of Human Rights and the International Covenants on Human Rights<sup>2</sup> recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

**Reaffirming** the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

**Recalling** that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) undertakes to take steps, individually and through international assistance and cooperation, 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 Covenant by all appropriate means, including particularly the adoption of legislative measures,

**Considering** that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

**Have agreed** as follows:

1. Resolution 217 A (III).

2. Resolution 2200 A (XXI), annex.

## Article 1 Competence of the Committee to receive and consider communications

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.
2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

## Article 2 Communications

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

## Article 3 Admissibility

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.
2. The Committee shall declare a communication inadmissible when:
  - (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;
  - (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
  - (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
  - (d) It is incompatible with the provisions of the Covenant;
  - (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
  - (f) It is an abuse of the right to submit a communication; or when
  - (g) It is anonymous or not in writing.

## Article 4 Communications not revealing a clear disadvantage

The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

## Article 5 Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

## Article 6 Transmission of the communication

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

## Article 7 Friendly settlement

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

## Article 8 Examination of communications

1. The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.
4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

## Article 9 Follow-up to the views of the Committee

1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

## Article 10 Inter-State communications

1. A State Party to the present Protocol may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under the present article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under the present article shall be dealt with in accordance with the following procedure:
  - (a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
  - (b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
  - (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;
  - (d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;
  - (e) The Committee shall hold closed meetings when examining communications under the present article;
  - (f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

- (g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:
  - (i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
  - (ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## Article 11 Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.
2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15 of the present Protocol.
8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

## Article 12 Follow-up to the inquiry procedure

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 11 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

## Article 13 Protection measures

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

## Article 14 International assistance and cooperation

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.
2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.
3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.
4. The provisions of the present article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

## Article 15 Annual report

The Committee shall include in its annual report a summary of its activities under the present Protocol.

## Article 16 Dissemination and information

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

## Article 17 Signature, ratification and accession

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## Article 18 Entry into force

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

## Article 19 Amendments

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at

the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

### Article 20 Denunciation

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 2 and 10 or to any procedure initiated under article 11 before the effective date of denunciation.

### Article 21 Notification by the Secretary-General

The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 19;
- (c) Any denunciation under article 20.

### Article 22 Official languages

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.

Source: [www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf)



# FORM

## SUGGESTIONS FOR IMPROVING THE MANUAL

# EMPOWERING THE POOR

Through Human Rights Litigation

Manual

Name: \_\_\_\_\_

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In the teaching of which subjects did you mostly used the manual?

\_\_\_\_\_  
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\_\_\_\_\_

What sections of the Manual did you find more interesting and useful?

\_\_\_\_\_  
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What recommendations would you make for the revision or update of the manual?

\_\_\_\_\_  
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Is there any theme that you would like to add or modify?

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Is there any information or resources you would like to provide to this manual?

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Further comments and suggestions:

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Thank you

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Tel : +33 (0)1 45 68 46 38

Email: [M.Abderrahmane@unesco.org](mailto:M.Abderrahmane@unesco.org)

Fax: +33 (0) 1 45 68 57 26

This manual is a response to the Millennium Development Goals (MDGs) adopted by the United Nations Assembly in 2000 and particularly the first objective of halving extreme poverty and hunger by 2015. It offers tools for grassroots organizations advocating human rights on behalf of all people.

The examples gathered worldwide connect policy-oriented action and legal decisions at local, national and regional levels. The manual seeks to empower the most vulnerable and marginalized groups of society through access to their basic human rights. It is designed to stimulate dialogue among state authorities and civil society, and provoke exploration of innovative ways to achieve the recognition and fulfilment of human rights for all stakeholders.

The manual also offers inspiration for the development of new strategies and approaches to extend and strengthen state capacity and civil society action in the fight against all forms of discrimination and exclusion worldwide.

*Maritza Formisano Prada is a Colombian lawyer specialized in public policies at the Université Panthéon-Sorbonne Paris I. A professor at the Universidad de los Andes in Bogota, Colombia and at the Université Sorbonne Nouvelle Paris III, she has published several articles in Latin America and France. As a UNESCO consultant, she collaborates on projects related to political science, communication, human rights, poverty and gender.*

Contact information:

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## UNESCO

Social and Human Sciences Sector  
1 rue Miollis  
75732 Paris Cedex 15  
France

Tel: +33 (0) 1 45 68 46 38

Fax: +33 (0) 1 45 68 57 26

<http://www.unesco.org/shs>



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Sciences Sector**

