An Activist's Manual on the International Convenant on Economic, Social and Cultural Rights

Jeff King

LAW & SOCIETY TRUST

Interventions at the UN Committee on Economic, Social and Cultural Rights		
Type	**Estimated Time Requirement**	**Section Number of Chapter II**
Invite a Committee Member to Visit the Country	1-2 weeks	D
Send a Source of Information	1 hour	E.1
Send a Letter or Written Statement	2 days	D.2
Submit a Draft `List of Issues'	2 days	F
Write Alternative Report	Minimum 4 days, maximum 15 days	E
Make an Oral Presentation to the Pre Sessional Working Group	1 week preparation, 2 weeks in Geneva	I.1
Make an Oral Presentation to the Committee	3 weeks in Geneva	I.2
Chat Informally about the State Report with Committee Members	3 weeks in Geneva	I.3
Be an Observer at the Day of General Discussion	(part of trip to Geneva)	Chapter III, G.7
Prepare and Submit Suggestions for a Draft General Comment	2 weeks, depending on expertise	Chapter III, G.8

AN ACTIVIST'S MANUAL ON THE INTERNATIONAL CONVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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LAW & SOCIETY TRUST

social justice through human rights
Center for Economic & Social Rights

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Introduction and Acknowledgements

Introduction to the Manual

The purpose of this manual is to serve activists and students. This service is expected to unfold in three ways: (1) primarily as a manual for reporting to the Committee on Economic, Social and Cultural Rights; (2) as a resource for students, particularly those in remote locations with less access to the Internet and large English language libraries; and (3) as an educational tool in training workshops, particularly for practical topics.

Some general comments on its form are necessary. The manual covers many issues in considerable detail. The reason for this is so that activists can find thorough explanations on particular points of difficulty. Thus it may appear legalistic to some readers. While this may be true, it was designed in part with the belief that activists may want a proper explanation of the legal complexities of the Covenant. For this author, the Covenant is not a loose collection of vague moral principles. It is a carefully crafted legal treaty, designed to be internally consistent and whose coverage is to be circumscribed by reasonable interpretation. This manual was thus written to explain when a claim falls within the scope of the Covenant, and how to use the Covenant's concepts to advocate social rights. It has been written to give such information in a clear and accessible format for activists who have no legal background.

Improvements

It is hoped that this manual will be the first edition of an ongoing project. The author invites comments, criticisms, suggestion, information on new publications, practical pamphlets, anecdotes, activist techniques and any other information that may be shared as a collective wisdom on advocating and implementing social rights. This work must be of real use to activists in order to achieve its goal.

Addenda to this manual shall be made available from the Law & Society Trust and the Center for Economic and Social Rights as new information comes to light.

Acknowledgements

Many people helped this project through direct contributions. First, I would like to thank Dr. Mario Gomez, Consultant to the Law & Society Trust and my supervisor in Sri Lanka, for providing me with invaluable direction, criticism, and references to key resources that give this manual its breadth. It was in no small part his expertise that drew me to Sri Lanka. I would next extend my gratitude to Professor Stephen Toope at McGill University, who read the entire draft carefully and made numerous suggestions for improvement. I would also like to thank Bruce Porter, a Canadian social rights activist and author who took much time to read over large portions of the draft and to converse about them. His comments broadened my conception of the utility of reporting to the Committee, and how it interacts with domestic activism. His comments on Chapters II and XVI improved them significantly. Scott Leckie, the Executive Director of COHRE in Geneva, took time to read Chapter II and give advice that only his unmatched experience would yield. Without it, the practical suggestions in that Chapter would be immensely impoverished. In particular I would like to thank him for his openness. Sarath Fernando, Secretary of Movement for Agriculture and Land Reform (MONLAR) in Sri Lanka, explained to me at length a variety of inter-related

social problems in Sri Lanka. I learned immensely from these conversations and his guided tours. I would like to thank the Movement for the Defence of Democratic Rights, and Lawyers for Human Rights and Development who helped me to understand labour rights issues in Sri Lanka.

I owe a huge debt to the people at the Law & Society Trust, who received, supported and encouraged the project. I would like to thank Damaris Wickremesekera for welcoming the idea, and for giving practical guidance on a variety of matters. The following office members read chapters and made comments that were eventually incorporated: Ramani Muttettuwegama (Chapters II, VII, XVI), I.K. Zanofer (Chapter III), Nuwan Rupesinghe (Chapter III), Rukshana Nanayakkara (Chapter IV), Navin Perera (Chapter V), Lakmini Seneviratne (Chapter VI), Maduranga Rathanayake (Chapter IX), Nishadini Guneratne (Chapter XIII), Chulika Fernando (Chapter XII), Sumangalie Atulugama (Chapter XIV), and Ambika Satkunanathan (Chater XV). Though there is little reference to Sri Lanka in this manual, my acquaintance with human rights conditions in Sri Lanka helped me immensely with the tone and objectives of the writing. I have the following people to thank for such an education: Chulika Fernando, Pubudini Wickremaratne, Nuwan Rupesinghe, M.C.M. Iqbal, Malathy Knight John, Dulip Samaraweera and M.I.M.Azwer. Finally, I would like to thank Janaki Dharmasena for her support in arranging appointments and dealing with publishers, Priyanka Ranjani for her assistance in finding resources at the Law & Society Trust, and Hiranya Wickremesekera for working on the final manuscript.

I am grateful for the substantive suggestions of Ashfaq Khalfan (Centre for International Sustainable Development Law, McGill University), and the unforgiving editorial comments of Bryan Thomas. Julika Erfurt contributed in innumerable ways, both directly and through crucial support.

Two written resources laid important foundations for this project. The first is Matthew Craven's book on the Covenant. It would not have been possible to define the scope of particular rights without this unparalleled examination of the Committee's work. It is hoped that this manual helps to translate Craven's many insights into a more accessible form for activists. The second source is Allan McChesney's *Promoting and Defending Economic, Social and Cultural Rights.* Mr. McChesney's work helped lay a better framework for Chapter II, which was arguably the most important chapter in this manual. His work is also a model of clarity, and may represent, for those with Internet access, the less "legalistic" alternative to this manual.

Above all, I must acknowledge the source of inspiration to undertake such work: Carol Anne King, who taught me the value of warmth and hard work, Robert E. King, the wellspring of my most cherished beliefs, and Julika Erfurt, the foundation of joy in my life.

Jeff King

Foreword

Since the Vienna World Conference on Human Rights we have seen a heightened interest in economic, social and cultural rights. Both international and domestic human rights groups have begun to explore these rights more closely and to look at concrete ways of realising them. In the period since Vienna our understanding of these rights has increased greatly as a result of this heightened interest.

This manual is a product of the increased attention that human rights scholarship and activism have recently given to economic, social and cultural rights. The object of this manual is to provide human rights activists with guidance on how the international process could be used to support their domestic struggles.

The human rights treaties and their monitoring procedures form an essential component of the international human rights system. The Treaty Monitoring Bodies rely a great deal on the information that activists and governments are able to provide, in making their periodic assessments of how States have complied with the provisions of the treaties. This manual is aimed at improving the quality of the information that is provided to the Treaty Monitoring Bodies, especially the Committee on Economic, Social and Cultural rights.

At the international level the International Covenant on Economic, Social and Cultural Rights is the best-known benchmark of these standards. The Covenant is monitored by the Committee on Economic, Social and Cultural Rights (ICESCR) and in this manual Jeff King looks in detail at how this monitoring process takes places. The thrust of the manual is on showing human rights activists how they could use the reporting process under the ICESCR to support their domestic struggles.

This manual walks us, step by step, through the process of developing a shadow or alternative report and then the procedures involved in making this report available to the Committee. In doing this, the manual looks at the structure and composition of the Committee and examines in detail how the Committee functions. The treaty monitoring process is not a rigid or fixed process. It has evolved over time and even now it is in a state of flux. The relationship between international processes and domestic advocacy is a two-way relationship. As much as the international processes impact on domestic protection, local activism and scholarship also impacts on the international process. This manual will help activists to understand this relationship better and also increase their capacity to contribute to making the international processes more robust and effective.

The author also looks at the concept of ICESCR obligations, perhaps one of the most difficult concepts in international human rights law, and deals with the different types of obligations of the States under the Covenant. Most of the rights in the ICESCR are examined in detail and the obligations under these rights analysed.

The relationship that certain vulnerable groups have with economic, social and cultural rights is considered and issues pertaining to justiciability are looked at. The author concludes by looking at some recent developments in the area of economic, social and cultural rights.

Jeff King spent the summer of 2001 in Sri Lanka, working as an intern with the Law & Society Trust. During this period he began to work on this manual and finished it after his return to Canada. Throughout this period he has shown a passionate commitment to economic, social and cultural rights and some of this commitment finds expression in this manual.

The manual is a comprehensive look at how the international reporting process under the ICESCR can create opportunities for change in domestic contexts. It is written in a style that is accessible to most activists and the manual will be a valuable tool for any activist who is contemplating using the international process. Many of its analyses have a relevance that goes beyond just economic, social and cultural rights and it has the potential to become a rich resource for activists working with other treaties as well.

It will also be a useful training resource for training programmes on human rights, especially on those programmes that focus on the relationship between the international process and domestic struggles.

The role of the international treaty monitoring process has been a controversial one. Many activists have been skeptical of the international process and the role it can play in advancing rights in domestic contexts. International systems of protection can never be a substitute for effective local mechanisms. Yet our recent experiences have shown us that international processes and mechanisms have an enormous potential to support the protection and promotion of rights domestically. This manual captures one facet of this potential by providing in concrete terms, how the generation of a shadow or alternative report can assist local human rights activists.

Mario Gomez

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Member, Law Commission of Sri Lanka

17th April 2002

I. How to Use This Manual

This manual is dedicated to the promotion of economic and social rights by means of reporting to the United Nations Committee on Economic, Social and Cultural Rights (CESCR). The Committee reviews State reports on the progress made in implementing human rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenant recognises the following rights:

1. to work
2. to just and favourable conditions of work,
3. to form unions and to strike,
4. to social security,
5. to protection of the family,
6. to an adequate standard of living (including food and shelter),
7. to health,
8. to education,
9. to participate in cultural life.

It is a presumption underlying this manual that social rights activists do not need to be reminded of the importance of a struggle for which they fight every day. Therefore, this manual aims primarily to explain how to use one specific tool in the ongoing fight for human rights. That tool is quality reporting to the UN Committee on Economic, Social and Cultural Rights, and quality participation in its sessions. The main goal of doing so is to obtain a declaration from the Committee that social rights have been violated. The value of a declaration depends on the use to which it is put. While some brief ideas are given, that part is mostly left to social activists' ample ingenuity. The manual was also designed to serve two other purposes. First, it is meant to provide students with a survey of the important topics, as well as references to some of the key literature in the field. Second, individual chapters may be copied and used for human rights education initiatives.

The basic structure is simple. How to participate in the Committee process, the general nature of social rights obligations under the Covenant, are explained and then each main right in particular is examined. After this analysis, there are some thematic chapters that may be of use for workshops, background reading, and for those who draft special reports.

The manual is not written for any one person to read from cover to cover. It is written in considerable detail precisely so that individual activists can get complete answers to specific questions, much the way one uses an instruction manual for a car. There is a simple way to use this manual.

1. Determine which right under the Covenant you wish to report on;
2. Read chapters II (NGO Participation in the Committee's Review Process), and IV (The Nature of States-Parties Obligations under the ICESCR);
3. Read the chapter that is related to the right you wish to focus on; and
4. Write the report.

This is all that is strictly necessary for an activist to create and deliver an effective report.

Noteworthy Limitations

There are no chapters on the right to social security (Art.9), the right to protection of the family (Art.10) and on cultural rights (Art.15). Social security is omitted because, as explained in the chapter on the right to an adequate standard of living, it is a means to protecting a more fundamental entitlement. That is, social security is a mechanism meant to protect the right to an adequate standard of living. Therefore, it is addressed briefly under that heading. While the same may be true of the right to form unions and to strike, those rights are longer, more complicated and thus require elaboration. The right to protection of the family is not addressed in particular due to time constraints on the one hand, and because of the attention devoted to these topics under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. In my experience, these two conventions receive a lot of attention in the activist community. It has also been stressed that due note must be taken of the rights of women and children within the context of all of the other Covenant rights, and in particular when reporting on vulnerable groups. Finally, the omission of cultural rights may be an unjustifiable defect. However, until the relatively recent adoption of the Committee's Statement on Human Rights and Intellectual Property (E/C.12/2001/15), little academic or Committee work was completed on this subject. Even that statement is more concerned with the limitations upon the exercise of intellectual property rights than with an affirmation of their primacy. The topic will be ripe for further elaboration once the proposed General Comment on the right of authors to benefit from protection of the moral and material interests of their work is adopted.

The omission of chapters upon these rights does not suggest that they are less important, or ought to be excluded from an alternative report. Activists may wish to consider them carefully before deciding upon the final format of the report.

II. NGO Participation in the Committee's Review Process: Reporting and Presentation[1]

'Perhaps the most crucial factor in the success of any reporting procedure is the extent to which the supervisory body has access to information other than that provided by the State concerned.'[2]

Reporting to the Committee is what this manual is all about. It is a process that can bring activists together, bring international attention to domestic issues, point out precise problems with the government's behaviour, and give an international voice to the cries of the oppressed within a country. At the same time, one must bear in mind that the tangible results may be slim. It is the process as much as the substantive outcome that truly brings attention to violations of people's social rights.

There are two ways to participate at the Committee. The first is to submit an alternative report, or some other piece of writing. This is not difficult, and there are many different ways that any person can submit any kind of information about any State Party at any time. The process is thus extremely flexible. The second way is to actually go to Geneva and present a report to the Committee. While this is more taxing financially, it is the very best way to have one's information and recommendations taken seriously. Thus when funding can be obtained for this process, it is the best thing to do.

A. Making the Decision to Submit

Most people reading this manual will be convinced that there is some symbolic, political or practical worth in having a United Nations human rights committee point out violations of human rights in their country. Thus the main questions will be (1) do we have the expertise, (2) do we have the funds and resources and (3) do we have the time?

The first question can usually be answered in the affirmative. If the NGO is a development organisation that is unfamiliar with human rights, this is not a problem. In fact, it is organisations like these that often provide the political and economic information required for the proper legal analysis at the Committee level. There are two ways to deal with this kind of concern. The first is to *tailor one's reporting around one's existing area of expertise* (e.g. if you work on the issue of water, housing or milk, then focus on that issue alone). The second is to form coalitions for the purpose of reporting. The work can be shared between different kinds of professionals, leaving the legalistic parts to lawyers, budget analysis to economists, and grassroots data to the development activists.

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[1] Special mention must be made of a few very helpful sources for this chapter. The first is Allan McChesney's book, *infra* note 7, which provides excellent advice that improved this chapter immensely. The second is Scott Leckie, Executive Director of the Centre on Housing Rights and Evictions (COHRE). Mr. Leckie's unparalleled experience before the Committee was the source of many of this chapter's practical suggestions. Third, Bruce Porter, Executive Director of the Centre for Equality Rights in Accommodation, who helped in particular with follow-up actions. Fourth is the CESCR Secretariat Note, *NGO participation in the activities of the Committee on Economic, Social and Cultural Rights* (UN Doc. E/C.12/2000/6), which is practical and available in the six official UN languages. Finally, I wish to thank Alexandre Tikhonov, Secretary of the Committee, for very insightful suggestions on numerous topics in this chapter.

[2] M.Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 75.

Funding also should not be a problem. First, NGOs are entitled to submit different kinds of information, some of which would require nothing more than an e-mail message or stamp and envelope. Second, most of the NGOs that are suitable for reporting will already be gathering the relevant data as part of their other operations. Reporting it to the Committee simply means translating the data into the vocabulary used in the Covenant, and even this is not absolutely necessary. Finally, one can coordinate with other groups to share administrative costs, or apply for block funding for the purposes of reporting. Funders often appreciate initiatives conducted in solidarity with other groups.

The last issue is time. This author estimates that an activist could compile a worthwhile alternative submission on a particular issue within a period of five to seven working days. This time would include (1) reading the relevant portions of the present manual, (2) picking an already well-known issue, and (3) producing a five page analysis along the lines sought by the Committee. As mentioned above, one could also simply drop an article or report in the mail, which takes no time at all. The ideal period to allocate, however, would include time for forming a reporting coalition, dividing the labour, reading the State Party Report carefully, compiling the final report by one particular individual or group and going to Geneva to present it. This process will take more time, but the total number of hours spent on the task may still be kept to a total period of three working weeks per participating person (minus the trip to Geneva). This is not a great time expenditure in light of the improvement such participation will have on the content of the questioning and Concluding Observations.

B. Brief Primer on the Committee

The Committee on Economic, Social and Cultural Rights is an 18 member body of individual experts. It meets twice a year for three weeks in Geneva to examine State Party Reports. State representatives come to present the reports, and are questioned in a dialogue that spans two or three afternoons on different days. NGOs are allowed to sit in on this exchange. Also, NGOs may present their own alternative report on the first day of the session, in a period that can last between five to fifteen minutes. The Committee adopts Concluding Observations on each country, always before the closing of the session.

The Committee established the Pre-Sessional Working Group (PSWG) to examine State Party Reports and draft a 'List of Issues' well in advance of the date on which the report is examined by the entire Committee. The PSWG sends the List of Issues to the State Party, and hopes the government will reply before the Committee meets to question the State Party. Those replies may be useful material for NGOs. The issues become the main concerns for discussion during the questioning period. NGOs may also make presentations to the PSWG, suggest particular issues for the list, and even invite the Committee member who is responsible for their country's report to visit the country. More information on these and other options is reviewed in Chapter III of this manual. Generally, all of the reports, records and Lists of Issues can be obtained over the Internet.[3]

[3] See Chapter XVII (Annex-Using the Website of the Office for the High Commissioner of Human Rights).

C. Getting Started: Key Documents, Due Dates and Contacting the Secretariat

It is important to begin the process by determining when the country's report is due, whether the government has submitted one, and whether a date for consideration of the report has been set for an upcoming session of the Committee. This is possible to do over the Internet, though sometimes difficult. Instructions are contained in Chapter XVII (Annex). Another useful starting point is to obtain the following documents from the website of the Office for the High Commissioner for Human Rights: (OHCHR)

1. a copy of your government's **State Party Report** (if available);
2. any past **Concluding Observations** on your country's previous reports;
3. **Summary Records** of the session in which your country's last report was presented;
4. any **List of Issues**, past or present, together with any available government replies to them.[4]

NGOs should contact the CESCR Secretariat upon deciding to report to the Committee. The Secretariat maintains a list of national NGOs working in the field of ESC rights and contacts them to solicit information to assist in the consideration of State Party Reports. The letter of invitation sent by the Secretariat will contain a copy of the State Party Report, List of Issues, Revised Reporting Guidelines and NGO Guidelines on Participation. It is necessary to read the relevant portion of the current State Party Report, the current List of Issues and available replies to them, and past Concluding Observations. It is useful to read the Summary Records, and past documents where time permits.

D. Inviting the Country Rapporteur to Visit Your Country

In 1997 a group of NGOs based in Hong Kong invited the Committee's Country Rapporteur for Hong Kong to visit the country and engage in a local dialogue just before considering the Hong Kong report. The outcome was very successful. Indeed, the Director of the Centre on Housing Rights and Evictions (COHRE), Scott Leckie, reports that this is one of the most effective ways to encourage and allow Committee members to understand and take seriously the social concerns in one's country.[5] Other activists have emphasised the same point. Practically, this can be arranged by contacting the CESCR Secretariat and requesting to be put in contact with the appropriate Country Rapporteur.[6] It is best to have the person visit either just before the PSWG considers the List of Issues, or just before the State report is due to be considered. Of course, one would need to determine whether a visa is required for such a visit.

E. Simple Written Submissions

It is not always necessary to submit lengthy submissions to the Committee. This section explores the simple, less time-consuming ways one can submit information.

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4 See Chapter III for explanations of these terms.

5 Telephone interview, 17 December 2001.

6 See Chapter XVIII (Annex-Contacting the CESCR Secretariat).

1. Factual Sources for the Country File

The Secretariat of the CESCR puts information into a 'Country File' for each country. NGOs are entitled to send whatever information they wish to the Secretariat, to be included in that file. This includes information on other States Parties to the Covenant. NGOs can contribute newspaper clippings, newsletters, reports from NGO's and other organisations.[7] Be cautious about what information is sent. The best sources are well-known news sources, or respected journal articles. The government will have difficulty challenging the legitimacy of these sources. Also useful, but perhaps more easily disregarded, are NGO newsletters. When sending them, it is best to select articles that stay fact-oriented, and which point out conclusions that follow clearly from the facts.

Other forms of useful information include Chamber of Commerce reports, right-wing think tank studies, business-oriented newspapers, Asian Development Bank reports, and World Bank and IMF studies.[8] These support a position by indicating that *even these* kinds of institutions view the relevant issue as a problem.

Finally, reports from UN specialised agencies (e.g. ILO, UNDP, UNHCR, UNESCO, WHO, UNICEF etc.), United Nations' Special Rapporteurs, and other human rights bodies are desirable. At the same time, the collection and provision of this information is also the function of the Secretariat and the specialised agencies themselves. Thus it can be made a lower priority, or sent only if one comes across the information by chance.

An NGO could establish its own **CESCR Fact File**, and place relevant news clippings and article information into it. This file can serve a dual purpose, namely, be an independent submission to the Committee as well as a resource for the compilation of an alternative report. All sources should indicate date, source, volume and issue numbers and, if applicable, what article of the Covenant they are related to. It is important that the file is reasonably small before sending it and that it includes nothing extraneous. The submissions should include a brief message stating "Submission to the CESCR Secretariat Country File", the name of the sending organisation, and your return postal or email address for confirmation of receipt. One may send them at any time, but if one collects a larger file, then it is better to send it prior to the meeting of the PSWG, or at a time arranged with the Country Rapporteur. Addresses are provided in Chapter XVIII.

2. Letters and Suggested Questions

NGOs are also welcome to send brief letters to the Committee, stating their opinion on a particular matter or pointing out problems with the State Party Report. In these letters, NGOs may propose particular questions that the Committee may then ask the State Party. The difference between this kind of submission and one to the Country File is that this one is more of an NGO statement of opinion, suggested questions, or comment on the State Party Report, while the former is the submission of factual information sources. One may also submit a 'written statement' of 2,000 words or less to the Committee, but it ought to be co-sponsored by an NGO holding consultative status with the Economic and Social Council of the UN (ECOSOC). The difference between a

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[7] A. McChesney, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook* (Washington: American Association for the Advancement of Science, 2000) at 99.

[8] It is not suggested that activists spend much time looking through these studies, but rather that it is useful to submit from these sources where possible. It is difficult to challenge them as ideologically inclined to the Left, and thus partial.

'letter' and a 'written statement' is that sponsored written statements will be considered official UN documents. Having a 'written statement' submitted to the UN can be an advantage for domestic advocacy. UN documents may be cited as a form of authority for news sources, in courts etc. Some NGOs report that it is particularly important to get that status.[9]

Letters should be kept brief, while written statements are generally longer. The advantage of a letter or written statement is that the Committee does not need to wait until the State's report is due in order to address either. Thus activists may draw attention to highly pressing concerns and ask the Committee to issue a communication to the government immediately.[10]

F. Parallel Reports

Technically speaking, a parallel report is a submission that provides new information regarding the progress of the implementation of the rights in the Covenant. Practically, most NGOs are interested in submitting information that alleges some form of non-compliance with the Covenant, in order to get a declaration to that effect. The process of compiling a report may be viewed as part of the implementation of human rights as well. It is said that monitoring, solidarity and coordination are all part of this process.[11]

The best reporting requires that one demonstrates both (1) the facts that show the non-enjoyment of a right and (2) the nature of the government's obligations to implement that right. It is not enough to show that high school enrolment has dropped, housing has worsened, or wages have fallen.[12] One must also show that there was a certain kind of responsibility the government should have exercised in the matter, and that it is obligated to act in a specific way under the terms of the Covenant. Illustrating this should be the chief goal of parallel reporting. In order to do this, with the resources provided in this manual, the activist should (1) read and understand how to organise an alternative report, and then (2) read carefully the section pertaining to the relevant right(s).

Broadly speaking, there are two kinds of parallel reports an NGO can consider submitting: a *coalition report* or an *individual report*. A coalition report is one that involves various NGOs working together to produce a single submission. These are ideal for numerous reasons, but presume good working relations and reliable partners. The Secretariat of the Committee has stated unequivocally that coalition reporting is preferred.[13] It gives the product more legitimacy, avoids overlap, reduces the burden on the Committee and prevents damaging contradictions. An individual report is one written alone by a single organisation. Often, the scope will be smaller, focusing on a particular right or issue.[14] Determining whether your organisation ought to do either of these is the first step in preparing a report. One may always attempt a coalition report, and if the cooperation fails simply hand in an individual report.

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9 Bruce Porter, telephone interview, 22 January 2002.

10 See Chapter III, Section H.5 for examples.

11 Scott Leckie, *supra* note 5.

12 It should be mentioned, however, that many alternative reports do just this. It is always better to discuss the State's obligations in particular where possible, because this more accurately respects the text of the Covenant. It also gets the Committee past the 'lack of resources' stalemate.

13 See *NGO Participation in the activities of the Committee on Economic, Social and Cultural Rights*, *supra* note 1 at para. 6.

14 Note that this is not always the case. NGOs have produced individual reports that cover several rights.

1. Written Format

The important thing to remember with written submissions is that they must be kept as short as possible. There is a strong possibility that several members will have only the chance to read as little as two or three pages. The way to deal with this practical problem is to attach a 2-3 page summary of conclusions and recommendations to the beginning of the report. *This summary may be the single most important part of the alternative report.* 'Summary of conclusions' refers to a summary of the report's findings of non-compliance with the Covenant. 'Summary of recommendations' refers to what your organisation hopes the Committee will suggest as part of its constructive dialogue with the State representative, and as part of its Concluding Observations. One may even suggest precise wording for the Concluding Observations. The summary can refer to pages or paragraph numbers in the alternative report, which will help Committee members get quick access to the supporting arguments and statistics during questioning. This summary may be circulated by hand in Geneva, so it is desirable to bring several copies of it. Where resources permit, it should be translated into French, Spanish and Russian as well as English.

RECOMMENDED ORGANISATION OF PARALLEL REPORT

Part I

Optional Introduction
Summary of Conclusions and Recommendations

Part II

Article 2(1)
Article 2(2)

Part III

Articles 6-15
Vulnerable Groups
National Plans of Action

Part IV

Annexes Containing Supporting Documentation

There is no strict policy on the format of written submissions. The format may vary, and one may browse through other reports if one has the chance.[15] These can be found on the OHCHR website. It is best to organise the report according to the articles of the Covenant. Thus an introduction and summary would be followed by sections corresponding to articles 2, and 6-15 of the Covenant. It is not necessary to cover all of these articles but it is desirable. The sections on each substantive article[16] should include, at the very minimum, (1) a consideration of the facts disclosing the non-enjoyment of a right, (2) the government conduct that amounts to its responsibility in the matter and (3) alternative courses of action.

A suggested organisational template may be found at the end of this chapter. In that template, it is suggested that activists focus upon one topic in particular for each substantive right. This suggestion is made for a number of reasons. First, the subject can thus be treated completely rather than superficially. Finding a violation requires a consideration of resource constraints and alternative courses of conduct (i.e. other "appropriate steps"), which is a potentially elaborate process. Without that information being provided, the Committee is less likely to make a specific pronouncement on a particular issue. Second, most activists are competent in a specific area, which would be the best to concentrate upon. Finally, it is perhaps more likely for the government to take seriously pin-point recommendations on a relatively limited number of issues. If it seems that compliance

[15] These reports are not necessarily models. Some are confusing, and seem to present enormous amounts of empirical data rather than discuss concrete situations under the headings of particular rights.

[16] 'Substantive article' refers to those that articulate rights to certain social entitlements, rather than procedural claims. This means Articles 6-15 of the ICESCR.

with these recommendations is plausible and not too costly, it can score major political points on the home front by appearing to comply with its international human rights obligations. On the other hand, if it receives a long list of vague but broad policy prescriptions, then it is less likely to feel motivated to implement any of them.

Areas that are not covered in the template at the end of the chapter include resource availability, non-discrimination, vulnerable groups, and national plans of action. The format of these types of submissions depends heavily on the context of the country. Thus one ought simply to read the chapters pertaining to that topic, and use her or his ingenuity to come up with a useful report. Relying on other expertise is particularly welcome in these cases.

Annexes can also be useful for including statistical information, charts, excerpts from reports, trade agreements or World Bank policy recommendations and other items *that are related to a certain argument in the report*.

A detailed table of contents is highly useful for quick access to information in the report during questioning. One should learn how to assign headings and sub-headings to the titles used in the report,[17] which can be used to create a detailed table of contents. Lastly, you may want to assign paragraph numbers to all the paragraphs in the report. The UN seems to do this for all its publications, and all the alternative reports posted on the website are numbered in such a way. If this becomes problematic during the coordination of the report, it may be omitted for it is not formally required. The table of contents, however, is crucial.

It may be noted that each chapter of this manual explains the full scope of each right. The reporting checklist at the end of each chapter suggests how to make a *complete survey* of the state of the right in a country. A report covering all of those items may be extraordinarily long for an alternative report. Therefore it may be desirable to devote a single page or two to this general kind of analysis as an introduction, before continuing to examine a focus topic.

2. Length of Report

The total length of the report can vary, depending on how in-depth one's NGO wishes to be and on what use the report will serve. Some activists view the report as establishing a record of human rights violations in the country, which gives the project worth, independent of how greatly the Committee relies upon it. It may be posted on the Internet thereafter, and referred to by activists, media and students. In such cases, there is no particular reason to keep the report short. There is not much to be lost as far as the Committee is concerned.

[17] This can be done by using the Formatting option on the toolbar of MS Word. This option can be added by placing the mouse over any part of the toolbar at the top of the screen, right-click on the mouse, and select 'Formatting.' Once this function is opened, select the text (by blocking it) you wish to make a heading, go to the drop-down menu on the far left of the new toolbar, and select a heading number. Next go to the Icon "Insert," select "Tables-Tables of Contents." One can also number the headings in a variety of ways by going to "Format-Bullets and Numbering-Outline Numbering."

That being said, the Committee's time constraints are very onerous in view of the necessity of examining the lengthy State Party Report, drafting the List of Issues, considering the government's replies, and drafting and adopting the Concluding Observations for each of four or five countries per session.[18] It has little time left for parallel reports. Therefore although there are no length requirements, it is generally desirable to keep it under 40-50 single-spaced pages length for a report that covers most aspects, and around 5 pages for a report covering one right or issue.[19] One does not need to count annexes in this total length. It should also be noted that some successful reports have exceeded this length. Another factor to consider is whether other groups are submitting a report. If several do, it may be wiser to keep your report shorter. In all cases, it is advisable to keep them as short as possible.

3. Division of Labour

Given the broad areas covered by the articles of the Covenant, and the planning required for organisation, a division of labour can greatly help the process. An effective division of labour can be conducted along the following lines. The brackets indicate the ideal professional background for the person writing that part of the report. Where more than one profession is given, the list is intended to mean '*any* or *all* of the following people':

1. **Article 1** - Self-Determination (political representative from the group claiming the right).
2. **Article 2(1) -** Appropriate use of Resources (economists, social scientists, lawyers)
3. **Article 2(2) -** Discrimination in Access to Covenant Rights (lawyers, minorities associations, civil rights organisations, anthropologists)
4. **Article 6** - The right to work (labour lawyers, economists)
5. **Article 7** - Just and Favourable Conditions of Work (labour lawyers, unions)
6. **Article 8** - Unions (unions, labour lawyers)
7. **Article 9** - Social Security (political scientists, lawyers)
8. **Article 11** - Adequate Standard of Living (grassroots development organisations, working with economists, political scientists, lawyers)
9. **Article 12** - Health (health experts, doctors' associations, lawyers, WHO officials, political scientists)
10. **Article 13 & 14** - Education (Political analysts, development activists, teachers' unions, university professors/bodies)
11. **Article 15** - Cultural Rights (Anthropologists)
12. **National Plans of Action** - (NGO Directors)

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[18] This does not include time for NGO presentations, Days of General Discussion, drafting General Comments, and deciding upon present and future agendas.

[19] Activists disagree over what is the appropriate length. Suggested maximum lengths varied from around 25 pages to 80 pages.

13. **Vulnerable Groups** - This is similar to the category of non-discrimination, but involves a different approach. While the former is concerned more with State-responsibility in particular instances, 'vulnerable groups' involves a general survey of the condition of these particular groups, including disaggregated statistics and special problems. (Activists, political analysts, NGO consultants, social anthropologists, sociologists).

14. **Editor** - An experienced lawyer who can edit the final product for consistency, adequate authority, and that it is in a comprehensible format for judicial figures (i.e. Committee members). This person will also write the 2-3 page summary of the coalition report, including recommendations. This person should read the chapter on 'obligations' under the Covenant very carefully.

15. **Secretary** - Someone to take charge of communications between the different groups, keeping group e-mail lists, keeping track of dates for submissions, contact with the CESCR Secretariat, getting copies of the State Party Report, Lists of Issues and any replies thereto, receiving and compiling the individual submissions for the editor, making arrangements for flights, hotels, booking appointments with the Committee etc. Should be a well-organised and responsible individual who is a permanent employee at an NGO, and preferably an experienced administrator. This person may also apply for block funding for the entire group.

It is not necessary to report on all of these articles. As will be explained below, there will often be some consideration of resource constraints under each particular right, so a general section upon it is not crucial.[20] It is also not necessary that the suggested professional backgrounds fill each role. This is what is ideal; activists will naturally make do with what is possible.

It would be useful to call a meeting between these kinds of people and consider this list as a starting point, to see who would like to do what. The main value of a group report is the coherence and efficiency conferred through a single formatting style and summary. If the cooperation fails, then the work can be submitted as a group of individual reports. Each section may be composed in a fashion that can function independently of all the others.

Finally, a common problem, which could have an impact on this process, is that NGOs are reluctant to share information and co-operate. One way to avoid conflict over taking credit is to form an *ad hoc*[21] Reporting Coalition of NGOs. All organisations may be listed alphabetically on the final report.

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[20] It would, however, be extremely helpful to include a national budget analysis for the Committee. It can use this for many purposes, and can provide the more sophisticated analysis needed for a finding of a violation, which takes resource constraints into account. A discussion of how to do so can be found in Chapter IV.

[21] *Ad hoc* means 'for one particular occasion or use'. It is often used to refer to meetings or approaches that follow no particular long term plan, and are simply used when needed.

4. Sources of Information

It is very important to cite authority for any statement of fact made in the report. This authority may be provided by citing information sources by means of footnotes, endnotes or parentheses. One can use, but need not limit oneself to, the following sources:

1. Government statistics;
2. Statutes and Regulations (particularly those included in annexes);
3. Domestic court decisions (if applicable);
4. National Commission reports and other governmental publications (e.g. Human Rights Commission, Royal Commission on Aboriginal Peoples etc.);
5. UN Specialised Agency reports (ILO, UNDP, UNICEF, WHO etc.);
6. Local and international surveys (If so, include a brief description of the methodology employed and attach it as an annex to the report);
7. Previous State Reports, Summary Records, Concluding Observations, governmental replies to Lists of Issues (useful for identifying trends and pointing out inconsistency), and Committee Press Releases;[22]
8. Local and international media sources (e.g. *The Economist, Guardian Weekly, Le Monde Diplomatique, Wall Street Journal, New York Times* etc.);
9. Academic journals;
10. NGO reports and publications; and
11. Interviews

The best way to cite such authority is through footnotes. Footnotes are useful because you can check the source quickly. It is most desirable that the information cited is as recent as possible.

Disaggregating data is also a helpful process. It means examining variances within sets of data, rather than looking at national figures as a whole. This kind of analysis often reveals insightful information about workers in particular sectors (e.g. tea estates), attendance at schools (e.g. girl children and internally displaced persons), or access to sanitation. Ideally, the person charged with examining vulnerable groups will seek data that is disaggregated along regional, ethnic and gender lines.

5. Last-Minute Updates

A lot of time can pass between when the parallel report is submitted and when the State meets with the Committee. Therefore it may become desirable or even necessary to send in last-minute updates on new information that has come to light. If so, such updates should be kept brief. The format can vary from a letter to a supplemental report, and can be mailed to the same destination. They should be marked clearly as a supplement *to an existing report*.

[22] During the questioning of the Canadian government during its 1998 review, an NGO coalition succeeded in retrieving damaging previous comments of Canadian delegates from the Summary Records. By pointing out the inconsistency, which involved representing an institution as crucial earlier and non-essential later, a Committee member was prompted to ask "Where you lying then or are you lying now?" See B. Porter, "Socio-Economic Rights Advocacy - Using International Law: Notes from Canada" in (1999) 2:1 *ESR Review (Economic and Social Rights in South Africa).*

6. Time Requirements and Coordination

One may not wish to give the alternative report *too much time*. If compiling the report becomes a time-consuming task, there is a potential that it will be less attractive in the future. If, on the other hand, it is performed efficiently and quickly, it will rightfully appear as being a minor burden for an important return.

In the case of a coalition report, it is suggested that the coordination *is begun* approximately one year before the date on which the Committee reviews the State Party's report in Geneva. A reasonable amount of working time for the production of a good coalition report is three working weeks (15 days). This figure would include all of the meeting time, logistics, division of labour, a skim read of the key documents,[23] reading this manual and writing, *on a topic with which one already has some experience.* Experienced activists report that the process may take much longer than this.[24] The extra time may depend on the extent to which an NGO wishes to relate the process to its other advocacy functions, other domestic issues (e.g. supporting court actions with the international advocacy) and cooperation with other NGOs. Therefore, if one has the opportunity of a more ambitious time commitment, experienced activists recommend taking the extra time. On the other hand, people caution against expecting grand results from the Committee or home government, which may be a relevant factor in deciding upon how much time to allocate. A minimum amount of time is virtually impossible to specify. The best way to determine this is to read the relevant parts of this manual,[25] and see how comfortable you are with the material. Thereafter, an experienced writer could write a report on a familiar topic within around three days. Copying and sending the completed material should take no longer than a day.

The coordination for a coalition report can be organised in many ways, but a proposed timeline follows. This timeline follows a countdown from one year before the date of the Committee's session in which the state is up for review. The 'months' indicate the period during which the activity should take place, but not the duration of the activity itself.

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[23] See Section C above.

[24] Bruce Porter, *supra* note 9. He adds that the consultation with other NGOs can take an enormous amount of time, but that NGOs often view this time as very worthwhile.

[25] That is, Chapters I, II, IV and on the right you wish to report on.

Month	Activity	Participant
12	Introductory Meeting: discussion of the idea and merit of alternative reporting to the CESCR, and preliminary plan of action.	All
11½	Meeting for the establishment of the division of labour (2 hours)	All
11	Find key documents (see Section C above), identify the Country Rapporteur, find agenda for meetings with the PSWG and Committee, contact CESCR Secretariat, send all key dates and documents by e-mail or post to the participants.	Secretary
11-10	Establish key issues and focus issues; preparation of a draft List of Issues.	All (individually)
10	▪ Meet for the joint adoption of draft List of Issues. ▪ Meet to discuss focus issues (i.e. the main issue each individual will treat under a particular right). ▪ Secretary sends the List of Issues to the Secretariat or directly to the Country Rapporteur. If possible, choose delegates to go to Geneva to present the draft List of Issues to the PSWG.	All
9-7	Write individual reports. Consult with others as needed.	All (individually)
6 (1st day)	▪ Submission of individual reports to the Secretary of the group. ▪ Secretary compiles them into one document and sends it to the Editor.	All (individually), Secretary
6-5	Edit for consistency, authority, presentation and quality.	Editor
5-4	Implement editorial suggestions and, if desired, make remarks on other parts of the group copy.	All (individually)
4	Resubmit edited copy of individual report to Secretary.	All (individually)
4-3	Final editing.	Editor
3	Submit final copy to CESCR Secretariat	Secretary
2-1	Monitor issues discussed in the report.	All (individually)
1	Submit last-minute updates to Secretary, who submits directly to the Committee.	All

It is important to note that trips to Geneva are not addressed directly in this timeline. Those options are discussed below. This timeline is merely a suggestion, but it should give participants a realistic time frame for getting the coordinated work finished.

G. Submissions to the Pre-Sessional Working Group

Bruce Porter writes about the significant influence a group of NGOs had on the composition of the List of Issues by the PSWG.[26] The List of Issues is very important, because it sets the framework of the conversation between the Committee and the State Party's delegates.[27] The group can submit a parallel preport (including a summary) directly to the PSWG, in order to give the Country Rapporteur a chance to consider it along with the State Party Report. A proposed List of Issues can be included as part of the report. While this is good in some ways, the report risks being partially out of date by the time of questioning. Therefore one would likely need to modify the PSWG report for the final submission. One may also compose a more modest draft List of Issues and send it accompanied by supporting material. The most effective approach is to send a delegate to present a draft List to the PSWG meeting (see Section I.1 below).

The List of Issues may also be important independently of the Committee. Activists may help form the questions to which the government responds in an official capacity. This is often good for getting official representations about the importance of certain programmes or policies, an interpretation of particular legal decisions, or a clarification of rules or regulations. These representations can become quite detailed and specific, and may become UN documents. They can become very useful for further domestic action, including legal action.[28] Therefore influencing the kinds of questions asked in the List of Issues can lead to results that have use beyond the workings of the UN Committee.

One should try to become acquainted with the Country Rapporteur as far in advance as possible.[29] This may be done by establishing e-mail contact or by going to Geneva. Establishing contact with this Committee member and perhaps inviting her or him to visit the country may make a decisive impact upon how well she or he understands the social problems under consideration. It will also assist the NGO delegates to communicate with the Rapporteur if and when they go to Geneva.

H. Where and When to Send Written Submissions

All submissions go to the CESCR Secretariat. The contact information is provided in Chapter XVIII. Submissions should be sent by post and e-mail. E-mail is useful because it can be forwarded easily. However NGOs must supply their own paper copies of the submissions. Translated summaries are always very useful where affordable.

Pre Sessional Working Group

The Secretariat recommends sending ten copies of any submissions one week before the PSWG meets. Presumably an earlier submission would not hurt. One can contact the Secretariat regarding additions or last-minute updates to these written submissions.

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[26] The List of Issues is a list of questions the Committee drafts and sends to the State Party between six months to a year ahead of the scheduled date of review. The government is asked to reply in writing to the List of Issues, and the list generally serves as an important framework of debate during the process. See Porter, *supra* note 22, and see generally Chapter III.

[27] The importance of the list was emphasised by Bruce Porter, *supra* note 9.

[28] Bruce Porter, *supra* note 9. The Charter Committee on Poverty Issues, a public interest legal committee that intervenes frequently in Canadian Supreme Court litigation, has used governmental replies to the List of Issues as part of its legal strategy.

[29] Scott Leckie, *supra* note 5.

The Committee on Economic, Social and Cultural Rights

The Secretariat recommends sending 25 copies of written submissions one week before the Committee meets for its session.

The Home Government

It is both courteous and tactically wise to send a copy of any written submission to the Ministry/ Department of Foreign Affairs of one's home government. It should be done immediately before sending the report to the Committee. The benefit of this is that the government representative cannot claim later not to have had adequate time to prepare an answer.[30]

I. Oral Presentations to the Committee in Geneva

The decision to go to Geneva is an important one, as the trip will involve considerable expense. *However it is the single most important element of the strategy to get the Committee to comment upon the most important issues*. This point cannot be emphasised enough.[31] The trip to Geneva involves much more than oral presentations to the Committee. It includes opportunities to circulate the summary by hand, to talk to different members during breaks in the proceedings (which span a few days), to participate in General Discussions, to comment on draft General Comments, to make contacts with Geneva based and other NGOs, to visit other human rights institutions, and possibly to seek funding.[32]

As far as the oral presentation itself is concerned, the benefits to be gained include a greater chance of the alternative report being read more widely and carefully, a refresher of the report, a clarification of the important aspects, a chance for the Committee to ask the delegate questions, and the accumulation of valuable knowledge that will make the next alternative report a better submission.

1. Oral Presentation to the Pre Sessional Working Group

NGOs are entitled to go to the meeting of the PSWG, which usually takes place six months before the report is due for consideration.[33] This means that NGOs may influence the List of Issues and point out problems and omissions from the State Party Report. Oral presentations are generally limited to 15 minutes, though it may vary depending on the number of NGOs wishing to speak.

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30 McChesney, *supra* note 7 at 102.

31 As made very clear by Scott Leckie, *supra* note 5.

32 Scott Leckie, *supra* note 5. Organisations headquartered in Geneva include the International Labour Organisation, the Office for the High Commissioner for Human Rights, the International Commission of Jurists, Habitat International Coalition-Housing and Land Rights Committee, the United Nations High Commission for Refugees and others.

33 In its May 1993 guidelines concerning NGO participation in the activities of the Committee, the Committee states the following: B. 2. "In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the PSWG to provide NGOs with an opportunity to submit relevant oral information to the members of the working group."

To arrange an appointment with the PSWG, contact the CESCR Secretariat well in advance. One must request a letter of accreditation from the Committee in order to obtain the photo-identity badge required to attend the sessions of the Committee (see Chapter XVIII). One must also inform the Secretariat whether audio-visual equipment will be needed for the presentation.

Since the PSWG meets immediately after the Committee's session, it may be wise to send a delegate slightly early so that she or he may sit in on some of the Committee's meetings. Doing so, and asking questions, may be a great insight into how the Committee works and what they are looking for at that period of time. Do bear in mind, however, that the last week of the Committee's three week session is occupied with closed meetings and the Day of General Discussion. Scott Leckie points out that this is a good time to get to know the Country Rapporteur, and also perhaps to seek funding.[34] It is also a good opportunity to visit COHRE, which provides excellent logistical and practical advice about Committee sessions.

2. Oral Presentation to the Committee

The afternoon of the first day of each of the Committee's sessions is set aside for the hearing of oral submissions by NGOs that concern a State Party Report being considered at that session. The Committee has made clear that such information should:

(a) focus specifically on the provisions of the Covenant;

(b) be of direct relevance to matters under consideration by the Committee;

(c) be reliable; and

(d) not be abusive.

Each speaker has between 5-15 minutes to address the Committee and answer questions. It has been suggested that it is wise to prepare and distribute succinct and clear briefing notes to the Committee. This will help the members follow the course of the presentation and focus on the key issues. One may also provide unified briefing notes for different NGO reports; doing so keeps the paper shuffle to a minimum. In those briefing notes, one can refer directly to the precise pages of the different alternative reports on which the analysis appears.

The length of time will vary depending on the number of NGOs present. There may be as many as 20 or more NGOs, depending on the country. State representatives may or may not be present during this period. NGOs may wish to highlight the important aspects of their report, but can address other relevant issues as well. The most critically important thing to do is to make very specific requests for what the Committee should do (e.g. ask them to issue a request calling upon the government not to evict certain residents etc.)[35] Also, this period is a good opportunity to bring to light new information, and to propose particular questions that the Committee could ask the government representative. Once again, it is very important to present the information on an article by article basis, and to leave time for questioning. The speaker should be your most effective orator. Finally, it has been recommended that organisations show up in Geneva with printed copies of the report and summaries of conclusions and recommendations.[36]

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[34] *Supra* note 5.

[35] Scott Leckie, *supra* note 5.

[36] McChesney, *supra* note 7.

In November 1998, a video was shown to the Committee during this presentation period. This technique may be an excellent way to capture the Committee's attention with footage of social problems that are visually moving. One ought to keep time constraints in mind when presenting such footage, and should weave together good narrative with the visual shots. It has also been noted that the size of the available video apparatus can lessen the effect of this approach, so the idea should be approached with some caution. It is particularly important that the narration be done in person.

One must request a letter of accreditation from the Committee in order to obtain the photo-identity badge required to attend the sessions of the Committee (see Chapter XVIII) and inform the Secretariat whether audio-visual equipment will be needed for the presentation.

It must finally be emphasised that one should not place very high hopes on the success of this particular day of the process. Some activists have commented that several Committee members may be absent on this day. Nonetheless, the process may still be effective, and there are still other opportunities to speak to Committee members.

3. Breaks in Proceedings

This is perhaps the greatest opportunity for speaking with Committee members. NGO delegates are permitted to remain in the room while the representatives from other states are presenting and being questioned by the Committee. McChesney observes that some NGO delegates take extensive notes during the session, and then "…politely point out any gaps or discrepancies to CESCR members during a break in the proceedings."[37] One may refer explicitly to a part of one's report when doing so. Unfortunately, there may be somewhat of a clamour for the attention of Committee members. It is for this reason that becoming acquainted with the Country Rapporteur ahead of time (and in particular making a presentation to the PSWG) is so useful.

During this time, and during the evenings between meetings, the delegates may draft particular questions and hand them to Committee members during the breaks. This is helpful because the issues are topical at that very time. An important suggestion is to remain in contact with resource people at home. The government delegate may offer questionable arguments that the NGO delegates may be unprepared to rebut. Contacts at home may rush to provide such information, which can be passed on to Committee members.

4. Choosing the Delegates

This question deserves careful attention. First, it is advisable to send *at least* two people. This is because there are 18 Committee members, and many distractions. Having a team there allows one person to get attention while the other(s) may be inadvertently distracted, or allow the possibility of addressing two or more members at once. Second, and put bluntly, the most appropriate people to send are those that are outgoing and effective oral communicators. There may be some compromise between the most outgoing or charismatic and the most effective person in argument. This compromise may be resolved by sending one of each. Doing so may allow one person to

[37] McChesney, *supra* note 7 at 108.

craft persuasive arguments and rebuttals while the other advocates them to Committee members. Another key consideration is whether one of the delegates is a strategic thinking 'go-getter'. In other words, whether the person can participate effectively in the possible clamour for attention, and be noticed. These remarks may disappoint some activists, perhaps rightfully. Unfortunately, though, they are part of the political reality that cannot be ignored. A final point is that the whole experience is very exhausting and time consuming. One should not expect sound sleep on each night.[38]

It has been indicated that in making the choice of who to send, it is important to send people who are knowledgeable about the constituency they are there to represent. This is necessary to rebut government answers to questions, and also for giving the process a genuine air of representation. A related point is that it is desirable that a member of the constituency itself attends the process (e.g. a homeless person, worker or member of another vulnerable group). This is part of an authentic experience of the rights-holder claiming the rights before this UN Committee. It may also more effectively engage the sympathy of the Committee, much the way witnesses do before the Courts. If this option is taken, it may be necessary to train the person for the task ahead of him or her.

The trip is also important because of the opportunity to create contacts and seek funding. Perhaps some attention may be given to the possibility of creating a draft proposal for funding before going. Practically, any final proposal will be submitted later. On a last practical note, it would be immensely helpful to bring a laptop/notebook computer. This could be indispensable for forming written notes that can be circulated to members at various times, or written observations for distribution on the Day of General Discussion.

5. Accommodations in Geneva, Contacting COHRE

The housing rights group COHRE assists those who wish to go to Geneva by making arrangements for 'affordable' accommodations. Contacting them is an excellent idea. COHRE can be of invaluable assistance in many other ways. Its members and Executive Director have been to literally every Committee session since 1987, and know about all of the Committee members. Thus their practical insights are of enormous benefit to the delegates. COHRE may be contacted through their website.[39] One should inquire with COHRE about where to access computers and printing facilities during the stay.

J. Follow-Up Action

There are several ways to use the Concluding Observations after they are released. The following sub-sections only explore a few.

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[38] Bruce Porter, *supra* note 9.

[39] www.cohre.org

1. Media

It is very useful to keep the media involved at each step of the way. The media is a key part of raising awareness of human rights issues. This may be done by using human rights discourse when presenting certain issues to the media, informing them about the submission of the parallel report (both to the Committee and to the government), and in particular, at the adoption of the Concluding Observations. During the Committee's session, press releases are issued by the United Nations Department of Public Information after every Committee meeting. Quite often NGO oral submissions will make it into the press release covering the relevant meeting. These press releases reflect the NGO's contribution, and make generally useful resources for journalists at home.

A key consideration is to arrange for media to get the information when it is still newsworthy.[40] Newsworthiness may be understood in terms of timeliness and subject matter interest. Timeliness may be somewhat difficult because the Concluding Observations are generally released on a Friday, which is the last day to get access to the journalists at the UN. A useful tactic is to establish networks of NGOs, academics and members of the constituency whose rights are in question, and arrange for them to be available at the time the Concluding Observations are released. One can then provide journalists with a call sheet of people to interview. It is also important for this reason to attempt to get an electronic copy of the Concluding Observations so that it can be forwarded immediately to the interested journalists, contacts back home and people being interviewed. One of the most effective ways to ensure good domestic coverage is to arrange for NGOs to hold press conferences on the topic as the results are released. This may be somewhat stressful, however, if it becomes difficult to obtain the Concluding Observations at the appropriate time on that final day of the session. Thus great care must be exercised to obtain the results precisely when they are needed, and in the form they are needed. Planning in advance is necessary to achieve this result. Another useful consideration is that radio and video recording equipment can be plugged directly into the sound system, which can provide reporters with quality sound-bites of the exchanges between the Committee, government delegates and NGOs.

In terms of the subject matter, the newsworthiness of the adoption of the Concluding Observations will depend on the readership or audience of the media source. Some propose 'playing the media game' by using celebrities and vivid symbols that play on popular axioms, highlighting drama, and accentuating the human factor.[41] Another way to achieve subject matter newsworthiness is to stage a demonstration that is timed to coincide with the release of the Concluding Observations, and to call upon the government to respect them.

It is thus crucial to form media contacts, within print news, radio and television, and to inform them about the upcoming process and the essentials of social rights advocacy at the UN level. Drafting media information pamphlets may help in this respect. One could include basic information about the Covenant, the Committee, the allegations being made by NGOs, and contact information for local NGOs and experts. Another way of using the media is to write opinion pieces for certain newspapers, or ask a contact at the newspaper to write an editorial.

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[40] Several of the following suggestions stem from Bruce Porter's comments regarding his experiences at the Committee, s*upra* note 9.

[41] Ashfaq Khalfan, Director of the Centre for International Sustainable Development Law, McGill University. The ideas are explained in his paper, "Selling' A New Paradigm: Promoting Economic and Social Rights in the Media", unpublished, on file with the CISDL, www.cisdl.org

2. Lobbying

Bringing the Concluding Observations up for discussion in the legislative assembly can be a good way to have the important issues discussed. The focus may be upon the recommendations made by the Committee, and the international embarrassment caused by the lack of governmental compliance. The discussion in the legislative assembly may in turn lead to a commitment to cooperate with some organisations to 'address the problem', which may be a foothold for NGO cooperation with the government. This effort will be especially useful if a sufficiently broad coalition of NGOs is formed. It will be helpful to establish and work through contacts in the assembly or Parliament itself. Such contacts may be kept informed about the drafting of the alternative report, presentation and Committee response. He or she may then raise the results of the review in Parliament, supported with documentation provided by the NGO. Some recommend attempting to get an undertaking from the MP to distribute the Concluding Observations to other members of the assembly before the results are released.

3. Unions

It is advisable to share the Concluding Observations with trade unions. These groups often have considerable political influence themselves, and effective contacts within political circles. Moreover, the education about other non-labour social rights issues can be a useful part of the human rights education process that unions are already a part of. This process of cooperation can be begun by asking unions to prepare the part of the alternative report concerned with labour rights and unions (Arts. 6-8).

4. Health and Educational Associations

It could be also useful to disseminate copies of the Concluding Observations as well as copies of the relevant section of the alternative report to these organisations. They may subsequently put the issue on their agenda, and come to recognise some of their existing goals as human rights issues. This would serve to expand the network of solidarity between groups, as well as to draw in a potentially strong lobbying and financial resource.

5. NGO Community

NGOs often work on particular areas of human rights, and are not aware of the developments in other areas. It could be highly useful to disseminate copies of the Concluding Observations to the individual members[42] of a broad group of NGOs for the purpose of publicising the results. Another approach is to call a meeting where the NGO delegates debrief people on the process of compiling and submitting an alternative report to the Committee and, as the case may be, of presenting to the Committee. Many people from NGOs will be quite interested in hearing about this process, irrespective of whether they are dedicated to social rights issues.

[42] Sending them to other offices for general distribution may not always be effective.

6. Dissemination over the Internet

Posting the Concluding Observations and all other pertinent documents over the Internet is a relatively simple thing to do for any NGO which already maintains a website. Such other documents can include the alternative report, the State Party Report, the List of Issues, Summary Records, Press Releases etc. It may be useful to set up such a site before the questioning period in Geneva, so that people have the chance to anticipate the session and see what NGOs are doing about the problem. It is a quick way to update people on what work is taking place. Once the site is up, one can distribute the address and encourage people to go through it. This may be quite helpful for media in particular.

7. Translation

If one very much wishes to popularise the results of the Concluding Observations, it may be highly useful to translate the results into the country's principal languages. Since the Concluding Observations are so short, doing so should not be a problem. It will also make reporting in the press of these languages more simple, and more attractive for the journalists.

8. Legal Action

One can use the Concluding Observations as well as the government's replies to the List of Issues as tools in domestic legal challenges.[43] It is generally an accepted practice to use international legal obligations to help interpret ambiguous domestic legislation. Since the Committee's Concluding Observations are an appropriate guide to the scope of a State Party's international social rights obligations, this may become a persuasive factor in pleadings. Thus it may be helpful to distribute the Concluding Observations and replies to the List of Issues to lawyers dealing with legal matters related to human rights, labour law, administrative law, immigration, environmental zoning and so on.

9. Monitoring Implementation of the Committeeís Recommendations

The Committee itself invites activists to take note of whether the Recommendations it makes in the Concluding Observations are implemented. NGOs are encouraged to report back to the Committee, either in their next parallel reports or through updates to the Secretariat's Country File. The Committee has now asked the Secretariat to keep track of all specific follow-up measures it recommends to States Parties, and to keep it informed of the implementation of such measures.[44] NGOs would provide great assistance to the Secretariat by reporting on inaction, and could lobby their governments to have the measures implemented.

K. Proposed Template for Substantive Articles of Parallel Reports

The following template is a suggestion for organising information when reporting under the substantive articles of the Covenant, namely, Articles 6-15. The idea is to keep the headings and replace the explanatory text with the actual information your organisation wishes to report.

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[43] See B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *J. Law & Soc. Pol'y* 117. Available online: www.equalityrights.org/cera/poverty.htm

[44] See the Note by the Secretariat, *Follow Up to the Consideration of State Party Reports* (UN Doc. E/C.12/2003/3) for examples, and the Committee's *Provisional Agenda and Annotations* for the 30th Session (E/C.12/2003/1) for a reference to its current interest in such reports.

All sections of the report should refer to what is stated or omitted in the State Party Report.[45] One may refer to distortions, omissions and challenge government statements. It is useful to do this because the alternative submission is supposed to shed light upon the State Party Report, and bring forward new information.

It will be helpful to read both Chapter IV and the chapter on the right you wish to report on before considering this practical template. Several of the terms used in the template are explained in detail in Chapter IV, including 'progressive obligations', 'available resources', 'retrogressive measures', 'violations' and so on.

Departures from this format are welcome, and it lays no claim to being the most appropriate option. It may be a useful time saving device and checklist. Please bear in mind also that this template focuses on how to report on a single issue, and is thus different from the general checklists provided at the end of each chapter on the substantive rights. Following this template may well result in going over the proposed length of five pages. This may be in part due to the use of several sub-headings. It is up to the activist to decide upon the value of doing so. Where the information is compelling, it may be worthwhile to be thorough.

[45] Bruce Porter, *supra* note 9.

"ARTICLE 11-The Right to an Adequate Standard of Living"

[What follows is a sample table of contents].

I. General Situation 1

II. Topical Focus-The Right to Milk/Water/ [etc.] 1

A. Facts 1

B. State Obligations under the Covenant 1

C. Appropriate Means for Realising the Right 2

D. Resource Constraints 2

E. Possibilities for Cooperation 2

III. CONSIDERATIONS FOR QUESTIONING STATE REPRESENTATIVES .. 2

A. List of Questions 2

B. Recommendations 3

C. Rebuttal of Government Position 3

I. General Situation

In this section, describe the general state of the rights covered by this Article in your country. It is here that one can give some general answers to the questions in the reporting checklist at the end of each chapter. This section should be around one page, and may be in point form. Highlight the aspects omitted from the State Party Report. Feel free to refer to charts and statistics contained in annexes.

II. Topical Focus-The Right to Milk/Water/ [etc.]

Introduce the focus topic briefly, including why it was chosen as a focus. If it is not perfectly obvious that the right falls under this article (e.g. milk and water under 'food'), a brief justification may be useful.

A. Facts

Give a factual description of the state of the rights-holders. Explain why they are not enjoying the right. Keep it brief and avoid value judgements. Cite good authority for all claims.

B. State Obligations under the Covenant

Indicate whether, under the terms of the Covenant as explained in this manual and in any relevant General Comments, the government has not complied with its undertaking to respect, protect and fulfil the right. Try to use these exact terms. Look for particular passages in the General Comments that seem to fit well with the government's conduct in this situation. If the conduct amounts to allowing someone to go without their minimum subsistence levels of food, housing etc., it should be phrased as a violation.

C. Appropriate Means for Realising the Right

The use of the words "appropriate means" is deliberate, and drawn from article 2(1) of the Covenant. Here one should write what specific alternative options the government has. The focus should be on affordable options where possible. Try to keep the proposed courses of action within the bounds of the politically possible, and in this respect getting second opinions is helpful. If you come up with an alternative, try to do a preliminary cost-estimate so that some monetary figure can be attached to the proposal. You may also propose law reform or the provision of judicial remedies for certain issues, which should require no considerable additional expense. Indicate here whether the government has considered the issue in a national plan of action, or has otherwise taken any positive steps.

D. Resource Constraints

The goal here is to show that the government is NOT using the 'maximum of available resources' to realise the right. Doing so means you must show that there are other 'available resources' which could have been used. If you can, compare the cost of the suggested alternative with other social spending items, and/ or with other items such as defence, infrastructure planning, and human resources development etc. It may also be useful to compare with other countries at similar levels of economic development. Cite examples of any retrogressive measures, unfavourable trading arrangements, structural adjustment policies agreed to by the government, corrupt practices, misplaced spending priorities and so on. The section does not need to be extensive. Practically, one should consult with the individual responsible for dealing with the section on resource constraints, and modify the details to suit this part of the report.

E. Possibilities for Cooperation

List briefly any previous attempts or present possibilities for cooperation between the NGO sector and the government in this area.

III. Considerations for Questioning State Representatives

A. List of Questions

List brief questions that you believe will keep the dialogue focused around the key issues.

B. Recommendations

Include a brief list of concrete and specific recommendations. These can be drawn from the 'alternative options' discussed above, or can be suggested steps for implementing the 'alternative options'. In either case, the wording should try to use the terms of the Covenant where possible.

The following is an example:

"We are of the opinion that "appropriate means" within the meaning of Article 2(1) would include the following:

1. The provision of low-interest housing loans for coastal slum dwellers in Colombo;
2. The appointment of a five person task-force with a one year mandate to assess and make recommendations in respect of the sanitary conditions in neighbourhood X. That task force should include not less than two members from non-governmental organisations having expertise in the area; and
3. The development of a national plan of action in active cooperation with members from civil society organisations."

C. Rebuttal of Government Position

The Committee will not find a violation unless the government has had a full chance to respond to any allegations. As the Committee member will engage the delegate on this point, it is helpful to include rebuttals of the government's standard arguments. Indicate whether the issue has been treated in the State Party Report, and whether analysis is deficient. Here it may be useful to refer to what the government has said in the past (e.g. Sate Party Reports, replies to List of Issues, or Summary Records of meeting) and see if it is consistent with what it says now. It is also good to anticipate the standard governmental response(s) to your argument, and include your rebuttal(s) of them. The rebuttals should be supported with references to the authority discussed in Section F.3.

III. The UN Committee on Economic, Social and Cultural Rights

A. Introduction

This chapter is a detailed explanation of the role, working methods and output of the Committee. It is meant to be a reference, to be consulted when needed rather than read carefully at the outset of one's work when compiling a report. The times in which it will be most needed are (1) when the activist chooses to go to Geneva to present a report and (2) when a reference to the Committee in another chapter leaves one wanting to know more about its output or working methods. In the second case, it is best to skim through the table of contents to find the exact reference one is looking for.

B. Situating the Committee within the UN Framework

Human rights bodies at the United Nations level are classified as either 'charter bodies' or 'treaty bodies'. Charter bodies are established under the authority of the Charter of the United Nations. These bodies include the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. These bodies are usually concerned with drafting new human rights treaties and appointing Special-Rapporteurs to conduct research and investigations. The Commission on Human Rights may, under narrowly defined circumstances, also address and examine consistent patterns of gross and reliably attested violations of human rights.[46] Treaty bodies, by contrast, are established under particular treaties and have the responsibility of evaluating compliance with those treaties. There are currently six main treaty bodies at the UN level: the *Human Rights Committee* (which supervises the implementation of the Covenant on Civil and Political Rights), the *Committee Against Torture*, the *Committee on the Elimination of All Forms of Discrimination Against Women*, the *Committee on the Elimination of Racial Discrimination*, the *Committee on the Rights of the Child*, and the *Committee on Economic, Social and Cultural Rights*.[47]

C. Background of the Committee

In Article 16, States Parties to the Covenant undertake to submit reports to the Secretary-General of the United Nations, who forwards them to the Economic and Social Council. These reports detail the measures that the governments have taken in order to comply with the Covenant, and the difficulties they have encountered in attempting to do so. It was deemed necessary to establish a body with some degree of expertise to review these reports in order to assess compliance with the Covenant. This body eventually grew into the present Committee, which is actively engaged in reviewing State Party Reports twice a year in Geneva. The Committee requested and was granted a 'Pre-Sessional Working Group' which meets twice a year to assist the Committee with its review of State Party Reports. The Committee developed a procedure whereby it allowed NGOs and other interested groups to submit information to it.

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[46] Pursuant to the 1503 procedure, named after ECOSOC Resolution 1503, (1967).

[47] See also the *International Convention on the Protection of the Rights of Migrant Workers and Members of their Families* was opened for signature. Adopted 18 December, 1990. General Assembly Resolution 45/158, reprinted in (1991) 30 ILM 1517. The Convention is scheduled to enter into force in July 2003. A seventh treaty body, charged with monitoring this Convention, is scheduled to become operational in 2004.

D. The Role of the Committee

The main function of the Committee is to ensure compliance with the undertakings of the relevant treaty.[48] Mathew Craven identifies three basic functions of human rights reporting:

1. To clarify and develop the applicable standards;
2. To assess the degree to which States Parties are conforming with their obligations;
3. To take remedial or preventive action, which would ensure compliance (which includes making recommendations and noting concern with certain policies or practices).

The decisions of the Committee are not binding on States Parties. It is allowed only to issue recommendations or opinions on whether the obligation in question has been complied with. Thus effecting compliance is left to domestic and international political pressure, esteem in the eyes of the international community, and the good faith of States Parties.

E. History of the Committee

The CESCR is different from the other human rights committees in that it was not created in the text of the legal document itself. Rather, the text simply stated that reports would be submitted to ECOSOC.[49] In the initial stages of reporting under the Covenant, ECOSOC established a *Sessional Working Group on the Implementation of the International Covenant on Economic, Social*

Key Details about the CESCR

Composition and Origin

- 18 Members, serve in individual capacity
- Broad geographical and legal representation
- Established in 1985 by ECOSOC, first session time in 1987

Pre-Sessional Working Group

- Five members
- Meets twice a year, immediately after regular session, for one week
- Designates of country rapporteur
- Drafts and adopts List of Issues for States with reports due for consideration in one to three years

Meetings

- 3 weeks, twice a year in Geneva (May and November)
- Consideration of State Reports for Weeks 1 & 2, General Discussion and adoption of Concluding Observations in Week 3
- Average of two meetings per State Party Report (previously three)
- Consensus decision making

Output

- Concluding Observations
- General Comments
- List of Issues
- Summary Records and Annual Reports
- Revised Reporting Guidelines
- Statements
- Letters to Governments

Special Tactics

- Reviewing out of turn
- Reviewing absent a delegate
- Communicating concerns/writing letters
- Country Visits
- Requests for Additional Information

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[48] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 31.

[49] The United Nations Economic and Social Council. ECOSOC is composed of 54 State Representatives. These representatives deal with economic and social issues, and in doing so represent the interests of their country. They may be contrasted with individual experts, who are supposed to decide matters independently of any state interest.

and Cultural Rights to 'assist' it with the consideration of State reports.[50] The Working Group was subsequently criticised heavily for an extensive array of reasons, which are compiled in Craven's work.[51]

This criticism led the Economic and Social Council to establish a permanent body of independent experts. In 1985, it adopted Resolution 1985/17, under which the Committee on Economic, Social and Cultural Rights was established.[52] Although the Committee was intended to inherit the procedure of the Sessional Working Group, it in fact took on a far more independent and effective role. It met for the first time in May, 1987.[53]

Although the fact that the text of the Covenant did not create a body was considered a drawback, it eventually became an advantage. The Committee's functions have not been locked in by the treaty provisions, as in the case of other human rights committees. ECOSOC has been able to broaden the mandate of the Committee as it pleases, due to the vague nature of its role described in Articles 16-25. In practice, this has usually meant the Committee issues requests, which ECOSOC often grants.[54] The extensive participation of NGOs owes a direct debt to this historical anomaly.

F. The Idea of "Constructive Dialogue"

The chief goal of the Committee is to conduct a 'constructive and mutually rewarding dialogue' to assist States Parties in implementing their obligations under the Covenant. This means that the Committee shall engage in a process of pointing out areas of concern and making recommendations, much the way a consultant would, without resorting to formal declarations of non-compliance or violations. The benefit of this approach is that governments have been less offended by the process than they have in the more confrontational approach.[55] The drawbacks may perhaps be that the declaratory substance of the Concluding Observations provides domestic activists with less clear language with which to advance their causes, and that it may steer the Committee away from the important task of frankly assessing compliance with the Covenant. In any event, in the face of compelling information, the Committee does not hesitate to declare that an article of the Covenant has been violated.

G. Composition and Election of the Committee

The notable aspects of the Committee may be summed up as follows:[56]

1. It is composed of 18 independent experts;
2. They are to be recognised experts in the field of human rights;

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50 ECOSOC Decision 1978/10, 3 May 1978, which may be found in UN Doc. E/C.12/1989/4 at 6 (1988).

51 Craven, *supra* note 48 at 40.

52 ECOSOC Resolution 1985/17, para. (a), UN ESCOR, Supp. (No.1), at 15, UN Doc. E/1985/85, (1985).

53 See P. Alston and B. Simma, "First Session of the UN Committee on Economic, Social and Cultural Rights" (1987) 81 *American Journal of International Law* 603.

54 Craven notes, *supra* note 48 at 50, that "[t]his has enabled the Committee, while working within the broad parameters of the ECOSOC resolutions that created it, to develop its working methods in an unprecedented manner."

55 Craven, *supra* note 48 at 67-68, seems to endorse the approach without mentioning the criticism that follows.

56 These criteria were established in Resolution 1985/17.

3. All geographical regions and legal systems are to be represented on the Committee;[57]
4. They are nominated by States Parties and elected by secret-ballot by ECOSOC;
5. They serve a four year term, and are often re-elected.

People serve in two distinct ways on the Committees, Councils and Commissions of the United Nations: they do so in either *representative* or *independent* capacity. *Representative capacity* means that they formally represent the interests of their States. *Independent capacity* means that the experts are expected to decide independently of any political interests, and thus receive no instructions from their home country. Members of the Committee serve in independent capacity. This distinction can become blurred because individual experts are elected from nominations submitted by the States Parties to the relevant Covention. [58]

H. Basic Procedure and Output of the Committee

1. Sources of Information

When reviewing a country's record, the Committee considers information from five sources:

1. A country file created by the Secretariat of the United Nations, and in which relevant information from other UN organs as well as NGO submissions are placed;
2. Submissions from specialised agencies of the UN (ILO, UNESCO, WHO, FAO, UNDP);[59]
3. Submissions from NGOs;
4. The State Party Report;
5. The general information available to Committee members as experts in their field.

The Committee also keeps abreast of the developments of the other UN human rights committees by appointing a 'liaison-officer' for each one.[60]

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[57] In practice, this means that 3 seats are reserved for each of Africa, Asia, Eastern Europe, Latin American and Western Europe, with the remaining three seats being reserved for the proportional increase in States Parties coming from each of these regions.

[58] For a criticism of some of these requirements by the former Chairperson of the Committee, see P. Alston "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 332 at 349.

[59] That is, the International Labour Organisation, the World Health Organisation, the Food and Agriculture Organisation, and the United Nations Development Programme.

[60] Craven, *supra* note 48 at 83. These include the Human Rights Committee (ICCPR Committee), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT) and the Committee on the Rights of the Child (CRC). One may note that the acronyms used in most cases are the same as the acronyms used for the Conventions themselves.

2. State Party Report

States Parties to the Covenant are obligated under Article 16 to submit reports every five years on the measures which they have adopted and the progress made in achieving the rights. Nearly all States are late in reporting, and there is a considerable backlog of reports. There is typically a significant difference between when the report is due, when it is submitted, and when it is considered by the entire Committee in the presence of a State representative. The Committee adopted Revised Reporting Guidelines in 1991.[61] These guidelines are lengthy, and ask specific questions regarding measures taken to implement the rights. They are meant to be followed by the government of the State, not necessarily activists. However, activists would be well advised to look over them when considering the State Party Report, to see whether the State has complied with the relevant instructions.

3. Pre-Sessional Working Group and the ëList of Issuesí

This body is a working group of the Committee, and was established by ECOSOC Resolution 1988/4.[62] Its principal task is 'to identify in advance the questions which might most usefully be discussed with the representatives of the reporting States.' This creation was a device to assist the Committee with its backlog of reports, and also to improve the efficiency of the reporting system. The PSWG is composed of five members, who are appointed by the Chairperson of the Committee with due regard for geographical representation.

State Party Reports are generally submitted over a year in advance of the date set for the dialogue between the Committee and State Party.[63] The PSWG meets twice a year, usually after the Committee's session, to examine study these reports. The PSWG assigns a *Country Rapporteur* to each of five reports, and this Rapporteur generally assumes the responsibility for handling all of the responsibilities concerning that country's report from its reception to the drafting and adoption of the Concluding Observations.

At each session of the PSWG, it considers reports for States Parties that are normally scheduled for review in approximately one year to six months time (the next session). The Country Rapporteur undertakes a detailed examination of the State Report, a file of information prepared by the Secretariat of the UN, and submissions from NGOs. He or she then drafts a 'List of Issues' to be forwarded for the State Party's consideration. These Lists of Issues contain many, but not all, of the issues that will likely be discussed during the dialogue between the Committee and the State representative(s). The purpose of the list is to allow State Parties to prepare answers to some of the Committee's concerns, and for the Committee "…to direct the constructive dialogue to those issues of greatest concern."[64] The State Party is asked to reply to the List in writing, and well in advance of the date set for the review so that it may be translated into the Committee's working

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61 *Revised general guidelines regarding the form and contents of reports to be submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/1991/1 (1991). These guidelines may be obtained over the Internet by going to the OHCHR website and entering the document number in the 'treaty-bodies database' search field.

62 ECOSOC Resolution, 1988/4, in UN Doc. E/C.12/1989/4 at 31.

63 However most Reports are long overdue, making the initial reporting schedule a poor indicator of when a report will be actually be considered.

64 Craven, *supra* note 48 at 73.

languages.[65] As discussed in the last chapter, NGOs may have a decisive and positive impact on the formulation of the List of Issues.[66]

4. Logistics of the Committee Sessions

The Committee meets twice a year in Geneva, usually in May and in December, for a period of three weeks. The Committee generally spends about eight days considering reports, and it considers about one report every two days.[67] Its general procedure is as follows:

Week 1: Consideration of State Reports

Week 2: Consideration of State Reports

Week 3: General Discussion and closed meetings for the drafting and adoption of Concluding Observations.

Each session of the Committee is designated numerically. Thus one finds that the State Party Report for such-and-such country was considered at the Committee's 16th session, held between April 28-May 16, 1992.

5. Oral Review Period

The procedure of the Committee is summarised succinctly in one of its reports. It includes the following procedures.

1. The State Party representative is invited to introduce the report, and to respond to the list of issues drawn up by the PSWG (approx.1-2 hours);
2. A period of time is then allocated to the specialised agencies to provide the Committee with any observations relevant to the report;
3. Members of the Committee question the S-P representative (3 hours);
4. Another period is scheduled on a different day to allow the S-P representative to present replies to the concerns mentioned by the Committee members (3 hours);
5. Where such replies are still inadequate, the representative is asked to provide further written information to the Committee at a later date.[68]

The State Party representatives are usually ambassadors of the country to Geneva, or some other high level diplomat. During the questioning, there has been what has been described as 'verbal discomfort', or even embarrassment, due to the detailed evidence regarding violations of the

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65 That is, English, French, Spanish and Russian.

66 Other tasks adopted by the PSWG include (i) the allocation of time limits in the consideration of reports; (ii) considering how to deal with supplementary reports containing additional information; (iii) considering draft General Comments; and (iv) drawing up Lists of Issues for the General Discussion. See Craven, *supra* note 48 at 73-74 for a more complete discussion.

67 By contrast, the CERD and the CEDAW consider a far greater number of reports. The CERD, for example, considered 26 reports in 14 working days, which has been criticised as 'pointless'. See R. Higgins, "The United Nations: Some Questions of Integrity" (1989) 53 *Modern Law Review* 1 at 19.

68 This information is drawn from the *Report of the Committee's Seventh Session*, UN Doc. E/1993/22 at 16, para. 32-34.

Covenant submitted by NGOs, and not detailed in the State Party's report.[69] Until recently, the entire process was conducted over a period of three meetings. Now this has been shortened to two meetings per report. NGOs are allowed to sit in on these sessions, but may not interrupt the proceedings.

6. Decision Making

The Committee may take decisions by majority of members present, but it strives to decide everything by consensus.[70] This practice has been praised as one that discourages political divisiveness within the Committee,[71] and criticized as weakening decisions to the point of the lowest common-denominator of opinions.[72] This author finds the former view more persuasive, particularly in light of the Committee's retention of the voting option and the progressive nature of the work it has undertaken over the last decade.

7. Adopting Concluding Observations

The Committee meets in closed session typically during the last week to discuss the State's performance and adopt the Concluding Observations. The Country Rapporteur prepares a draft set of Concluding Observations, and then presents them to the Committee for its adoption, generally in the last week. The Concluding Observations are all organised along the same lines: (i) Introduction, (ii) Positive Aspects, (iii) Factors and Difficulties Impeding the Implementation of the Covenant, (iv) Principal Subjects of Concern, and (v) Suggestions and Recommendations. The Concluding Observations are one of the primary sources for understanding the obligations under the Covenant, much the way judicial decisions are a key source for understanding the application of domestic legislation or private law. All of the Committee's Concluding Observations are available on the OHCHR website, usually in English, French and Spanish.[73]

8. Days of General Discussions

The Committee takes a day of the third week for General Discussions about virtually any topic related to the Covenant, including the general considerations regarding State Reports. The purpose of such discussions is to give the Committee a chance to reflect upon and synthesize the information it has considered, with a view to clarifying or elaborating upon the nature of the obligations related to particular rights or themes. It often uses such days to prepare for the eventual adoption of a General Comment. The topics for such meetings are made public in advance, and specialists are often invited to present relevant information or background papers. These days are considered 'open', and thus NGOs are welcome to attend, and often sit as observers. These observers *may* be able to make comments, depending on the topic and organisation of the day.[74]

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69 See A. McChesney, *Promoting and Defending Economic and Social Rights: A Handbook* (Washington: American Association for the Advancement of Science, 2000) at 105-106.

70 *Rules of Procedure*, approved by ECOSOC, in UN Doc. E/C.12/1990/4/Rev.1.

71 Craven, *supra* note 48 at 54.

72 A. Robertson, "The Implementation System: International Measures" in L.Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981) at 340.

73 However, they are all available in the six official languages of the United Nations, upon request.

74 McChesney, *supra* note 69 at 114. But see Craven, *supra* note 48 at 94, who writes "It is particularly notable that the participation of NGOs has been considerably greater at such discussions than in other stages of [the Committee's] work."

The General Discussions have been criticized as being somewhat unproductive, as they do not tend toward the adoption of a particular set of recommendations or agreed principles.[75] The results, which are often summarised and published by the Committee in its annual report, are usually a patchwork of observations rather than a programme of action or agreed assessment of the situation.

9. General Comments

General Comments are documents published by the Committee that describe in detail the nature of a particular set of obligations or themes related to the Covenant.[76] There are currently 15 General Comments, with several draft Comments being considered. The stated purpose of the General Comments is to facilitate the task of State reporting.[77] This is so because the Committee was formally created to assist ECOSOC with its task of reviewing State Party Reports.

In the course of doing so, however, the General Comments have elaborated in considerable detail the scope and specificity of obligations under the Covenant. There can be no question that these General Comments have introduced more specific obligations under the Covenant. This may be viewed by some as altering the substance of the obligation under the Covenant itself, while it may be defended by others as elaborating the content of rights that were necessarily formulated in an abstract manner. Either way, the practice is established in respect of other human rights treaties, and has not to date been the subject of a formal objection by any State Party.[78]

Any member of the Committee may put forward a draft General Comment for consideration by the Committee when it meets together in a plenary session. Once it is adopted by the Committee, it is included in its annual report to the General Assembly, and transmitted to States Parties. Any comments from these groups are brought to the Committee's attention at its next session. There has been a recent trend toward encouraging the active contribution of NGOs and other special individuals or bodies to an extensive period of consultation before adopting General Comments.[79] This gives activists an excellent opportunity to contribute to this process. Practically, this could involve finding out whether a draft General Comment is being considered at the session to which you are going. This and information about how to get involved in the process may be obtained from COHRE, at www.cohre.org.

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75 Craven, *ibid.*

76 ECOSOC invited the Committee to begin producing such General Comments in Resolution 1987/5 (26 May 1987), in UN Doc. E/C.12/1989/4 at 27. Each human rights treaty body at the United Nations is engaged in the process of issuing General Comments or General Recommendations. For a compilation of all General Comments and General Recommendations, consult "International Human Rights Instruments", UN Doc. HRI/GEN/1/Rev.5. To access it over the Internet, go to www.unhchr.ch, and type the document number into the 'Treaty Bodies Database' search field. See also P. Alston, "The Historical Origins of the Concept of 'General Comments' in Human Rights Law" in L. Boisson de Chazournes & V. Gowland Debbas, eds., *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff, 2001).

77 Craven, *supra* note 48 at 90. See the *Report of the Committee's Seventh Session*, UN Doc. E/1993/22, at 19, para.49 (1993) in which the Committee explains its role in greater detail.

78 *Ibid*

79 See for example, COHRE's (Centre on Housing Rights and Evictions) open invitation to share experiences or make suggestions for use in the development of a draft General Comment on the right to water. COHRE Online Newsletter No.4, (June 2001), available at the website www.cohre.org

10. Annual Reports and Summary Records

Both of these documents are public.[80] The Committee issues Summary Records for each session, which outline in greater detail the actual procedure before the Committee in particular cases. These reports include paraphrased summaries of the verbal exchanges between government delegations and individual Committee members. They thus contain valuable insight into how the Committee works. It is particularly useful to get the Summary Records of the last presentation made by one's government to the Committee. This has been used effectively in the past to hold the government accountable for contradictions. On the other hand, they are quite detailed and thus require time to read. They are available on the OHCHR website.[81]

The Committee's Annual Report is a brief summary of the main events happening during that particular year, as well as attached documents such as draft General Comments or draft guidelines for the preparation of certain documents.

11. Statements

The Committee on occasion issues Statements, such as the *Statement on Human Rights and Intellectual Property*,[82] *Statement on Poverty*,[83] and *Statement to the Third Ministerial Conference of the World Trade Organization*[84] among others. These statements are usually shorter and less rigorous then the General Comments, and are more of a general reflection issued by the Committee than a statement of the legal content of a particular article. It is not clear what the juridical value of such statements is,[85] though for activists they effectively serve the same role as General Comments. Thus references to them will bolster advocacy efforts on the same topics, as well as relevant submissions to the Committee.

I. Unconventional Procedures

1. Reviewing the Compliance of States that Have Not Submitted Reports

The Committee has resolved that it will review the progress of the Covenant in States Parties whose reports are long overdue. It notifies the government of the country concerned that the situation will be considered on a particular date. It has done so in 1999 with the Solomon Islands and in 2000 with the Congo (Brazzaville).[86]

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80 See Craven, *supra* note 48 at 55-56, where he explains the crucial role of publicity to the work of the Committee.

81 See Chapter XVII .

82 UN Doc. E/C.12/2001/15.

83 UN Doc. E/C.12/2001/10.

84 UN Doc. E/C.12/1999/9.

85 Note that in para. 2 of the *Statement on Human Rights and Intellectual Property*, *supra* note 82, the Committee remarks that it issued the Statement as a preliminary treatment of the problem. The impliedly more mature and juridically dispositive pronouncement appears reserved for the forthcoming General Comment.

86 McChesney, *supra* note 69 at 119-120.

2. Reviewing a Report When the State Party Does not Send a Delegate

At its seventh session, the Committee resolved that once a government had consented to a particular date for the review of its report, the Committee would proceed to consider that report with or without the presence of a representative. This was a practical technique developed to deal with the problem of constant deferrals.

3. Reviewing a State Out of Turn

In some cases, the Committee may arrange to examine a situation sooner that it normally would. This may happen when a State Party has failed to comply with the Committee's requests for information or recommendations for how to avoid violating rights.[87] This has taken place with Canada and Israel.

4. Requests for Additional Information

At its Fifth Session, the Committee requested that every single State under review at that period submit additional written information at a later time. This is the process it utilises to address inadequate reports or insufficient answers to its concerns. It may request that such information be provided in three ways: (i) in the next periodic report, (ii) by written reply to the direct questions posed, or (iii) that it be provided within six months for the consideration of the PSWG. If the latter option is taken, the PSWG may adopt Concluding Observations with regard to that information in particular.

5. Communicating Concerns to the State Party & Requesting Information

After receiving complaints from Canadian NGOs in 1996 and 1997, the Committee decided to communicate its concerns to Canada without waiting for its next report, which was due in 1997. In its Concluding Observations on Canada's Report, issued on 4th December, 1998, it highlighted that the government had not replied to its request for information, and that it considered a particular piece of legislation to be "…a clear violation of the Covenant."[88] On 21st May 2001, the Committee wrote a letter to the government of Israel, and also to the Secretariat of the United Nations, to protest the mistreatment of civilians.[89]

6. Country Visits

In 1997, the Government of the Dominican Republic accepted a longstanding offer from the Committee for it to send a delegation to examine the local situation. The delegation, consisting of two Committee members and a UN support staff, met with government officials and individuals and organisations from civil society. The visit concerned the issue of forced evictions.

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87 McChesney, *supra* note 69 at 119.

88 *Concluding Observations: Canada* (1998) UN Doc. E/C.12/1/Add.31.

89 For more information about this communication, contact ADALAH, the Legal Centre for Arab Minority Rights in Israel, at http://www.adalah.org

Another country visit took place in Hong Kong in 1997. A group of NGOs invited the Country Rapporteur for Hong Kong to visit the country and engage in a dialogue concerning the problems there just before considering the Hong Kong report. The outcome was very successful. Indeed, the Director of COHRE, Scott Leckie, reports that this is one of the most effective ways to encourage and allow Committee members to understand and take seriously the social concerns in one's country.[90]

J. Conclusions

Among the Committee's benefits we can count publication of non-compliance, elaboration of the content of the rights, encouragement of academic work on the nature of the rights, an international forum for domestic dissent, constructive dialogue that facilitates a consideration of the rights and demands justification of adverse policies. Among its drawbacks we find tight time constraints, lack of expertise in all the areas, and a 'constructive dialogue' approach that involves more 'noting with concern' than the identification of violations,[91] and excessive workload.

What is interesting to note is that most drawbacks associated with the Committee and the reporting system can be addressed through quality alternative reporting. By providing brief and pertinent information, NGOs can essentially do the Committee member's work for her or him, by spelling out the conditions that amount to non-compliance. The lack of expertise problem is remedied by the provision of adequate empirical information. While legal officials are not as good at gathering and constructing analyses of such information, it is standard practice for them to adjudicate between conflicting analyses.

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[90] Telephone interview, 17 December 2001.

[91] Some may see little merit in pointing out violations as opposed to 'noting with concern'. Others may view such declarations as providing activists with stronger rhetoric for use in domestic advocacy.

IV. The Nature of States Parties' Obligations under the ICESCR

Article 2

1. *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of 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.*

A. Introduction

Article 2 (1) is the key to the ICESCR. It sets forth the kinds of obligations the States Parties undertake when they ratify[92] the Covenant. It identifies the steps the government must take in order to realise each substantive right.

Social rights are seen as different from civil and political rights in that they are supposed to be implemented progressively, or over time, rather than immediately. Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) requires States Parties to "respect and ensure" the rights set forth in that Covenant. The ICESCR, by contrast, requires States Parties to "take steps…to the maximum of available resources" to realise its rights. Many people have argued that this wording makes the rights under the ICESCR so vague that one cannot tell when they have been violated. However this is no longer generally regarded as true. The Committee on Economic, Social and Cultural Rights and many academics have devoted substantial efforts to demonstrating how this kind of obligation is meaningful, and that clear violations of it may be demonstrated.

This chapter will explain how to identify such violations. First, it will examine the conceptual framework for discussing the government's obligations. Second, it will explain exactly how one may address specific kinds of government obligations. Finally, it will deal with the important issue of how to analyse 'available resources.'

B. Conceptual Framework

1. Obligation of Conduct and Result

An obligation of conduct exists where a government must behave in a particular way, but not commit itself to achieving any substantive result. For example, in the right to be free from torture, the government commits itself to order its laws and practices such that it never tortures any individual while carrying on its activities. The obligation is concerned with conduct only. An obligation of result, on the other hand, is one that commits the government to realizing a particular state of affairs, but leaves the government the discretion to adopt its own means of achieving it. For example, in the case of the right to education, the government would commit itself to ensuring

[92] To 'ratify' the Covenant means to officially signify the State's willingness to be bound by it. In most cases, it takes place after 'signature', which signals only an intent ultimately to be bound. The United States and China have currently (2002) signed but not ratified the Covenant.

that primary education is free for everyone, but may decide to accomplish this result in a variety of differing ways. In 1977, the International Law Commission[93] declared that the obligations arising under the ICESCR were obligations of result, and not of conduct.

This conclusion has been criticized heavily, and is now generally rejected. Consider once again the case of torture. While it is true that the State has an obligation of conduct to abstain from the use of torture, it is equally the case that it commits to "prevent" the use of torture within its territory.[94] Put simply, it commits to eradicate torture. This is therefore also an obligation of result. It is understood to be the case that the use of torture must be addressed through proactive governmental measures such as police, military and prison official training. Likewise with education, there is a 'conduct' dimension as well. States must not remove access to educational resources, nor can they simply do nothing whatsoever. They must also provide such services in a non-discriminatory fashion (Art. 2(2)) and to everyone (Art. 13(2)(b)), the failure of which may be viewed as the non-fulfilment of obligations of conduct. These issues highlight the difficulty of trying to conceive either the ICCPR or the ICESCR in terms solely of obligations of conduct or result. In General Comment No.3 (1990), the Committee clarified that the ICESCR includes both types of obligations.[95]

2. The Obligation to Respect, Protect and Fulfil

A better way to conceive of the obligations under the Covenant, and human rights obligations in general, is that they include three types of obligations. The *obligation to respect* requires the State not to do anything that would actively interfere with the realisation of a right (e.g. banning unions, forced evictions). The *obligation to protect* requires the State to ensure that individual's rights are not violated by private non-state actors, such as corporations, landlords or paramilitaries (e.g. refusing to enforce labour laws, allowing discriminatory hiring practices, illegal expropriations of land). The *obligation to fulfill* requires the State to take positive steps to ensure the realization of the right in question, which may include "…legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights."[96] In the later General Comments, the

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[93] The ILC is an important international legal commission that is in charge of drafting new treaties for the United Nations and the international community in general. Most human rights treaties, by contrast, are drafted by the UN Commission on Human Rights (discussed in Chapter 1). For the report of the Commission, see "Report of the International Law Commission" (1977) 1 *Yearbook of the International Law Commission* 20, para. 8.

[94] See Art. 2(1) of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment* (adopted in 1984, in force in 1987). "Each state Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[95] See also "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", reprinted in (1998) 20 *Human Rights Quarterly* 691, para. 7; M. Craven *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Oxford University Press, 1994) at 107.

[96] *Maastricht Guidelines, ibid.* para.6; for a thorough analysis, see Craven, *ibid*. at 109-114 and his references therein. The Committee itself seems to have adopted the approach informally, and without consensus, and it is notably absent from General Comment No.3 Another version of this typology includes the obligation to promote, see G. Van Hoof , "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of some Traditional Views" in P. Alston and K. Tomasevski, eds., *The Right to Food* (The Hague: Martifus Nijhoff, 1984) 97, the relevant excerpt of which is reprinted in H.J. Steiner and P. Alston, eds., *International Human Rights in Context* (Oxford: Oxford University Press, 1996) 279-283.

obligation to fulfil is defined further as including an obligation to *facilitate*, to *provide* and to *promote*.[97]

It is clear today that all of the rights under the Covenant must be respected, protected and fulfilled. Many commentators feel that ESC rights are exclusively concerned with the obligation to fulfil, while civil and political ones involve the obligation of respect only. This position has been criticized ably by scholars who have indicated the extensive range of obligations to protect and fulfil civil and political rights, as well as the obligations to respect and protect ESC rights. [98]

This language is also helpful because, generally speaking, the obligations to respect and protect are often viewed as not being dependent on resource availability.[99] In general, it is advantageous to use this terminology when reporting if it is useful to the activist her or himself. It has been noted that in actual practice, it may be difficult to categorize conduct in this way.

C. The Government's Obligations under the Covenant

Many critics argue that social rights are vague, lack judicially enforceable content and are merely legislative aspirations rather than legal rights. The Committee and academics have struggled against this view to give the admittedly general wording of the Covenant an interpretation which may give rise to legal obligations that may be applied with some consistency and in predictable ways. This section summarizes those developments in plain language that non-lawyers can understand and use in their reports.

1. Progressive Obligations

A progressive obligation under the Covenant is an obligation to implement the right over time, to the maximum of available resources. It is a commonly made observation that the infrastructure necessary to implement all of the rights in the Covenant cannot be established overnight. However States Parties may not delay the implementation of the right indefinitely. The Committee addresses this issue in General Comment No.3.

> *[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring*

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97 The obligations to facilitate and provide are introduced in General Comment Nos. 12 & 13, and the obligation to promote is introduced in General Comment No. 14. The Committee notes in General Comment No. 14 that the obligation to promote is justified in the case of the right to health due to its fundamental importance. It is doubtful that this justification would apply any less to other rights under the Covenant. In General Comment No. 15, para. 25, the obligation to provide is reaffirmed vis-à-vis the right to water.

98 See C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in the New South African Constitution" (1992) 141:1 *University of Penn. Law Review.* 1 at 46-72 (comparing positive and negative rights) and 72-85 (examining the obligations to respect, protect and fulfil social rights).

99 See for example, General Comment No. 7 on Forced Evictions, para. 9. "However, in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must *refrain* from forced evictions and *ensure* that the law is enforced against its agents or third parties who carry out forced evictions." [emphasis added]. The terms 'refrain' and 'ensure' are perfectly synonymous with 'respect' and 'protect'.

> *full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant, which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible toward that goal.*[100]

Thus it is crucial to note that while all the aspects of the right will take time to realise fully, the State must begin to implement the right immediately. A careful reading of General Comment No.3 reveals that a government is required to do at least three concrete things to implement its obligations progressively. First, it must take specific steps, and cannot do nothing. Second, the steps must be 'expeditious' and 'effective'. Third, the steps must be "deliberate, concrete and targeted as clearly as possible…"[101] These requirements are supported by text of the Covenant, which specifies that States Parties shall realise the rights "by all *appropriate* means". Part of this requirement is that States Parties adopt national plans of action which set forth long-term plans and policies for implementing the right(s). Plans of action are discussed further below.

To put this information more practically, one may consider the following interpretation of the progressive obligation to implement all of the Covenant's rights. The government must take steps that are (a) a necessary stage of a long term plan, (b) a substantial contribution (i.e. not of negligible impact), (c) clearly targeted and (d) expeditious (i.e. do not take an unreasonable amount of time to effect results). The long term plan itself must strive to implement the full scope of the entitlement envisaged by the right. This full entitlement is described in the chapters of this manual pertaining to each right. It should be noted that by showing that a governmental programme does not meet these criteria, it is in non-compliance with the Covenant. So in this way, one may point out non-compliance with progressive obligations without even considering resource constraints. One may try to show that a government failed to protect and fulfil the right because it failed to create a coherent strategy, misspent its funds, or acted in bad faith when implementing the supposed remedial programme.

A final point about progressive obligations is that they impose equally onerous obligations on rich countries. Since the obligation is to promote the rights to the maximum of available resources, rich countries must also spend heavily to respect, protect and fulfil the rights of the people living on their territory. The Committee's 1998 Concluding Observations on Canada demonstrate clearly how a relatively affluent country can be found clearly to violate its obligations under the Covenant.[102]

2. Immediate Obligations

There is no perfectly clear dividing line between progressive and immediate obligations.[103] It is clear from the foregoing that progressive obligations must be acted on immediately, and thus contain sub-obligations that are of immediate effect. The difference between a progressive

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[100] Para. 9.

[101] General Comment No. 3, para.2. All of these points are repeated with emphasis in General Comments No. 12 at para. 14; No. 13 at paras. 43-44; and No. 14 at paras. 30-31.

[102] UN Doc. E/C.12/1/Add.31, 4 December 1998.

[103] Immediate obligations are discussed in General Comments No. 3 at paras. 1-2; No.12, at para. 16; No. 13, at para. 47; and No. 14 at para. 30.

obligation and an immediate obligation appears to be that all of the elements of a specific immediate obligation must be realised at once or as a matter of first priority. For example, if a State has an immediate obligation to adopt a plan of action for primary education, merely commencing the plan will not suffice. It must adopt a completed one. If it does not, it violates the Covenant. If it has a progressive obligation to adopt a plan of action for higher education, *commencing* the plans implementation in an expeditious manner will suffice. Other examples of immediate obligations include the obligation to take steps under the Covenant,[104] to guarantee all of the rights on a non-discriminatory basis,[105] to monitor the housing rights situation,[106] and to adopt a national plan of action in respect of certain rights.[107] If any of the elements of an immediate obligation are not present within a reasonably short period of time,[108] the government is in automatic non-compliance. It is for this reason that immediate obligations must be defined precisely. When the Committee identifies an immediate obligation, it is stating that resource constraints are not an excuse for non-implementation.

Immediate obligations are similar to 'core obligations,' which are discussed below, so far as resource constraints are concerned. However 'core obligations' pertain to the minimum essential levels of resources required under each right. Immediate obligations do not necessarily need to concern those core needs, and in fact do not in any of the examples given above. Another difference between them is that 'core obligations' can, ultimately, be left unfulfilled if the State can demonstrate that every effort was made to secure them. Immediate obligations are usually so specific, and bureaucratic, that they are rarely the kinds of obligations that involve an insupportable expense.

3. Core Obligations

The Committee realised rather early that States were denying the realisation of basic social rights on the pretext that the obligations were merely progressive. The formation of a more robust interpretation of 'progressive obligations' as given above was one part of the strategy in dealing with that argument. But that alone was not sufficient to deal with severely aggravated situations in which people died from preventable diseases, children starved, or people were left to sleep under the hostile open skies. The Committee thus developed the idea that the State has a heightened obligation to protect and provide the minimum essential levels of resources required for each right.[109]

> *[T]he Committee is of the view that a minimum core obligation to unsure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant…. In order for a State Party to be able to attribute its failure to meet at least its*

[104] General Comment No. 3, para. 2.

[105] General Comment No. 3, para. 1.

[106] General Comment No. 4, para. 13.

[107] For housing, see General Comment No. 4, para. 12; for food, see General Comment No. 12 at para. 21; for education, see General Comment No. 13 at para. 52; for health, see General Comment No. 14 at para. 53.

[108] This is the language used for the obligation 'to take steps' in para. 2 of General Comment No. 3.

[109] The actual wording used by the Committee is 'minimum essential levels of each right'.

> *minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*[110]

Therefore, the practical difference is that failure to provide these minimum essential levels means that the State is *prima facie* failing to discharge its obligations. This means that the State, rather than the activist or Committee, must prove why it does not have sufficient resources. A second aspect is that the State has an apparently heightened responsibility to care for these rights in such situations. Rather than merely take 'appropriate' or 'expeditious' steps, it must demonstrate that "…every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[111] So, in the result, the two main differences between core obligations and progressive obligations is that core obligations involve (1) the State having the burden of proving resource constraints,[112] and (2) a more intense State obligation to protect and fulfil the right, and thus less deference to the State's discretion in choosing the means of implementation.

As a practical matter, however, it is advisable for activists to develop arguments about resource constraints anyway. Whether or not the burden is on the State, it will always argue that it did not have the resources to implement the right. The Committee has little time to do an in-depth analysis of the State's budgetary allocations, and so it is not well positioned to reject the State's arguments in this regard. Therefore, activists should provide those rebuttals. In doing so, they may exploit the more intense obligation involved. This could mean showing that the government did either nothing, very little, or ignored plausible options and thus did not make 'every effort'.

A slight wrinkle to this explanation is that the Committee states in General Comment No.14 that "…a State Party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable."[113] It thus claims that

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110 General Comment No. 3, para. 10.

111 General Comment No. 3, para. 10.

112 Another way of putting 'burden of proof' *in this case* is 'presumption of guilt'. See Craven, *supra* note 95 at 142-144. Craven shows that the Committee clearly did not intend to establish a presumption of guilt by introducing the concept of core obligations. Craven argues, however, that the doctrine must be read as establishing a presumption of guilt independent of resource considerations. He argues that otherwise it makes no sense to speak of *prima facie* violations. I agree with Craven's reasoning and conclusion, but will employ the commonly used words 'burden of proof'. In General Comment No. 12, para. 17, the Committee confirms such an approach: "A state claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the *burden of proving* that this is the case…" [emphasis added]. The reason Craven may have avoided speaking of 'burdens' is that the role of the Committee is not strictly adjudicative. That is, it does not formally decide between two parties, however much it may do so in practice. Thus it is not clear *from* whom the burden is supposed to shift. It seems implicit that it is from the Committee or the NGO, though it is not clear at the institutional level that the Committee has the role of trying to prove that violations have occurred. Were the Committee to adopt a complaints procedure, this method would become more sound. Alternatively, Bruce Porter would argue that the State should always bear the responsibility of demonstrating why resource constraints inhibit the realisation of Covenant rights. This interpretation is supported in General Comment No. 14, para. 47, and makes sense granted the State's role is that of presenting reports on the progress made in implementing the rights. Telephone interview, 22 January, 2002.

resource constraints may never be an excuse for failing to implement some core obligations. While perhaps useful, such an interpretation may be incompatible with the text of Art.2(1), which stipulates categorically that the obligations are linked to the maximum of available resources. It also disregards the doctrinal method of dealing with core obligations proposed in General Comment No.3 and used thereafter. Moreover, the Committee places this remark in the section pertaining to violations (rather than core obligations), gives no mention of breaking with its own past jurisprudence, and leaves open such a categorical interpretation that the claim may be inconsistent with the limitations clause of the Covenant (Art.4). It thus remains unclear how strongly the Committee intended the statement to be read. The Committee may have meant that all of the core obligations in paragraph 43 *in particular* are immediate obligations, and thus not subject to resource constraints. This is consistent with why paragraph 44, also containing core obligations, but those which are more resource dependent,[114] is not labelled as non-derogable. Thus it is possible to read the Committee's comment to be that some but not all core obligations may be immediate obligations and thus not dependent on available resources. Should it choose to adopt the stance that all core obligations are non-derogable, it may give rise to legitimate criticism. In practice, the matter should have little impact on the task of writing reports.

4. 'Violations'

The word 'violation' is a common expression used in human rights discourse. It has at least two different connotations. One is that a violation is an interference with a liberty of some sort. Under public international law, for example, one State violates another State's borders when it crosses them without permission. The State violates an individual's liberty when it arrests him without cause. Another connotation is that a violation is a breach of a rule. One may violate a law or an oath by not obeying it.

There are three distinct ways in which we speak of violations of rights under the Covenant. The first use of 'violation' under the Covenant is non-compliance with the rules. In the *Limburg Principles*, a group of academic experts declared that "[a] failure by a State Party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant."[115] This conception refers to the second of the connotations explored above. This kind of violation can happen through *acts of commission* (i.e. active interferences with rights) and *acts of omission* (i.e. neglecting to do what it ought to do).[116] This notion is expansive and encompasses the next two meanings.

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[113] Para. 47. 'Non-derogable' means that they may not be taken away under any circumstances, including times of emergency, war or outbreak. Classic examples are torture and arbitrary execution. 'Derogable' rights, by contrast, may be waived in emergencies. So in the case of a national emergency, states may lawfully restrict the right to a trial within a reasonable amount of time, or the right to vote. . See R. Higgins, "Derogations under Human Rights Treaties" (1976-77) 48 *British Yearbook of International Law* 281. See also the *International Covenant on Civil and Political Rights*, Art. 4 of which is a 'derogations' clause. Art. 4(2) enumerates certain rights that may not be derogated from under any circumstances.

[114] The Committee calls the obligations in para. 44 'of comparable priority'. This author interprets such a comment, in light of the arguments presented here, as meaning that they are also core obligations. There is no other appropriate conceptual category for them, and they are listed under the sub-heading of 'Core Obligations'.

[115] Para. 70 of "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/CN.4/1987/17, Annex. Reprinted in (1987) 9 *Human Rights Quarterly* 123, at para. 70.

[116] Extensive examples are given in *Maastricht Guidelines*, *supra* note 95 at paras. 14-15. This was the follow up conference to the Limburg conference a decade earlier, and was attended mainly by academic experts.

A second way that the word 'violation' can be used is when there is an active State interference with a right protected by the Covenant. Examples would include an Act to Prevent Unionization,[117] forced evictions,[118] genital 'mutilation',[119] corrupt mismanagement of social funds,[120] etc. The third way of speaking of violations under the Covenant was proposed in a highly influential article written by Audrey Chapman. [121] She declared that a violation occurs when a State fails to fulfil the minimum core obligation of any given right.[122] In General Comment No.12 on the right to food, the Committee adopted this wording. It states that "[v]iolations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger."[123] It did not use the term 'violation' to refer to other aspects of non-compliance with the Covenant, and thus seemed to imply that the term was to be used in this particular sense only. However in General Comments No.13 and 14, the Committee returns to the original sense of violations being any form of non-compliance with obligations under the Covenant, and confirms that this third kind of 'violation' is merely a species of the first.[124]

5. Retrogressive Measures

A retrogressive measure is any action or measure taken by the government that has the effect of removing or rolling back legislation or institutions previously used to safeguard a right. Examples would include a decision to eliminate a rental board or a drastic reduction in welfare rates without accompanying compensatory measures. The most common example of a retrogressive measure is simply to cut a budget allocation for a social sector. In the result, bureaucrats are often left to decide what to cut, and claim that they had no other choice but to do so with that year's funding. This area is a particularly acute concern at the moment, because of loan conditions imposed by organisation such as the IMF and World Bank, and presumably because of the new hazards that will arise once markets are deregulated according to the standards set out in the WTO Agreement.

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117 See the 1998 *Concluding Observations on Canada*, *supra* note 102 at para. 31.

118 See the Chapter X on 'The Right to Adequate Housing'.

119 As in the case of Mali. See A. Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 *Human Rights Quarterly* 23 at 52. There is some debate as to whether the word 'mutilation' is appropriate. In its place, one may refer to female circumcision, and determine on the facts of each situation whether the practice in question violates the rights of women.

120 As in the case of Kenya. See Chapman, *ibid*. at 51.

121 Chapman, *supra* note 119 at 42-46.

122 *Ibid*. at 42-46; see also *Maastricht Guidelines*, *supra* note 95 at para. 9.

123 Para. 17.

124 See General Comment No. 13, paras. 58-59; General Comment No. 14, paras. 46-52. There are extensive examples given in both. The Committee also suggests, in General Comment No. 14, para. 47, that any form of inability to comply with Covenant obligations engages a burden upon the State to demonstrate resource scarcity. I believe this comment may be confused, because Art. 2(1) renders compliance itself dependent on resource availability. Thus one cannot say that a State is not complying with its obligation to realise a right *unless* it has available resources remaining. The Committee may have meant that any form of non-enjoyment of a right puts the burden on the State to justify the situation. While this is more consistent with Art. 2(1), it is a considerable and unexplained expansion of the 'core content' doctrine as explained in General Comment No. 3. This point may be of insufficient practical interest for a full discussion in this Manual.

Once a retrogressive measure is taken, the State's obligation is very similar to the duty to fulfil minimum core obligations.

> *If any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources.*[125]

Therefore when a retrogressive measure is introduced, the State has the burden of showing that (1) all alternatives were carefully considered, (2) the measure was justified by reference to the rights in the Covenant and (3) the choice reflects the optimal use of available resources.

6. Specific Means of Implementing the Rights

The Covenant states that the rights are to be implemented "…by all appropriate means.." The word "means" has been elaborated,[126] and is now understood to include some specific categories. The categories are not exhaustive, but rather illustrate the kinds of things the government should be doing to implement ESC rights.

1. ***Legislative***: The enactment of legislation designed to implement ESC rights.
2. ***Administrative***: For example making sure that the various government bodies, such as social security agencies, hospitals, agricultural bureaus, and regulatory commissions respect the rights when they deal with people;
3. ***Judicial***: For example, recognizing, either within or through the adjustment of domestic law, the importance of economic and social rights by the provision of judicial remedies for violations of them.[127]
4. ***Economic***: For example, adopting economic policies, such as exchange rates, minimum-wage provisions and protections in trading agreements and privatization of public services.
5. ***Social***: For example, the adoption of public holidays, funding community centres, adoption of social security legislation, and possibly support for civil society organizations that monitor and assist the realization of the rights.
6. ***Educational***: For example, the dissemination of the information required by people in order for them to vindicate their rights (e.g. legal literacy for agricultural workers), education of children, and public education in general.

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[125] General Comment No. 14, para. 32. The idea was introduced in General Comment No. 3, para. 9.

[126] See Limburg Principles, *supra* note 115 at paras. 16-20.

[127] A judicial remedy is provided when a complainant (anyone making a complaint before the court) brings an action to ensure that his or her right is respected, protected and fulfilled by the government, and the Court either (1) restricts someone from doing something (injunction), (2) compels specific performance, (3) awards monetary compensation (damages) or (4) gives a symbolic declaration that a right has been violated (declaration).

Activists have made it clear that the enactment of legislation will not be sufficient alone, but that it must be supported by policies and training.

7. National Plans of Action

A national plan of action (sometimes called national strategy) is a specific time-bound plan to ensure the full realisation of a certain right. Each State Party to the Covenant is required to adopt a national plan of action in respect of each right under the Covenant.[128] These plans must include the following items, which are derived from General Comment No.14:

1. Objectives of the strategy (para.53);
2. Policies for implementing it (para.53);
3. Identification of resources for implementing the plan and cost effective means of using them (para.53);
4. Indicators for monitoring the enjoyment of the right in question (paras.57-58);
5. Specific benchmarks as individual goals of achievement (paras.57-58);
6. Consultation with civil society (which includes the NGO community, the rights holders themselves, academic experts, the private sector and international organisations) (paras.54 & 56);
7. Address the problem of discrimination (para.54);
8. Consider framework legislation for implementing the right (para.56);
9. Remedies for the non-enjoyment of the right; (paras.59-62);
10. Provide a reasonable time-line for its implementation. (para.56);[129]

While this list is fairly straightforward, some explanation of the roles of indicators and benchmarks is warranted. Indicators are numerical indicia of factors related to the enjoyment of a right. For example, a health indicator would be infant mortality, life expectancy or immunization rates. An education indicator would be enrolment rates, literacy rates, etc. The Committee makes it clear that the formulation of indicators for the various elements of each right is imperative if the State is to monitor the situation properly. Their design is thus an immediate obligation.

Benchmarks are goals or standards of achievement.[130] For example, a benchmark for education would be an improvement to a 90 percent literacy rate. A benchmark for the right to water could

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[128] General Comment No. 1, para. 4.

[129] This obligation is derived from the definition of a housing strategy, as discussed in Chapter XI, Section B.4.

[130] See P. Alston, "Development of Policy, Plans and Legislation to Protect and Promote ESC Rights" in *Circle of Rights: Economic, Social and Cultural Rights Activism* (Washington: International Human Rights Internship Program/Asian Forum for Human Rights and Development, 2000) 407 at 409-411, where he discusses the experience in South Africa in particular.

National Plans of Action in South Africa

The following is an excerpt from *Circle of Rights*, at p.410.

"South Africa was faced with the challenge of translating the ESC rights provisions included in its Constitution to national plans designed to further those rights. One of the areas addressed has been water: the right of access to sufficient water is enshrined in section 27 of the Constitution. To this end, the Department of Water Affairs introduced legislation that recognizes and provides a more detailed definition of the constitutional right to water. The Water Services Act (1997) defines the right of access to a basic water supply as "the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene." This definition is further elaborated on in its policy documents, which identify the following six elements of a basic water supply: quantity, cartage, availability, assurance of supply, quality and upgradability. (A definition is also provided for basic sanitation).

[T]he department quantified the minimum level of water supply at 25 litres per person per day. It also agreed that the water must be available within 200 meters of the dwelling, the flow rate from the outlet should be no less than 10 litres per minute and the water supply should provide water security for the community. This means that "raw water" should be available for 98 percent of the time, and the operation and maintenance of the system should be effective. Finally, a guide was developed in conjunction with the Department of Health containing the minimum health standards for the assessment of the quality of water supplies.

The Department of Water Affairs set itself a medium-term target [i.e. a benchmark] of supplying 50-60 litres of water per person per day (based on WHO guidelines), and a long-term target of full services and house connections for all. In addition, the new water legislation provides a framework for the equitable and sustainable use, management and conservation of water resources. The Minister must establish a national water resource strategy after consultation with the society at large, and local authorities are obliged to adopt a Water Services Development Plan for the progressive implementation and improvement of the delivery of water services over a five-year period."

include the distance of water source from house (e.g. 200 metres), flow rate from the tap (e.g. 5 litres per minute). A benchmark for the right to housing could be percentage of houses built with structurally sound materials, percentage of households with access to sewage, running water and electricity etc. Benchmarks may be interim goals, and thus do not need to be set at the rate of full enjoyment of the right in question.

There are more specific obligations related to certain of the rights, and these are discussed below in the chapters pertaining to them.

8. International Obligations

The Committee has given this subject recent attention. The textual source of the obligation is Art. 2(1), which requires States to take steps, individually and through international cooperation, to realize the rights. The Committee created a section of General Comment No.14 devoted to this area of obligations, and followed suit in General Comment No.15. This concern has taken several forms. Generally, the Committee calls upon States to refrain from actions that interfere directly or indirectly with the enjoyment of the rights in other countries. Examples would include harmful embargoes[131] and conclusion of damaging international trade agreements or debt service conditions (whether bilateral or through a multilateral agency).[132] States also have the duty to protect people in other countries from the harmful activities of transnational private actors based in their jurisdiction. This may include raids by paramilitary or guerrilla squads, or the more widespread concern of transnational corporate activity.[133] States are further called upon to ensure that their actions as members of international organizations respect, protect and fulfil Covenant rights.[134]

The more difficult issue is whether there is an obligation to provide aid. In General Comment No.15, the Committee says that where resources are available, States "…should facilitate realisation of the right to water in other countries…."[135] In General Comment No.14 it writes that States must cooperate to provide disaster relief.[136] However Craven points out that during the drafting of Art. 2(1), the idea that States could claim assistance as a legal right was rejected by general consensus.[137] Most commentators would likely agree that the Committee is not bound by the drafters' intent, though it is relevant. Moreover there is subsequent practice in Concluding Observations and General Comments that States are not free to do nothing. In practice, activists from richer countries may point to the level of aid by reference to the UN target of 0.7 percent of GDP, a figure only a tiny number of States now meet. Yet it is likely that most activists from such countries will be pressing the government to spend more at home rather than abroad, which highlights the difficult dilemma that this type of obligation engenders. However, this is a problem that international NGOs and other UN agencies can raise.

D. Assessing the Availability of Resources

Assessing the availability of resources is perhaps the single most difficult part of finding a violation of the Covenant. It has been indicated above that it is not always necessary to show that lack of resources is a factor when demonstrating violations. However, it is often necessary for showing a violation of a progressive obligation, and it is always extremely useful to show that the government's spending priorities were not what they should have been.

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131 See General Comment No. 8 in general, and General Comment No. 14 at para. 41, and General Comment No. 15 at para. 32.

132 See General Comment No. 14 at para. 39; General Comment No. 15 at para. 35: "Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water."

133 See General Comment No. 14 at para. 39, for an oblique reference, and General Comment No.15 at para. 33, where companies are singled out as a concern.

134 See Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, (1999), UN Doc: E/C.12/1999/9.

135 Para. 34; see also General Comment No. 14 at para. 40.

136 Para. 40.

137 Craven, *supra* note 95 at 147, and generally at 144-150.

The basic obligation in Art.2(1) is to take steps to implement the rights to "the maximum of available resources". First, we will examine what constitutes resources. Second, we will look at how to talk about availability. Lastly, some ideas for practical budget analysis will be discussed.

1. ëResourcesí

The term 'resources' was meant to be understood broadly. Robert E. Robertson proposed grouping resources into five categories. This provides a helpful way of conceptualising the factors governments may deploy.[138]

1. **Financial Resources**: Government revenue and loans, whether given directly to people or invested by the state into items that are may be used to implement the rights. It is crucial to recognise that these resources include foreign aid.[139]
2. **Natural Resources**: Access to natural resources can be more important to rural dwellers than monetary transfers. The provision of land, seeds and access to water may be important resources that can be provided at minor cost.
3. **Human Resources**: This would include paid and unpaid work. The mobilisation of volunteer potential and cooperation with civil society groups to provide the required information and expertise for implementing the rights can be an important and oft neglected category. For instance, bureaucratic intransigence may prevent government from cooperating with community groups, thus duplicating costly research or neglecting available informational sources. Another important area is adequate training, which is denied to many groups, and in particular to teachers.
4. **Technology**: The role of technology in many areas such as housing construction, farming, communications and medicine plays a fundamental role in promoting human welfare, and thus the rights under the Covenant.
5. **Information**: People such as teachers, health workers, trade unionists and community groups need adequate information about the state of laws, new approaches to their work, and how certain essential legal mechanisms work in order to employ the means that are already technically at their disposal.

These categories highlight what the government ought to and is capable of drawing upon. They also provide a useful checklist for activists when considering whether the government has used all of the means at its disposal.

2. ëAvailableí

The single most difficult aspect of the Covenant is determining what are 'available' resources. There are at least two approaches to discuss availability of resources in the context of the Covenant. The first is the 'micro-approach.' This involves examining the availability of resources in a very particular and isolated context. For example, if the State closes a school in a particular community,

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[138] R. E. Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights" (1994) 16 *Human Rights Quarterly* 693 at 695-697.

[139] Craven, *supra* note 95 at 138.

it may be possible to show that there are available resources within that very area that could have been used to prevent the closure. Another example is to demonstrate how the particular right in question could be fulfilled with very little cost in that particular context. In the Canadian case of *Eldrige*,[140] the government of a province in Canada was ordered by the Supreme Court to offer interpreting services for the deaf, partly because the additional expense in that situation was very low when weighed against the loss of the right (CND$ 150,000, or, 0.0025% of the provincial health budget). This kind of micro-level availability analysis will often be much easier for most human rights activists. It will also be much easier for the Committee to find a breach of an obligation with such clear and compelling evidence. Experience shows that it is best to provide whatever evidence seems most compelling.

The second approach to discussing availability of resources is the 'macro approach'. In this case, the analysis pertains to the economy as a whole, rather than an isolated part of it. There are at least two different ways to examine the economy under the macro approach. The first way is to analyse the government's budgetary allocations on the items protected under the Covenant. One would need to assess (1) the amount spent on each item, (see section D.3 below) (2) calculate this as a percentage of the whole, and (3) compare it with other items on the budget (e.g. debt service, defence spending, subsidies). This comparison can allow criticism of misplaced priorities. While it involves reading the budget carefully, the calculations are fairly simple. The limitation of this approach is that one is restricted to the amount set in the national budget. One can only criticize how the pie is divided up, not how large the pie is.

The second macro approach, and the far more difficult one, is to question the way in which the economy is run. This is asking how large the pie (national budget) should be. This would include questioning the regulation of private markets, land holding laws, import restrictions, taxation rates, the granting of subsidies, foreign ownership laws and so on. This is an extremely difficult and politicised kind of analysis, but one worth making in today's rapidly globalising world. The person that undertakes this analysis should, where possible, have economics training. Although this is not absolutely necessary, this will help the conclusions gain legitimacy. It should be emphasised, however, that this kind of analysis is not necessary for reporting to the Committee. Some may even believe that it threatens the legitimacy of the process by making it too political.

Experience has shown that the Committee is very reluctant to engage even in the first kind of macro analysis,[141] let alone the second. However, there have been remarks about seeking to improve this area of its work, [142] and activists would make useful allies in this project.

3. Budget Analysis

It is necessary to emphasise that budget analysis should never be an obstacle to submitting a report. In fact, the majority probably do not contain such an analysis. However, it is always a useful tool to include in an alternative report. The very examination of a budget is a useful tool for domestic political action as well. Therefore, those activists with the time and know-how for analysis may wish to give serious thought to conducting one. Understanding a budget analysis

[140] See *Eldridge* v. *British Columbia* (A.G.), [1997] 3 S.C.R. 624. Supreme Court of Canada decisions, along with other Canadian jurisprudence, are available on a keyword-searchable free database at www.lexum.umontreal.ca.

[141] Craven, *supra* note 95 at 137.

[142] *Ibid*.

involves considering *how* one examines the budget, and *what* one is looking for. Therefore this section is divided into technical analysis and substantive analysis.

a) Technical Analysis

Maria Socorro I. Diokno wrote a very useful paper on this topic: "A Rights-Based Approach to Budget Analysis".[143] The paper outlines the following four steps for getting started on a budget analysis :

1. Learn how the budget is prepared, and identify the key players in the process. Secure a copy of the budget law and guidelines on preparation.
2. Become familiar with the terms used in the budget. Using an accounting dictionary or consulting with experts is helpful.
3. Learn how to read the budget.
4. Analyse the State's development plans.

A very useful list of guidelines is also proposed by the Indian organisation called Developing Initiatives for Social and Human Action (DISHA), which has several years of social-based budget analysis. It recommends the following:

1. When interpreting data, use judgment based on experience, subject studies or new learning;
2. Test each hypothesis through an analysis of data;
3. Bring in people from many disciplines to review the analysis;
4. Review current and possibly new or innovative uses of data or findings, such as articles, new accounts, views or fact sheets;
5. Use skilled analysis to focus on unusual patterns or trends over time, sectors or constituencies;
6. Conduct brainstorming sessions to generate new ideas for ways of looking at findings;
7. Identify and use established standards of comparison;
8. Think of direct action, follow-up collective or legal action, and analyse or interpret data that can lead to or support such action.

One unique aspect of analysing budgets within the context of the Covenant, is to match up budget allocations with the listed rights. Diokno gives a very helpful categorisation of relevant State expenditures:[144]

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[143] The paper has not yet been issued as a stand alone publication, but is available from the Asian Forum for Human Rights and Development, at www.forumasia.org.

[144] Diokno, *ibid.* at 12.

Item	Budget Allocations
Education	Education department or ministry's budget, portions of budget of the department or ministry of social welfare, public works (school buildings) and other related expenditures.
Food	Departments and ministries dealing with land issues, agriculture, animal husbandry, nutrition, portions of public works and highways (farm-to-market roads, irrigation projects etc.), portions of environmental budget (conservation, marine management etc.), portions of the trade and industry budget (Pricing, consumer protection etc.) and other related items (food stamps, poverty alleviation funds, social development projects etc.)
Health	Health department or ministry's budget, portions of social welfare budget, environmental budget (waste control, sewage etc.), portion of public works budget (construction of sanitation facilities, water pipes etc.) and related items (population control, etc.)
Housing	Budgets of all agencies, departments or ministries tasked with housing issues, portions of social welfare and public works budgets.
Social Security	Social welfare budget, agencies that provide income-maintenance or income-support schemes, and other related items.
Obstructive allocations	Those that, on their face, inhibit the realisation of the rights (e.g. subsidies to tobacco companies).
National Defense and Security	Budget for ministry or department of national defence, law enforcement and police, and portions that related to national defence (e.g. intelligence funds etc).
Debt Service	Generally a separate category in the budget.
Other Executive Functions	Allocations for official State expenses incurred for administrative purposes.

There is also a very helpful resource available for those who wish to undertake a thorough budget analysis, *A Guide for Budget Work for NGOs*, available freely over the Internet from the Center on Budget Policy and Priorities, in Washington D.C.[145] Although the guide is not designed exclusively for activists that report to the Committee on Economic, Social and Cultural Rights, its wisdom is perfectly suitable for this kind of work.

b) Substantive Analysis

Some international organisations have developed concrete figures for indicating what level of social spending is desirable. For example, the World Health Organisation (WHO) has set a global target to encourage States to spend at least 5% of their Gross National Product (GNP) on health expenditures. A more general figure is the United Nations Development Programme (UNDP) recommendation that States devote at least 5% of Gross National Product or 20% of the national

[145] http://internationalbudget.org/resources/guide

budget on what it calls 'human priority spending'.[146] This example is supported by the 1995 UN World Summit for Social Development and its '20/20' initiative. That initiative recommends that developed nations insure that 20% of their foreign aid budgets are allocated to human priority spending, while developing nations devote 20% of their national budgets.[147]

Another common technique for substantive analysis is to compare allocations or percentages of budgets on social spending with those of another country at a similar level of economic development. It is particularly useful to use charts that compare visually different factors such as GDP per capita, health indicators, wage rates etc.

Yet another trend to look for in a budget analysis is social spending cutbacks. These are 'retrogressive measures' under the Covenant, and thus they involve a high degree of responsibility under the Covenant. Similarly, the State must accord some priority to vulnerable groups in its budget. Thus activists can look to see whether the vulnerable groups discussed in Chapter XIV of this manual receive any consideration in the budget.

In practice, the Committee has employed, among others, the following tactics to assess availability:

1. Percentage of government expenditure in the relevant area as a percentage of total expenditures;
2. *Increases* of spending on factors such as defence.
3. Comparisons between defence expenditures and social services;
4. Comparisons with other countries at similar levels of economic development.[148]

Beyond this, another approach has been suggested by Robertson. He argues that the government could be obliged to estimate how much money would be necessary to realise the ICESCR rights, and he adds that such a step is a pre-condition for the realisation of the rights themselves. One may also argue that this 'estimate' falls clearly into the category of 'taking steps', which is an immediate obligation under the Covenant. Once this estimate is made, the government can be "…put through the process of justifying expenditures of comparable amounts on non-human rights issues as opposed to those needed to solve its [human rights needs]."[149] Thus in this way, one can use the immediate obligations under the Covenant to give greater clarity to the issue of 'availability'.

E. Conclusion

It is useful to recall the most important points discussed in this admittedly difficult chapter. First, social rights involve progressive obligations, but these include very concrete steps. It is not difficult to show that a government has not complied with its progressive obligations to take concrete, effective and expeditious steps. Second, activists do not need to spend a great time dealing with

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[146] Both of these sources are from Diokno, *supra* note 143 at 10. 'Human priority expenditures' are defined as "…expenditures on basic education, health, water family planning and nutrition." See www.undp.org for more information.

[147] See *Report of the World Summit for Social Development*, (1995), UN Doc. A/CONF.166/9.

[148] These four examples are drawn from Craven's analysis of the Committee's work, *supra* note 95 at 137.

[149] Robertson, *supra* note 138 at 712.

resource constraints when they address immediate obligations, violations of core obligations or retrogressive measures. Third, there are very specific steps activists can take to get involved in lobbying and designing a national plan of action for specific rights. The Covenant entitles them to be a part of that process. Fourth, there is a diversity of resources at the State's disposal. Financial resources are only one of them. Fifth, the activist does not need to focus on budget analysis when dealing with resource constraints. She may take the 'micro-level' approach, and talk about specific resources that should have been made available in a specific context. Finally, for those brave enough to venture into the budget analysis, you may be pleasantly surprised with how simple a basic analysis turns out to be, and with how many excellent resources you will find to help you. With these points in mind, it is now best to turn to the chapter that deals with the right you wish to address.

V. The Right to Work (Article 6)

Article 6

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

A. Introduction

The right to work is considered a right of fundamental importance for both intrinsic and instrumental reasons. It is of intrinsic importance because work is a fundamental part of our daily life activity, and is therefore an expression of our spirit and a strong determinant of our happiness.[150] It is of an instrumental value because it is the main way in which we provide for our material well-being, as well as that of our family. Therefore the importance of work to human welfare is enormous, and it is probably in recognition of this fact that the right to work was made the very first substantive article of the Covenant.

Article 6 consists of two paragraphs. The first states the normative entitlement, or, the right itself. The second describes the steps that are to be taken to fulfil the right. Paragraph 2 is in fact a further elaboration of what steps are to be taken when one reads 6(1) in conjunction with the general obligations article, 2(1).

This chapter clarifies the nature of the obligations under Art. 6, and then gives a checklist for activists that are interested in reporting non-compliance. There are three important areas of protection covered by Art. 6: (1) access to employment; (2) free choice of employment; and (3) freedom from arbitrary dismissal.

B. Not a Guarantee of a Job

The right to work is considered an easy target for critics of social rights. They claim that since it is preposterous to expect a democratic government to give everyone a job, particularly one of his or her choice, the claim that they have a right thereto is empty and an example of the misuse of rights language. However this point of view was taken well into account by the Commission on

[150] See K. Marx, *Philosophical and Economic Manuscripts of 1844*, in D. J. Struik, ed., (New York: International Publishers Co., 1964) "Estranged Labour". Although Marx is often criticised for the subsequent exploitation of his theory of communism, his observations on the importance of work to one's psychological well-being are illuminating. He writes "[L]abor, *life-activity, productive life* itself, appears in the first place merely as a *means* of satisfying a need-the need to maintain physical existence. Yet the productive life is the life of the species. It is life-engendering life. The whole character of a species-its species character-is contained in the character of its life activity; and free, conscious activity is man's species character. Life appears only as a *means to life*….Conscious life activity distinguishes man immediately from animal life activity. […] It is just in his work upon the objective world, therefore, that man first really proves himself to be a species being. This production is his active species life."

Human Rights when they drafted the ICESCR. It rejected the option of using the words 'guarantee the right' instead of 'recognise the right'.[151] This same approach has been upheld by the Committee.[152] The use of the word 'recognise' meant that the Commission viewed the right as one that must be realised progressively, rather than immediately, and as such it is to be interpreted through the lens of Art.2(1). This does not render the right meaningless. It rather means that governments must take effective steps to realise the right over time. Activists are free to show that governments are not complying with Art. 6(1) because they are not taking such steps, or that they are in fact making the situation worse.

C. Access to Employment

The Covenant requires five types of State conduct that are related to access to employment: (1) to strive for full employment, (2) to protect the opportunity to gain a living by work, (3) to ensure equal access to work, (4) to provide employment services, and (5) to provide occupational training in the form of technical and vocational education. Some of these are very explicit requirements, while others are logical extensions of Art.6.

1. Full Employment

Art.6(2) -"The steps to be taken…shall include…policies and techniques to achieve…full and productive employment…"

Although the Covenant does not guarantee full employment, which is seen as a means for the realisation of the rights, Art.6(2) does oblige States Parties to pursue policies toward that end. The Committee has stated that in order to comply with Art.6 and Art.2(1), States must provide both, (1) an accurate evaluation of the present circumstances, and (2) a programme of action regarding the eradication of unemployment.[153] Since most States already have plans of action to reduce unemployment, and it is equally clear that many of these do not address some pressing needs, it is also necessary that these plans be 'effective'.[154]

States are obligated to provide information on the "……situation, level and trends of employment, unemployment, and underemployment"[155] and on the particular situation of disadvantaged groups such as women, youth, older workers, and the disabled.[156] Notably, the Committee has abstained from proposing a ceiling above which the unemployment rate may not climb. It rather adopts an

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[151] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 195-6.

[152] Craven, *ibid.* at 204.

[153] Craven, *ibid.* at 206.

[154] See General Comment No. 3, para. 9. The obligation to produce 'effective' plans of action is derived in the following manner. (1) There is an obligation to take all appropriate steps towards implementing the rights recognised in the Covenant (Art. 2(1), General Comment No. 3, para. 9); (2) such steps must be effective and expeditious *(ibid)*; (3) the establishment of plans of action are required steps (General Comment No. 1, para.4); therefore (4) the plans of action must be 'effective'.

[155] *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/1991/1, ('Article 6').

[156] See *Revised Reporting Guidelines*, *ibid.* 'Article 6' para.2(a).

approach in which it questions rising unemployment, or strong regional differences in unemployment.[157]

2. The Opportunity to Gain a Living by Work

Art.6(1)- "…the right of everyone to the opportunity to gain his living by work…"

This right may be applied to persons that are denied the opportunity to work as a result of regulatory restrictions such as licensing requirements for street vending, regional prohibitions on employment, restrictions on mobility etc. It may be important for the activist to show that, in the case of a particular restriction on such a right, there are few other opportunities for the group of workers in question. The inclusion of the word 'opportunity' is likely to have been added by critics that believe that workers must play a very active role in seeking out and creating their own employment, and cannot simply expect to be handed a job.

Another aspect of this right is the notion of 'gaining a living'. This receives more treatment in Art. 7(a)(i), which includes the right to a wage that provides them with a decent living. Practically, the activist would be advised to leave the adequacy of wage rates to the Art. 7 analysis. Article 6 may be used to address unfair denials of the opportunity to gain a living by work.

3. Equal Access to Employment

Art.6 as a whole prohibits discrimination in regard to vocational training, access to freely chosen employment, and security of tenure in employment. The Committee is particularly concerned with distinctions, exclusions, restrictions, or preferences, in law or practice, on the grounds of race, colour, sex, nationality, political opinion, social origin, and age.

For example, in Iran and Zaire, the Committee found legal provisions that required women to obtain the permission of their husbands before seeking work outside the household to be direct violations of the Covenant.[158] Another example of such denials of equality would be political affiliation, which was a crucial factor in obtaining certain forms of employment in the German Democratic Republic (East Germany) and the former Union of Soviet Socialist Republics.[159]

Another issue is the degree to which foreigners enjoy a right to equal opportunity in employment. The United Kingdom and France, for example, issued interpretative statements (*reservations* (UK) or *declarations* (France)) claiming that Art.6 did not include people born outside of their territory. It has been argued that these reservations imply that the Covenant normally protects foreigners' rights to equal opportunity in employment.[160]

Finally, it is very important to note that the obligation to eliminate discrimination in access to employment is an immediate obligation, not a progressive one. Therefore any non-compliance with it is an automatic violation of the Covenant, unless it may be justified under Article 4.

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[157] Craven, *supra* note 151 at 209.

[158] *Concluding Observations on the Report of Iran*, UN Doc. E/C.12/1993/7 at para.6; Craven *ibid.* at 210.

[159] Indeed in all communist countries, it is practically mandatory to be a party member and to support actively the promotion of the state ideology if one wishes to obtain certain forms of employment, such as professor, school principal or politician.

[160] See Craven *supra* note 151 at 214. He cautions that general state practice would not support this position.

4. Employment Services

Employment services are those that assist people to find jobs. Placement agencies, job boards, and government employment agencies would fall squarely within this meaning. There has been little discussion of whether the provision of employment agencies is mandatory under the Covenant, but some argue that it ought to be seen as implicit.[161] There are compelling grounds for believing that employment agencies fall within the paragraph 2 undertaking to adopt "…policies and techniques to achieve steady economic…development and full and productive employment...". Therefore, a thorough report would indicate the availability of such services.

5. Occupational Training[162]

Art. 6 (2)-"The steps to be taken…include technical and vocational guidance and training programmes…"

There is a useful overlap between Art. 6(2) and Art.12 (2)(b) (the right to education) of the Covenant in that both concern technical and vocational education/training. Technical and vocational training is a crucial factor in both general education for life-skills, and for mobilising and unlocking the potential of a workforce. It is thus indispensable for the promotion of employment for individuals, and for the overall policy goal of achieving full employment.

In 1999, the Committee adopted General Comment 13 on the Right to Education, and explains the importance of Technical and Vocational Education (TVE). The Committee adopts a definition from the UNESCO *Convention on Technical and Vocational Education* (1989): 'TVE consists of all forms of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding related to occupations in the various sectors of economic and social life.' From this, the Committee elaborates the following aspects of the right to TVE, in para.16 of General Comment No.13:

a) Acquisition of skills for self-reliance, personal development and employability;

b) The programme shall take into account the skills, needs and cultural background of the relevant population and the needs of the economy;

c) Provide training for adults whose skills have become obsolete in light of technological, social, economic or other changes;

d) Consist of foreign exchange programmes, enabling students to receive training abroad and return to share it;

e) Promote the TVE of women, girls, out-of-school youth, children of migrant workers, refugees, persons with disabilities, and other disadvantaged groups.

As a matter of strategy, it may be worthwhile to identify a group or several groups that have a particular need for TVE, and then argue that this group has a right to such training under Arts. 6(2) and 12(2)(b) of the Covenant. Specific demands such as these are more likely to generate a response from the government and the Committee than are wide-scale demands that a comprehensive nation-wide TVE plan be adopted. While the latter is, of course, the ideal situation, one may question what the best strategy towards that goal may be.

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[161] Craven, *supra* note 151 at 216.

[162] This section is substantially similar to Chapter XIII, Section D.3.

D. Free Choice in Employment

Art.6(1) "…the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts…"

The notion of 'free choice' under the Covenant means that no one may be compelled to accept a form of employment. Thus it is concerned mainly with forced labour and similar issues. The insertion of the 'free choice' requirement may have been partially ideological. The Western capitalist countries may have been concerned with the Communist tendency to streamline individuals into certain forms of labour, as is sometimes done in centrally planned economies. Thus one way to oppose the Communist ideal and reality of full employment would be to suggest that it is not freely chosen, and is thus not a fulfillment of a human right. Whatever the reasons, the Committee has spent less time considering the issue of forced labour, because the International Labour Organisation (ILO) has complex machinery for considering the issue already, namely ILO Forced Labour Conventions No. 29 (1930) and No.105 (1957). Also, the Human Rights Committee, charged with supervising the *International Covenant on Civil and Political Rights*, also considers the issue under the rubric of Art.8, ICCPR.

While it is possible to interpret 'free choice in employment' as guaranteeing a person the right to the job of his or her choice, this interpretation of Art.6 has been rejected for the same reasons that the State does not guarantee a job to every citizen. The most that can be said regarding this aspect of the Covenant is that "[a]n obligation to ensure freedom of choice can only imply that the State should provide appropriate employment training, guidance and placement services."[163]

E. Arbitrary Dismissal

ILO Termination of Employment Convention, 1982 (No. 158)

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

One may also argue that the right to work includes the protection against arbitrary dismissal, or, dismissal without valid grounds.[164] The Committee has not yet confirmed that the Covenant covers arbitrary dismissal, but there are encouraging comments to that effect.[165] The justification for such a human rights claim is similar to that against arbitrary eviction from one's home: namely, that the interest in question is so fundamentally important to the well-being of the individual that it should not be taken away without just cause. The ILO Termination of Employment at the Initiative of the Employer Convention (No.158) gives a good definition of what would be permissible grounds for dismissal.

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163 Craven, *supra* note 151 at 218.

164 This interpretation is argued with convincing support in Craven, *ibid.* at 221-223.

165 Badawi El Sheikh, UN Doc. E/C.12/1987/SR.5, at 3, para. 12. "[W]ithout a fundamental guarantee against arbitrary dismissal, the right to work would be meaningless." See also *General Observations on additional information of Panama*, UN Doc. E/1993/22, at 53, para. 197.

Thus far, the Committee has concerned itself primarily with the adequacy of domestic recourses for workers who have been arbitrarily dismissed. That is, they have focused on the right to appeal, access to courts, or dismissal on political grounds. The activist may therefore be better off focusing on these recourses when reporting on the subject of arbitrary dismissal.

F. Reporting Checklist

The following questions address the general coverage of Art. 6:

1. Does the State pursue policies that tend towards maximum employment (Art.6(2)? Does it have an 'effective' plan of action towards that goal (Arts. 6(2) and 2(1))?
2. Is any group denied the opportunity to gain a living through employment (Art. 6(1))? Are any limitations to such rights compatible with the Covenant and solely for the purpose of promoting the general welfare (Art.4)?
3. Is every person capable of choosing his/her employment freely (Art.6(1))?
4. Are there adequate remedies protecting workers from arbitrary dismissal?
5. Are there employment service agencies?
6. Are there technical and vocational education programmes for the unemployed (Arts. 6(2) and 12(2)(b))?

VI. Just and Favourable Conditions of Work (Article 7)

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

A. Introduction

The importance of this right follows clearly from the importance of the right to work itself. The intrinsic and instrumental value of work in our lives demands that the working conditions themselves not be oppressive. The left-wing revolutionary movements in Europe were spurred on by terrible working conditions, as are most labour movements everywhere in the world. Today, as many 'developing' nations move further from agriculture towards manufacturing and the 'race to the bottom'[166] intensifies, the need for guarantees of just working conditions is highly acute.

B. Art. 7(a)-Remuneration

There are three ways to approach the issue of remuneration: (1) fair wages, (2) equal remuneration for work of equal value, (3) decent remuneration.

1. Fair Wages

During the drafting of the Covenant it was clear that the notion of 'fair wages' was seen as being different than the idea of 'minimum remuneration' for a 'decent standard of living'. One proposal to fix wages at a rate based on the cost of living and by profits made from the undertakings was rejected. Craven states that the words ought to be given independent meaning, and should stand for the principle that the level of pay for an occupation ought to reflect the nature and circumstances

[166] The 'race to the bottom' is an expression that describes the process of developing countries scrambling to lessen the protection of workers, rate of unionization and regulation of business activity in the effort to attract foreign investment. The creation of 'Export Processing Zones' is often an example of this.

of the work.[167] This proposal opens possibilities for activists to report on the status of certain workers who receive pay that is lower than the value of their work, but is higher than minimum subsistence income. Domestic servants, whose basic subsistence needs are often provided for by the host family, may fall into this category. However, such an approach would demand compelling evidence, as the notion of 'value of work' may be highly relative. Another way to interpret the idea of 'fair wages', by reading it in its context, is that it ensures 'equal' or 'non-discriminatory' rates of pay between all members of society, and thus only protects even-handedness towards all workers. Thus a bad wage distributed equally might not be reviewable by the Committee under this concept. This debate is not of great importance because the Committee has spent little time considering the issue of a fair wage, and is more concerned with minimum subsistence wages and equal pay for equal work.

2. Equal Remuneration

There are two noteworthy aspects of Art.7(a)(ii): (1) it *recognises* the right of everyone to 'equal pay for work of equal value', and (2) it *guarantees* 'equal pay for equal work' for women in particular. This means that in the former, States may implement the obligation progressively. In the latter case, the State must implement the obligation immediately. The distinction can be an important one.

'Equal pay for work of equal value' means that notwithstanding the fact that people formally hold different job titles, they deserve the same pay if the work is of the same value. The multitude of possible job titles and administrative sub-categories makes it simple to designate formally as different what are substantially the same jobs. Also, certain forms of work, such as housework or other domestic functions, pay far less well than other forms of employment that contribute similar levels of social value. Imagine a factory that employs women weavers and male basket carriers, who work symbiotically but receive different salaries. In such cases, there would be different 'work' but it would be of 'comparable value.' The concept of 'equal pay for work of equal value' is designed to address these variances. The United States has developed extensively a similar doctrine of 'work of comparable worth,'[168] and the European Social Charter also uses the concept of 'equal value' (Art.4(3)).

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[167] M.Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 233. Craven's unparalleled treatment is the basis for most of the analysis in this chapter. For other references, see also *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource* (Washington: International Human Rights Internship Program, 2000), and A.Eide, C. Krause & A. Rosas, *Economic, Social and Cultural Rights: A Textbook (2nd, Revised Ed.)* (The Hague: Martinus Nijhoff, 2001).

[168] M. Benson, "Equal Pay for Work of Equal Value" (1985) 15 *Israeli Yearbook on Human Rights* 66 at 67-70.

Some ILO Conventions Related to Art. 7

Conventions

Occupational Safety and Health Convention, No.155 (1981)
Workman's Compensation (Occupational Diseases) Convention, No. 42. (1934)
Workman's Compensation (accidents) Convention No. 17. (1925)
Labour Inspection Convention, No.81 (1947)
Labour Inspection (Agriculture), No.129. (1969)
Minimum-Wage Fixing Convention, No.131. (1970)
Equal Remuneration Convention, No.100 (1951)
Weekly Rest (Industry) Convention, No.14 (1921)
Weekly Rest (Commerce and Offices) Convention, No. 106 (1957)
Holidays with Pay Convention (Revised), No.132 (1970)
Hours of Work (Industry) Convention, No. 1 (1919)
Hours of Work (Commerce and Offices) Convention, No.30 (1930)
Forty Hour Week Convention, No.47 (1935)

Recommendations

Reduction of Hours of Work Recommendation, No.116 (1962)

The concept of 'equal pay for equal work' means that no two people working *the same type of job* can receive a different salary. This idea is encompassed by the 'work of equal value' concept, but is protected more strongly by the Covenant in the case of women. The Covenant *guarantees* this right to women, and so any non-compliance with it is an automatic violation, irrespective of resource constraints. In conclusion, States have a progressive obligation to protect equal pay for work of equal value, and an immediate obligation to guarantee equal pay for equal work for women.

A key aspect of protecting this particular right is the provision of adequate remedies. In General Comment 3, the Committee indicated that Art. 7(a)(i) was a right capable of judicial enforcement. Indeed, the human rights commissions and tribunals of most countries that use them are primarily concerned with discrimination cases. Thus one way of prompting the government to comply with its obligations under Art.7(a)(i) is to insist on the establishment of a proper judicial recourse for discriminatory employment practices. For the reasons given above, this recourse should include the enforcement of a right to 'equal pay for work of equal value.' It is also of crucial importance that the government makes the right enforceable against private actors, particularly employers. As several activists have indicated, the mere enactment of a law is not sufficient; it must be supported with professional training that renders lawyers and judges capable of enforcing the rights. To achieve this goal, it is necessary that people create and implement plans.

3. Decent Remuneration

The Committee expects that States Parties establish machinery for fixing, monitoring and enforcing equitable minimum wage levels that are geared to the cost-of-living index. According to Art.7(a)(ii), the level of remuneration should provide all workers with a 'decent living for themselves and their families'. The cost of living index provides a useful numerical indicator of what constitutes the bare minimum of a 'decent standard of living' in a particular area. Where such an index is not available, the concept of 'decent living' may be defined substantively by reference to other relevant

Covenant rights, particularly Articles 11, 12 and 13. Finally, where no minimum wage legislation exists, it can be argued strongly that it is required by this article and that workers and representative unions should have input into the determination of the wage.

C. Art. 7 (b)-Safe and Healthy Working Conditions

This article overlaps with Art.12(2) of the right to health, which calls for improvement in environmental and industrial hygiene, and for the prevention, treatment and control of occupational diseases. The ILO plays a crucial role in monitoring and setting standards in this area. It has created 21 Conventions that operate in this area of labour rights, including the ILO Occupational Safety and Health Convention, 1981 (No. 155). Craven confirms that the Committee expects the standards in Convention No.155 to apply equally to the obligations under Art.7(b).[169] An example of an issue covered by this right is the detrimental use of agricultural pesticides on workers.[170]

It is also plausible to recognise the right to be free of sexual harassment in the workplace as part of the right to safe and healthy working conditions. Sexual harassment affects both mental and physical health, and is unrelated to any work function.[171]

D. Art.7 (c)-Equal Opportunity for Promotion

This article provides for substantive equality, rather than formal equality. That means that policies must reflect the existing inequalities between groups when giving them equal opportunity for promotion. For example, if one ethnic minority is generally worse at speaking English than the majority, and the requirement for a particular post requires English, it may be necessary to provide English training for those groups or to tolerate less perfect language skills in order to achieve the goal of substantive equality. Affirmative action and quotas, however, seem precluded from protection by this article as the text explicitly limits promotional considerations to 'seniority' and 'competence' only.

So while specific training programmes or alteration of general requirements are permitted, reserved places are not guaranteed by the Covenant. It may be argued that this omission has become obsolete, due to the proliferation of affirmative action programmes in jurisdictions where they are viewed as necessary to achieve substantive equality.[172]

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169 Craven, *supra* note 167 at 241.

170 This is a serious concern in Sri Lanka. Sarath Fernando, Secretary of MONLAR - Movement for Agriculture and Land Reform, Colombo, Sri Lanka, reports that there is currently one labour inspector tracking this issue for the entire country. Interview, July, 2001.

171 Interview with Mario Gomez, Lecturer at the Faculty of Law, Colombo University, and Consultant at the Law and Society Trust, Colombo, Sri Lanka. August, 2001.

172 See the discussion of such programmes in Chapter XII, Section C.1. Note also that during 2003 the Committee is circulating a Draft General Comment on Art.3 of the Covenant which includes a strong affirmation of the principle of substantive equality. The 'seniority' and 'competence' requirements must be read anew in the light of these developments.

E. Art. 7 (c)-Rest and Leisure

There are three principal concerns under the rubric of this article: (1) reasonable limitation of working hours, (2) periodic holidays with pay and (3) remuneration for public holidays. The Committee has focused almost exclusively on working hours and paid holidays.[173] The Committee has not made a direct comment upon what it considers a reasonable work week to be, but has indicated that some are excessive (e.g. a 54 hour week). There are, however, ways in which States Parties can implement a strategy for the progressive reduction of the work week. Activists could therefore concentrate on that aspect, and propose methods for doing so and what bodies to consult for strategy.

The Committee seems to have adopted a policy that, as a minimum, States are obligated under Art.7(d) to ensure that workers enjoy a period of rest of not less than twenty-four consecutive hours every seven days.[174] Finally, the drafting of Art.7 makes it clear that all workers are entitled to a minimum annual holiday of two consecutive weeks per year, with pay.

F. Additional Reporting Considerations

1. Disaggregation of Data

When reporting, it is helpful to *disaggregate* by region and gender, and perhaps other useful indicators such as ethnicity. Disaggregation means to separate data between regions or groups in order to examine large disparities between them. For example, the Indian state of Kerala is often disaggregated from other Indian states because of its unusually high achievements in the field of human development.[175] Likewise in Sri Lanka, the protection of workers as a whole may vary considerably between dock workers on the one hand, and plantation and free trade zone workers on the other. Therefore, it is useful to assess the conditions (1) per region and (2) with special attention devoted to disadvantaged groups.[176] One may identify relatively low incomes by comparing the income with the national average, or with the cost of living.

2. Enforcement

Since many countries have developed sophisticated enforcement mechanisms for protecting and enforcing working conditions, this area deserves particular attention in a report. Specifically, attention may be devoted to whether there are adequate *inspection services* and *sanctions for disobedience.* 'Adequate' means that they create an effective deterrent to violations of this right. In practice, the Committee has largely focused on whether the State has designed a coherent national policy, the role of legislation in the area, and the ability to claim compensation under the existing legislation and regulations. It is here that the role of the labour inspectorate is crucial. The Committee has not yet interpreted Art. 7 as implying an obligation to establish labour inspectorates, but given their central role in enforcement, Craven argues there ought to be one.[177]

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[173] Craven, *supra* note 167 at 244.

[174] Craven, *ibid.* at 245. They have done so by referring to the ILO Weekly Rest Conventions, which establish the given standard.

[175] See for example Amartya Sen, *Development as Freedom*, (New York: Alfred Knopf, 1999) at 21-24, where he discusses Kerala, and 99-104, where he disaggregates social data pertaining to India and Sub-Saharan Africa.

[176] See Chapter XIV, "Vulnerable Groups and ESC Rights".

[177] Craven, *supra* note 167 at 238.

Practically, this means that the activist should focus on (1) the establishment of monitoring structures and national policies, and (2) the effectiveness of the existing labour inspectorates, in terms of facilities, training, powers and human resources. Where effective policies are lacking, activists may lobby for the enactment of legislation. The ILO provides good assistance to governments in these matters.

G. Reporting Checklist

The following checklist addresses the general scope of Art.7. The article number at the end of each question indicates the provision of the Covenant that would be violated:

1. Are the wages 'fair'? (Art.7(a)(i))
2. Do minimum wages provide workers and their families with a 'decent standard of living'? That is, is their wage set at or above the cost of living and does it compare favourably with the national average? (Art.7(a)(ii))
3. Are all members of the workforce provided with equal pay for work of equal value? (Art. 7(a)(i))
4. Are women guaranteed (i.e. have legally enforceable entitlements to) the right of equal pay for equal work? (Art.7(a)(i))
5. Is there legislation and supporting policies protecting the safe and healthy conditions of work? (Art.7 (b))
6. Are there equal opportunities for all members of the workforce to be promoted? (Art.7(c))
7. Does everyone get at least one day off per week and two weeks paid holiday per year? Is there legislation enforcing this standard? (Art.7(d))
8. Are employees required to work an excessive number of hours per week (e.g. over 50 hours)? (Art.7(d) Enforcement (Art.7 + Art. 2(1))
9. Are there 'adequate' labour inspectorates operating to enforce such norms? Are the labour inspectorates sufficiently staffed and equipped to deal with the need?
10. Are there effective sanctions for violations of Art. 7 rights?

VII. The Right to Form and Join Trade Unions (Article 8)

Article 8

1. *The States Parties to the present Covenant undertake to ensure:*

   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations;

   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. *This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

A. Obligation to Ensure

Article 8 is different from most other rights under the Covenant. It requires States to 'ensure' rather than 'recognise' the rights in question. This use of the word 'ensure' was to signal that the right engages immediate and not progressive obligations. This means that resource constraints are not an excuse for non-compliance. The right to associate (but not the right to strike) is also protected under Art. 22 of the International Covenant on Civil and Political Rights, which requires that an effective judicial or quasi-judicial remedy be provided.[178] Furthermore, the Committee indicated in General Comment No. 3 that it considers Art. 8 to be capable of judicial enforcement.[179] This means that lobbying for the legal protection of these rights is the appropriate implementation strategy.

[178] ICCPR, Art. 2(3).

[179] General Comment No. 3, para. 5.

B. The Right to Form and Join a Trade Union of One's Choice

1. The Right of ëEveryoneí

There are two classes of people that might not be covered by the Covenant; public servants and non-nationals. Under Art. 8(2) the Covenant appears to exempt the State from responsibility for 'lawful' curtailments of the right in the cases of (1) police, (2) armed forces and (3) those working for the administration of the State. While 'lawful' remains somewhat unclear, one may make a convincing argument that the restrictions ought to be carried out in accordance with the limitations discussed under 'Restrictions' below.

The rights of non-nationals to take part in unions seems to be covered by the text of the Covenant, but Committee members have been hesitant to display more than 'concern' over denying non-nationals such rights.[180] There is no obvious reason for denying protection to non-nationals either in the Covenant or on policy grounds, and therefore activists should report this type of violation. It is in every nation's, particularly Sri Lanka's, and certainly every worker's interest to uphold the freedom of non-nationals to organize to protect their interests. Art.26 of the recently adopted *UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[181] supports such a view, and may influence the interpretation of Art.8 of the Covenant. For example, activists may take note of the union restrictions under which Sri Lankans work abroad, particularly in the Middle Eastern countries that employ many as domestic servants. Both the Sri Lankan and the host governments (subject to both being parties to the Covenant) have obligations to protect the rights of those workers. Activists may consider reporting to the Committee when the host country's report is under consideration.

2. Free Choice

This right protects individuals from being compelled to join a trade union against their will. There are two aspects of this right.

a) Trade Union Diversity

One aspect of the 'choice' under consideration is that there be more than one union to choose from. Where there is only a single trade union or federation in the country, the Committee has considered countries to be in violation of this right. The main concern in all cases, however, is whether workers have the choice to form and be represented by a different union. If this ability can be demonstrated, then the requirement of 'union of one's choice' is met.

b) Union Security Agreements

These agreements are designed to ensure that once workers enter a particular workforce, they are obliged to remain a part of the union representing that workforce. Art. 2 of ILO Convention No.87 allows the State concerned to determine whether such agreements are appropriate. Also,

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[180] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 265-6. The author indicates that there were restrictions for non-nationals in Costa Rica, Panama and Senegal.

[181] Adopted 18 December 1990, in force 1 July 2003. General Assembly Resolution 45/158, reprinted in (1991) 30 ILM 1517.

proposals to incorporate a 'negative freedom of association' (i.e. the right to disassociate oneself from a union) were rejected from the texts of the ICCPR and the European Convention on Human Rights.[182]

Despite this apparent latitude for interpretation, the Committee takes the view that stipulations requiring members to join automatically a particular union and remain within it are inconsistent with the Covenant. Notably, the Committee of Independent Experts that was charged with monitoring the European Social Charter has come to the same conclusion. Thus the Covenant does not only not protect union security agreements, but may in some cases prohibit them.

A recent decision of the Supreme Court of Canada addressed whether the section 2(d) protection of freedom of association of the *Canadian Charter of Rights and Freedoms* also protects a freedom not to associate.[183] Eight of nine justices held that the freedom not to associate is protected by the Charter, yet five of nine ultimately held that it could be limited under the general limitations clause of the Canadian Charter (section 1). In other words union security agreements are still legal in Canada because of the important goal they advance. Four justices cited article 8(1)(a) of the Covenant in support of their interpretation.[184] The narrower internal restrictions clause applicable to Art. 8 (found in Art.8(1)(a)) may be narower and thus might not support the same conclusion.

3. Conditions

The Committee is particularly concerned with whether the government imposes minimum levels of membership upon unions before they are legally recognized, as well as whether union membership is restricted to certain trades. They request such information from States Parties in their paragraph 2(d) of the Reporting Guidelines. These are components of the general restriction on the formation of unions.

4. Restrictions

The main concern of the Committee's treatment of Art.8 is the nature and degree of restrictions placed upon the formation of unions in the State concerned. Art. 8(1)(a) states that the rights may be limited only if the limitation is (1) prescribed by law; (2) necessary in a democratic society in the interests of (i) national security or (ii) public order or (iii) protecting the rights of others. These restrictions are particular to Art.8, and the broader limitations clause found in Art.4 is not applicable to Art.8.[185]

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182 Craven, *supra* note 180 at 268.

183 *R. v. Advanced Cutting and Coring Ltd.* [2001] SCC 70. Supreme Court of Canada decisions, along with other Canadian jurisprudence, are available on a keyword-searchable free database at www.lexum.umontreal.ca

184 Per Bastarache J., for four dissenting members of the Court, at paras. 11-14. The Court was quite divided on the outcome of the decision. The freedom not to associate was defined more cautiously than some of the other Charter rights. While three justices argued that there must be an imposed "ideological conformity" in order to find a violation of the interest, another justice argued that an infringement of a "specific liberty interest" must be found.

185 Craven indicates, *supra* note 180 at 271, that the limitation in Art. 8 was "…created on the basis that article 4 would not apply to article 8."

The meanings of these terms, as developed in the European Court of Human Rights' widely accepted jurisprudence on the same kinds of limitations, can be understood as follows:

'Prescribed by Law'- It must be by validly enacted law, not by an extra-judicial or arbitrary act, and such laws must be accessible and prescribe foreseeable penalties. This prevents people from being unjustly prosecuted for offences about which they knew nothing.

'Necessary'- This requirement has two aspects. First, the limitation must be more than merely 'reasonable' or 'desirable'. It must conform to a 'pressing social need'. Secondly, the means adopted must be proportional to the end sought. That means, (i) that the method is rationally connected to its end, and (ii) that the limitation does not impair rights more than is necessary (i.e. is not too broad or over-inclusive and does not ignore a less rights-restricting alternative).[186]

It must be noted that such rights may be limited only on the three state grounds. As this is a provision which permits the curtailment of rights, it must be read narrowly. Therefore if an activist wishes to argue that limitations were not justified in a particular case, it would be helpful to resort to this test. This kind of analysis is usually best left to lawyers.

C. Right of Trade Unions to Function Freely

1. Internal Organisation of Trade Unions

The ILO has stated that the free determination of the structure and organization of trade unions is an essential part of the right to form them. This insight is reflected in Art.8(1)(a), and reaffirmed in Art.8(1)(c). The only permissible limitation of this right would be the insistence that unions do not adopt discriminatory rules on membership.

Practically, this means that unions ought to be able to design their own administrative policies and elect their own leaders. It should be noted that the Covenant stipulates that an individual has the right to form and join a trade union for the 'promotion and protection of his social and economic interests.' This was inserted in order to limit the political activities of unions,[187] though on its face it does not seem to preclude such activities, which are usually of a social and economic nature. However where such involvement seems to stray from the protection of workers or other disadvantaged groups, the Covenant ceases to offer protection.

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[186] The Supreme Court of Canada has developed an elaborate test for the limitation clause under the *Canadian Charter of Rights and Freedoms*. See *R.* v. *Oakes*, [1986] 1 S.C.R. 103. The case concerned a law that placed the burden of proof upon the defendant to show that when in possession of even minute amounts of narcotics, such possession was not for the purposes of trafficking. The latter is a far more serious offence. This reverse-onus provision was on its face contrary to the right to be presumed innocent. Once a violation is found, the court must decide whether the government has limited the right in accordance with the demands of the limitation provision of the Charter, which is similar to the test in the ICESCR. The Supreme Court struck down the law on the grounds that it was (i) overinclusive and (ii) not rationally connected to its objective, and the 'Oakes Test' has since stood as the Canadian test for determining whether a restriction of a right is 'necessary in a free and democratic society'.

[187] Craven, *supra* note 180 at 274.

2. Collective Bargaining

Another important aspect of the free functioning of unions is their ability to bargain collectively. A union is certified by worker vote (typically a majority) to represent all of the workers in a bargaining unit. i.e. all employees of a particular kind in a given workplace. That union then becomes the exclusive representative and negotiator for all the workers in the unit. The union negotiates with the employer to establish a contract known as a collective agreement. Once a collective agreement is signed, it creates a binding agreement between the workers and the employer, just as a contract does between private parties. Collective agreements cover the terms of employment for the period specified. In many jurisdictions, the scope of collective agreements and disputes arising thereunder are determined and adjudicated by labour relations boards or through specific arbitrators. Because of the specific character of labour disputes, courts are less frequently employed, though they may review awards.

The essential value of collective bargaining is that it allows a more equal bargaining process that leads to industrial peace. It helps society by preventing economically harmful work stoppages, and occasionally violent strikes by discontented workers. It is common knowledge in contract law that when parties are of unequal bargaining power, it is easy for one side to impose unfair terms on the other. Thus contract law has developed mechanisms for correcting these imbalances of power when they are used to insert unreasonable or even 'unconscionable' terms into contracts. Without a collective bargaining strategy, workers may be dismissed arbitrarily or can be bargained out of a just wage on the threat that the job will be given to another, more desperate individual. With a collective bargaining strategy, workers can demand just conditions of work, and stand up together when one of its members is unjustly harmed or dismissed by the employer. Unions played perhaps the most significant role in the improvement of working conditions and general development of the welfare state.

In the Reporting Guidelines, the Committee requests information on what measures governments have taken to 'promote *free* collective bargaining.'[188] First, this suggests that the State may not restrict or hamper unduly the process of free collective bargaining between unions and employers. This also suggests that governments even have an obligation *to promote* the institution of collective bargaining, in line with the ILO Right to Organize and Collective Bargaining Convention No.98, (1949). This promotion may, for example, require the establishment of an effective labour relations regime including a labour code and labour board. The obligation may also be of particular relevance in countries in which the trade union movements have been virtually crushed by the active interference of the government.[189] Under these circumstances, it would appear appropriate to highlight the State's responsibility in this situation, and invoke the corresponding governmental obligation to promote union activities through reasonable means.

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[188] *Revised General Guidelines Regarding The Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of The International Covenant on Economic, Social and Cultural Rights* UN Doc. E/C.12/1991/1, "Article 8", para.2(d).

[189] This may be quite relevant to Sri Lanka, whose trade union movement is widely regarded as having been greatly set back when the UNP government banned some aspects of industrial action by declaring certain services to be "essential" in 1980. Over the next several years, workers were induced under economic duress to sign waiver forms promising not to join unions before returning to affected work areas. Interview with *Movement for the Defence of Democratic Rights*, which was formed as a reaction to this exact policy in 1981, June, 2001.

3. Protection from Dissolution or Suspension

Quite naturally, the right to function freely protects unions from arbitrary dissolution or suspension, subject to the reasonable limitations that are necessary in a democratic society. Any government action suspending or dissolving unions must then be evaluated through the lens of the restrictions discussed above. Activists should be concerned with whether the dissolution was 'prescribed by law' and 'necessary'.

D. The Right to Strike

The Covenant, the European Social Charter (Art. 6(4)) and the San Salvador Protocol Art.8 (1)(b) all protect the right to strike. The right to strike has been deemed an essential aspect of the right of unions to function freely, as well as integral to the freedom of collective bargaining. Indeed, as noted by a Committee member, without the right to strike, collective bargaining is 'an exercise in futility'.[190]

A strike, in its most basic form, is a total stoppage of work in a particular work setting. However, the right to strike can be interpreted to include other forms of action, such as the following: (1) partial stoppage of work, (2) go-slow, (3) work to rule, (4) sit down strike and (5) repeated walk-out.[191] Labour law typically defines a 'strike' as a concerted effort to limit output.

Whereas the right to form trade unions is restricted to the promotion and protection of people's social and economic interests, the right to strike is not.[192] This implies that strikes for a broader range of purposes are protected by the Covenant, which is an important right for the promotion of interests and expression of collective dissent. An example of such a non-labour strike is the *hartal*, which was advocated and used extensively by Mahatma (M.K.) Gandhi in the protest against British colonial domination.[193] The Covenant protects such rights, subject to the usual limitations.

The form of protection of this right may include, among others, (1) the constitutional protection of the right, (2) statutory protection, (3) immunity from civil liability, and (4) protection of workers from unjustified dismissal (when firing for strike action is deemed to be unjustified). These are legislative protections that may be lobbied, and their absence reported. A key point for activists is whether any of such existing mechanisms are *effectively available* for workers. Such information may best be gathered from unions and through random surveys of workers themselves.

1. ëÖin conformity with the laws of the countryí

This phrase was not designed to deprive the right to strike of its meaning, but rather to highlight the requirement that strikers conform to certain procedural rules when using strike action. Therefore States may not limit the right to strike without just cause. Many countries have labour legislation in place that requires a certain amount of bargaining before taking strike action. The Freedom of Association Committee of the Governing Body of the ILO has provided a list of criteria that

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190 Sparsis, UN Doc. E/C.12/1988/SR.4 at 6, para. 32. Cited in Craven, *supra* note 180 at 278.

191 Craven, *ibid.* at 279, citing R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Deventer: Kluwer, 1988) at 72-83.

192 As discussed above, the limitation with respect to trade unions may also be questioned.

193 See M.K. Gandhi, *An Autobiography or My Experiments with Truth* (Ahmedabad, India: Navajivan Publishing, 1927).

stipulate the permissible legal limitations of this right. The limitations include procedural obligations with which the striking workers must conform: (1) to observe a certain quorum (i.e. that a minimum number of group members be present during voting or decision-making procedures); (2) to take decision by secret-ballot; and (3) to give the employer prior notice. As the Committee has stated that it views ILO Convention No. 98 and Art.8 of the Covenant as substantially similar, these reflections import well into the interpretation of the limitations provision of Art.8(1)(d). Beyond this, the right appears capable of limitation in accordance with the terms of Art. 4 of the Covenant, which insists that such limitations be (1) compatible with the nature of the rights, (2) determined by law, and (3) solely for the purpose of promoting the general welfare in a democratic society.[194]

E. Working with the International Labour Organisation

All of the labour rights protections offered in the Covenant are found in greater detail in ILO Conventions. This does not mean that the Covenant is useless when the State concerned has ratified the relevant ILO Conventions. It does mean, however, that the most effective way to use the international human rights law to protect workers' rights is to coordinate efforts with the ILO. Thus the very first step is to contact the local ILO office and in order to learn about the existing data-collecting processes and gaps that remain to be filled. The local office, or head office in Geneva, may have highly useful past reports on the Country. The activist may choose to tailor her or his report around particular issues that are not well addressed in the ILO reports, or that need repeated emphasis. Also, any additional information used by the activist for reporting to the Committee on Economic, Social and Cultural Rights ought also be made available to the ILO.

F. Reporting Checklist

The following checklist addresses the general scope of Art.8. The article number at the end of each question indicates the provision of the Covenant that would be violated:

1. Is there any class of people (other than public servants) that is denied the right to form and join a trade union of its choice? (Art.8(1)(a))
2. If the rights of the police, armed forces or members of the administration of the state are limited, are they restricted by law? (Art. 8(2))
3. Are all workers free to choose the union of their choice? (Art.8(1)(a))
4. Are there government imposed conditions for membership in unions? (Art.8(1)(a))
5. Are any restrictions upon the formation of unions prescribed by law *and* necessary? (Art.8(1)(a))
6. Are unions free to determine their own internal structures? (Art.8(1)(c))
7. Are there any restrictions on free collective bargaining? (Art.8(1)(c))
8. Has the government or have private actors limited the exercise of the right to strike? Are such limitations prescribed by law and justified? (Art.8(1)(d))
9. Is there effective legal protection of these rights?

[194] See Craven, *supra* note 180 at 258-259 for a description of the compromise position taken during drafting.

VIII. The Right to an Adequate Standard of Living

Article 11

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

2. *The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

   (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

   (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

A. Introduction

The right to an adequate standard of living may be the single most important right in the Covenant. It articulates the broadest concern of the Covenant; that people not live in abject poverty, and that they enjoy the bare minimum necessary for a decent and fulfilling life. The right specifically protects the right to housing and food, but is not limited to these fundamental needs. Originally, the United Nations Commission on Human Rights[195] considered proposals to create a separate article on the subject of housing, apart from the concept of an adequate standard of living. The argument for this position was that the concept of an adequate standard of living was too vague, and ought to be broken into component rights, each of which could receive specific elaboration.[196] In fact, the Commission did forward two draft articles, one on housing and the other on an 'adequate standard of living', for approval by the Third Committee of the General Assembly of the UN. The Third Committee decided to combine the two, with the rights to food, clothing and housing serving as 'illustrations' or 'component elements' of the right to an adequate standard of living. It was felt that the concept of an adequate standard of living was sufficiently plain for all to understand.

This drafting activity illustrates that the scope of Article 11 was never intended to be limited to food, clothing and shelter alone.[197] Moreover, the text does not support such a restrictive interpretation either. Despite this, however, little elaboration of the other aspects of this right has

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[195] The Commission on Human Rights is different from the Committee on Economic, Social and Cultural Rights. The Commission is a body of 54 State Representatives that is today concerned primarily with the drafting of human rights documents. The CESCR, by contrast, is composed of independent experts and is charged with supervising the implementation of the International Covenant on Economic, Social and Cultural Rights.

[196] See Morosov (USSR), UN Doc. E/CN.4/SR.294 at 6, (1952). Discussed in M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 289.

[197] See Craven, *ibid*. at 301. "As was made clear in the travaux preparatoires, the concept of an adequate standard of living was intended to have a broad and general meaning."

taken place. It is an open challenge for activists to give greater meaning to this yet undefined aspect of Art. 11, which may encompass notions of poverty reduction, development programmes and other relevant concerns.

B. The Basic Needs Approach

Craven proposes that the concept of an 'adequate standard of living,' ought to be read as including, but not limited to, the 'basic needs' of an individual. The value of such an approach is that it benefits from the multi-disciplinary work that has sought to define such basic needs.[198] Such research has identified the following as among basic needs: food, shelter, clothing, certain household equipment and furniture, safe drinking water, sanitation, public transport, health facilities, health, education, and cultural facilities.

It is clear from this list that a number of the basic needs pertain to other explicitly protected rights under the Covenant, while some additional needs - such as sanitation, household equipment and transport - may not. Activists who are acquainted with the special needs of people in particular areas are well positioned to advance their own ideas of what is necessary for an adequate standard of living. Article 11 may serve as an umbrella concept under which one may address such concerns.

C. The Right to Social Security and Social Insurance

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

This Manual does not contain a chapter on Article 9 of the Covenant. The reason for this is that Article 9 does not appear to deal with the substance of a social right, but rather with the state-run form through which a substantive entitlement can be realised. Social security and social insurance are ways of protecting people from sinking into utter poverty. In other words, they are ways to allow people to enjoy a decent standard of living. Therefore, the activist that collects data for the purpose of reporting under Article 11 is well situated for indicating the problems or inadequacies of the social security system. A recent publication offers a thorough examination by a renowned expert.[199]

Social security and social insurance are not the same. Social security is a social safety net provided by the government free of any substantial cost to the recipient. Examples would include a state run pension system, food stamps, or welfare cheques that one receives simply because she or he is poor. Social insurance, on the other hand, is a system of social protection into which the recipient pays. Several pension and unemployment insurance programmes are run this way through regular deductions from a worker's pay cheque.

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[198] See the *Copenhagen Declaration of the World Summit for Social Development, Report of the World Summit for Social Development*, (1995), UN Doc. A/CONF.166/9.

[199] L. Lamarche, "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights" in A. Chapman & S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002). See also more generally, S. Liebenberg, "Social Security as a Human Right" in *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource* (Washington: International Human Rights Internship Program, 2000).

The programmes may be scrutinized to see whether they provide people with enough money to have an adequate standard of living. The easiest way to determine this is to compare the amount of the support with the cost of living. When it is below the cost of living, there may be a violation of the right to social security and the right to an adequate standard of living.

It ought to be recalled that the political rhetoric surrounding social security is very strong in two ways. First, States, no matter how rich, always argue that they cannot afford it. Second, and particularly in rich Western countries, people argue that the welfare state creates dependency. It may therefore be desirable that activists show why the person on such social security or insurance has no other option. Physical handicaps or diseases are one indicator, and outright lack of employment is another. It is also useful to indicate the amount of government spending on other budget items, such as military, infrastructure development to promote investment and other items. A review of the chapter on the nature of the obligations under the Covenant would be useful for this purpose.

In its Revised Reporting Guidelines, the Committee asks for information about the following forms of social security: medical care, cash sickness benefits, maternity benefits, old-age benefits, invalidity benefits, survivors' benefits, employment injury benefits, unemployment benefits, and family benefits. [200]

[200] *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,* E/C.12/1991/1, "Article 9" para.2.

IX. The Right to Food (Article 11)

Article 11

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

2. *The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

   (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

   (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The first paragraph of Article 11 articulates the normative entitlement, or, the basic right to food. The second spells out how the government must realise this right. The Committee on Economic, Social and Cultural Rights has adopted a General Comment on the right to food, and a number of UN Special Rapporteurs have written reports about it. Much of this chapter will refer to the important comments in these documents. When writing a report, it is important to understand two main things: first, the definition of the right, or, the scope of entitlements it is intended to protect; second, the nature of the government's obligations to respect, protect or fulfill those entitlements.

A. Definition of the Right to Food

With the adoption of General Comment No.12, the Committee formalized many of the insights of previous work on the right to food. The right had been studied by Special Rapporteurs, in Expert Consultations, by the Food and Agriculture Organization, the World Food Programme and UNICEF. In paragraph 8 of General Comment No. 12, the Committee adopts the following definition of the 'core content' of the right. The underlined phrases are those that receive further elaboration in the Comment:

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
>
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

(a) ***'Availability'*** **-** Refers to either (i) feeding oneself directly or (ii) access to well-functioning distribution, processing and marketing systems that respond to demand. (para.12)

(b) ***'Dietary Needs'*** **-** The diet consists of a mix of nutrients for physical and mental health and growth. This has been further defined elsewhere as consisting of a mixture of nutrients, calories and proteins. (para.9)

(c) ***'Adverse Substances'*** - Sets requirements for food safety, both public and private. Practically, governments must set and enforce health and safety standards. (para.10).

(d) ***'Culturally Acceptable'*** - It is necessary to take into account non-nutrient based values for judging the acceptability of food, including the informing of consumers. (para.11)

(e) ***'Accessibility'*** - This comprises two components: (i) economic accessibility and (ii) physical accessibility. (para.13)

Economic Accessibility - The costs of obtaining an adequate diet of food should not prevent the satisfaction of other 'basic needs,'[201] with particular attention being given to the socially vulnerable.

Physical Accessibility - Food must be accessible to everyone, which means that vulnerable groups, or victims of natural disasters (e.g. Internally Displaced Persons), may need special and emergency distribution programmes.

Important Sources for Understanding the Right to Food

The order of these documents is not meant to be hierarchical:

- General Comment No. 12, CESCR (1999).
- *Report of the Special Rapporteur on the Right to Food*, Jean Ziegler, (2001), E/CN.4/2001/53.
- *Report of the Third Expert Consultation on the Right to Food*, Bonn, (2001).
- Interim Reports updating the 1987 *Final Report on the Right to Food* (see below), Asbjørn Eide, (E/CN.4/Sub.2/1998/9). In 1999, Mr. Eide updated his study with document E/CN.4/Sub.2/1999/12, which, as he points out, should be read in conjunction with the 1998 interim report.
- *Report of the Second Expert Consultation on the Right to Food*, Rome (1998) (organised jointly by the OHCHR and the Food and Agriculture Organization (FAO)).
- *Report of the First Expert Consultation on the Right to Food*, Geneva (1997). (organised by the OHCHR).
- *Rome Declaration on World Food Security* (1996).
- M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 306-329.
- Asbørn Eide (UN Special Rapporteur on the Right to Food), *The Right to Food* (Final Report) UN.Doc. E/CN.4/Sub.2/1987/23 (1987).
- P. Alston & K. Tomasevski, *The Right to Food* (The Hague: Martinus Nihjoff, 1984).

One finds upon reading these sources that much of the wisdom put forth in the earlier works is adopted in later works, particularly in General Comment No. 12. This makes references to earlier documents more of academic than practical interest. It is also important to note that there are other sources of the right to food under international law, in both the UN and regional systems.

[201] The UNDP is helpful in this regard, for it collects data on the percentage of household income that is spent on food. See its annual *Human Development Report*, which is available at www.undp.org

B. Governmental Obligations Related to the Right to Food

When analysing governmental obligations, the objective is to indicate *how* the State has failed to set in the way it should. Put another way, we are trying to show what the State must focus on in order to implement the core content defined above. In paragraph 16 of General Comment No.12, the Committee clarifies that there are two main kinds of obligations: (i) progressive and (ii) immediate

1. Progressive Obligations

Progressive obligations are the class of duties that the State must implement over a period of time rather than immediately. The government's progressive obligations should be analysed through the careful consideration of Art. 2(1). It is helpful to use the terminology of 'respect, protect and fulfil' where possible, and to discuss the issues of resource constraints wherever progressive obligations are concerned. Also, one must strive to use the terms employed in the definition of the right to adequate food; they are the terms the Committee understands and has assured are protected by the Covenant. Practically, the Committee and other sources have invited consideration of, among other areas, the following: (1) production, (2) processing, (3) distribution, (4) marketing, (5) nutritional education, (6) conservation measures, (7) diffusion of scientific and technical knowledge, (8) status of land tenure laws and agrarian reform, and (9) the direction to which international assistance is sought and used in conjunction to the right to food.[202] Another aspect of the State's progressive obligations is to ensure that private actors such as businesses act in conformity with people's right to food.[203]

2. Immediate Obligations and Violations

"Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger."[204] Thus, when an activist shows that a State has failed to eradicate hunger, it is the State that must show that it does not have sufficient resources. General Comment No.12 requires that once a violation of a minimum subsistence right is found, "…the State has to demonstrate that *every effort* has been made to use *all the resources at its disposal* in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Art. 2(1) of the Covenant..." [emphasis added]. Activists ought to try to demonstrate that there is at least one or more 'efforts' the government was capable of making in order to satisfy those minimum obligations. Concrete counter-proposals are important in this respect, and should always try to present an affordable option.

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[202] Sources confirming the relevance of these suggestions can be found in the following documents: (1)-(4) General Comment No. 12, para. 25; (5) Art. 11(2)(a), ICESCR, (requiring states to "disseminate knowledge of the principles of distribution," also in the *Revised Reporting Guidelines* and discussed in Craven, supra note 180 at 321-22, as well as in the *Report of the Third Expert Consultation on the Right to Food* (2001), at para.21; (6) Craven, at 319 and Art.11(2)(a); (7) Craven, at 322-23; (9) Craven, at 327-29.

[203] General Comment No. 12, para. 27. Unfortunately, this paragraph uses the word 'should' take appropriate steps, which may appear to constitute a weaker obligation than that provided in Art. 2(1), which asserts that State Parties 'undertake to take steps.' This author submits that the State's obligations to protect the right to food should include the immediate obligation to bring its domestic legislation into conformity with that international obligation, with the effective enforcement itself being perhaps subject to progressive implementation.

[204] General Comment No. 12, para. 17.

To help States and activists identify violations, the Committee gives the following examples:[205]

(a) formal repeal or suspension of legislation necessary for the enjoyment of the right to food;

(b) denial of access to food to particular groups, whether such discrimination is based on legislation or is proactive;

(c) adoption of legislative policies which are manifestly incompatible with pre-existing legal obligations related to the right to food;

(d) failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others;

(e) the prevention of access to humanitarian food aid in internal conflicts or other emergency situations;

(f) failure of the State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or international organisations.

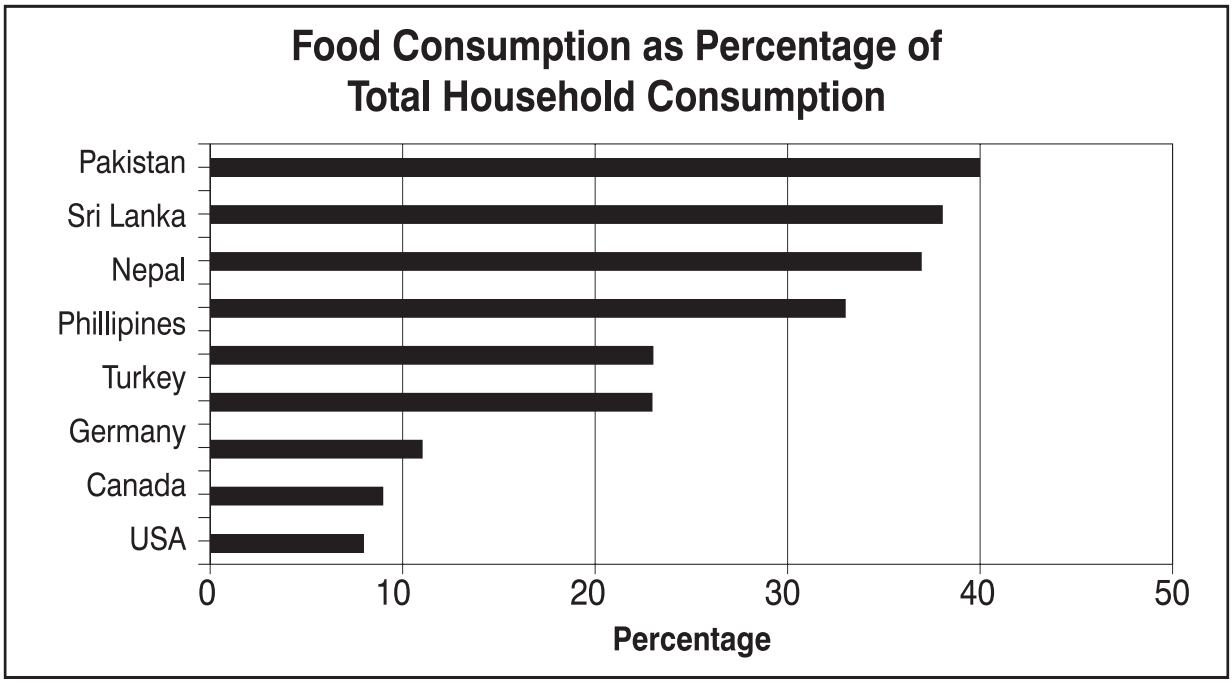
These examples of violations are intentionally vague, so that they be applied broadly. Activists can use this vocabulary to articulate their findings. For example, one could argue that a law that repeals legislation that provided food stamps to impoverished families is a 'formal repeal of legislation necessary for the enjoyment of the right to food (example (a)), which has the adverse effect of discriminating against vulnerable groups including women, estate workers and children.' One could also say that a law that authorizes the expropriation of agricultural land without adequate compensation is 'the adoption of legislation that is manifestly incompatible with the pre-existing legal obligation to guarantee the right to food, (example (c)) which constitutes a violation of the Covenant according to the terms of paragraph 19 of General Comment No.12.' It is helpful to cite the appropriate paragraph of the General Comment in a footnote when using its language.

3. Plans of Action and Benchmarks

[T]he Covenant clearly requires that each State Party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food an nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.[206]

[205] General Comment No. 12, para. 19.

[206] General Comment No. 12, para. 21.



Source: UNDP Human Development Report, 2000

Benchmarks are standards of achievement. Examples of benchmarks for the right to food could include the minimum caloric intake per person in a certain region, the amount of annual funding for agricultural products and tools for subsistence or small-scale farming, or the percentage of household income spent on food. Benchmarks may always be reviewed and changed later, so there may be room for some compromise when negotiating them. It appears clear from the General Comment that a government has an immediate obligation to commence the design of a plan of action, and the progressive obligation to carry out its various aspects, such as consultations, baseline studies, and benchmark setting.

When designing its plan of action, the government must observe the following elements. Some relate to the procedure that must be followed, while others refer to the content of the plan:

- Create representative (design that incorporates the views of the different stakeholders (paras. 24, 29);
- Set a timeline for implementation (para. 24);
- Address critical production and distribution measures, as well as related issues in health, education and social security (para. 25);
- Address the issue of discrimination in particular (para. 26);
- Set verifiable benchmarks (para. 29);
- Adopt framework legislation which includes targets set relative to the benchmarks, a time frame for achievement, and intended collaboration with civil society and others (para.29).

The NGO community can contribute in many ways to the creation of a national plan of action. The following steps are but one way to do so: (1) devise an alternative national plan of action in conjunction with other groups working in the same sector; (2) formulate a proposal for the establishment of collaboration between the government and civil society for the purposes of establishing a plan of action; (3) propose indicators, benchmarks and surveys for evaluating access to adequate food, including nutrition, safe water, and education, and (4) develop proposals for policies and laws you

wish to have incorporated in the framework legislation. A failure of the government to cooperate with a well-organised NGO sector in this regard would amount to non-compliance with its obligations under the Covenant. This is made clear by the first point in the list above.

C. Drinking Water as Human Right

The right to food is largely an entitlement to nutrition adequate to maintain health. As water is an indispensable aspect of this nutrition and health, it is necessarily implied in the terms of the right to food and health, as well as to the right to life and housing.[207] The issue of privatisation of water resources, (see box), makes the relevance of this aspect of the right quite important.

In November 2002 the Committee adopted General Comment No. 15 on the Right to Water. It confirms that the right is protected under Articles 11 (the right to an adequate standard of living) and 12 (the right to health). The General Comment is organised along similar lines as General Comments No. 13 and 14. It describes the normative content of the right in terms of availability, quality, and accessibility, and examines in detail the situation of vulnerable groups and the right to water (paras. 10-16). Thereafter the Committee discusses general obligations, violations, national implementation and obligations of non-state actors. The general character of obligations remains the same as in General Comments Nos. 13 and 14, although the substantive entitlement is different. Those activists interested in reporting on this topic should consult this Comment.

The adoption of this Comment was a result of the extensive collaboration between international organisations, including the Centre on Housing Rights and Evictions, WaterAid and the World Health Organisation. It suggests a promising role for the involvement of civil society organisations in the elaboration of international human rights law.

D. Reporting Checklist

The following checklist addresses the general scope of the right to food under Article 11. The letters appearing at the end of each question indicate the section of this chapter in which the topic is examined:

1. Are there people who look any or all of the elements of the core content of the right to food? (A)
2. Has the government failed to implement its progressive obligations? (B.1)
3. Has the government failed to implement any of its immediate obligations or committed violations of the right to food? (B.2)
4. Has the government initiated a national plan of action? (B.3)
5. If so, has it included the necessary elements and consulted the NGO community or the direct stakeholders? (B.3)
6. Has the government respected, protected and fulfilled the right to water? (C)

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[207] See the working paper by Mr. El Hadju Guissé, on the right to access of everyone to drinking water supply and sanitation services, UN Doc. E/CN.4/Sub.2/1998/7, and the Report of the Special Rapporteur on the Right to Food, Jean Ziegler, UN Doc. E/CN.4/2002/58. See also General Comment No. 4, para. 8 where the Committee states that the right to adequate housing includes the right to safe drinking water.

THE RIGHT TO WATER IN SRI LANKA - TEXTBOOK CASE OF INDIVISIBILITY

The Water Resources Council and Secretariat of the Government of Sri Lanka have prepared a Draft Water Resources Act, and Draft Water Resources Regulations for the implementation of the Water Resources Policy. The main effects of the policy would be to give all rights over access to groundwater and river basins to the State of Sri Lanka, which would assume control over issuing 'water entitlements'. Those entitlements will sold to particular users. The use of water-wells and even groundwater from rain without an entitlement will be an offence punishable by fine and/or imprisonment.

Justification

The policy is claimed to be a water conservation measure aimed primarily at stemming the wasteful usage of irrigation water on relatively unproductive paddy farming in the dry zones of Sri Lanka, which is said (by advocates of the policy) to consume 90-95 percent of water resources. However the motivation for this policy stems clearly from a World Bank Policy 'Recommendation', "Non Plantation Sector Policy Alternatives" Report (1996). The report states unequivocally that this sector will not grow economically unless paddy farming and other low-value crops are replaced with higher value export crops. The report states further that small farmers are unwilling to give up paddy and other food crops, and that they must be encouraged to abandon such production. It refers to the fact that water is given to them free as a reason for such attitudes, and then states clearly that 'water is a commodity' and ought to be 'marketed…by the private sector, and not the government.' The Sri Lankan government is in the process of complying with this recommendation. Activists also point out the efforts of trans-national corporations such as Monsanto and multilateral institutions such as the WTO to have water declared a commodity. For these compelling reasons, the policy has been critiqued for being implemented in favour of foreign interests, and not the water needs of the people of Sri Lanka.

Nine Major Problems

First, the proposed legislation will have the effect of giving 'entitlements' not to small users, but rather to large users who in turn will have the right to sell it on their own terms. The poor will have virtually no access to entitlements, no say in the determination of water prices, and ultimately highly restricted access to water they cannot afford. Second, the infrastructure costs of water measuring will likely be borne by the State and ultimately the tax-payers of Sri Lanka, and not by private investors, as have the infrastructure costs for most large scale 'development' projects undertaken in the last two decades that were designed to attract foreign investment (e.g. Mahaweli diversion, super-highways, airport, harbour etc.) Third, as production will be shifted to export oriented crops, and thus subject to fluctuating foreign markets, the food security of the farmers and other Sri Lankans will be threatened. Some forecast potential starvation. Fourth, the cultural relevance and historical importance of paddy production to the people of Sri Lanka has been given no importance whatsoever. Fifth, the provision of privatised water resources will most likely not be provided by Sri Lankan business, which lacks the expertise in the area, and rather by foreign companies with large amounts of capital and international experience in the 'water business'. Thus the supposed profits from the industry will be siphoned away. Sixth, the move towards efficient methods of water transportation-such as concrete channelling-will have the deliberate consequence of preventing seepage into channel banks, which is an important element of the bio-diversity of surrounding areas. Seventh, the move towards 'productive' crops involves the shift toward heavily 'input-dependent' farming, which increases greatly the use of chemicals and poisonous pesticides. This in turn pollutes water supplies. This exposes the hypocrisy of the 'sustainability' justification of the proposal, and is supported by the experience of producing such crops in the hill country by companies unwilling to take measures against soil erosion and depletion. Ninth, and most importantly, until recently civil society organisations representing the poor-and of course the poor themselves- have not been consulted during the policy adoption process. This situation has begun to change, largely through a well-organised Campaign to Protect Common Water Rights, which can be joined through MONLAR-Movement for National Agriculture and Land Reform (monlar@sltnet.lk).

Source: MONLAR, "Can Water Marketing Prevent a Crisis?, and LHRD, "Privatisation of Water Resources and its Consequences" in People's Rights, Issue No.2-2000.

X. The Right to Adequate Housing (Article 11)

The right to adequate housing is regarded as a fundamental right upon which other crucial rights depend. These dependent rights include health, education, freedom of expression, freedom of association, the right to work, freedom to take part in public decision making as well as many others.[208] The Committee has confirmed that the right to housing means a right to *adequate housing*,[209] and devoted two general comments to the topic of housing rights (Nos. 4 and 7). In addition, the January 2001 report of the Special Rapporteur on the Right to Adequate Housing, Miloon Kothari of India, contains a recent summary of the legal and institutional work conducted on the right at the UN, as well as the identification of important strategies and goals that are necessary for the effective implementation of the right to adequate housing.[210]

The Committee has addressed the right to adequate housing generally (General Comment No.4), and the issue of forced evictions in particular (General Comment No.7). In each case, it is important to understand (1) the definition or scope of the right, and (2) the nature of the State's obligations to respect, protect and fulfil the right.

A. Definition of Adequate Housing

While the Committee makes clear that the definition of 'adequate housing' will vary depending on the circumstances in each country, it articulates the key elements that must be present in adequate housing anywhere. These elements are explained in paragraph 8 of General Comment No. 4:

a) ***Legal Security of Tenure*** - "Security of tenure should be provided and enforced in consultation with the affected groups. This protects people from eviction, harassment and other threats.

b) ***Availability of Services, Materials, Facilities and Infrastructure*** - All people are entitled to i.e facilities that are essential for health, security, comfort and nutrition, which include safe drinking water, energy for cooking, heating, lighting, sanitation facilities, refuse disposal, storage and emergency services.

c) ***Affordability*** - The cost of adequate housing should not compromise the satisfaction of other basic needs.

d) ***Habitability*** - Housing must protect its inhabitants from cold, damp, heat, rain, or other health threats and structural hazards, as well as provide them with adequate space. Here the Committee refers to the World Health Organization's *Health Principles of Housing* (1990).

e) ***Accessibility*** - All people are entitled to adequate housing, and disadvantaged groups in particular must be accorded full and sustainable access to housing, which may mean granting them priority status in housing allocation or land-use planning.

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[208] See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 330 for a discussion of the Committee's view of the fundamental aspects of the right to housing. See also General Comment No. 4, paras. 1 and 7. Para. 1: "The human right to adequate housing…is of central importance for the enjoyment of all economic, social and cultural rights."

[209] General Comment No. 4, para. 7.

[210] It should be noted that this report, despite its comprehensiveness, has been critiqued. See COHRE, Newsletter No. 4, June 2001, available from the COHRE website: www.cohre.org

f) ***Location*** - Housing should be located in areas in which there is access to employment options, health-care services, schools, child-care centres and other social facilities. This applies equally in urban and rural areas. Housing also should not be built on or near polluted sites or sources of pollution.

g) ***Cultural Adequacy*** - Activities geared towards development or modernization of housing should ensure that the cultural dimensions of housing are not sacrificed, while simultaneously ensuring modern technical facilities.

These aspects of adequate housing are necessarily general, and must be given more specific content by activists working in particular countries and regions. It is helpful, however, to use the vocabulary employed under each paragraph. So for example, one could address poor housing for plantation or estate workers with the language of 'habitability,' the condition of Internally Displaced Persons' shelters with 'cultural adequacy,' and the restrictions on transport and mobility in conflict zones with 'availability of services, materials, facilities and infrastructure.' More suggestions are given below, under 'Plans of Action.'

The Right to Housing Under International Law

Law

Universal Declaration of Human Rights (1948), Art.25(1)
Convention on the Elimination of All Forms of Racial Discrimination (1965), Art.5(e)(iii)
Convention on the Elimination of All Forms of Discrimination Against Women (1975), Art.14(2)
Convention on the Rights of the Child (1989 Art.27(3))
Convention on the Status of Refugees (1951), Art.21
Migrant Workers Convention (1990) Art.43(1)
Revised European Social Charter (1996) Art.31

Declarations

ILO Recommendation No.115 on Workers' Housing (1961)
Vancouver Declaration on Human Settlements (1976)
Global Strategy for Shelter to the Year 2000 (General Assembly, 1987)

B. Government Obligations Related to the Right to Adequate Housing

1. Progressive Obligations

The government must implement the right to housing to the maximum of available resources. There are also more specific requirements of this obligation. "A general decline in living and housing conditions, directly attributable to policy and legislative decisions by States Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations found in the Covenant" (General Comment No.4, para.11). It may be argued convincingly that any general decline in housing conditions that was preventable by the government is inconsistent with its progressive obligations under the Covenant.[211]

There are at least three other specific progressive obligations under the Covenant. The first is that the government must promote 'enabling strategies' that help people find their own housing (para.14).

[211] See Craven, *supra* note 208 at 331-2, where he writes "Even where housing provision is generally undertaken by the private sector, States must retain ultimate responsibility for shortfalls… ."

Examples would include, but are not limited to, low-interest or interest-free loans, 'self-help' information on sanitation and infrastructure construction, and the funding of community initiatives. A strategic move to engage and this obligation would be for NGOs to propose such measures. Refusing to discuss valid proposals in good faith would be a violation of the Covenant. The second obligation is that when seeking international assistance, States 'should' seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. In so doing, they should take due note of the needs and views of the affected groups (para. 19, General Comment No. 4). Consultation is explicitly called for in this case. Finally, when implementing strategies for the realisation of the right, priority must be given to disadvantaged groups (para. 8(e)).

2. Immediate Obligations

Governments cannot justify the non-implementation of an immediate obligation, unless there are extraordinary circumstances. Therefore resource constraints are *not a factor or excuse* in this analysis. The following are immediate obligations related to the right to adequate housing:

(a) To adopt a national housing strategy (para. 12);

(b) To monitor the situation with respect to the right to housing (para. 13);

(c) To refrain from action that would obstruct access to housing (Craven at 331);

(d) To 'facilitate self-help' (granted the completion of such plans will be a progressive obligation);

(e) To seek international assistance if immediate obligations appear to be beyond the State's financial capacity (para. 10, General Comment No. 4);

(f) To ensure that evictions are carried out in accordance with duly enacted law, and include resettlement or compensation (see 'Forced Evictions' below);

3. Judicial Enforcement Strategies

The right to housing is special in that it is often protected through a variety of judicial and quasi-judicial means (e.g. Rental Boards). In acknowledgement of that experience, the Committee addresses several ways in which the right may be legally protected. These are concrete and well-known techniques for protecting housing rights. As such, they would make excellent and well-justified recommendations by activists.

They include the following (para.17):

(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;

(b) legal procedures seeking compensation following an illegal eviction;

(c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination;

(d) allegations of any form of discrimination in the allocation and availability of access to housing; and

(e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems, it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

4. Plans of Action and Benchmarks

In paragraph 12, the Committee confirms that the obligation to take steps under the Covenant "…will almost invariably require the adoption of a national housing strategy." This plan is adopted directly from the Global Strategy for Shelter, paragraph 32. According to this document, a proper national housing strategy "…defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures."[212]

If one wishes to become part of the process of developing a national plan of action, one may consider the following practical steps for doing so:

(a) establish a network or coalition with other NGOs working in the area. This kind of network is crucial for getting the government to take proposals seriously;

(b) drawing on the work of UN specialised agencies, produce national, disaggregated criteria for what constitutes adequate housing. This would mean providing specific indicators and benchmarks for each of the elements of the definition discussed above;

(c) adopt a set of joint civil society proposals for inclusion in a national plan of action to implement the right to adequate housing;

(d) having achieved steps 2 and 3, initiate a dialogue with the government with a view to adopting the indicators and benchmarks developed in steps 2 and 3. Part of the proposal could ask that the indicators be included in the statistical data-collection of the *Department of Census and Statistics*.

The refusal of the government to cooperate at stage four of this proposed strategy, in this author's opinion, would be a violation of the Covenant. The undertaking to 'take steps' clearly requires (1) monitoring, (2) strategies, and (3) collaboration with civil society. These are explained clearly in paragraph 12 of General Comment No.4.

C. Forced Evictions

General Comment No.4 refers to security against forced evictions as a part of 'security of tenure,' which is an integral aspect of the right to adequate housing. In 1997, the Committee adopted General Comment No. 7, which treats in detail the subject of forced evictions. After having considered a number of State Reports (see box) in relation to forced evictions, it decided that the matter was ripe for further elaboration in the form of a General Comment. Two major aspects of the Committee's treatment of State Reports were (1) the fact that during the course of the evictions the families had been forced to live in 'deplorable conditions' and (2) the domestic legal requirements for enforcing an eviction had not been followed.[213]

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[212] The Document was adopted by the General Assembly at its Forty Third Session, Supplement No. 8, addendum 1, UN Doc. A/43/8/Add.1.

[213] See Craven, *supra* note 208 at 341 for a discussion.

FORCED EVICTIONS- EXAMPLES FROM THE FIELD

- **Dominican Republic** - 1985-1995, over 15, 000 families were evicted during the course of city 'remodelling.' The authorities did not comply with local laws regulating evictions, and did not relocate the victims or provide them with adequate compensation. In 1991, Dominican NGOs persuaded the Committee to issue a warning to the government against carrying out a planned eviction of 70,000 people. As a result, the eviction order was not carried out, and was formally repealed by a new government in 1996. (Source: M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 341-343; F. Morka, "The Right to Adequate Housing" in *Circle of Rights: Economic, Social and Cultural Rights Activism* (Washington: International Human Rights Internship Program, 2000) at 250-252 (who puts the figure at 200,000, according to the estimates of local NGOs)).

- **Panama** - In 1990, the US invaded Panama and together with some Panamanian forces took part in the forcible eviction of a number of settlers. While some were deemed unavoidable aspects of the invasion, others were seen as unacceptable under the terms of the Covenant. In particular, over 5,000 persons who had lived in the area for more than two years were forcibly removed from their homes and the homes were destroyed. The evictions had not been carried out pursuant to a legal order, and were thus inconsistent with domestic law (Source: Craven at 343).

- **Nigeria -** In July 1996, the Nigerian government announced that it intended to demolish 15 slum communities without making provisions for compensation or resettlement. Over 2,000 people were evicted pursuant to the first phase of the project. The plan was to be carried out under a World Bank funded project, and thus the Social and Economic Rights Action Centre (SERAC), a Nigerian NGO, engaged the Bank's new Inspection Panel Review process, which provides a procedure for people to complain to the Bank about projects that do not comply with its internal guidelines on certain matters. An on-site inspection was carried out, and the Bank officials agreed that the project managers had not complied with the Bank's *Operational Policy on Involuntary Resettlement* (Source: Morka at 250).

1. Definition

"[Forced evictions are] the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provisions of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights." (Paragraph 4, General Comment No.7).

The Committee thus notes the *internal limitations* of the right not to be forcibly evicted, and repeats the limitations in paragraph 6. It recognizes that the expropriation of land by the State is a recognized and legally acceptable practice, provided that it is carried out in accordance with the limitations provision of the Covenant, which is Art.4. Notice that the wording is 'homes/land which they occupy.' This means that holding legal tenure is not a precondition for applying this right. In fact, the right is largely designed to protect people who have no choice but to 'squat' on land to which they have no title.

2. Governmental Obligations

a) Progressive Obligations

Forced evictions concern primarily the government obligation to 'respect' the right to adequate housing. As explained in the chapter on States Parties' obligations, the obligation to respect is one of restraint only. This means that resource limitations should not be a significant factor in the realization of the right not to be forcibly evicted. There are, however, at least two progressive obligations which were identified in the General Comment, and thus may be subject to realisation over time in accordance with the available resources:

1. To review relevant legislation to determine compliance with the Covenant (para.10);
2. To ensure to the maximum of available resources, that where evictions cause homelessness or the violation of other human rights, these people have adequate alternative housing, resettlement or access to productive land (para.17).

b) Immediate Obligations

The following are identified as immediate obligations in General Comment No.7:

1. To refrain from forced evictions [obligation of respect] and ensure that the law is enforced [obligation to protect] against State agents (e.g. police) or third parties who carry out forced evictions (para.9);
2. To enact legislation that controls forced evictions. This is a part of the undertaking 'to take steps' in article 2(1). It should include (a) greatest possible security to occupiers of houses and land, (b) conform to the Covenant, and (c) be designed to control the circumstances under which evictions may be carried out (para.10);
3. To consult with affected persons in the effort of identifying "all feasible alternatives" before carrying out any evictions, particularly large ones. This should aim to avoid the use of force (para.14);
4. Legal remedies or procedures 'should' be provided to those who are affected by eviction orders (para.14);
5. States Parties 'shall see to it' that all individuals concerned have the right to adequate compensation for any movable or immovable (personal or real) property that is affected (para.14).

While points 4 and 5 use somewhat weaker language in the General Comment, they nonetheless articulate immediate obligations, and may be reported in the same manner as the rest. Points 2

and 4 refer to the provision of legal mechanisms for protection against forced evictions. These legal mechanisms are designed to enforce 'procedural guarantees,' which are rules with which the State must comply if it wishes to carry out an eviction. Procedural guarantees are well known in criminal law. Their justification is that when the State uses its enforcement mechanisms to deprive an individual of his or her liberty, it must do so in accordance with certain procedures (e.g. reading of rights, presumption of innocence, and a fair and impartial trial). The Committee clarifies what it considers to be the essential procedural guarantees for protecting the human right not to be forcibly evicted (para.16):

(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) government officials or their representatives to be present during an eviction, especially where groups of people are involved;

(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.

It would be useful to look for these precise things in both legislation and governmental conduct when compiling a report for the Committee.

D. Reporting Checklist

The following checklists address the general scope of the right to adequate housing under Art. 11. The letters appearing at the end of each question indicate the section of this chapter in which the topic is examined:

1. Do all people enjoy all of the key elements of adequate housing? (A)
2. Has the government tolerated a decline in housing conditions that it could have prevented? (B.1)
3. Has the government promoted enabling strategies, sought international assistance for housing in particular, and given priority to disadvantaged groups in its programmes? (B.1)
4. Has it fulfilled its five immediate obligations? (B.2)
5. Has it adopted the judicial enforcement mechanisms for protecting housing rights? (B.3)

6. Has it initiated a national plan of action? If so, has it consulted the NGO community or direct stakeholders in doing so? (B.4)
7. Has the government evicted anyone within the terms defined in General Comment No.7? (C.1)
8. If so, was the eviction conducted according to law and was it necessary for the promotion of the general welfare in a democratic society (Article 4 of the Covenant)? (C.1)
9. Has the government fulfilled the two progressive obligations mentioned? (C.2(a))
10. Has it fulfilled the five immediate obligations? (C.2(b))
11. Does it respect and protect procedural guarantees? (C.2(b))

XI. The Right to Health (Article 12)

Article 12

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

   (b) The improvement of all aspects of environmental and industrial hygiene;

   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

A. Introduction

The right to health is an essential entitlement both intrinsically and as a means for the satisfaction of other human rights. The indivisibility of the right is recognised through its inextricable relationship to the right to food, adequate housing, work, participation in political life and above all the right to life itself.[214] Its importance is recognised through its affirmation in numerous other international human rights conventions, such as those pertaining to racial discrimination, women's rights and children's rights (see box). In addition to the protection offered by the Covenant, there are other extensive sources of the right to health in international law and international relations.[215]

Paragraph 1 of Article 13 stipulates that everyone has the right to enjoy the highest attainable standard of physical and mental health. This is a general obligation, which may be realised in numerous ways. Paragraph 2 sets forth particular steps that States Parties undertake to implement the right stated in paragraph 1. These steps are necessary for the full realisation of the right set forth in paragraph 1, but are not the only steps that must be taken (i.e. they are not sufficient). They represent priority steps and particular indications of the concrete issues that must be addressed by States Parties.

In May 2000, the Committee adopted General Comment No. 14, which is its longest single commentary to date on any of the Covenant rights. As this Comment is very recent and a compilation of much work on the subject, this chapter will be an extensive analysis of its provisions. The General Comment is not the clearest of the Comments adopted thus far. The reader will therefore need patience to get through this chapter. Relatively simple advice for reporting is given at the end of the chapter.

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[214] In General Comment No. 14, para. 36, the Committee outlines some of the State's obligations to fulfil the right to food. They include, among other things, nutritiously safe food and potable (drinkable) water, basic sanitation and adequate housing.

[215] See V. Leary, "The Right to Health in International Human Rights Law" (1994) Vol.1, No.1 *Health and Human Rights* 24. The author discusses the importance of the World Health Organisation and some of the numerous studies conducted on the right at national, regional and international levels.

B. Definition

Paragraph 12 describes the essential and interrelated elements of the right to health:

(a) ***Availability*** - Public health care facilities must exist in sufficient quantity. Though this definition will vary according to the level of development, adequate facilities must include the following: (i) safe drinking water, (ii) adequate sanitation, (iii) hospitals, (iv) clinics, (v) trained medical personnel receiving domestically competitive salaries, and (vi) essential drugs.[216]

(b) ***Accessibility*** - This includes the sub-elements of (i) non-discrimination, (ii) physical accessibility, (iii) economic accessibility,[217] (iv) information accessibility.

(c) ***Acceptability*** - All health facilities must be respectful of medical ethics and culturally appropriate.

(d) ***Quality*** - Health facilities, goods and services must be scientifically and medically appropriate and of good quality. Among other things, this requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe water and adequate nutrition (within medical facilities).

As these are the core elements of the right to health, they represent the primary entitlement the State must ensure to its people. It is helpful to use this vocabulary in reports to the Committee. Practically, this would involve showing that particular facts amount to a lack of 'availability,' 'economic accessibility', or so forth. For example, one could argue that when closing a certain hospital without compensatory measures, the State 'fails to respect the availability of the right to health within the meaning of paragraph 12 (a) of General Comment No.14.'

Another important point is that these are the 'essential' elements. It is open to activists to show that there are other crucial aspects to the right to health, particularly in their society, that are not covered by the elements above. These may include the provision of emergency health care during an epidemic, the institution of an immunisation programme for youth or other measures.

C. General Obligations

While the definition of the essential elements of the right to health are spelled out above, the nature of the government's obligations to respect, protect and fulfil those elements are discussed below. It is important to recall that demonstrating a violation of the right to health requires showing (1) that a person or group is not enjoying one of the essential elements of the right to health, and (2) that there is something the government ought to be doing to respect, protect or provide that element (obligations). In General Comment No.14, the Committee divides governmental obligations into two categories: general and specific. This section deals with general obligations.

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[216] As defined by the WHO Action Programme on Essential Drugs. See General Comment No. 14, para.12 (a).

[217] Regrettably, the Committee does not define what the word 'affordable' means. It also avoided doing so in General Comment No. 13, on the right to education. It did, however, define it in General Comment No. 12 on the Right to Adequate Food, para. 13. "Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised." The Committee uses the same definition for affordability of housing, in General Comment No. 4 (The Right to Adequate Housing), para.8(a). Taken together, then, it seems that the same definition of 'affordable' in respect of the right to health ought to be defined as a price that does not compromise the satisfaction of other basic needs.

The Right to Health Under International Law

The following Conventions do not all assert a substantive right to health ; some focus on the discriminatory aspects of the right to health. However all elaborate a dimension of the general right to health under international law.

Universal

Universal Declaration of Human Rights (1948), Art.25
Convention on the Rights of the Child (1989/1990), Art.24(1)
Convention on the Elimination of All Forms of Racial Discrimination (1965/1969), Art.5(e)(iv)
Convention on the Elimination of All Forms of Discrimination Against Women (1979/1981), Arts.11(1)(f)& 12.

Regional

European Social Charter (1961, Revised in 1996), Art.11
African Charter of Human and People's Rights (1981), Art.16
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Art.10

1. Respect, Protect and Fulfil

General Comment No.14 makes extensive use of these categories for the analysis of governmental obligations. In General Comments No. 12 and 13, the Committee clarifies that the obligation to fulfil includes two sub-components: the obligation to *facilitate* and the obligation to *provide*. The Committee steps forward in General Comment No.14 to add a third sub-component, namely, the obligation to *promote* the health of its people.[218] The Committee explains the addition as being justified in light of the "…critical importance of health promotion in the work of [the] WHO and elsewhere."[219]

2. General Legal Obligations

The most general obligation arising from the Covenant is to implement progressively, to the maximum of available resources, the enjoyment of the highest standard of physical and mental health. The activist should therefore consider Art. 2(1) of the Covenant, which is covered in Chapter IV. This is a high and general standard of achievement, and is usually broken down into various components for the sake of specificity.

The paragraph uses language that suggests a nearly utopian level of implementation, which appears to render the right susceptible to the interpretation that it can only be realised progressively over a long period of time. The Committee counters this interpretation by indicating that the right includes a core obligation to satisfy the minimum essential level of primary health care. This aspect is examined below, under 'Core Obligations' (H.1).

[218] Information on this aspect of the right to fulfil can be found at paras. 33 and 37.

[219] Footnote 23 to para. 33, General Comment No. 14.

Finally, the Committee calls attention to the fact that Art.2(1) requires States Parties to take immediate steps toward the full realisation of the right to health. Those steps must be deliberate, concrete and targeted.[220]

3. Non-Discrimination and Vulnerable Groups

During times of severe resource constraints, the State must protect the most vulnerable members of society through the adoption of relatively low-cost targeted programmes.[221] An example of a low-cost targeted programme would be the establishment of a women's health station in a conflict zone, or an immunisation programme for particularly vulnerable children during times of outbreak. Presumably, 'the most vulnerable members' of society can include members of the groups listed above, but also pertain to the poorest people and to those most susceptible to physical danger by the non-implementation of the right. The Committee offers the following guidance:

> *By virtue of Art. 2(2) and Art. 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, 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 (incl. HIV/AIDS), sexual orientation, civil, political or social status which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.*[222]

This list of prohibited grounds is quite contemporary, and includes the newer categories of health status, social status, social origin and sexual orientation. These newer categories of non-discrimination represent the cutting edge of progressive human rights law throughout the world, and are only now gaining ground in the rich western countries.

The Committee gives specific attention to the issues of women's right to health (para.21), children and youth (22-23), older persons (25), persons with disabilities (26) and indigenous peoples (27). Each of these paragraphs suggests pro-active measures for realising the right to health. Thus, when compiling data on these groups, activists should refer to these paragraphs to add support to their own suggestions for alternatives.

4. Retrogressive Measures

The attention given to retrogressive measures is particularly timely. In the rich Western world, cutbacks in social spending in order to lower taxes has become a persuasive form of political rhetoric directed at a majority population that is by and large rich enough to tend to its own needs. The adverse effect is increasing poverty, as demonstrated by comparing the rate in the United States to that in Norway.[223] In the developing world, the doctrine of retrogressive measures is equally important as many of the debt-related restructuring programmes involve the curtailment

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[220] General Comment No. 14, para.30.

[221] General Comment No. 14, para.18, referring to General Comment No. 3, para. 12. See also Chapter XIV (Vulnerable Groups and ESC Rights).

[222] General Comment No. 14, para. 18.

[223] See UNDP, *Human Development Report, 2000*. While 14.1 percent of the United States' population lives on less than $14.40 a day, only 2.6 of Norway's population does. While 17.3 percent of the United States' population earns less than 50% of the median income, only 5.8 of Norway's population does.

of social spending and the privatisation of social sectors, including health. The new patent rules introduced under the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) may induce several governments to curtail access to life-saving drugs.[224] There is a strong presumption that such measures are incompatible with the Covenant, and the State assumes the burden of proving that the measures were introduced "…after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources."[225] Activists should thus seek to identify whether the State has given careful consideration to alternatives, and whether the cutbacks are justified by the totality of rights in the Covenant.

5. International Obligations

There are three important aspects of this category. The first is that the international community undertakes to support, through international assistance and cooperation, the progressive realisation of the right to health.[226] The second is that States Parties must respect the enjoyment of the right to health in other countries "…if they are able to influence these third parties by way of legal or political means."[227] This statement alludes to the problem of a corporation that is based in one country (e.g. Canada) violating the rights of people in another country (e.g. Sudan). People have used the US Alien Tort Claims Act to challenge such corporate action successfully. Another way to control this conduct is through legislative controls regulating where and how corporations may do business. Third, States Parties must refrain from using sanctions or embargoes to restrict the flow of adequate medicines and medical equipment to countries in need. In General Comment No.14, the Committee recalls its succinct discussion of this issue in General Comment No.8, on the relationship between economic sanctions and the enjoyment of economic, social and cultural rights. Finally, it may be argued that States Parties have an *obligation to seek* international assistance for the fulfillment of the right when they do not have sufficient resources to fulfil it.[228] Showing the non-fulfilment of this obligation would involve the activist demonstrating both that (1) when obtaining foreign aid, the right to health was not a priority and (2) that there has been no sustained effort to obtain international assistance to implement the right to health.

D. Specific Legal Obligations

The Committee makes a long list of specific obligations to respect, protect and fulfil at paragraphs 34-37. These lists indicate the measures required to comply with the obligations under the Covenant, but are far too long to reproduce here. Activists that are interested in identifying particular violations ought to consult these lists to see whether their situation matches up with any of the given examples. The following are a few of the author's examples of how to use the language of the General Comment to report non-compliance:

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[224] See Statement of the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, (2001), UN Doc. E/C.12/2001/15.

[225] General Comment No. 14, para. 32, referring to General Comment No. 3, para. 9, and General Comment No. 13, para. 45.

[226] General Comment No. 14, paras. 39 and 45. This follows from Art. 2(1), as clarified in General Comment No. 3.

[227] General Comment No. 14, para.39.

[228] In respect of the right to food, see General Comment No. 12, para. 17. In respect of Covenant obligations in general, See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 144-145.

"The government fails to comply with its obligation to respect the right to health. Policy X imposes an impediment upon the practice of traditional preventive health care, which contravenes the government's obligation to *respect* the right to health under General Comment No.14, para.34."

"The privatisation of health care without adequate mechanisms for safeguarding *availability* constitutes a failure to *protect* the right to health under para.35, General Comment No.14."

"In failing to provide additional hospital beds during predictable outbreaks of Dengue Fever, the government has not *fulfilled* its obligation to make health services *available*."

1. Core Obligations

In General Comment No.3 the Committee established that "…a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on the State Party."[229] This means that, over and above the progressive obligation to provide the essential and interrelated elements of the right to health, there are certain things the government must do as a matter of priority. The obligation to ensure these 'core elements' is much stricter on the government. In General Comment No. 14, the Committee sets out what obligations the minimum essential levels of the right to health entail (para.43):

(a) To ensure the right of access to health facilities on a non-discriminatory basis, especially for vulnerable groups;

(b) To ensure access to minimum essential food;

(c) To ensure access to basic shelter, sanitation, and adequate supply of potable (drinkable) water;

(d) To provide essential drugs, as defined by the WHO;

(e) To ensure equitable distribution of all health facilities (this probably refers to both regional disparity and disparity between social classes);

(f) To adopt an extensive public health strategy and plan of action.

The obligation to adopt an extensive public health strategy is given considerable attention in this paragraph and elsewhere.[230] Another notable aspect is the references of the 'right of access' to food, housing and health facilities on a non-discriminatory basis. The vocabulary is a bit confusing. Point (a) demands that the government ensure a 'right of access' to health facilities, while points (b) and (c) demand that it merely ensure 'access'. The Committee does not define 'access'. The use of 'right *of access* to health care' rather than 'right to health care' is supposed to invoke less onerous governmental obligations. The South African Constitution uses this terminology for

[229] General Comment No. 3, para. 10.

[230] Paras. 53-56, considered below.

precisely this reason.[231] In this case, point (a) appears only to address the government's obligation to ensure access to existing facilities to all equally and without discrimination.

The meaning of 'access' in points (b) and (c) is unclear. It is thus open to put interpretations of 'access' before the Committee. One may argue that 'access' means, in this context, that the holder of the right may have to make reasonable efforts to obtain food, shelter and so on before declaring that she or he has no access. The government, on the other hand, must not restrict mobility, destroy or close access points for health care, or do anything else to interfere with or restrict access. Where it is impossible for the person to provide her or himself through reasonable efforts with such items, there is no access. Other interpretations may be equally plausible.

In this General Comment, the Committee states that 'core obligations' are non-derogable,[232] and thus may not be violated under any circumstances whatsoever. This interpretation is examined above[233] and will not be re-examined here. This interpretation means that the State may not attribute its failure to resource constraints under any circumstances. The interpretation gives activists the opportunity to emphasise the strictness of the core obligations when reporting to the Committee.

2. Violations

In paragraph 46, the Committee explains that "[w]hen the normative content of the article 12 (Part I) is applied to the obligations of States Parties (Part II), a dynamic process is set in motion which facilitates the identification of violations of the right to health."[234] This phrase is also found in General Comment No.13, [235] and appears to depart from the earlier working definition, which was that violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level of the relevant right.[236] The newer interpretation suggests that any failure of the State to respect, protect or fulfil any of the measures or elements of the right to health identified in Part I of the Comment is a *prima facie*[237] violation of the right to health.

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[231] See Art. 26 (1) of the Constitution of South Africa, Act 108, 1996. It is helpful to compare it with the right of children to shelter, in Art. 28(1)(c), which implies a stricter obligation. For more information, see S. Liebenberg & K. Pillay, eds., *Socio-Economic Rights Advocacy in South Africa: A Resource Book* (Bellville, South Africa: Community Law Centre, 2000) at 192-93. See also *Government of the Republic of South Africa (et.al.)* v. *Irene Grootboom (et.al.)* [2000] Constitutional Court of South Africa, where the Court interprets the 'right of access to adequate housing,' and points out the difference between 'the right of access to housing' and the 'right to housing.' Unfortunately, the treatment of 'access' does not clarify greatly how the term is to be understood. The case is accessible at www.law.wits.ac.za.

[232] The words 'derogable' and 'non-derogable' generally refer to human rights claims that may be set aside under certain circumstances (derogable) or never set aside under any circumstances (non-derogable). Classic examples of 'derogable' rights are the right to a trial before imprisonment or freedom of assembly during times of war or national emergency. Some rights are considered non-derogable under any circumstances, examples of which include the laws of armed conflict (humanitarian law), the prohibition of torture, and the prohibition of slavery. See R. Higgins, "Derogations under Human Rights Treaties" (1976-77) 48 *British Yearbook of International Law* 281. See also the *International Covenant on Civil and Political Rights*, Article 4 of which is a 'derogations' clause. Art. 4(2) enumerates certain rights that may not be derogated from under any circumstances.

[233] Chapter IV, Section C.3.

[234] General Comment No. 14, para. 46.

[235] General Comment No.13, para. 58.

[236] See Chapter IV, Section C.4.

[237] See General Comment No. 14, para. 47. In the context of the Covenant, this requires the government to prove that resource constraints prevented the realization of the right.

A number of violations were mentioned over the course of paragraphs 46-49:

- The adoption of retrogressive measures incompatible with the core obligations under the right to health, as outlined in paragraph 43 (para.48);
- The failure to take steps towards the full realisation of the rights (para.49);
- The failure to have a national policy on occupational safety and health, and the failure to enforce relevant laws.

The Comment lists examples of specific violations of the obligations to respect, protect and fulfil the Covenant rights. These are straightforward lists of what the Committee takes to be violations, and are by no means exhaustive or exclusive. Activists may want to skim through these lists either before or after gathering data.

3. Obligations of Non-State Actors

The Committee highlights that non-state actors such as the UN specialised agencies, in particular the World Bank and International Monetary Fund, should "…cooperate effectively with States Parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates."[238] It mentions that the World Bank and IMF in particular "…should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes."[239] It is appropriate to recall that these institutions are not States Parties to the Covenant. However, they are international organisations and are arguably bound by customary international law,[240] which includes the social rights set forth in the Universal Declaration of Human Rights.[241] This statement is therefore best read as a recommendation, and as added weight to the claim that States themselves must accord protection of such rights when entering into agreements with these institutions. The activities of private and other non-state actors are to be regulated by the government of the State Party in accordance with its obligation to protect the right to health.

4. Article 12(2)(a)-Healthy Development of the Child

In paragraph 14, the Committee clarifies that specific obligations are required in respect of children's health:

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238 General Comment No.14, para. 64. See paras. 63-65 for the complete treatment of the subject.

239 General Comment No.14, para. 64.

240 Customary international law is the set of rules that is applied mainly when there is no specific legal convention that regulates the conduct of the actors. In order to find a customary international law, the Court or Arbitrator must find (i) that the rule is demonstrated in the practice of an important number of States, and (ii) that when acting according to this rule, the States acted as though they were obliged by law to do so (opinio juris). Any standard text on public international law will explain this kind of law in great detail.

241 Arts. 22-27, with Art. 25 being the right to health. On the customary status of the Universal Declaration, see L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) 32 *Amercan University Law Review* 1 at 16-17. See also General Comment No. 8, para. 8 for a similar allusion.

- Measures to improve child and maternal health;
- Measures to improve sexual and reproductive health services, including access to family planning, and pre-and post-natal care;
- Emergency obstetric services;
- Information required to enjoy these measures; and
- Resources necessary to act on such information.

As failure to respect, protect or fulfil any of these measures is not necessarily a 'violation,' reporting about them ought to take into account resource constraints as discussed in Chapter 4.

5. Article 12(2)(b)-Environmental and Industrial Hygiene

Unfortunately, the Committee mentions nothing of the overlap between this article and Art. 7(b), which pertains to safe and healthy working conditions. It has been pointed out elsewhere[242] and reporting on this aspect should refer to both articles. The Committee highlights the following specific aspects of the obligation:

- Preventive measures in respect of occupational accidents and diseases;
- Adequate supply of safe drinking water and basic sanitation; and
- Prevention and reduction of exposure to radiation and harmful chemicals.

These obligations are subject to widespread legislative control in many jurisdictions. Therefore the adoption and enforcement of protective legislation is an effective means for their protection, and would thus make a good objective for lobbying efforts. The Committee makes reference to other aspects of Art.12(2)(b), but it is not clear that they add anything new or clarify the nature of the State Party's obligations. In fact, it is questionable whether the provision of adequate food, proper nutrition and the discouragement of tobacco and drug use may plausibly be read into an otherwise specific obligation concerning environmental and industrial hygiene. Perhaps a more useful interpretation would come from a consideration of the ILO's many Conventions on occupational health and safety.[243] Nevertheless, the Committee has placed these elements at the activist's disposal, and she or he may find a useful application for them.

Another potential and unexplored aspect of this right is the degree to which this article ought to be read in conjunction with the right to a healthy environment.[244] It is quite plausible to read Art.12(2)(b) as covering industrial waste-disposal practices, among other things, which affect the health conditions of the people living near the site. This aspect of health has become a major contemporary concern. Therefore, activists may note the negative impact of industrial waste on the right to health, and submit this information under the rubric of this article.

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[242] Craven, *supra* note 228 at 240.

[243] See Craven, *ibid.* at 240. The author indicates that the ILO refers to 21 conventions operating in this area, which deal with a broad spectrum of workers and monitoring mechanisms. These may be found in UN Doc.E/1994/5 at 4.

[244] See M. A. Santosa, "The Right to a Healthy Environment" in *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource* (Washington: International Human Rights Internship Program, 2000).

6. Article 12(2)(c)-Epidemic, Endemic and Occupational Diseases

This article deals with "[t]he prevention, treatment and control of epidemic, occupational and other diseases." The Committee treats prevention, treatment and control separately. Regarding *prevention*, the Committee stipulates that this article 'requires the establishment of education and prevention programmes' for the following:[245]

- Behavioural health concerns such as sexually transmitted diseases, in particular HIV/ AIDS;
- Practices adversely affecting sexual and reproductive health;
- Promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity.

Once again, one may criticise this list of items for a few reasons. First, Malaria, Dengue Fever, Typhoid, Hepatitis A and B, Japanese Encephalitis, Diarrhoea, multitudes of parasites and many other tropical diseases and viruses that cause death and misery throughout the world are not mentioned. These are often countered effectively through low-cost preventative programmes. Second, the suggestion concerning the promotion of social determinants of good health is quite vague, and would seem to encompass nearly any thing that could be related to health. More specificity would have been helpful for activists to address non-compliance, and to maintain the integrity of the rights-based approach to health issues. It is therefore recommended that activists themselves determine what creative forms of preventive education or action the government could take to avert the spread of certain diseases. In this regard, prevention need not only be limited to education. It may be the case that the government could alleviate a spread of Malaria or Dengue Fever through the provision of mosquito netting to a refugee or IDP camp. Another case could be the provision of clean drinking water to avoid critical harm brought on by water-borne diseases and parasites. In order to be persuasive, suggestions for these kinds of prevention tactics ought to be focused rather than general.

The Committee writes that the right to *treatment* includes the following:

- The creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards; and
- The provision of disaster relief and humanitarian assistance in emergency situations.

Both of these obligations to treat are fairly straightforward. What could be argued with success, it is submitted, is that these systems should be designed *before* the advance of any disaster so that there may be a rapid response.[246] This would involve aspects of both the obligation to *prevent* and the obligation to *treat*. Practically, governments could do so by identifying the highest risk diseases or disaster possibilities (e.g. earthquake, flood, mudslides, fires) and designing rapid response plans. These could account for various scenarios including differing numbers of victims, supplies, transportation, communications and coordination between foreign and local NGO assistance, and the government and military. Technical assistance can be sought from relief agencies who have experience in the logistical aspects of such operations. If such foreign technical assistance were to be used, the overall cost of such pre-emptive planning should be relatively low.

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[245] General Comment No.14, para. 16.

[246] In this regard, see General Comment No. 15, para. 28.

When writing of the *control* of diseases, the Committee refers in particular to States' 'individual and joint efforts' in this regard. This reference is to international cooperation for the control of disease, and is presumably made because of the importance of expensive technology in regulating such diseases. The Committee refers to the following aspects (para.16):

- Make available relevant technologies;
- Use and improve epidemiological surveillance and data collection on a disaggregated basis;
- Implement or enhance immunisation programmes and other strategies for infectious disease control.

7. Article 12(2)(d)-Medical Services in the Event of Sickness

This sub-paragraph concerns "[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness." This obligation would seem to require an extensive medical care system, either private, public or mixed, that attends to physical and mental sickness. Thus it is a condition that is subject to progressive realisation.[247] It would include, according to the Committee, the following aspects:

- Provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education;
- Regular screening programmes;
- Appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community levels;
- The provision of essential drugs; and
- Appropriate mental health treatment and care.

Activists may make use of these items as a checklist or conceptual framework for presenting information to the Committee. If the activist shows the lack of such services, she or he must also treat the issue of resource constraints and plausible low-cost alternatives.

[247] Except for the provision of essential drugs, which is listed under the 'Core Obligations' in para. 43, General Comment No. 14.

E. National Implementation

1. Framework Legislation and National Plans of Action

The Committee states unequivocally that States Parties have the obligation to take steps towards the implementation of the right to health, and that this requires the adoption of a national strategy. Such a strategy would include the following elements:

- Be based on human rights principles which define the objectives of the strategy;
- Formulate policies and corresponding 'right to health' indicators and benchmarks;
- Identify the resources available to attain the defined objectives; and
- Identify the most cost-effective way of using those resources.[248]

Another important aspect of such a strategy, which was not mentioned but is perhaps implicit in the last element, is estimating the overall cost of the full implementation of the suggested strategy.[249] NGOs could make a plausible argument that their services, knowledge and expertise make them part of the 'available resources' for the implementation of a national strategy. This agrees well with the recommendation concerning the participation of NGOs in the design of such strategies.[250]

The Committee recommends the adoption of a framework law to implement the national strategy. The recommended law would include the following elements:[251]

- Provisions on the targets to be achieved and the time-frame for their achievement;
- The means by which benchmarks could be achieved;
- The intended collaboration with civil society, including health experts, the private sector and international organisations;
- Institutional responsibility for the implementation (i.e. who bears responsibility for what parts); and
- Recourse procedures for failures of implementation.

Activists may consider forming a coalition of related NGOs for the purpose of consulting with the government on the creation of a draft framework law containing these elements. Such a coalition could itself produce a draft, but may want to consider governmental participation from the outset in order to make the end product seem less of a demand than a collaboration between partners.

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248 General Comment No. 14, para. 53.

249 For an explanation of the merit of this approach, see R. Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights" (1994) 16 *Human Rights Quarterly* 693 at 712 (discussed in Chapter IV, Section H.2).

250 General Comment No.14, para. 53.

251 General Comment No.14, para.56.

2. Indicators and Benchmarks[252]

Now that the Committee has set forth in painstaking detail a great number of obligations under Art.12, national governments are in a better position to establish local benchmarks[253] in respect of certain key obligations.

The most appropriate starting place is likely to be with the four essential features. The State Party and NGOs in particular should identify the relevant quantitative and qualitative factors associated with what is socially accepted to be physical accessibility, economic accessibility, acceptability and quality. The Committee recommends first establishing relevant indicators (e.g. hospital beds per area, infant mortality, access to essential drugs, immunisation rates, etc.), and then the establishment of a national benchmark in relation to each indicator. This recommendation ought to be read in light of the obligation to care for the most vulnerable and owing in particular to the varying socio-economic circumstances in most States, benchmarks are perhaps better set at a regional level.

The Committee indicates that it will engage in a process it calls 'scoping,' which is the joint consideration of the indicators by the State Party and the Committee, with a view to adopting new targets for the next reporting period (5 years). What is being suggested here is that the government design indicators and set benchmarks, bring them to the Committee for dialogue, and the two jointly adopt them as being the relevant national standard for compliance with the obligation to fulfil the right to health. This is an excellent suggestion, though States may be reluctant to adopt a benchmark. Once the State Party agrees to a specific benchmark with the Committee, it renders itself more accountable for non-compliance.

Another pragmatic suggestion is for activists not to try to establish benchmarks at too high a level. What would be better would be an assessment of the average current situation, and then a 'progress benchmark' that sets realistic goals. This approach may be supplemented by the proposal of a number of such benchmarks, to be realised progressively over time and subject to future amendment. The very attainment of those goals will score a political victory for the government in power at that time, which will motivate it to accomplish them. On the other hand, an unattainable goal may be challenged as unreasonable and therefore be ignored.

3. Remedies and Accountability

The Committee has become increasingly concerned with access to remedies at the national level. Remedies are some form of recognition or compensation for the wrong caused by a government act or omission. The Committee states that "[a]ll victims of…violations [of the right to health] should be entitled to adequate reparation, which may take the form of restitution,[254] compensation,[255]

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252 General Comment No.14, paras. 57-58.

253 See Chapter IV for more information on Benchmarks.

254 'Restitution' occurs when the person causing the harm returns the harmed person to the condition he or she enjoyed prior to the harm suffered. This is known in civil law as *restitutio in integrum*.

255 'Compensation' is payment for harm suffered, and need not be aimed at returning the person to a condition they formerly enjoyed.

satisfaction[256] or guarantees of non-repetition."[257] In particular, the Committee recommends the following institutions for giving domestic remedies of this kind:

- National Ombudsmen
- Human Rights Commissions
- Consumer Forums
- Patient's Rights Associations

This comment can be used by activists to lobby for the establishment of such institutions. The non-establishment of such institutions does not amount to automatic non-compliance with the Covenant, but if made *effective* and accessible, such institutions may contribute significantly to the realisation of the Covenant rights. Activists are free to draft ideas for other 'watchdog' institutions for securing respect for the right to health, including mixtures of public/civil society monitoring, 'health care access' tribunals and so on. These kinds of institutions can often be established with little funding, provided that there are individuals in the area that are willing to undertake the responsibility for hearing complaints. Another method would be to assist in the formalisation of a complaint system within the existing bureaucratic structure. This could be achieved largely through the establishment of a procedure by NGOs, and presented for adoption by the relevant official. With political support from above, this may provide a convenient complaints mechanism, so long as the follow-up mechanism is not too ambitious.

The Committee also recommends that States Parties should encourage judicial figures to 'pay greater attention' to the right to health in the exercise of their functions.[258] Again, this remark may be used as a political tool for the establishment of training programmes and for the political acceptance of courts recognising social rights.

F. Reporting Checklist

Article 12 is quite broad, and encompasses many aspects of the right to health. Likewise, General Comment No.14 is long and broad. It may also be confusing at times. The easiest way to report under Article 12 without becoming caught up in the complexities of General Comment No.14 is to use the following steps, and check the relevant parts of the General Comment (as indicated in the text and footnotes of each section above) *after* you have gathered your data. If some of the information you have matches up with one of the many examples in the Comment, then all the better. The letters appearing at the end of each question indicate the section of this chapter in which the topic is examined:

1. Do all people enjoy the essential and interrelated elements of the right to health? (B.) (This is a general question, to be considered while answering all of the other questions below).

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256 'Satisfaction' is generally understood as a symbolic declaration that has the effect of admitting formal responsibility, apologizing, and generally undertaking not to repeat the harm.

257 General Comment No. 14, para. 59.

258 General Comment No. 14, para. 61. For more information on justiciability of economic and social rights, see the chapter pertaining to that subject. See also General Comment No. 9 (The Domestic Application of the Covenant), particularly paras. 9-11.

2. Has the government implemented the right to health to the maximum of available resources? (C.1)
3. Has it ensured the right on a non-discriminatory basis? (C.3)
4. Has it removed any legislation or institutions previously used to protect the right? (B.4)
5. Has it respected the right in its international dealings? (C.5)
6. Has it ensured the 'core obligations,' regardless of resource constraints? (D.1)
7. Has it committed any of the specified 'violations'? Has it done or not done anything similar that may be a violation? (D.2)
8. Has it protected the children's right to health in the specific ways required by the Covenant? (D.4) (See also the chapter on "Vulnerable Groups.")
9. Has it implemented legislation to protect environmental health and industrial hygiene? (D.5) (See also Art.7(b))
10. Has it taken appropriate steps to safeguard against epidemic, endemic, and occupational diseases? (D.6)
11. Does it supply appropriate medical services? (D.7)
12. Has it developed a national plan of action (E.1) that specifies indicators and benchmarks (E.2) and that addresses appropriate remedies (E.3)?

XII. The Right to Education (Article 13)

Article 13

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

   (a) Primary education shall be compulsory and available free to all;

   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

   (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

   (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*

4. *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

A. Introduction

"Education is both a human right in itself and an indispensable means of realising other human rights."[259] This truth is now nearly universally recognized. It means that education is both a source of dignity and an essential part of the development of the human personality. It is also necessary in today's world if one wishes to become an effective part of the political decision-making process. Moreover, the right has been hailed an indispensable part of the process of effective economic development, upon which several other rights, both political and social, are said to depend.[260] The Covenant reflects this importance by giving it the most thorough textual elaboration of all the rights it sets forth. Activists may profit from that textual clarity by using exact references to the individual paragraphs of Article 13. In addition to this textual specificity, Art.13 of the Covenant is devoted to the unusually specific obligation of developing a national plan of action for primary education within two years of ratifying the Covenant. Thus the Covenant's drafters obviously considered the right to education to be of great importance.

The key source of interpretation for the right to education is General Comment No.13. General Comment No.11 gives a brief treatment of plans of action under article 14. This Chapter will deal with both. It is organised around (1) definition, (2) general obligations, (3) specific obligations under paragraph 2 of the Article 13, and (4) violations. The chapter concludes with a reporting checklist.

B. Definition of the Right to Education

1. Four Essential Features of the Right to Education

Paragraph 6 of General Comment No.13 outlines the four essential features of all forms of education:

(a) ***Availability*** - Institutions and programmes must be available in sufficient quantity. All institutions will require buildings, sanitation, safe drinking-water, trained teachers with domestically competitive salaries, and teaching materials. Other elements may be required depending on the developmental context.

(b) ***Accessibility*** - This incorporates three main aspects: (i) non-discrimination, (ii) physical accessibility/proximity, and (iii) economic accessibility (which is defined in relation to each category of education).

(c) ***Acceptability*** - Form and substance, including curricula and teaching methods, must be acceptable to students and, in appropriate cases, parents. Given examples of 'acceptable' include (i) relevant, (ii) culturally appropriate and (iii) of good quality. This is subject to the educational objectives set forth in Art.13(1).

(d) ***Adaptability*** - It must adapt to the changing needs of society and students, and be capable of reflecting the diverse social and cultural settings.

These elements should be present in all forms of education that are discussed under the Covenant. They are sometimes referred to as 'the four As.' Practically, the activist ought to use the vocabulary provided to identify the problems in implementing the rights. So, for example, he or she could

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[259] General Comment No. 12, para.1.

[260] On this point, see A. Sen, *Development as Freedom* (New York: Alfred Knopf, 2000).

argue that primary schooling is not *accessible* to certain students in Vavuniya, or that the teaching materials in Trincomalee are not *acceptable* in light of the cultural backgrounds of the Tamil students studying there. Where sub-categories are given, one can state both aspects (e.g. the 'quality' of the teaching materials is not 'acceptable'; the schools are not 'physically accessible' within the meaning of Paragraph 6 (b) of General Comment No.13, etc.) A final and important aspect of these essential features is that they are to be interpreted and applied 'in the best interests of the student.'[261]

2. The Objectives and Purpose of Education

Article 13(1) states specifically what the purpose of education should be. It states that education shall:

- be directed to the full development of the human personality and the sense of its dignity;
- strengthen the respect for human rights;
- enable all persons to participate effectively in a free society;
- promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and
- further the activities of the United Nations for the maintenance of peace.

These aspects help one determine whether education is 'acceptable' within the definition given above. The Committee notes in paragraph 5 of General Comment No.12 that since the Covenant was adopted in 1966, much work and newer interpretations of the right to education have been introduced. These texts include, among other things, specific references to gender equality and respect for the environment. The Committee declares that these newer elements may now be seen as implicit in the definition of the Covenant. The State's obligation in respect of these elements will be examined below.

C. General Obligations

The first paragraph of Article 13 states the basic substantive entitlement to a right to education. The above definition gives the broadest statement of the essential elements of all forms of education. States Parties are obligated to implement these elements to the maximum of available resources, in accordance with Art.2(1) of the Covenant.[262] Therefore, any important interest one may feel is missed by the more specific obligations examined below may be addressed under this part. Granted the breadth of the rest of the article, it will not likely be necessary to do so.

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[261] Para. 7. This is an adaptation of a familiar concept in family law, where the judge is to decide a dispute between parents, particularly custody, in 'the best interests of the child.' The *Convention on the Rights of the Child* uses the same language in reference to administrative decisions taken in respect of children. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. (See *supra* note 140 on how to find this decision on the Internet). In this decision, the majority of the Supreme Court of Canada held that international human rights law ought to be a significant influence in the interpretation of a domestic legal statute that provided immigration officials the administrative authority to accept or reject immigration applications. Reading the domestic statute in conformity with the obligation to take administrative decisions in 'the best interests of the child' led the court to overturn the administrative decision taken by the immigration official and allow the family to stay in Canada.

[262] See Chapter IV.

1. Non-Discrimination and Equal Treatment

The general obligation guaranteeing everyone the right not to be discriminated against is set out under Art.2(2) of the Covenant.[263] This obligation is immediate[264]. The Committee clarifies that special measures intended to bring about *de facto* equality are not a violation of this non-discrimination protection. Such activities must be discontinued once the intended equality is achieved.[265] The Committee further clarifies that separate educational systems or institutions for groups defined under Art.2(2) might not be discriminatory under certain circumstances.[266] Finally, the Committee requests that educational data should be disaggregated along these lines to ensure proper monitoring of the condition of the right to education among vulnerable groups.

2. Academic Freedom and Institutional Autonomy

The Committee focuses on this issue between paragraphs 38-40. On the basis of its experience, it has found that the right to education may only be properly fulfilled when both teachers and students enjoy academic freedom. Also on the basis of that experience, the Committee has noted that higher education is particularly susceptible 'to political and other pressures which undermine academic freedom.' Academic freedom is defined in the following way:

> *Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without any discrimination or fear of repression by the State or by any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction.*[267]

This freedom requires the institutional autonomy of higher educational institutions. A balance must therefore be struck between institutional autonomy and accountability to public needs, as required by State set standards (para.40).

3. Retrogressive Measures

Retrogressive measures are those that remove legislation or institutions that previously assisted in the realisation of a right. In the era of globalisation, particularly in reference to loan and trading conditions, the issue of retrogressive measures is a timely one. It is therefore worth reading all of paragraph 45 in a careful manner.

> *There is a strong presumption against the permissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the*

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263 This Article is not discussed at any length in this Manual. For a detailed discussion of Art. 2(2), see M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 153-192.

264 General Comment No. 13, para. 31

265 *Ibid*. para. 32.

266 *Ibid*. para. 33.

267 *Ibid*. para. 39.

> *most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State Party's maximum available resources.*

This is a slightly stronger statement than that found in General Comment No.3.[268] Again, although the obligation is clearly put upon the government to justify its actions, it will normally plead resource constraints as a reason for the retrogressive measure. Although these arguments are often flawed, the Committee has no way of rebutting them without detailed and specific evidence. This evidence should therefore be provided by NGOs in anticipation of the standard governmental justification of the spending cuts. When doing so, the NGO should keep paragraph 12 of General Comment No.3 in mind, which outlines the obligation to protect the most vulnerable groups during times of severe resource constraints.

D. Specific Obligations under Paragraph 2

1. Art.13(2)(a) - Primary Education[269]

Art.13(2)(a) insists that primary education be 'compulsory' and 'free for all.' The Committee adopts the statement by UNICEF that "[P]rimary education is the most important component of basic education."[270] In addition to including the four essential features discussed above, the Committee adopts the following statement on the substantive aspects of the right:

> *The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.*

The important elements of this claim are that (1) primary education is 'universal,' which means access must be provided to all and can be restricted to no class, and (2) that it is to ensure the 'basic learning needs' of children.

The Committee incorporates a definition of these needs from Article 1 of the *World Declaration of Education for All* (1990), which defines basic learning needs as follows:

1. Essential learning tools (such as literacy, oral expression, numeracy, and problem solving); and
2. Basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able (i) to survive, (ii) to develop their full capacities, (iii) to live and work in dignity, (iv) to participate fully in development, (v) to improve the quality of their lives, (vi) to make informed decisions, and (vii) to continue learning.'[271]

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[268] See General Comment No. 3. para. 9. "Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." The version in General Comment No. 13 uses the terms 'strong presumption,' 'burden of proving' and 'after the most careful consideration of all alternatives.'

[269] General Comment No.13, paras. 8-10.

[270] In para. 9, citing UNICEF's "Advocacy Kit: Basic Education" (1999) UNICEF, Section 1, p.1.

[271] The numbers are added for convenience. The original citation may be found in General Comment No. 13, note 4 to para. 9.

Art.14 of the Covenant is devoted to the situation in which these conditions have not been met. In Art.14, the State Party that has not secured compulsory education, free for all, undertakes to work out a detailed plan of action for the progressive realisation of the right. That plan of action should specify a reasonable number of years in which the goal shall be realised. An important aspect of this obligation is that the government undertakes to 'adopt' (i.e. not develop) this plan within two years of the Covenant's entry into force, or within two years of the change in circumstances that led to the non-fulfilment of the right.[272] Although the obligation is fairly straightforward, the Committee has adopted a brief General Comment (No.11) on the content of Art. 14.

2. Art.13(2)(b) - The Right to Secondary Education[273]

This right includes the four As.[274] The Committee recognises the role of secondary education to be the completion of basic education and the preparation of the foundations for life long learning and human development. Thus it prepares students for vocational and higher education opportunities.

The main difference between primary education and secondary education is that secondary education may be acceptable 'in all its forms,' while primary education is generally realised through a single universal system. The Covenant thus encourages alternative educational programmes.

Another important difference is that secondary education is to be made 'generally available' and that States must 'progressively introduce free secondary education.' While these statements could be interpreted as detracting from the strength of the protection offered secondary education *vis-à-vis* primary education, the Committee has defined the terms constructively. 'Generally available' signifies that secondary education is not to depend on capacity or ability, and that it should be distributed such that it is available on the same basis for all. In particular, the use of the words 'by every appropriate means' means that there should be 'varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.'[275] In respect of the undertaking to introduce progressively free secondary education, the Committee notes that the undertaking invokes the obligation to take concrete steps towards achieving free secondary and higher education. It must be acknowledged, however, that this undertaking amounts to an implicit recognition that free secondary education is not guaranteed by the Covenant.

In addition to the undertaking to take concrete measures, the activist can argue that retrogressive measures in this area engage an acute responsibility under the Covenant, in light of the general obligation under Art.2(1) and the specific obligation under Art.13(2)(b). One can also highlight the degree to which post-secondary education has become a pre-condition for effective participation of many levels of contemporary society, and that the objectives of the right to education cannot be fulfilled, in certain communities, without free secondary education. Examples from rich industrialised countries abound.

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[272] This latter aspect is not in the text of the Covenant itself, but is found in para. 8, General Comment No. 11.

[273] General Comment No. 13, paras. 11-14.

[274] General Comment No. 13, para. 11.

[275] General Comment No. 13, para. 13.

3. Art. 13(2)(b) - Technical and Vocational Training[276]

Technical and vocational training is a crucial factor in both general education for life-skills, and for mobilising and unlocking the potential of a workforce. This is why it is recognised as a crucial aspect of the right to work, under Art.6(2) of the Covenant. The Committee adopts a definition from the UNESCO *Convention on Technical and Vocational Education* (1989):

> *TVE consists of all forms of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding related to occupations in the various sectors of economic and social life.*

From this, the Committee elaborates the following aspects of the right to TVE, in para.16:

a) Programmes shall: Develop skills for self-reliance, personal development and employability;

b) Take into account the skills, needs and cultural background of the relevant population and the needs of the economy;

c) Provide training for adults whose skills have become obsolete in light of technological, social, economic or other changes;

d) Consist of foreign exchange programmes, enabling students to receive training abroad and return to share it;

e) Promote the TVE of women, girls, out-of-school youth, children of migrant workers, refugees, persons with disabilities, and other disadvantaged groups.

In a highly underdeveloped economy, such training may be of the most relevance and use for satisfying the developmental needs of both the individual workers/students and the economy as a whole. Increasing such self-reliance will strengthen the social security of families and provide more options for their children. Thus activists may wish to place emphasis on this often neglected dimension of education.

4. Article 13 (2)(c) - The Right to Higher Education[277]

The principal difference between the right to higher education and the other forms is that access to it is to be made on the basis of individual capacity. At paragraph 19, the Committee writes that "…capacity should be assessed by reference to all their relevant expertise and experience." It is difficult to know what to make of this comment. On the one hand, it is clear that the Committee declares as violations any restrictions that are unrelated to capacity, such as gender, physical disability, etc.[278] On the other, the Committee seems to imply that academic performance alone should not be the only criteria for determining the capacity of potential students. However, it would be difficult to imagine the Committee second-guessing the admissions policy of a higher learning institution because it determines acceptance on academic performance alone. This is, in fact, the main practice of most institutions throughout the world today.

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[276] General Comment No. 13, paras.15-16.

[277] See General Comment No. 13, paras. 17-20.

[278] Thus a new policy in China, which restricts access for physically disabled students, to certain university programmes would most certainly constitute a violation of Art. 13(2)(c).

It may, however, note such practices 'with concern.' The Committee often uses language such as 'notes with concern,' or 'expresses regret' regarding governmental actions or omissions that may restrict the enjoyment of the Covenant rights, but which may fall short of an outright violation. Activists may therefore use this definition of capacity to draw the government and the Committee's attention to entrance policies that restrict access to higher education to people who may be understood as 'capable' based on other criteria. It is particularly important in this respect to take into account the *de facto*[279] disadvantages faced by vulnerable groups, particularly women and people living in rural areas. For example, if an admissions policy requires a certain competence in a discipline for which there is no adequate training in rural areas, it may effectively restrict access to students coming from them. Identifying such a problem could generate three rights-friendly responses: first, the problematic requirement could be dropped; second, a class of exceptions could be opened; or third, targeted training programmes could be introduced to the specific areas to correct the inequality of opportunity. Activists can suggest options such as these for remedying potential violations of this right.

Another means of assuring access to higher education is through the development of what the Committee calls 'varied delivery systems', which include distance learning. Activists may want to press for an expansion of such systems, so that people who are otherwise unable to participate in certain educational programmes may have the chance to do so. One ought to note at the same time, however, that there is mixed success with distance learning programmes. For example, surveys of people participating in on-line learning or 'webucation,' which is probably among the more dynamic of the distance learning alternatives, have shown that participants find the programmes boring and the drop-out rate is around 80 percent.[280] It is this author's opinion that adequate education generally involves collegiality, personal interaction and discussion with teachers and other students, and the institutional routine that provides many points of subtle motivation. Remove these elements and most would find it difficult to sustain a long-term education. Those who can ought to be applauded, but activists may want to consider the degree to which they press for distance learning as a permanent alternative to institutional education. With this in mind, one ought to read Art. 13(2)(c) in light of Art.13(2)(e), which provides that 'The development of schools at all levels shall be actively pursued.'[281]

5. Article 13(2)(d) - The Right to a Fundamental Education[282]

This right to a fundamental education pertains primarily to individuals "…who have not received or completed the whole period of their primary education."[283] However, the Committee clarifies that the right is not confined to this group alone, and in fact it extends to "…all those who have not yet satisfied their 'basic learning needs.'"[284] The definition of basic education comes from the

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[279] *De facto* means 'in fact,' and is often contrasted with *de jure,* which means 'in law.' The notion of *de facto* inequality refers to situations in which people remain unequal despite their efforts simply because their opportunities for advancement were more limited. Related concepts are *formal* and *substantive* equality in the language of human rights law, discussed in Chapter VI, Section C.3.

[280] See K. Tomaševski, *Annual Report of the Special Rapporteur on the Right to Education,* (2001) submitted to the Fifty-Seventh Session of the Commission on Human Rights, UN Doc. E/CN.4/2001/52, paras. 55-59 on 'webucation.'

[281] This aspect is examined in greater detail below.

[282] See General Comment No. 13., paras. 21-24.

[283] General Comment No. 13, para. 22.

[284] General Comment No. 13., para. 23.

World Declaration on Education for All (1990), and is the same as that treated in section D.1 above. The most concrete statement regarding the State's obligations in General Comment No.13 is that curricula and delivery systems must be devised in a fashion that is suitable for students of all ages. Thus, a government that does not provide curricula or educational opportunities for older people who lack fundamental education may be regarded as not complying with this obligation.

6. Article 13(2)(d) - School Systems, Fellowships and Conditions of Teaching Staff [285]

"[A] State Party is obliged to have an overall developmental strategy for its school system."[286] The Covenant's use of the words 'actively pursued' suggests that the overall strategy should attach a degree of governmental priority and must be implemented with vigour. While this is true of all obligations under the Covenant, as General Comment No.3 made clear, the added text can only strengthen this obligation in respect of Art.13.

A 'fellowship system' is not defined in the General Comment. Historically, it referred to an endowment fund in higher education institutions for the support of graduate students. Since the Committee has hesitated to define this term with precision, it appears to leave open the possibility that other forms of funding should be made available in other institutions, such as technical and vocational education[287] or undergraduate studies. This interpretation is consistent with what the Committee states the purpose of the fellowship system to be: "[It] should enhance equality of educational access for individuals from disadvantaged groups."[288]

A key aspect of Art.13(2)(e) is that it speaks of the material conditions of teaching staff. This is an early recognition that it is difficult to obtain a proper and adequate education if teachers are not paid a decent salary and receive their society's respect. The Committee writes that "…in practice, the general working conditions of teachers have deteriorated, and reached unacceptably low levels in many States Parties over the years. Not only is this inconsistent with article 13(2)(e) but is also a major obstacle of students' right to education."[289] The Committee continues to highlight the relationship between this article and articles 6-8 (rights to work, favourable conditions of work, to unionize and to strike) of the Covenant. It concludes by urging "States Parties to report measures they are taking to ensure all teaching staff enjoy the conditions and status commensurate with their role."[290]

This all means that activists may focus on (1) whether there are formal restrictions on teachers' freedom of association, right to strike and right to bargain collectively, (2) whether the salary is sufficient for guaranteeing a decent standard of living (see Art.7(a) and commentary), (3) whether the salary is sufficient to attract *enough* competent teachers, and (4) whether they enjoy the position of esteem in society that is commensurate with their contribution to it.

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[285] General Comment No.13, paras. 25-27.

[286] General Comment No. 13, para. 25.

[287] The Committee makes clear in para.19 that "…TVE forms an integral component of all levels of education, including higher education."

[288] General Comment No. 13, para. 26.

[289] General Comment No. 13, para. 27.

[290] General Comment No. 13, para. 27.

E. Article 13(3) and (4) - The Right to Educational Freedom[291]

These articles are concerned with the right to establish educational institutions outside of those provided by the State. They are principally concerned with ensuring educational plurality, and with preserving educational institutions that conform with parents' beliefs, particularly "…to ensure the religious and moral education of their children in conformity with their own convictions."[292] In practice, this would include methods such as home schooling, Montessori schools, denominational schools and others.

This freedom must be considered in tandem with the 'minimum educational standards' established by the State. The Committee clarifies that "…these minimum standards may relate to issues such as admission, curricula and the recognition of certificates."[293] This condition on the exercise of this right must be read in light of the purpose of these articles, for if the State were capable of exercising unrestrained control over these factors, it could effectively eliminate the option of non-State schools. It is submitted that the State should regulate core standards in certain subjects, ensure non-discrimination and non-violence within school systems, and ensure that curricula conforms with the educational objectives in Art.13 (1). Activists are free to put forth creative interpretations of these rights.

F. Specific Legal Obligations and Violations

The Committee identifies the following specific obligations that relate to Art.13 as a whole:

1. To adopt a national educational strategy (para. 52);
2. To adopt a fellowship programme (para.53);
3. To establish minimum educational standards and an effective monitoring system (para.54);
4. To ensure that communities are not dependent on child labour (para.55);
5. To ensure that all international negotiations (regarding trade, loans, etc.) do not adversely impact the right to education. (para.56, 60);
6. To ensure access to public educational institutions without discrimination (para.57);
7. To ensure education conforms to the objectives in Art.13(1) (para.57);
8. To provide primary education for all (para.57);
9. To ensure free choice in education (para.57).

One may note that the obligations listed in para.57 are 'core obligations.' These particular obligations do not appear to be dependent on resource availability. In the few cases where they are, the provision of resources for the stated task may be considered so important that resource scarcity may not be offered as an excuse for non-compliance. In this light, one must read the obligation to provide primary education in accordance with Art.14, and the obligation to adopt strategies together. The possible exceptions to this interpretation may be points 2 and 4.

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[291] General Comment No. 13, paras. 28-30.

[292] ICESCR, Art. 13 (3).

[293] General Comment No.13, para. 29.

In paragraph 59, the Committee lists a series of what it considers to be violations. It points out that violations may occur through either governmental actions or omissions. Most of the examples are repetitions of what comes elsewhere in the General Comment. The activist may wish to consult paragraph 59 for added support for a declaration that a certain governmental action or omission is a violation of an ICESCR right. To do so would give a finding added rhetorical weight.

G. Reporting Checklist

The following checklist addresses the general scope of the right to food under Art. 11. The order of the questions does not reflect the order of treatment above. The letters appearing at the end of each question indicate the section of this chapter in which the topic is examined:

1. Do all forms of education include the four essential features of the right to education? (B.1)
2. Do all education programmes respect the purposes of education as set forth in Art.13(1)? (B.2)
3. Is primary education compulsory and available free for all? Does its content include the essential learning tools and basic learning content? (D.1)
4. If not, has the government adopted a national plan of action to make it so? (D.1)
5. Is secondary education 'generally available'? Is it progressively being made free? (D.2)
6. Are the specific aspects of technical and vocational education made available to the maximum of available resources? (D.3)
7. Is higher education made equally accessible to all on the basis of capacity? (D.4) Is it progressively being made free?
8. Is *de facto* inequality addressed and are there varied delivery systems? (D.4)
9. Are those who have not completed primary education capable of receiving a fundamental education? (D.5)
10. Are school systems, fellowships and the working conditions of teachers maintained adequately? (D.6)
11. Is the right of all teachers and students to educational freedom respected? (E)
12. Are there any of the specified violations? (F)
13. Are there any other (previously unaddressed) elements of the right to education that are not respected, protected or fulfilled to the maximum of available resources? (C.1)
14. Are all rights guaranteed on a non-discriminatory basis? (C.2)
15. Has the State adopted any retrogressive measures relating to the right to education? (C.3)

XIII. The Evolution of Economic and Social Rights

Economic and social rights may be understood as individual entitlements and freedoms concerning the community's resources, which all human beings hold as a matter of fundamental justice. They are claims that the State should ensure that no one in the society lives in abject poverty, and that everyone enjoys the *opportunity* to develop his or her personality. This means that the State is obliged to provide and protect certain services if they are not guaranteed by private actors, and to ensure that the quality of those services is sufficient to provide everyone with a decent standard of living. The underlying justifications of economic and social rights are twofold: first, that no individual may be truly free in a political sense without a certain underlying social security (the instrumental argument) and second, that the conditions enumerated in social rights are intrinsically valuable because they spell out the minimum conditions necessary for a dignified life (the intrinsic value argument). Most commentators accept the validity of both arguments. What makes social rights human rights is their fundamental quality. While many interests are socially desirable both instrumentally and intrinsically (e.g. global travel), human rights discourse is reserved for those fundamental interests that nearly all cultures agree are indispensable for a dignified life.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) articulates an international consensus about what the bare minimum *social* conditions for such dignity are: (1) the right of self-determination; (2) the right to work; (3) the right to just and favourable conditions of work; (4) the right to form and join trade unions; (5) the right to social security and social insurance; (6) the right to protection of the family; (7) the right to an adequate standard of living, including food, shelter and clothing; (8) the right to health; and (9) the right to education and (10) the right to take part in cultural life. The remainder of this section explores the conceptual and historical background of economic and social rights in order to give the reader an understanding of where they come from.

This chapter may be inexcusably Western. There is much excellent work drawing the connection between non-Western values and human rights discourse. That work is enormously helpful in dealing with the objection that human rights values are Western in origin. However this chapter does not examine the origin of social welfare values, which go back much further in Western history as well. Rather, it explains the origins of economic and social rights *as human rights*. This discourse, though certainly not the values, appears to have had its initial origins in the West. For an Asian, Middle Eastern, African or Latin American person, these historical origins may explain why social rights were resisted more by the rich Western countries than by any other region of the world.

A. History of Economic and Social Rights

1. First Generation Rights

Many scholars write of three generations of rights.[294] The first is civil and political rights, the second economic and social, and the third are solidarity or peoples' rights, such as the right to development and the right to a healthy environment. This notion of generations has been critiqued,[295]

[294] K. Vasak, "Les différentes catégories des Droits de l'Homme" in A. Lapeyre, F. de Tinguy & K. Vasak, eds., *Les Dimensions Universelles des Droits de l'Homme*, vol. 1 (Bruxelles: Bruyant, 1990) 297.

[295] See P. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) 29 *Netherlands International Law Review* 307.

but it is true in one respect namely, the temporal order in which the different claims grew to be recognized as human rights.

The American scholar Louis Henkin gives a helpful summary of some of the main trends in the conceptual history of the first two generations of human rights. He argues for an 18th century natural rights 'liberty' thesis, followed by a 19th century 'welfare' anti-thesis, combined into a 20th century synthesis of the two notions. He argues that the first category of rights to appear was civil and political. They arose from the revolutionary 18th century, particularly in the American Revolution (1776) and the French Revolution (1789), and from writers such as John Locke, Thomas Paine and Voltaire. He mentions that these rights were the logical consequence of natural law doctrines.[296] Those political declarations concerned the rights of certain people, usually citizens (which excluded the propertyless, women and slaves), to take part in the governance of the State and to be ensured certain procedural safeguards when brought before courts. Their focus was political liberty. Historically, the claims arose from the fact that although certain propertied classes of individuals accounted for most of the wealth and production in French and American society, the political decisions were dictated by an unrepresentative authority. The notion of representative government would allow such classes to enter the political arena. Thus it may be argued that the revolutions were primarily about these classes taking sovereignty into their own hands, and ensuring that it be shared equally among the society's narrowly defined class of citizens.

These groups declared that there are certain rights that every human being possesses, in virtue of the very nature of humanity, and that humans were endowed with these rights by their divine creator.[297] This natural rights philosophy was articulated by John Locke, whose chief contribution was the justification of private property as a natural right. Although such revolutionary declarations of rights were phrased in terms of universal equality and dignity, their application and benefits were in fact restricted to a certain class of people, namely, property-owning financially secure males. Nevertheless, these rights advanced the cause of democracy considerably, and were the precursor to a more universally just political order in which eventually everyone would become entitled to vote for his or her political representative, and be assured of a relatively fair trial before an impartial court.

2. Second Generation Rights

The restricted class of beneficiaries, as well as the conceptually questionable foundations of the rights, were heavily criticized. What was missing from these revolutionary 'natural' rights was the protection of the poor, the working class and the dispossessed. Utilitarian, idealist and Marxist philosophers argued that the rights of an individual must be determined according to the needs of society as a whole.[298] Although social mobility became a possibility, unlike before the revolutions, it remained effectively impossible for most of the poor, whose lives remained, to borrow an old expression, 'nasty, brutish and short.'[299] At the same time, due to the increasing industrialisation

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[296] L. Henkin, *The Rights of Man Today*, at 4-5. Jack Donelly, who wrote far more extensively on this point, disagrees with the necessary connection between natural law and natural rights. See his *Universal Human Rights in Theory and Practice*, (Ithica: Cornell University Press, 1989) and "Natural Rights as Human Rights" (1982) 4 *Human Rights Quarterly* 391.

[297] For a more elaborate treatment of natural rights philosophy, see J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) , and J. Donelly's *Universal Human Rights in Theory and Practice* and "Natural Rights as Human Rights," *ibid.*

[298] As noted by M. MacDonald, "Natural Rights," in J. Waldron, *ibid.* at 33.

[299] From Thomas Hobbes' *Leviathan*, a phrase he uses to describe life in the pre-societal state of nature, the state in which people lived prior to entering into the social contract of society.

of Europe, the working class emerged as a considerable political force that became increasingly well-organized. John Stuart Mill introduced the modern Western concept of redistributive – taxation in his *System of Political Economy*, while Immanuel Kant wrote that "[i]t is every man's duty to be beneficient – that is, to promote, according to his means, the happiness of others who are in need, and this without the hope of gaining anything by it." [300] Of course, the greatest influence on the mobilisation of the working classes and socialist thought was the writing of Karl Marx, who was himself influenced enormously by G.W.F. Hegel.

In addition to questioning the value of so-called natural rights,[301] Marx put forth a theory of communism. His communism was an assertion that workers are the ones who add the true value to raw materials through their labour upon them. When they fashion raw materials into a valuable commodity, they add value to them. Yet despite this, these workers do not own, nor even benefit in any significant measure from this added-value. Instead, the commodity is taken by the capitalist (the owner of the means of production) in return for paltry wages, and sold for great profit. Marx found this situation to be unjust both because it was exploitative and it stifled human nature,[302] and called for workers to seize by revolution the means of production in society and thereby come to own the fruits of their labour. This required a centralized workers' government that would administer the resources of the State for the benefit of all, until such time that a utopia would be reached in which the State would "wither away."[303] The failure of any form of autocratic one-party government is now nearly universally accepted. Saint-Simon (1760-1825), Charles Fourier (1772-1837) and Robert Owen (1771-1858) are other thinkers who proposed socialist alternatives to capitalism.

Politically, these socialist ideas gained force during the Industrial Revolution in Europe, which began first in England in the mid-1700s and spread throughout Europe shortly thereafter. The European uprisings of 1848 represent a great historical event in which numerous actors came together for diverse reasons. This year saw revolts in nearly every major city in Europe. A primary force behind the revolts was the working class, and Marx published his enormously influential *Communist Manifesto* in that same year. The reasons for the uprisings were varied, and included among other things the overthrow of autocracy, establishment of democracy, the unification of nations and improvements in the conditions of the working class.[304] It was after these uprisings that most social welfare legislation was introduced in Europe. German Chancellor Otto von Bismarck introduced basic welfare legislation in 1883. The Scandinavian countries established

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[300] I. Kant, 'The Doctrine of Virtue' from *The Metaphysics of Morals* (1797), excerpt reprinted in Steiner & Alston, *International Human Rights Law in Context* (Oxford: Oxford University Press, 1996) 276.

[301] See K. Marx, "On the Jewish Question," in R. Tucker, ed., *The Marx-Engels Reader* (New York: WW Norton, 1978).

[302] While the exploitative aspects were brought out in great detail in *Kapital*, Tucker, *ibid.*, the link between work and human nature was elaborated in his *Philosophical and Economic Manuscripts of 1844.*

[303] K. Marx, *The Communist Manifesto*. The failures of some communist regimes is believed to lie chiefly with the inability of centralized bureaucracies to administer the resources of the state to the benefit of all, corruption and despotism, the vicious curtailment of political liberties, including freedom of thought and expression, and the general inadequacy of centrally planned economies to cater to the multiplicity of human needs and desires. For the horrendous human rights record of the Soviet Union by someone sympathetic to socialist thought, see A. Erh-Soon Tay, "Marxism, Socialism and Human Rights" in E.Kamenka & A. Erh-Soon Tay, eds., *Human Rights: Ideas and Ideologies* (London: E.Arnold, 1978).

[304] M. Craven "Historical Perspective on Economic, Social and Cultural Rights" in *Circle of Rights: A Manual for Activism in the Field of ESCR* (Washington: International Human Rights Internship Program/Asian Forum for Human Rights and Development, 2000).

public commissions to prepare state action plans on social insurance in the following order: Sweden in 1884, Denmark and Norway in 1885, and Finland in 1889. By 1916, nearly all European countries had adopted basic welfare legislation to protect worker' rights, and rights of the old and infirm.[305] Some authors indicate that, as a general trend, autocratic societies in Europe were more likely to grant welfare legislation as a concession to palliate the discontent of the increasingly powerful working classes. This may highlight the politicised origins of social rights, which ought to be considered candidly in tandem with the 'bourgeois rights' thesis.[306]

In 1917, the great 'spectre' about which Marx wrote finally happened: the Bolshevik Revolution occurred, and Russia began its 80 year journey as a communist state and head of a communist union. This new State began to support directly and indirectly the calls of workers in other countries.[307] In 1919, the Allies founded the first international organization that was primarily concerned with social inequality and justice: the International Labour Organization. Mathew Craven identifies three reasons for why the ILO was created at that time: (1) governments made strong war-time promises regarding future social programs in order to maintain loyalty and morale; (2) during the war period, workers became internationally organized and formulated demands; and (3) the Russian Revolution generated considerable pressure to respond to those demands.[308] The need for the national protection of social interests such as health, education, and social security grew even more acute in the 1930s. During this period, much of North America and Europe fell into the Great Depression, which was characterised by extremely high levels of unemployment, food shortages, and social deprivation. At this time, Franklin Delano Roosevelt was elected President of the United States and introduced a variety of social security measures that were known collectively as the 'New Deal.' The New Deal was the starting point of much of the American social legislation, and was part of the President's concept of the importance of social welfare. In 1941, Roosevelt identified four freedoms that he thought were of cardinal importance: freedom of speech, freedom of religion, freedom from want and freedom from fear. In his 1944 State of the Union address, President Roosevelt identified with great clarity what freedom from want should include, the entitlements being listed *as rights.*[309] This was one of the earliest popular articulations of social security in the form of a right and freedom. Hitherto it had been referred to in terms of justice; it was what a just political order would provide. With the introduction of rights–language, it may be argued that Roosevelt contributed to the elevation of social security into that sphere of importance that was reserved only for the very most important of human needs

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305 See "Article 22" in A. Eide, et. al., eds., *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandanavian University Press, 1992) at 323 and following for an illuminating analysis and references to important surveys, including P. Flora & A. J. Heidenheimer, eds., *The Development of Welfare States in Europe and America* (New Brunswick: Transaction Books, 1981).

306 The expression 'bourgeois rights thesis' refers to the argument that the civil rights that arose through the American and French revolutions produced rights that were overwhelmingly for the benefit of financially secure property owners.

307 This was typically for political reasons. For an interesting account of how the Soviet Union was in some cases antagonistic to workers' interests in other countries, see George Orwell's *Homage to Catalonia*, in which Orwell documents his personal experience of fighting in the Spanish Civil war of 1936, and how the Soviet Union undermined socialist attempts to organize a society of equality and public ownership.

308 Craven, *supra* note 304 at 35.

309 For more on the ILO, see V. Leary, "Lessons from the Experience of the International Labour Organisation" in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992).

The Rhetoric of Rights

What is so important about the language of rights? Why do activists need to say that something is a violation of a right rather than simply say it is wrong? Is there a difference for someone who denies the existence of natural rights between saying that a government omission is wrong and a government omission violates someone's rights? Consider the following quotes:

"Claims presented as rights are claims that are often, perhaps usually, presented as having a special kind of importance, urgency, universality, or endorsement that makes them more than disparate or simply subjective demands. Their success is dependent on such endorsement- by a government or a legal system that has power to grant and protect such rights, by a tradition or institution whose authority is accepted in those circles that recognize these claims as rights, by widespread social sentiment, nationally or internationally."

Eugene Kamenka
"Human Rights, People's Rights," p.127

"We need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies."

Ronald Dworkiin
"Rights as Trumps," p.166

"It is the ability to claim the right if necessary - the special force this gives to the demand and the special social practices that it brings into play - that makes rights so valuable and that distinguishes having a right from simply enjoying a benefit of being the (rights-less) beneficiary of someone else's obligation."

Jack Donelly,
" Universal Human Rights in Theory and Practice," p.12

– (see the box on 'Rhetoric of Rights'). That is, social entitlements were no longer a matter of a utopian societal objective, but were individual rights that must be guaranteed by the State.[310] Another significant aspect of Roosevelt's approach was the identification of social rights as *freedoms* and not merely welfare claims. Nobel Prize – winning economist Amartya Sen – makes much the same argument today with respect to conceptualizing development as creating freedoms.[311] So with Roosevelt – it was no longer a debate between equality and liberty, or welfare and liberty, but rather of competing conceptions of liberty.[312]

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[310] Another important development in 1944, and presumably influenced by Roosevelt's declaration, was the American Law Institute's draft international bill of rights. The ALI commissioned a Committee for the elaboration of a draft bill, which was completed with the inclusion of the full range of social rights. The ALI failed to endorse these conclusions, but the report was nonetheless submitted to the United Nations and was "…to prove highly influential in the preparation of the first draft of the Universal Declaration in 1947." H.J. Steiner & P. Alston, *International Human Rights Law in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996) at 260.

[311] See A. Sen, *Development as Freedom* (New York: Alfred Knopf, 2000). The basic thesis is that development should not be viewed as 'utility' creation (creation of accessible market options), but rather as removing capability-deprivation (giving individual freedoms, which would take into account the quality of the choices presented by the market). While the former looks to income as an accurate assessment of the welfare of individuals, the latter looks to the costs of life and quality of options as relevant factors in the consideration of human welfare. Sen's concept of human welfare is the individual's *capability* to choose a life one has reason to value (p.74).

[312] For an often – quoted treatment of this idea of competing conceptions of liberty, see I. Berlin, "Two Concepts of Liberty," in I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118.

B. Economic and Social Rights at the United Nations

1. The International Bill of Rights and the Universal Declaration

After World War II, the United Nations provided new hope for peace through international cooperation. Part of that commitment included the promotion of human rights. Article 1 of the Charter establishes the promotion of human rights as one of the goals of the organization, and Article 55 elaborates upon that commitment. Article 56 pledges members to take joint action to achieve these purposes, and article 68 calls upon the Economic and Social Council to establish a human rights commission. The Commission on Human Rights was established by ECOSOC in 1946, and was composed of government representatives who were charged with, among other things, drafting of human rights instruments and standard setting.[313]

Originally, the Commission was asked to draft an 'International Bill of Rights,' which was to consist of (1) a non-binding declaration of rights, (2) a convention of a more limited scope, and (3) a document of methods of implementation. The Commission completed a copy of the Declaration quickly, and forwarded it to the General Assembly, who revised it and adopted the new version in 1948, with a vote of 48-0, with 8 abstentions.[314] The adoption of that text is significant for those who view human rights as natural rights. The Scandinavian scholar Tore Lindholm conducted a careful analysis of the preparatory work of Article 1 of the Universal Declaration of Human Rights, including the debates it went through at the General Assembly. Article 1 was viewed as the cornerstone or justification of the rights that follow it. Lindholm shows the varied and vigorous debates during the drafting procedure, and how the notion of natural rights or divinity was explicitly rejected by the Commission.

> *Interpreted in its proper context, Article 1 is not a traditional Western natural rights foundation for a system of human rights to be implemented globally. It provides the thin, but crucially important normative basis on which representatives from several cultures could reach agreement.*[315]

The Universal Declaration includes economic and social rights, from Articles 22-27, and is regarded as an expression of the notion of the indivisibility of the rights. However the UDHR gives clear precedence to civil and political rights, which are articulated first and over the course of Articles 3-21. It is also a consensus between less than one-third of the present number of United Nations members, and its universality may be questioned somewhat based on this lack of representation.

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313 For a greater examination of the role of the Human Rights Commission, see P. Alston, "The Commission on Human Rights" in Alston, *supra* note 309, 126. 314 GA Res. 217 A (III), (10 December 1948), 3 UN GAOR, Resolutions. Pt. I, at 71 (1948). Abstentions being Byelorussia, Czechoslovakia, Poland, USSR, Saudi Arabia, Ukraine, S.Africa and Yugoslavia.

314 GA Res. 217 A (III), (10 December 1948), 3 UN GAOR, Resolutions. Pt. I, at 71 (1948). Abstentions being Byelorussia, Czechoslovakia, Poland, USSR, Saudi Arabia, Ukraine, S.Africa and Yugoslavia.

315 T. Lindholm, "Article 1: A New Beginning" in Eide, supra note 305, 31 at 51.

2. The Separation of Human Rights into Two Covenants[316]

In 1950, the Commission decided that despite its agreement on the substantive content of a Covenant on civil and political rights, it could not do the same with respect to economic, social and cultural rights. It therefore resolved to treat them in a separate covenant, to be drafted at its next session in 1951. ECOSOC requested that the General Assembly make a policy decision regarding the inclusion or exclusion of social rights from the single draft–Covenant. After painfully drawn out debate in the General Assembly, it declared that "…the enjoyment of civil and political rights and of economic, social and cultural rights are interconnected and interdependent…" and that economic and social rights must be included in the single draft "…in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant."[317] This decision was adopted by ECOSOC, and work on the draft Covenant resumed.

Despite these clear instructions, the Commission continued to treat the rights separately and developed conceptually distinct articles, particularly with regard to the nature of States Parties' obligations, and a separate supervision system that was to apply uniquely to the economic and social rights provisions of the draft Covenant. This arrangement was described by John Peters Humphrey as a creating a virtual "covenant within a covenant."[318] Faced with this undesirable prospect, ECOSOC asked the General Assembly to reconsider its decision, which it did. Thus the General Assembly reversed its initial position and asked that two covenants be drafted.

The reasons why this separation occurred are numerous, but many commentators believe the primary cause was ideological. The Cold War gave rise to such tensions at the openly political Commission on Human Rights, whose members were explicitly mandated to represent their State's interests. Some argued that the notion of economic rights would lead to the restriction of political rights of individuals in the name of economic organization, a charge that was hardly unfounded. On the other hand, the same charge could be levelled at the rather minimalist conception of civil liberties protected in the sister covenant on civil and political rights – rights that left untouched the immense problem of economic exploitation and abject poverty. In any event a clause was included in the Covenant to clarify that no State could justify the violation of civil and political rights based on a social rights justification.[319]

At a theoretical level, however, those who opposed the inclusion of both categories of rights in one covenant did so not necessarily because they believed that the two categories were not interdependent and interconnected, but rather because the juridical nature and thus enforcement mechanisms were fundamentally different. Those opposed to the single covenant argued that (1) economic and social rights were not justiciable, or, capable of being assessed by a court of law, (2)

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316 For a superb account of the drafting process, see M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 16-22.

317 GA Res.421 (V), Sect.E, (4 Dec. 1950) 11 UN ESCOR, Res. Supp. (No.20), at 42 (1951), cited in Craven, *ibid.* at 18.

318 J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, New York: Transnational Publishers, 1984) at 144. This autobiography is an account of Humphrey's 20 years as Director of the Division of Human Rights in the Secretariat of the United Nations. He gives a candid, first hand account of the political and bureaucratic background of the adoption of the Universal Declaration and the two Covenants.

319 See Art. 5, ICESCR.

that they were not capable of immediate implementation and (3) that while civil and political rights involve mostly negative obligations, economic and social rights were mostly positive obligations. The differences can be summed up as follows: civil and political rights were viewed as legal rights, while economic and social ones were viewed as programmatic obligations, requiring resources and time. Owing to these technical/legal differences, it was thought to be desirable that two covenants be drafted with separate systems of implementation or monitoring.[320] While this rationale could be effectively divorced from the opinion that social rights were not important or 'real' rights, it often was not.[321] Such arguments will be examined further in Chapter XV.

3. The International Status of Social Rights Today

Since the adoption of the ICESCR on 16 December 1966, it has been stressed repeatedly that civil, political, economic, social and cultural rights are indivisible. Indivisibility, simply put, means that neither group of rights can be properly enjoyed without the other. Another way of understanding it is that human rights spell out the bare minimum conditions of dignity, and that these minimum conditions include both categories of rights. Documents supporting the indivisibility of all human rights include the Proclamation of Teheran (1968, First World Conference on Human Rights); Art. 13, UN General Assembly Resolutions in 1977 and 1986; and the Vienna Declaration and Programme of Action (1993, Second World Conference on Human Rights), paragraph 5. Their interdependence has also been given substantial research treatment.[322]

Perhaps a greater indication of their indivisibility is the extent to which newer human rights conventions include modalities of both 'categories' of rights, including the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Convention on the Rights of the Child (CRC). These conventions elaborate the fairly complete set of rights for each group in particular. It is interesting to note that these include political, legal and social rights. Moreover, the proliferation of regional declarations and conventions that contain references to or are exclusively concerned with social rights is further support for the belief that a worldwide consensus on what constitutes the common denominators of dignity includes social and civil rights (see box). Some modern national constitutions now include legally enforceable social rights within their lists of fundamental rights, notably South Africa, Thailand, and Ethiopia.

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[320] These points are culled from the "Annotations on the Text of the Draft International Covenants on Human Rights" UN Doc. A/2929 (1955), reprinted in Steiner & Alston, *supra* note 300 at 260-61.

[321] *Ibid*, point 12 at 262 (cited to Steiner & Alston); C. Scott & P. Macklem. "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," (1992) 141:1 *University of Pennsylvania Law Review* 1 at 19. "The separation [of the two categories of rights] is reflected in the adamant refusal of the United States to view social and economic rights as human rights, let alone justiciable, in negotiations surrounding new human rights treaties and on votes on United Nations resolutions." See also M. Cranston, *What are Human Rights* (London: Bodley Head, 1969) and "Human Rights: Real and Supposed" in D. Raphael, ed., *Political Theory and the Rights of Man* (London: Macmillan Press, 1967).

[322] The best of these is generally regarded to be C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) *Osgoode Hall Law Journal* 769. See also P. Alston, "The Importance of the Inter-play between Economic, Social and Cultural Right, and Civil and Political Rights," UN Doc. A/CONF/157/PC/66/Add. 1. See also J. Donelly, *Universal Human Rights in Theory and Practice*, *supra* note 296 at 28-47.

Finally, the Committee on Economic, Social and Cultural Rights has now held over 18 sessions and produced 15 General Comments on the ICESCR, and two influential expert meetings conducted in Maastricht (1987 and 1998) have contributed immensely to the elaboration of the content of the rights. Thus the status of economic, social and cultural rights as human rights is now established beyond question. While certain conceptions of human rights may continue to downplay their importance, it remains indisputable that one cannot speak of international human rights law without referring also to its highly developed range of economic and social rights. They are here to stay, and will only grow in importance as the world moves into a phase of globalization in which the chief social concerns will be labour, social security and health.

The Present Scope of Economic and Social Rights under International Law*

Universal

Universal Declaration of Human Rights (1948), Arts. 22-28.

International Covenant on Economic, Social and Cultural Rights (1966/1976).**

Convention on the Elimination of All Forms of Racial Discrimination (1965/1969), Arts. 1, 2, 5(e).

Convention on the Elimination of All Forms of Discrimination Against Women (1979/1981), Arts. 1, 10-14.

Convention on the Rights of the Child (1989/1990), Arts. 23, 24, 26-29, 31.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990/2003).

Regional

European Social Charter (1961/65)

Revised European Social Charter (1996/1999)

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995/1998)

American Declaration of Human Rights and Duties of Man (1948), Art s. VIII, IX, XI-XVI

American Convention on Human Rights (1969/1978), Art.26

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

Protocol of San Salvador (1988/1999)

African Charter of Human and Peoples' Rights (1981/1986), Arts. 9,10,15-18

African Charter on the Rights and Welfare of the Child (1990/not in force), Arts.4, 11, 12, 13, 14, 15, 16, 23,

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

Arab Charter on Human Rights (1994/not in force), Arts.29- 34. 36-39.

* Excluding ILO Conventions
** (Adopted/In Force)

XIV. Vulnerable Groups and ESC Rights

A. Introduction and Definition

The purpose of this chapter is to offer guidance on how the Covenant and other relevant international instruments can be used as tools to address the special issues raised by vulnerable groups. In General Comment No.3, the Committee makes clear that vulnerable groups have special status under the Covenant:

> *[T]he Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, or economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes*.[323]

This important status is reiterated in several other General Comments.[324] The Committee has not adopted a single list of what constitutes vulnerable groups, nor is it desirable that they do so. The definition is left flexible, and certain groups may be indicated in the context of certain rights. For example, in the case of the right to food, the Reporting Guidelines request information about the following groups:[325]

- Landless peasants
- Marginalized peasants
- Rural workers
- Rural unemployed
- Urban unemployed
- Urban poor
- Migrant workers
- Indigenous peoples
- Children
- Elderly people
- Other especially affected groups

The guidelines continue to ask for any differences in the situation between men and women in each of these groups. These groups are, in the opinion of the Committee, more likely to be disadvantaged *vis-à-vis* the rest of the population in their enjoyment of the right to food. For education, though, the list is different:

- Young girls
- Children of low-income groups
- Children in rural areas

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[323] General Comment No. 3, para. 12.

[324] General Comment No. 4 (Adequate Housing), para. 13; General Comment No. 5, para. 10; General Comment No. 6, para. 17; General Comment No. 7 (Forced Evictions) para. 11; General Comment No. 8 (Economic Sanctions and ESCRs) paras. 4, 8, 10, and 15; General Comment No. 12 (Food) paras. 13, 28, 35 and 38; General Comment No. 13 (Education) para. 6(b); General Comment No. 14 (Health) paras. 12(b), 18, 35, 37, 40, 43(a), 43 (f) and 65; General Comment No. 15 (Water), para. 13.

[325] *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights* 17/06/91. UN Doc. E/C.12/1991/1 (Basic Reference Document), Article 11, para. 2 (b) (i).

- Children who are physically or mentally disabled
- Children of immigrants and of migrant workers
- Children belonging to linguistic, racial, religious or other minorities
- Children of indigenous people.

This demonstrates how the definition of a 'vulnerable group' can be viewed as dependent upon the social entitlement (right) in question. That is, one does not need to begin with a list of 'vulnerable groups' in society, and then check how such groups enjoy each right. One may find different vulnerable groups when considering different rights. Perhaps the most general working definition is that vulnerable groups are those that consistently enjoy the rights under the Covenant at a level less than the national average. The more extreme the disparity between the national average level of enjoyment and the level of the group, the more vulnerable it may be considered.

B. Reporting on Vulnerable Groups

There are two ways to report about the state of vulnerable groups as part of an alternative report. The first is to include a section on vulnerable groups under each substantive right. For example, the treatment of the right to work could include a section on free trade zone workers or plantation workers. The other way is to include a stand-alone section on vulnerable groups. The rationale for the latter approach is that the situation of vulnerable groups often calls for special research techniques and data. Such data may be better collected by a single person in respect of several rights than by many people in respect of separate rights. Also, it may be desirable to present information on a range of social indicators pertaining to a single group in order to present a complete picture of its social deprivation. The ideal method is a mixture of both approaches, but this Chapter is written for the person attempting to write a stand-alone report on vulnerable groups.

When taking this approach, it is not necessary to treat each right separately. Providing a range of information allows the Committee to form a better understanding of the general situation of the particular groups, and to recommend holistic[326] remedies for the problems. Thus the report can be organised *per group*, rather than *per right*. This does not mean, however, that activists should report on any source of injustice pertaining to that group. The problems reported should be themselves grounded in the substantive articles of the Covenant.

In light of the many vulnerable groups in most societies, and of the length constraints of an alternative report, it may be desirable to focus upon certain groups. This may help get a specific declaration from the Committee, which would carry more political weight. On the other hand, some emphasis should also be placed on the obligation to take stock of all vulnerable groups, and the development of an all-inclusive national plan of action. Thus it is also important to highlight *the range* of vulnerable groups, so that the Committee urges the government to adopt effective monitoring procedures and targeted programmes covering all of them.

[326] Holistic can be contrasted with piecemeal. It refers to an approach that attempts to address a range of interrelated causes that lead to a single overall problem.

The rest of this chapter concerns the status of the State's obligations towards all vulnerable groups, and then an individual consideration of some helpful sources related to a variety of different groups.

C. State Obligations in Relation to Vulnerable Groups

Although vulnerable groups are protected by the same rights as everyone else, there are four special obligations concerning vulnerable groups alone. The first is the *obligation to monitor effectively*. In General Comment No.1, the Committee explains that the State must monitor the extent to which all individuals in its territory enjoy the rights under the Covenant. Doing so is necessary before appropriate action can be taken to improve the situation. However, gathering such information "…requires that special attention [be] given to any worse-off regions or areas and to any specific groups or subgroups which appear particularly vulnerable or disadvantaged."[327] This obligation is confirmed by the Committee's extensive requests for information about vulnerable groups in its Revised Reporting Guidelines.[328] In General Comment No.4, the previous claim that States Parties 'should' employ effective monitoring strategies, including the emphasis on vulnerable groups, is confirmed as an *obligation of immediate effect.* Thus States Parties would appear to violate their obligations under the Covenant if they do not report adequately on the condition of vulnerable groups.

The second obligation is *to provide low-cost targeted programmes* to alleviate the condition of the most vulnerable. This obligation is announced in General Comment No.3, and therefore it applies to all of the Covenant rights. It is confirmed again in General Comments No.12 and 14.[329] Identifying non-compliance with this obligation can be achieved by checking whether such programmes exist, and whether there is any plan to introduce them.

The third obligation is *to give priority to the most vulnerable groups in the distribution of disaster and humanitarian relief aid, as well as international medical or food aid.* This obligation is drawn from General Comment No.12 (Food)[330] and No.14 (Health).[331] The obligation does not give vulnerable groups an entitlement over *any* form of aid, but simply the mentioned kinds. The obligation may, however, be extended analogically to cover aid that is intended for equally dire needs (e.g. emergency shelter).

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327 General Comment No. 1, para. 3.

328 See *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of The International Covenant on Economic, Social and Cultural Rights* 17/06/91. E/C.12/1991/1, at "Article 6" para.2(b); "Article 9" para. 6(c); "Article 10" para.5(b), "Article 11" para.2(b)(I) [right to food] and 3 (b) [right to adequate housing]; "Article 12" para. 5(b), 5(d), and 5(i); "Article 13" para. 5(b); "Article 15" para. 1.

329 General Comment No. 12, para. 28; General Comment 14, para. 18.

330 Para. 38.

331 Para. 40 and 65.

The fourth obligation is *to guarantee vulnerable groups the enjoyment of all Covenant rights without discrimination*. This aspect of the right is treated in General Comment No.7[332] and No.13.[333] Art.2(2) of the Covenant clarifies that all the rights set forth under the Covenant are to be guaranteed without discrimination of any kind, particularly when based on a number of listed grounds. There is a debate as to whether the grounds listed in Art.2(2) are the only grounds upon which discrimination is prohibited. That is, whether the right is protected only when discrimination is upon the basis of sex, race, colour, etc. and on nothing other than any of those grounds. This is the approach employed with respect to some human rights documents. Craven confirms, however, that despite a strong argument in favour of the limited approach, the Committee has recognised discrimination under Art.2(2) as applying to regional areas, aliens (including stateless persons, migrant workers and refugees), unmarried couples, parents, people with AIDS, physical and mental disabilities, homosexuals and the poor.[334] The Committee itself later considered this issue in General Comment No.5, with regard to the possibility of discrimination on the basis of age. It deliberately left the question open.[335] Thus, discrimination based on characteristics related to one's status as a member of a vulnerable group may be alleged as non-compliance with the Covenant.

D. Women

Women may be regarded as a vulnerable group in two important ways. First, they are often disadvantaged in relation to men as a general trend in society. That is, they often receive lower salaries, have less opportunity for employment, do more unpaid domestic work, have less access to credit and property rights, and in many cases receive fewer opportunities for education. Second, women are often disadvantaged in relation to men *within each of the other vulnerable groups*. When reporting, one may choose the group which you are aware is at a disadvantage, and then find the indicators or data related to their substantive rights under the Covenant. Then consider each of the four specific obligations mentioned above.

The Committee does not assess compliance with other human rights conventions, but it can bolster one of its own claims by reference to one. This makes relevant the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).[336] The CEDAW contains many articles that concern economic, social and cultural rights.[337] The fluid way in which the CEDAW integrates both civil and social rights can be viewed as the perfect expression of the indivisibility of all human rights.[338] It also has an Optional Protocol in force, which provides for a petition procedure. This procedure allows individuals who have suffered an alleged violation of a right under the CEDAW, and who have exhausted all recourses under national law, to submit a communication to the Committee on the Elimination of Discrimination Against Women (also CEDAW) claiming a violation of that Convention. The CEDAW Committee is empowered to

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332 Para. 6 (b).

333 Para. 11.

334 M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 170.

335 See General Comment No.5 (The economic, social and cultural rights of older persons), para.12.

336 Adopted in 1979, in force in 1981.

337 See Arts. 1, 10 (Education), 11(Employment), 12 (Health), 13 (Economic and Social Life), 14(Rural Women) (c) (social security), (d) (education and vocational training), (f) (participation in cultural life) and (g) (access to credit).

338 It covers a range of civil and political rights as well as economic, social and cultural ones within the rubric of the same articles.

consider the complaint, along with the government's replies, and to make a formal declaration of whether the right has been violated and recommendations for remedial action.

While the ICESCR Committee has General Comments, the CEDAW Committee issues General Recommendations, some of which deal explicitly with the social rights aspects of the CEDAW. These include:

- No.13 (1989) - Work of Equal Value
- No.14 (1990) - Female Circumcision
- No.16 (1991) - Unpaid Women Workers in rural and family enterprises
- No.19 (1992) - Violence Against Women
- No.21 (1994) - Equality in marriage and family relations[339]

Again, the use of the CEDAW should only be to supplement reporting on rights that are also covered by the Covenant on Economic, Social and Cultural Rights.

E. Children

Children are a vulnerable group because, among other reasons, they are usually unable to provide for themselves. Important areas concerning children's rights include education, health, housing, sexual exploitation, labour, refugee status, interests in administrative or family law proceedings, etc. Reporting upon their condition would involve considering the four obligations in addition to the general obligations under each substantive right of the Covenant.

There are other important international documents from which some guidance can be drawn. A notable recent development is the ILO Convention No.182 (the Worst Forms of Child Labour Convention). Some of its articles are cited in the box on the next page. This Convention is very specific in its demands for 'effective, time-bound measures' in respect of certain listed items.

The most important international instrument, however, is the Convention on the Rights of the Child (CRC).[340] It is the most widely ratified human rights instrument, and includes a vast range of economic, social and cultural rights.[341] In addition to providing for a number of new social

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339 This list is taken from S. Abeysekera, "The Economic, Social and Cultural Rights of Women" in *Circle of Rights: Economic, Social and Cultural Rights: A Training Resource* (Washington: International Human Rights Internship Program/Asian Forum for human Rights and Development, 2000) 71 at 90-98. The author's article is a good introduction and survey of the various issues that are related to women's enjoyment of social rights. It includes the relevant excerpts from these General Recommendations. For a compilation of all General Comments and General Recommendations, consult "International Human Rights Instruments," UN Doc. HRI/GEN/1/Rev.5. To access it over the Internet, go to www.unhchr.ch, and type the document number into the 'Treaty Bodies Database' search field.

340 Adopted in 1989, in force in 1990. It has been ratified by every country, except by the US, Ethiopia, and East Timor.

341 Arts. 23, 24, 26-29, 31.

rights provisions, it also includes rights that are covered in the ICESCR, such as social security (Art.26, CRC/ Art.9 ICESCR), the right to an adequate standard of living (Art.27 CRC/Art.11 ICESCR), the right to education (Art.28 and 29 CRC/Art.13 ICESCR) and the right to rest and leisure (Art.31 CRC/Art.7(d) ICESCR). Although the Committee may not be empowered to make a finding about compliance with the CRC, the CRC can be a tool for the interpretation of children's social rights under the ICESCR. Activists should thus feel free to refer to the CRC in this way.

ILO Convention No.182 (Worst Forms of Child Labour) (1999)

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term "child" shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

F. Ethnic Minorities

Ethnic minorities also face a range of problems regarding access to health , education and housing, discrimination in the access to social services, and the inability to take part in cultural life. The Convention on the Elimination of all forms of Racial Discrimination (CERD) defines 'racial discrimination' as including any discrimination based on, among other things, descent or national or ethnic origin. The CERD provides for the protection of economic, social and cultural rights in Articles 1, 2(2) and 5(e)(i) - (vi). While the CEDAW and the CRC gave more specific elaboration to the content of the rights of the respective beneficiaries, the CERD gives each right much less detail than does the Covenant. However the CERD does require the State to take special measures to address the condition of minorities in a proactive way.[342] This is consistent with the ICESCR concern of addressing vulnerable groups with low-cost targeted programmes.

[342] Art. 2(2).

G. Persons with Disabilities

Persons with disabilities include people 'disabled by physical, intellectual or sensory impairment, medical conditions or mental illness.' This vulnerable group has received a thorough treatment in the Committee's General Comment No. 5 (Persons with Disabilities) (1994). In that General Comment, the Committee adopts a general definition of 'disability,' considers relevant international instruments, general obligations under the Covenant, means of implementation, non-discrimination and each of the specific provisions of the Covenant. The Committee confirms that all States are required to adopt a major policy and programme effort[343] and to protect the rights of persons with disabilities from the practices of private actors.[344]

The Committee makes numerous suggestions concerning each right under the Covenant, and these ought to be considered by reading over the General Comment when reporting on this group. Some of the more significant of those recommendations are the following:

- The obligation to adopt comprehensive anti-discrimination legislation in relation to disability (para.16);
- The need for consultation with the affected groups before making policies (para.14);
- The need for wheelchair accessible workplaces (para.22);
- The need for social security for both the person with a disability and her or his caretaker (para.28); and
- The obligation to promote accessibility to places for cultural performances and services, as well as places for recreation, sports and tourism.

The General Comment also makes reference to the CRC, Art. 23; the African Charter on Human and Peoples' Rights, Art.18(4); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, Art.18. Thus one may also wish to examine these documents over the Internet.

H. Older Persons

General Comment No.6 (1995) is concerned with the economic, social and cultural rights of older persons.[345] It opens by stressing the historically unprecedented numbers of the world's ageing people, and how the recent trend has led to several international consultations and plans of action. These include the 1982 World Assembly on Ageing, at which was adopted the Vienna International Plan of Action on Ageing. The Committee refers to this document extensively throughout the Comment. It also refers often to the United Nations Principles for Older Persons (adopted by the General Assembly, 1991). In many ways, this General Comment is an assertion of the validity of these guidelines in respect of the rights under the Covenant. The General Comment is organised around an extended introduction, a discussion of general obligations and an examination of specific provisions of the Covenant.

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343 General Comment No. 5, para.9.

344 General Comment No. 5, para.11.

345 UN Doc. E/C/13/1995/16/Rev.1 (1995).

Concerning obligations, the Committee states plainly that the methods for the fulfilment of the ESC rights of older persons are basically the same as for other obligations under the Covenant. They include the following needs:[346]

- to determine the nature and scope of problems within a State through regular monitoring;
- to adopt properly designed policies and programmes to meet requirements;
- to enact legislation when necessary and to eliminate any discriminatory legislation; and
- to ensure the relevant budget support or, as appropriate, to request international cooperation.

The Comment includes several specific and interesting entitlements. It is quite evident that the Committee achieved such specificity in no small part through the assistance of the well developed range of ILO Conventions and Recommendations on the subject[347] as well as the above – mentioned declarations. Some of these entitlements include the following:

- The provision of non-contributory old-age benefits, particularly for women (para.21);
- The implementation of retirement preparation programmes (para.24);
- Social assistance for entire families where the family supports an elderly person (para.31); and
- Providing restoration and other services to allow the elderly to remain in their homes for as long as possible (para.33).

There are some additional measures proposed for health and education, but they are consistent with the general trend of obligations under the Covenant and need no further elaboration. If one feels confused and overwhelmed by the profusion of information under these General Comments, simply put them aside and focus on the general obligation to develop low-cost targeted programmes for the group in question. For the purposes of reporting on vulnerable groups, the more important task is the description of the actual state of those groups within the given country.

I. The Internally Displaced

Internally displaced people, along with refugees, are perhaps the paradigmatic example of a vulnerable group. These groups are removed from all the social and historical networks their communities had used for survival over the generations. Thus much of the accumulated knowledge is lost or inapplicable, and they become highly dependent on governmental support. Worse still, they are usually displaced due to violence, and are at some risk in the new community. This situation has rightfully received a great deal of attention in Sri Lanka, and has recently been added to the mandate of the United Nations High Commission for Refugees. The most notable development is the adoption of the Guiding Principles on Internal Displacement (Deng Principles, see box). These principles are declaratory, rather than binding, but announce claims that are clearly covered by the terms of the Covenant. The only difference may be that the Deng Principles clearly apply to the 'authorities' in charge of the area, which can mean either the government or a belligerent faction. The Covenant appears only to bind the government, though there may be good arguments that rebel factions become bound when they gain effective control over an area.

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346 General Comment No.6, para. 18.

347 Particularly ILO Recommendation No. 162 (1980) concerning Older Workers, and ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967).

GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (DENG PRINCIPLES) (1998)

Principle 7

…

2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

Principle 10

…

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

…

(b) Starvation as a method of combat;

…

Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:

   (a) Essential food and potable water;

   (b) Basic shelter and housing;

   (c) Appropriate clothing; and

   (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

…

Principle 23

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

…

XV. The Justiciability of Economic, Social and Cultural Rights

This chapter is written primarily for lawyers and judicial figures. However it may also be of interest to activists who are attempting to understand the justiciability debate. The debate is between those who disagree over whether courts have the capacity and legitimacy to enforce social rights. The purpose of this chapter is to define justiciability, state the basic case for justiciable social rights, outline the arguments against justiciable social rights and responses to them, and to review recent international developments. The conclusion of the chapter is that the main objections to justiciable social rights are political, and that courts are both the capable and legitimate institutions for enforcing them.

A. Defining Justiciability

An issue is 'justiciable' when a court is the capable and legitimate institution for resolving it. The central concerns in deciding such an issue have been summarised as follows:[348]

> *[I]t is possible to identify at least four concerns common to all justiciability doctrines: (1) the concern for judicial economy, efficiency and effectiveness, (2) the concern for disputes being adequately argued in an adversarial forum, (3) the concern not to immunize laws and government actions from judicial review, and (4) the concern not to deny worthy parties and issues, both present and future, a proper judicial resolution. These concerns arise out of two central principles which underly the law of justiciability: first, that courts not adjudicate cases beyond their institutional capacity; and second, that courts not adjudicate cases beyond their legitimacy to resolve disputes.*[349] [Emphasis added]

Thus, the relevant questions are (1) is it *possible* for judges to enforce social rights, and (2) *should* they do so. These questions are addressed under the rubrics of *institutional capacity* and *institutional legitimacy*.

Before examining arguments for and against, it is important to note that the justiciability of an issue is relative to the jurisdiction in question. For example, the power conferred upon the judiciary in South Africa to review the adequacy of public housing measures is express and constitutionalised. The Canadian Charter of Rights and Freedoms mandates courts to determine whether the government has fulfilled its positive obligation to provide minority language schooling to the children of francophone or anglophone citizens.[350] In India, the Supreme Court has on its own initiative issued a number of decisions on social rights topics that invoke stringent governmental

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348 L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell: Toronto, 1999).

349 *Ibid*, at 233

350 The provision is s.23, *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter *Canadian Charter*]. It reads:s.23 (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

positive obligations. What is acceptable in one jurisdiction may not be in another. This diversity shows that the primary obstacles to the judicial review of social rights may be of a political nature, rather than an intrinsic incapacity or illegitimacy of the courts.

Another important distinction is that between *justiciability* and *enforceability*. Michael Addo explains the difference between the two:

> *Enforcement of human rights deals with the identification of the entitlements and duties created by the legal regime which have to be maintained and executed. Justiciability on the other hand, presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime.*[351]

The essence of the distinction is that while justiciability concerns a court determining whether compliance with a law or convention has taken place, enforceability concerns the court's ability to order remedies. This distinction may be quite important, for it may be possible to establish that social rights are justiciable in a particular jurisdiction without going as far as claiming that courts ought to be able to enforce all valid social rights claims.[352] It is a practice in certain common law countries that courts assess compliance with conventions, but do not order political bodies to obey them. Although admitting a violation but denying an injunction, declaration of invalidity or monetary damages is clearly problematic,[353] it may bring a practical advantage by exposing violations and allowing some social rights to be enforced. This option is examined further below.[354]

B. The Basic Case for Justiciable Social Rights

A starting assumption of the argument for justiciable social rights is that they represent fundamental moral entitlements. Social rights spell out the minimum conditions for a dignified life. This is what is meant when we call them human rights. Once this axiom is agreed upon, the question becomes how to secure them.

One argument is that international human rights law obligates States to provide legal remedies or explain why they have not. When States ratify the International Covenant on Economic, Social and Cultural Rights, they undertake to implement its provisions "…by all appropriate means."

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[351] M. Addo, "The Justiciability of Economic, Social and Cultural Rights," (1988) *Commonwealth Law Bulletin*, Oct., 1425 at 1425. See also *Sossin*, *supra* note 348 at 7. Sossin states that the classic illustration of this distinction is the judicial treatment of constitutional conventions. "Conventions are…justiciable in the sense that a court could interpret the scope of a convention and declare whether [it] had been breached by government action. They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention."

[352] See the Canadian case *Gosselin* v. *Attorney General of Quebec*, [1999] R. J. Q. 1033 (Quebec Court of Appeal) at 1048. The case concerned a class action in which a drastic social assistance cutback was challenged. The majority of the Court of Appeal dismissed the action. However the dissenting Justice found a violation of the Quebec Charter, but refrained from granting restitution; he simply declared that the impugned regulation was contrary to the Quebec Charter. He also would have granted costs. The Justice who wrote the majority opinion stated that if he had agreed with his colleague on the substantive arguments, he would have granted the same relief. Baudouin J. at 1048. The appeal was dismissed by the Supreme Court of Canada in *Gosselin v. Attorney General of Quebec*, [2002] S.C.C. 84, for reasons differing from those of Justice Baudouin's.

[353] Louise Gosselin was not at all satisfied with the dissenting declaration.

[354] Section C.2.(d).

The Committee is of the view that the burden is upon the State to show why the judicial protection of the Covenant's rights is not among the 'appropriate means.'[355]

A second argument is that judicial remedies are the natural recourse for violations of human rights. This is so because the political forum does not adequately protect rights. The concept of human rights is precisely about imposing requirements upon governmental conduct. Human rights delineate a sphere of entitlements that the government, or majority, may not invade or disregard. It is problematic to suggest that the political forum is the only appropriate one for protecting these rights because if so, there would be little need for rights-discourse in the first place. Moreover experience does not support such a conclusion. The very people these rights are most meant to protect, including the impoverished, homeless, illiterate, and exploited, are not properly represented in the political system. Rights by their very nature are meant to compensate for the *inadequacies* of the political process.

A third argument is that judicial recourses provide an effective means of protecting social rights. Courts are an effective and disciplined forum for evaluating evidence, adjudicating adversarial claims, reviewing the unforeseen consequences of policies and laws, giving an official audience to claims about rights violations and more. These procedures are themselves an important source of participation for the politically excluded.[356] They allow the poor and excluded to be taken seriously by a respected organ of the State. They also have a direct impact on the political evolution of the State. In addition to media coverage, public education and academic research in these areas, a dialogue forms between courts and the legislature through the range of available remedies courts apply. Above all, the court's perhaps limited but nonetheless residual power to order remedies allows people to stop or compel governmental actions that affect their rights. It is this power above all else that makes judicial recourses the most appropriate avenue for defending social rights.

These arguments establish that social rights should be protected by the judiciary in the absence of compelling and socially pressing reasons suggesting otherwise.

C. Arguments Against Justiciability

Even though the foregoing suggests that the burden of proof lies upon the opponents of justiciable social rights, the history of the justiciability debate shows clearly that the reverse has been the case. First, social rights were not accepted as 'real' human rights.[357] Then critics argued that they were not justiciable.[358] Thus those who disagreed usually bore the burden of proving that courts could or should enforce social rights. The contemporary shift in the acceptance of social rights, together with the Committee's comment in General Comment No.9,[359] suggest that the burden of proof should now be upon those who oppose the justiciability of social rights. Each of the main

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[355] See General Comment No. 9, para. 3.

[356] See B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *J. Law & Soc. Pol'y* 117. Porter also explains that the procedure before the UN Committee on Economic, Social and Cultural Rights may serve the same function. See Chapter II, Section I.2.

[357] See M. Cranston. *What are Human Rights?* (London: Bodley Head, 1969).

[358] See Chapter XIII, Section B.2.

[359] See the first argument in section C above.

arguments are outlined below, and are followed by responses. Before considering them in detail, it is helpful to examine a general summary:

1. Positive obligations are technically unsuitable for judicial enforcement because courts lack the capacity to decide upon complex policy matters;
2. The rights are very vague, and would amount to judicial legislation;
3. The rights are progressive, and thus there is an absence of an enforceable core content;
4. Social rights would be a massive expansion of judicial review. This would undermine the doctrine of the separation of powers, and would involve unelected judges deciding upon the allocation of scarce resources.

Each of these arguments is examined in turn below.

1. Institutional Capacity

Perhaps the most sophisticated arguments to be made against the institutional capacity of courts to adjudicate social rights are articulated by Craig Scott and Patrick Macklem in their article "Ropes of Sand."[360] Capacity-based arguments against social rights generally fall into three categories: (1) the unsuitability of positive obligations, (2) vagueness of social rights provisions and (3) the absence of an enforceable core content due to the progressive nature of the rights.

a) Positive Obligations

The most common objection is to the notion of courts enforcing positive obligations. Courts have traditionally demarcated the boundaries of what a State cannot do; to ask them to judge the extent to which a State should act, rather than at what point it should not, is to force an ill-advised institutional change upon them. This is so because the enforcement of positive rights requires the courts to assess what constitutes 'satisfactory' governmental expenditure in administrative and economic matters that go far beyond their ability to comprehend. Judges are not social scientists, economists nor public administrators, and therefore they are unable to determine what is appropriate in each of these domains.

There are a few responses to this argument. The notion of categorizing social rights as exclusively positive and civil and political rights as exclusively negative, has been heavily and widely criticized. Scott and Macklem give a detailed inventory of how courts have repeatedly enforced the government's positive obligations to ensure civil and political rights. They survey a list of court-enforced positive obligations arising from civil and political claims of (a) due process and procedural fairness, (b) life, liberty and security of the person, (c) the rights to privacy and family life, (d) prisoners' rights, and (e) equality rights.[361] Their detailed argument shows beyond doubt that

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[360] C. Scott & P. Macklem, "Constitutional Ropes of Sand or Justiciable Gurantees? Social Rights in a New South African Constitution" (1992) 141:1 *University of Pennsylvania Law Review* 1 at 17-84. *Ropes of Sand* is the publication of a study by two constitutional law experts that were invited to submit a report to the South African transitional government on the issue of whether to include enforceable social rights in the new South African constitution.

[361] Scott & Macklem, *ibid.* at 48-71. These examples are supported extensively by case law from Canada (at 48), the European Court of Human Rights (throughout), the United States, and the Interamerican Court of Human Rights (at 54-55).

courts are already enforcing positive obligations. This argument was the conclusive point in the South African *Re: Certification* case.[362] In that case, certain petitioners challenged the economic and social rights provisions of the new South African constitution as being non-justiciable by their nature. The Court decided that, among other reasons, the fact that courts were already heavily engaged in enforcing positive obligations gave them reason to believe that continuing to do so with social rights would not be a drastic institutional change.

Another related response to the negative-positive distinction is that economic and social rights embody both kinds of obligations as well. Therefore the 'positive rights' objection would not exclude all social rights. This argument is helped by one of the currently employed methodologies of categorizing State obligations: to respect, protect and fulfil.[363] The obligation of respect is one of mere restraint. That is, the State may be obligated to abstain from doing things such as unjustifiable evictions[364] or union-banning.[365] The obligation to protect involves the State ensuring that people's rights are not violated by private actors. The Committee has considered under this rubric issues such as the domestic enforcement of sanitary working conditions, the right to strike, employment of women, retirement ages, and the provision of pensions.[366] The enforcement of the obligation to respect and protect is similar to the enforcement of criminal laws, and does not involve additional cost to the State on a scale any larger than that contemplated by civil and political rights.

In conclusion, although it may be true that economic and social rights involve an increasing number of positive obligations, Scott and Macklem have undoubtedly shown that courts are *capable* of enforcing positive obligations when they are called upon to do so (see boxes).[367] Therefore the issue is more whether such court enforcement is appropriate, rather than whether it is possible.

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362 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (*1996) (4) SA 744 (CC).

363 M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development.* (Oxford: Oxford University Press, 1995) at 109-114. The author defines these terms and examines thoroughly the Committee's use of these categories in their sessions. See also Chapter IV, Section B.2.

364 Craven notes the eviction of 15,000 families by the authorities in the Dominican Republic, discussed in UN Doc. E/1991/23 at 64, para. 249, UN ESCOR, Supp. (No.3) (1991).

365 The Committee noted in para. 31 of its 1998 report on Canada that Bill 22 "An Act to Prevent Unionization" of the adopted by the Legislative Assembly of Ontario, November 24, 1998, which denies workfare participants the right to join a union, bargain collectively or strike, was "a clear violation of Art.8 of the Covenant." *Concluding Observations on the Report of Canada*, (1998), UN Doc. E/C.12/1/Add.31.

366 Craven, *supra* note 364 at 112-113.

367 Note also that there is currently a database on social rights jurisprudence being developed. To keep abreast of this development, visit ESCR Net website, at http://www.escr-net.org.

Jurisprudence Concerning Positive Obligations

Canada - *R v. Askov*, (1990), Supreme Court of Canada: The court wrote that due process required fiscal commitments from the government of Canada. "This conclusion should not be taken as a direction to build an expensive courthouse in a time of fiscal restraint. Rather, it is a recognition that this situation is unacceptable and can no longer be tolerated. Surely an imaginative solution could be found that would rectify the problem." It went on to make recommendations. In *Mahe v. Alberta,* the Court wrote "the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met. This discretion is however subject to the positive obligation on government to alter or develop "major institutional structures" to effectively ensure the provision of minority language instruction and facilities and parental control on the scale warranted by the relevant number of children of the minority…"

United States - *Goldberg v. Kelly,* (1970), Supreme Court of the United States: "[T]he interest of the eligible recipient in uninterrupted receipt of public assistance, couple with the State's interest that his payments not be erroneously terminated, clearly outweigh the State's competing concern to prevent any increase in its fiscal and administrative burdens."

India - *Frances Mullin* v. *Union Territory of Delhi,* (1981) Supreme Court of India: "[T]he right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings…Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

European Court of Human Rights - *Rees v.United Kingdom*, (1986) "The Court has already held on a number of occasions that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life…"

Inter-American Court of Human Rights - *Velasquez Rodríguez Case,* (1988): "[The obligation to 'ensure' the rights set forth in the American Convention on Human Rights] implies the duty of the States Parties to organise the governmental apparatus and , in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights….The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction…This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the safeguard of human rights…"

Source: C.Scott & P. Macklem, "Ropes of Sand", pp. 48-71.

b) Vagueness

Critics argue that insofar as social rights give rise to aspirations, such as the right of all to work or to a decent standard of living, the rights are in principle too vague to determine whether a violation has occurred.[368] To try to do so would be a hopelessly subjective task, and would make a farce out of any notion of judicial objectivity.

Scott and Macklem point out that the argument for vagueness is "…often bound up in the overall claim that social rights are positive."[369] Part of the reason, they explain, for which the rights are thought of as vague is that courts are asked to identify the kinds of measures that must be taken to fulfil a right; little guidance is offered from the text of the rights themselves to accomplish this task, and this imprecision prevents their effective applicability. Therefore, in practice both of these arguments may be presented together as an undifferentiated whole.

One response to this argument is that the best solution to the problem of vagueness is that of judicial elaboration:

> *It is clear that in theory, the generality of a legal norm does not impede judicial decision making* per se*... The justiciability of a particular issue depends, not upon the generality of the norm concerned, but rather upon the authority of the body making the decision. Thus it is apparent that in a number of cases, national courts have undertaken to apply constitutional provisions of an exceedingly broad and general nature.*[370]

Alexandre Berenstein makes the same point when discussing the notion of including social rights in the European Convention of Human Rights as early as 1981. He goes beyond Craven's statement, however, and adds that there is a benefit to doing so: "It is precisely because the terminology used is imprecise that it is possible to take account of changing circumstances interpreting rights which are themselves undergoing constant change within each State."[371] Scott and Macklem add that "[t]he specific shape and contour of a right is the result of years of repeated applications of practical reasoning to the facts at hand."[372]

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[368] See M. Craven. "The Domestic Applicability of the International Covenant on Economic, Social and Cultural Rights" (1993) XL *Netherlands International Law Review* 367 at 388. The author discusses the problem of vagueness in the application of the Covenant in domestic courts. "In one particular case, the terms of Article 7(a)(I) IESCR were considered by the Dutch Supreme Court…The Court found that the guarantee of 'equal remuneration for work of equal value' was of such a general nature that it could 'hardly function in the legal order in a field as wide as the present one unless it is elaborated in more detail.'" *D.Hoogenraad* v. *Organisation for Pure Research in the Netherlands*, (1991) 22 *Neth. Yearbook of International Law* 376 at 377. See also J. Bakan. "What's Wrong with Social Rights?" in J.Bakan & D. Schneiderman (eds.) *Social Justice and the Constitution*. (Ottawa: Carleton University Press, 1992) 85 at 86-89.

[369] *Supra* note 360 at 45.

[370] Craven, *supra* note 368 at 388-89.

[371] A. Berenstein, "Economic and Social Rights: Their Inclusion in the European Convention on Human Rights" (1981) 2 *Human Rights Law Journal* 257 at 274-5. He mentions that "In domestic public law the courts are constantly required to deal with "indeterminate legal concepts' (*unbestimmte Rechtsbegriffe*) and to interpret them." He notes the official recognition of this concept in Swiss law, and cites a Federal Court ruling stating that when a court interprets an indeterminate legal concept, it is deciding a point of law.

[372] *Supra* note 360 at 72.

Elaborating the nature of each right, so that it becomes a more easily enforceable, is a task the Committee and national courts have undertaken in some detail. The Committee has developed 15 General Comments on the nature of obligations under the Covenant, and has spelled out in great detail the obligations related to housing, forced evictions, food, education and health. In each case, a number of standards are announced that are themselves capable of immediate application, or ones that may be elaborated easily at a national level. National elaboration of such norms is also a fast emerging development. South Africa, for example, has adopted legislation describing in considerable detail what constitutes 'adequate access to water' and 'adequate housing.' These standards include quantifiable standards related to flow rate, pressure rate, distance of water sources from dwellings, and so on.[373] These locally defined standards render a vague right susceptible to immediate judicial determination. Indeed, this is much the way national health and safety standards are elaborated and rendered judicially enforceable. Judicial decisions can serve the same function.

Finally, courts are constantly engaged in deciding upon very vague concepts. The concepts of liberty, reasonableness, due diligence, efficiency, expression, and proportionality are all at least as vague as social rights concepts. The reason we tolerate judicial pronouncements upon these issues is because we believe that such questions are important and demand consideration in the courts. Thus we accept the validity of the courts' responses to these admittedly vague questions in light of the social importance such responses play. Human rights claims ought to be regarded as supremely important. It thus seems that vagueness *per se* is not a valid objection.

c) Absence of Core Content

A third argument relates to the idea that because the rights are to be implemented 'progressively,' pursuant to Art.2(1) ICESCR, there is *in principle* no minimum threshold requirement that judicial authorities can identify and enforce.

Article 2

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

Critics often rely on this text to support the claim that the rights are incremental, or progressively realised. "Such rights cannot, it is thought, be delineated in terms of immediate obligations on states."[374] In the Canadian *Gosselin* case,[375] for example, a Justice of the Court of Appeal inferred that Art.11 of the Covenant was a mere policy objective because it was to be realised progressively.[376] Implicit in this argument is that such a threshold is necessary before courts can enforce the rights.

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373 See P. Alston, "Development of Policy, Plans and Legislation to Protect and Promote ESC Rights" in *Circle of Rights: Economic, Social and Cultural Rights: A Training Resource* (Washington: International Human Rights Internship Program/Asian Forum for human Rights and Development, 2000) 407 at 409-411 for a discussion. See Chapter IV, Box for a description of the South African water plan.

374 Scott & Macklem, *supra* note 360 at 44.

375 *Supra* note 352.

376 Porter, *supra* note 356.

There are at least two responses to this argument: first, that the claim is simply wrong as a matter of doctrine, and secondly, that progressive obligations are themselves subject to judicial review. One can argue that the 'absence of core-content' claim is incorrect because it is contradicted by the authority of the bodies and experts best acquainted with the nature of social rights obligations. In General Comment No.3, the Committee on Economic, Social and Cultural Rights clarifies that a core content is necessarily part of each right under the Covenant:

> *10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States Parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. [Examples given.]…If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.*[377]

The Committee equates core obligation with 'minimum essential levels of each of the rights.' It is thus difficult to argue that there are no minimum core obligations arising from the ICESCR when the most authoritative body charged with its interpretation has expressly declared that there are.[378] Moreover, the Committee has undertaken in General Comments Nos. 13-15 to describe in specific terms what the core content of those rights includes.

The theoretical justification for the idea of core content is that the language of rights implies the existence of a core. To deny its existence would be to deny the alleged right-holder of any concrete entitlement, which would make the use of the terminology of rights entirely without justification at best, and a sham at worst.[379]

The second argument against the 'absence of core-content' claim is that progressive obligations are themselves justiciable. Art.2(1) requires States Parties to take concrete and expeditious steps. The Committee is entitled to question whether a step effectively advanced the right(s) in question. A similar approach has been taken by the Constitutional Court of South Africa, in *Government of South Africa (et.al.)* v. *Grootboom (et.al.).* Yacoob J. writes for the Court on this point:

> *In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have*

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377 General Comment No. 3, para. 9-10. See Chapter IV for a detailed treatment of core content and its implications.

378 But see *Grootboom*, *infra* note 380, where the Constitutional Court of South Africa declines to pronounce upon a core entitlement to the right of access to adequate housing under the South African Constitution. The decision on that point rested on the relative lack of experience the Constitutional Court had *vis-à-vis* the right under consideration, particularly when compared with the Committee. It thus left the door open to future interpretations of core entitlements.

379 See P. Alston. "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 332 at 352-3: "The fact that there must exist such a core [subject to some derogations] would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a 'claim' to the status of a right (with all the connotations that concept is generally assumed to have) if it its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything."

> *been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*[380]

This approach demonstrates that courts can review government conduct without even considering the question of a definitive core entitlement provided by the right. In conclusion, the arguments against an absence of core content are misguided. This is so because there is in principle an identifiable core content to social rights and secondly, core content is not strictly necessary for judicial review.

2. Institutional Legitimacy

Those who are opposed to the notion of justiciable social rights may grant that it is in principle *possible* for judges to enforce them, but oppose the notion that they *should* do so. Although these kinds of normative claims depend heavily on the jurisdiction in question,[381] some general comments can be examined. Two general arguments against institutional legitimacy may be presented.

The first is that such an expansion of judicial review would be inconsistent with the doctrine of the separation of powers between the judicial and legislative branches. One constitutional scholar expresses the general concern as follows:

> *[Social rights involve] a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including the regulation of trades and professions, the adequacy of labour standards and bankruptcy laws and, of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost…*[382]

Joel Bakan raises a number of sound concerns regarding the political implications of justiciable social rights.[383] First, the admittedly vague provisions that will be elaborated by judges may not receive the progressive interpretation that social rights activists would hope for. Conflicting groups will advance conflicting views on the scope of the rights, and there is no sound reason for believing that judges will side with the more progressive interpretations. A second related concern is that once a social 'right' rather than a 'policy' is established, governments may choose to defer progress

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380 *Government of the Republic of South Africa (et.al.)* v. *Irene Grootboom (et.al.)* [2000] Constitutional Court of South Africa at para.41. Although the approach is similar, one may easily disagree with the claim that the assessment of reasonableness should not be decided in light of other available options. Clearly, the existence of more rights-friendly alternatives is a key factor in deciding upon whether an administrative decision is reasonable.

381 Scott & Macklem, *supra* note 360 at 17: "[N]ot only is justiciability variable from context to context, but its content varies over time." Sossin cites this passage in agreement, *supra* note 348 at 2. He adds that "…it is neither possible nor desirable to impose precise limitations on terms such as justiciability, which are so contingent on legal, political and historical contexts."

382 P. Hogg. *Constitutional Law of Canada: St.Ed., 1999*. (Toronto: Carswell, 1999) at 905. Professor Hogg is interested in showing why s.7 of the Canadian Charter does not provide a clear mandate for the judicial reading in of social rights claims. He is not necessarily opposing the notion of social rights *per se*. His argument, however, provides a good summary of the concerns of some who oppose social rights.

383 See Bakan, *supra* note 368.

or even justify regressive social policies once the core obligation of that right is defined. "The discourse of social rights is well suited for such arguments because of its 'on-off' quality – either a right is breached or it is not."[384] This might, in Bakan's opinion, allow a government to argue that a current or new rate of assistance is consistent with the minimum rate of the right. Finally, since social rights enumerate rights, and often the core rights, it could make some goals social priorities over others that are not enumerated (e.g. shelters for battered women, foreign aid or public broadcasting).[385] Courts are not the legitimate institution for diverting limited resources from some initiatives to others.

Responses to these arguments vary according to jurisdiction. The crucial question will depend on the wording and scope of the rights proposed for a particular jurisdiction. Despite this, some general observations are possible.

a) Express Mandate

The first response is that the concern is addressed by an express legislative mandate. The main concern is that courts will assume powers without the proper authorisation by the legislative assembly. This is particularly so where courts are asked to interpret existing legal provisions in a way that includes protection of social rights. However, if a parliament takes the clear step of enacting social rights legislation authorising judicial review, there will not ordinarily be a transgression. In such cases, the authorisation is clear.[386] Justice Yacoob emphasises this point in *Grootboom*:

> *I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.*

We may recall that the same arguments were made with respect to civil and political rights. The right to create laws that flout due process, restrict national assemblies and imprison without trial were all formerly prerogatives of parliament. It was decided that the social concerns were of such importance that they ought to be constitutionalised, and the sanctity of the claims be put beyond ordinary legislative whims. So if the 'massive expansion of judicial review' was tolerated in the case of civil and political rights, then why not with social ones?

b) Social Rights do not Always Involve Great Expense

A related issue is that social rights involve expansions into areas of serious fiscal concern. This issue is admittedly difficult, but usually overstated. There are a range of social rights that courts can enforce without great expense. The rights to form and join trade unions, protection against

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[384] *Ibid.*

[385] It should be noted that Bakan's arguments are clearly intended to suggest potential problems in the Canadian context. Such concerns may not be as applicable in countries in which there is no assistance at all, and the notion of a social rights based regression would be impossible. His arguments are, however, an important addition to the general concerns regarding whether courts are the legitimate institution for enforcing social entitlements.

[386] This may be subject to the constitutional contraints on the delegation of legislative powers, but this objection will depend upon the particularities of different jurisdictions. Thus it will not be considered here.

arbitrary eviction and non-discrimination in access to employment, housing and social security benefits are a few examples.[387] There are also cases in which the amount of cost to the government appears to be insignificant next to the social right in question. In the Canadian case of *Eldrige*,[388] the government of a province in Canada was ordered by the Supreme Court to offer interpreting services for the deaf, partly because the additional expense in that situation was very low when weighed against the loss of the right ($CND150,000, or, 0.0025% of the provincial health budget). In *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*[389] the entire court ruled that a mother who challenges the governmental custody of her children had the right *to be provided with* counsel at the hearing. The Chief Justice of Canada declared specifically that a cost of less than CDN $100,000 was insufficient to warrant a curtailment of the mother's right.[390]

c) The Case by Case Approach

Courts may decide whether certain social rights are justiciable on a case by case basis. The merit of such an approach is that it allows, at the very least, the consideration of *some* social rights claims while reserving the power to reject those that would involve too strong an institutional change. The comments of Jane Connors illuminate that this was the approach of the Committee on the Elimination of All Forms of Discrimination Against Women, which recently adopted a complaints procedure that includes economic and social rights. When discussing the drafting, she noted that "[t]he issue of justiciability was debated only in the beginning of discussions of the draft by governments and ultimately become a non-issue, with Governments concluding that the supervisory body should be given the discretion to decide on justiciability, as with national courts."[391] This effectively amounts to determining justiciability on an *ad hoc* basis, rather than rejecting the concept of justiciable social rights outright.[392]

d) Remedial Flexibility

Judges can declare a provision justiciable without enforcing it. Judges may effectively face three options when faced with a social rights claim that they deem justiciable: (1) deny that a violation took place, (2) declare that a violation took place, but not order any particular result,[393] or (3) declare a violation and choose the least intrusive remedial option. The first option is quite easy to

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387 In General Comment No. 9, para. 10, the Committee notes that Arts. 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4), and 15(3) of the Covenant are capable of immediate implementation by way of judicial remedy.

388 See *Eldridge* v. *British Columbia (A.G.),* [1997] 3 S.C.R. 624.

389 [1999] 3 S.C.R. 46.

390 See Porter, *supra* note 356 for commentary.

391 This comment is attributed to Connors in the *Report on the workshop of the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the ICESCR,* Commission on Human Rights, 57th Session, (22 March 2001), UN Doc. E/CN.4/2001/62/Add.2, para. 16.

392 In his submission to the *Workshop on Justiciability*, *ibid.*, Bruce Porter notes that "The question about the appropriate role for courts in relation to legislatures is an important one in Canada, as elsewhere, but we have found that it is best considered in the context of particular rights claims, not as a basis for a distinction between categories of human rights." In 'The Justiciability of Social and Economic Rights: The Canadian Experience,' *Presentation to the Workshop on the Justiciability of Economic, Social and Cultural Rights* (Geneva, Feb.5-6, 2001). On file at the Law & Society Trust.

393 See C. Scott and P. Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise", (2000) 16 *South African Journal on Human Rights* 206 at 224. "[A] court can declare a violation, without necessarily mandating a particular response."

rely upon, particularly when the right is guaranteed 'to the maximum of available resources.' The second option allows the court to grant a symbolic declaration and costs, but to refuse a remedy that would revolutionise its role.[394] In the third case, judges may choose to order the development of a plan, the provision of inexpensive temporary facilities, order good faith negotiations or issue injunctions against behaviour that actively interferes with the right. There are endless options, which can be crafted and plead by the litigants. Thus judges may tailor their remedies to suit their institutional role, while leaving room for gradual progressive advancement.

e) Paramountcy Argument

Finally, the problem of courts of expanding judicial review and deciding upon resource constraints is outweighed by the unanswered violation of human rights. The protection of human rights must remain the paramount consideration. It was noted that judicial recourses are the best way to guarantee such rights. Therefore an institutional change is warranted. It is important to recall that one is not asking the courts to order the State to provide unaffordable services. The very concept of social rights is that the State is obligated to provide services 'to the maximum of available resources.' If it can be demonstrated that resources are lacking, then the court cannot compel the State to do anything. Courts are usually quite conservative in these assessments.

D. Recent National and International Developments

1. India

The Supreme Court of India was perhaps the first court to begin enforcing social rights under its domestic charter of rights.[395] It is ironic that it should do so when there is a part of the constitution under which social rights are listed, but are declared non-enforceable.[396] This interdiction did not stop the Supreme Court from giving broad interpretations of the constitutional protection of the right to life. In *Frances Mullin* v. *Union Territory of Delhi,*[397] the Court interpreted this right to include the bare necessaries of life. It held that the government could not deprive its citizens of these essential elements of their right unless done under a reasonable, fair and just procedure.[398]

Later, the Court defined the right to earn a livelihood. *Olga Tellis* v. *Bombay Municipal Corporation*[399] concerned the attempt to evict pavement dwellers in order to install a modern freeway. The Court challenge alleged that doing so would leave the dwellers without a residence, and lead to their deportation to their place of origin. This would in turn deprive them of their right to life. The Court agreed and ordered the municipal authorities to provide the dwellers with

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394 This was the dissenting judge's approach in Gosselin, *supra* note 352.

395 See V. Sripati, "Human Rights in India Fifty Years After Independence" (1997) 26 *Denver Journal of International Law and Policy* 93. Several of the cases that follow are drawn directly from Sripati's concise analysis.

396 Constitution of India, Art.37 "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

397 [1981] 2 S.C.R. 516 (India). For a discussion of this case and others pertaining to the same subject, see Scott & Macklem, *supra* note 360 at 114-130 generally, and this case in particular at 117.

398 *Ibid.* at 529.

399 A.I.R.1986 S.C. 180.

alternative accommodations that were within a reasonable distance of the original site. What is interesting to note is that the Court halted all evictions during a period of four years, pending the consideration of the writ. It also urged the municipal government to consider a housing scheme for the poor.[400]

In another case, *Banwasi Seva Ashram* v. *State of V.F.*,[401] the National Thermal Power Corporation Ltd. attempted to oust "tribals" from their traditional forest lands, which provided them with food and shelter. The Court ordered the NTPC to find alternative dwellings for the tribals and have them approved by the Court before continuing. Subsequent cases applied this interpretation to similar situations.[402]

An even more progressive step was taken in respect of the right to education in *Mohini Jain* v. *State of Karnataka.*[403] Despite the fact that the right to education is a directive principle under the Indian Constitution, the Court used it to interpret the right to life under the Constitution. It declared that private educational institutions that are accredited by the State could not charge exorbitant tuition fees for educational courses.[404] In so doing, it brought private institutions within the ambit of the Bill of Rights, and applied an expansive definition of the right to life.

These achievements demonstrate the merits of allowing judicial review in some cases. The Court has apparently not opened massive floodgates of litigation, nor has it ordered enormous remedies that are unaffordable for the State. Rather, it has given protection where it could by means of progressive, liberal, and soundly reasoned interpretations of the right to life.

2. South Africa

The new South African Constitution, adopted in 1996, contains judicially enforceable rights to housing (Art.26), health care, food and water (Art.27), education (Art.29) and children's rights (Art.28). These provisions were challenged immediately as being non-justiciable,[405] and therefore unenforceable. The Constitutional Court disagreed with the petitioners:

> *[W]e are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [new constitution] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.*[406]

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400 *Ibid.* at 204.

401 A.I.R. 1987 S.C. 374, 375, 378.

402 Sripati referes to *Karajan Jalasay Y.A.S.A.S. Samiti* v. *State of Gujarat*, A.I.R 1987 S.C. 532 and *Gramin Sewa Sanstha* v. *State of Uttar Pradesh*, 1986 (Supp) S.C.C. 578.

403 *Mohini Jain* v. *State of Karnataka*, A.I.R. 1992 S.C. 1858, 1871. Sripati also refers to *Ajay Hasia* v. *Khalid Mujib*, A.I.R. 1981 S.C. 481; *Unnikrishan* v. *State of Bihar* (1993) 1 S.C.C. 645.

404 *Ibid*. 1870-1871.

405 *Certification Case*, *supra* note 362.

406 *Ibid*. para. 78.

This finding is put beyond all doubt in *Grootboom*.[407] In *Grootboom*, the appellants challenged an eviction order that forced squatters off private land without providing alternative shelter. The claim was based on the constitutional right to access to housing (Art.26), and for the children's right to shelter (Art.28(1)(c)). The High Court judge, after inspecting the situation in person, granted the petition based on the children's right to shelter. He ordered the provision of temporary shelters. The Constitutional Court overturned the High Court's remedy, and rather declared that the government owed a duty to produce and implement an effective plan of action. The essence of the Court's holding is that the State has a duty to take reasonable steps to implement its progressive obligations under the Constitution.[408] It is interesting to examine the order made by the Constitutional Court (see box).[409] It may be significant that some negotiations had taken place between the municipality and the people evicted. The Constitutional Court was not, in this case, ordering the children back out into the cold winter rain. The High Court judge effectively would have had to if he arrived at the same legal finding. In any event, the Court did find a violation of a progressive obligation, and specified in the judgment that the Human Rights Commission would be charged with monitoring compliance with the Court's order.

Order of the Constitutional Court of South Africa, *Grootboom* Decision

The Order

The following order is made:

1. The appeal is allowed in part.
2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it:

It is declared that:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

3. There is no order as to costs.

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407 *Supra* note 380.

408 See *supra* note 380 and accompanying text.

409 The order can be criticised for a number of reasons, not least of all for depriving the claimants of any substantive entitlement under the circumstances. The circumstances were exceptional, and the Constitutional Court could have upheld the High Court order.

In the case of *Soobramoney,*[410] the applicant alleged an emergency health care right to be provided with dialysis treatment. The public hospitals refused to treat him because the machines were reserved for a class of patients that were not terminally ill. All Courts held that he did not have a right to treatment based on their definition of 'emergency,' and on a narrow interpretation of the protection offered by the right in question. This decision has been criticised for being too conservative.[411]

Although both *Grootboom* and *Soobramoney* have been criticised for not providing the substantive relief sought by the petitioners, both cases demonstrate that accepting some judicially enforceable social rights did not lead to the judicial excess some had expected. Thus one effect of these cases is that they demonstrate Courts cautiously entering the domain of social rights adjudication, in the conservative manner that social rights activists would expect. This supports the view that even expressly constitutionalised social rights will not lead to a massive expansion of judicial review. Rather, it will be slow and incremental.

3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

In 1999, the General Assembly of the United Nations opened the *Optional Protocol to the CEDAW* providing a petition procedure. This means that individual complaints regarding alleged violations of particular rights under that Convention may be submitted to the CEDAW Committee. This Committee examines the communication with a view to determining whether the State Party has complied with its obligations in a particular situation.

The CEDAW includes a number of provisions on the economic, social and cultural rights of women. This meant that when drafting the Optional Protocol, the Committee had to consider the issue of justiciability. As mentioned earlier, the Chief of the United Nations Women's Unit confirmed that the issue was dispensed with quickly by deciding the Committee would decide in particular cases whether the right in question was subject to judicial review.[412] Thus there are now justiciable social rights provisions within that reporting system.

4. European Social Charter (ESC)

In 1995, the Council of Europe adopted the *Additional Protocol to the European Social Charter providing for a System of Collective Complaints*. This system allows certain organisations listed

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[410] *Soobramoney* v. *Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC). The case is discussed and criticised extensively in Scott & Alston, *supra* note 393.

[411] Namely, that the right to emergency health care guarantees only access in a non-discriminatory manner to the resources that are already provided. In other words, the 'availability' of resources cannot exceed the existing budget allocation already given to the hospital. The applicant could not, it was held, challenge the actual amount of funding given. See Scott & Alston, *ibid*. for a convincing critique of this interpretation of the right.

[412] *Report on the Workshop on the Justiciability of ESC Rights, supra* note 391 at para. 16.

in Article 1 of the protocol[413] and certain NGOs[414] to submit complaints to the European Committee of Social Rights alleging that the State Party has not "ensured the satisfactory application of this provision."[415] Under this approach, a new procedure for social rights adjudication has been begun. The European Committee on Social Rights is a nine member elected body. It may declare whether the Charter has been violated, and will pass on its views to the executive organ, the Committee of Ministers. That body may in turn make recommendations or adopt resolutions. One creative system employed within the ESC is that States Parties are permitted to select a certain number of obligations listed under the Charter, provided that their selection amounts to a specified number of Articles.[416]

5. San Salvador Protocol to the American Convention on Human Rights

In 1998, the Organisation of American States adopted the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, which came into force in 2000. This protocol sets forth an extensive range of economic and social rights, and renders them subject to periodic reporting and limited complaints. Art.19(6) allows individual petitions to be submitted when the rights established under Art.8(a) (freedom to form and join trade unions) and Art. 13 (the right to education, which is extensive) "are violated by action directly attributable to a State Party to this Protocol… ." It appears the drafters used the language of 'violation by action' to exclude the application of complaints regarding governmental omissions. It remains to be seen, however, what kind of construction the Court will give to this provision. It may decide, in keeping with its progressive stance on human rights, that 'action' includes 'omission,' particularly in the case of the right to education.

The process of examining complaints is regulated by the American Convention on Human Rights. Under that system, complaints are filed first with the Inter-American Commission of Human Rights, which conducts an investigation and then decides whether to submit the issue to the Inter-American Court of Human Rights for judicial determination. Once a claim has been through this process, the Court will be called upon to adjudicate social rights.

6. The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The most relevant of the recent developments is the discussion surrounding the adoption of the draft optional protocol.[417] As with the protocol to CEDAW, this one will allow the submission of

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[413] Art. 1(a) international organizations of employers and trade unions referred to in para. 2 or Art. 27 of the Charter; (b) other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee; (c) representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

[414] Namely, any national NGO within the State Party's jurisdiction declared as having the right to complain under Art. 2 of the *Additional Protocol*

.[415] Art. 4, *Additional Protocol*.

[416] See Part III, Art. 20 "Undertakings" of the original *European Social Charter* (1961), particularly para. 1. See also Part III, Art. A "Undertakings" of the *Revised European Social Charter* (1996), which keeps the 'menu approach' but expands the number of mandatory undertakings. In the *Additional Protocol*, the State Parties only consent to the reception of complaints dealing with the provisions to which they have consented.

[417] UN Doc. E/CN.4/1997/105, annex.

individual complaints alleging non-compliance with the obligations under the ICESCR in a particular case. The advantage of doing so will be that the Committee will be invited to consider a single situation in great detail, and thus pronounce upon the State's obligations and the scope of the right with greater clarity than it often does in its Concluding Observations on State Party Reports. It will also give the Committee a chance to propose remedies to particular violations, which may become an interesting body of jurisprudence for national courts considering the application of judicial remedies for social rights violations. Above all, however, it gives a chance for the Committee to demonstrate whether it is possible to give well-reasoned findings of violations. As one author put it in relation to the International Covenant on Civil and Political Rights:

> *the collected 'views' of the Committee based on individual cases are of much greater value in shedding light on the meaning of the various rights formulations than either the Committee's General Comments or the insights generated by its examination of State reports.*[418]

Thus the adoption of the optional protocol will be a significant step forward in developing the quasi-judicial adjudication of social rights, and in the more detailed elaboration of the Covenant. There has been no clear consensus on adopting such a protocol, but the effort continues with vigour. Many feel optimistic about its adoption.[419]

E. The Final Hurdle

Mathew Craven writes:

> *[t]he justiciability of a particular issue depends, not on the quality of the decision, but rather upon the authority of the body to make the decision. Prima facie then, in so far as the Committee is given authority to assume a quasi-judicial role over the rights in the Covenant, those rights will be justiciable.*[420]

The wisdom in this comment is that it points to the crucial role of *giving* the legitimacy to the deciding institution. As pointed out above, the judiciary has the *institutional capacity* to consider complex social rights issues. Once the authority is properly conveyed to a judicial institution – as in South Africa, with certain rights in Canada, and the Bill of Rights in India – the *institutional legitimacy* may often be viewed as conveyed as well. At such a point, capacity and legitimacy will be married and social rights will be justiciable.

Thus the crucial hurdle appears to be a political one. This opens clear avenues for action for lawyers, judges and activists. If we believe in the importance of social rights as human rights, the question will be how to protect them effectively. It was demonstrated above that judicial remedies provide one of the best recourses. Therefore it is necessary to lobby the government to give social

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418 P. Alston, "Toward an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," in UN Doc. E/1993/22, *Report of the Committee's Seventh Session* at 98, para.12.

419 The background to the work on the Optional Protocol, and any new information on its development can be obtained from the Committee's website, at http://www.unhchr.ch/html/menu2/6/cescr.htm.

420 Craven, *supra* note 363 at 102.

rights constitutional protection. Lawyers and judges may greatly assist this by being vocal about the institutional capacity to adjudicate social rights, teaching youth about human rights, and through lobbying in the Bar Associations. Political activists and scholars, on the other hand, may lobby the government through the regular political and literary channels. Together, these efforts may succeed in getting social rights over the final hurdle.

-Annexes-

XVI. The International Covenant on Economic, Social and Cultural Rights

(Adopted 1966, In force 1976. U.N.T.S. No. 14531, vol. 993 (1976), p. 3)

The States Parties to the present Covenant,

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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

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

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

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

   (a) remuneration which provides all workers, as a minimum, with:

   (i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

   (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;

   (b) safe and healthy working conditions;

   (c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

   (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

   (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

   (c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize' to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

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

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

    (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

    (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

   (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

   (b) the improvement of all aspects of environmental and industrial hygiene;

   (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

   (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

   (a) primary education shall be compulsory and available free to all;

   (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

   (c) higher education shall be made equally accessible to all, on the basis of capacity by every appropriate means, and in particular by the progressive introduction of free education;

   (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

   (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

   (a) to take part in cultural life;

   (b) to enjoy the benefits of scientific progress and its applications;

   (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.

   (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or as appropriate for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialised agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph I of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) signatures, ratifications and accessions under article 26;

(b) the date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the 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 Covenant to all States referred to in article 26.

XVII. Using the Website of the Office for the High Commissioner for Human Rights

Site: www.unhchr.ch

On the one hand, this website is to be praised for providing so many useful documents to the general public. On the other, it may be criticised as not being user-friendly. Finding documents on this website can be very difficult.

Finding Out When Your Country's Next Periodic Report is Due

State Reports are often submitted long after they are due. In most cases the Committee will not review a State´s compliance without a report. Therefore checking to see whether a report has been submitted is the first step.

1. Start at OHCHR.
2. Go to Documents
3. Go to Treaty-Bodies Database
4. Go to Reporting Status
5. Go to All Reports by Convention, choose CESCR
6. Choose the Appropriate Country

At this point the screen presents a number of dates and past reports. Click on one of these dates. The screen will probably offer a number of links to the documents you are interested in. The bottom of the most recent Reporting Status Form will indicate whether when the most recent report is or was due, and whether it is pending consideration.

These forms may not contain all of the information available on the website. Some of the documents whose document numbers are given may not be linked to the actual text. However the document itself still may be available elsewhere on the website. Therefore the best way to do a thorough search is to copy the State Party Report document number, and return to the basic homepage at www.unhchr.ch. Once there, put the document number into the Treaty Bodies Database search field and hit Go. This may produce Lists of Questions that were not indicated in the Reporting Status Form, as well as NGO Submissions.

Finding Out Whether the Report has Been Received

Go to the Committee's Provisional Agenda to Determine which Reports Have Been Received

1. Start at Treaty Bodies Database
2. Go to Documents-By Treaty
3. Chose CESCR
4. Select Provisional Agenda
5. Choose most recent agenda.

An easier method is to use the Human Rights Internet site:

1. www.hri.ca
2. Choose ‘For the Record’
3. Chose ‘UN Human Rights System’
4. Choose ‘Volume 1: Introduction, Thematic Reports and Appendices’
5. Choose ‘Appendix 4: Draft Schedules for Consideration of State Reports’

The schedules usually go a few years into the future. This website is a very convenient tool for searching for all forms of UN human rights documents.

Getting Past State Party Reports, Lists of Issues, Replies to Lists of Issues

Follow the instructions under ‘Finding out When the Next Report is Due’.

Getting UN Documents by Symbol

Start at www.unhchr.ch. Once there, put the document number into the Treaty Bodies Database search field and hit Go.

Note that if the document is the report of a Special Rapporteur, or issued by the Commission on Human Rights or the Sub-Commission on the Protection and Promotion of Human Rights, then the document number should be entered into the “Charter Bodies Database” rather than “Treaty Bodies Database”.

XVIII. Contacting the CESCR Secretariat

Address to Send Written Submissions to CESCR or PSWG

Alexandre Tikhonov
Secretary of the Committee on Economic Social and Cultural Rights
Office of the High Commissioner for Human Rights
Palais des Nations
8-14 avenue de la Paix
CH-1211 Geneva
Switzerland

E-Mail: atikhonov.hchr@unog.ch

Tel: (41) 22 917 9321
Fax: (41) 22 917 9046

Be sure to send 25 copies of parallel reports to the full Committee and 10 copies of submissions to the Pre-Sessional Working Group.

Location of Office
Palais Wilson, Office 1-02552
Rue des Paquis
CH-1201 Geneva
Switzerland.

Obtaining Identity Photo Badges

Go to

United Nations Office at Geneva (UNOG)
Security and Safety Section
Villa “Les Feuillantines”
13 Avenue de la Paix
Geneva, Switzerland

Badges are available between 8am and 2:30pm, must present letter of accreditation and identity document.

General

If one encounters any confusion or difficulty, simply write to the web administrator to ask for clarification:

webadmin.hchr@unog.ch

Notes

XIX. Other Useful Resources

Promoting and Defending Economic, Social and Cultural Rights

Alan McChesney's handbook is an extremely helpful resource for those planning on presenting an alternative report. The work contains annexes with examples of violations, boxes with illustrative anecdotes, a descriptive list of organisations involved in the promotion of social rights. It also contains an excellent checklist (Annex F) for NGOs that are planning to submit a report. The handbook in general may serve as a less complicated alternative to the present work. It can be obtained in print format from the American Association for the Advancement of Science, or over the Internet:

http://shr.aaas.org/escr/handbook/toc.htm

CESCR Secretariat Note on NGO Participation in the Activities of the Committee on Economic, Social and Cultural Rights (UN Doc: E/C.12/2000/6)

This document contains information quite similar to that presented in Chapter II of this manual, yet it is provided directly by the Secretariat of the Committee itself. Those with plenty of time may be comforted by skimming through it as well. Remarkably, this document is not linked to the Committee's website. To find it, go to www.unhchr.ch. Put the document number in the Treaty Bodies Database search field and hit Go.

Circle of Rights

Circle of Rights is a training resource developed in wide consultation with numerous world-renown experts in the field of economic, social and cultural rights. The book is organised around modules, and they are designed primarily for assisting with human rights education initiatives. It contains a lot of helpful resources that would assist students, those hosting training seminars and academics looking for references to the international legal coverage social rights. It may be obtained in print form from the International Human Rights Internship Program or Forum Asia, and over the Internet at the following site:

http://hrusa.org/hrmaterials/IHRIP/circle/toc.htm

This book is also available at the Law & Society Trust.

COHRE-Centre on Housing Rights and Evictions

While there are many useful organisations that assist with social rights issues, COHRE must be singled out insofar as getting very practical information about presenting to the Committee. COHRE goes to every session of the Committee. It is aware of the topics for days of General Discussion, what draft General Comments are under consideration, the particular interests of different Committee members and so on. It also formally offers the service of finding accommodation for people going to present in Geneva, as well as website instructions for how to use the Committee. Thus its website should to be consulted:

www.cohre.org

Revised Reporting Guidelines

These are the guidelines prepared by the Committee to assist States with their reporting obligations. Thus they are the official guide to what the State is supposed to include in its report. They may be interesting to some activists, particularly those who want to show how the government has not taken its reporting obligations seriously. The requirements are actually quite extensive, and may provide useful guidance for activists as well.

Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (UN Doc: E/C.12/1991/1) (1991).

To find, start at www.unhchr.ch. Once there, put the document number into the Treaty Bodies Database search field and hit Go.

The Committee on Economic, Social and Cultural Rights Website

The Committee maintains a modest website. One must bear in mind that the information may not be completely up to date. At present, the site is as follows:

http://www.unhchr.ch/html/menu2/6/cescr.htm

ESCR Net

This is a recently begun network of ESC rights activists. It is the beginning of a world wide collaboration on social rights activism and advocacy. It includes a database on social rights case law. The Network is administered by the Center for Economic and Social Rights in New York.

http://www.escr-net.org

Bibliography of the Committee on Economic, Social and Cultural Rights

http://www1.umn.edu/humanrts/esc/esc-bibliography.htm

Select Bibliography on Economic, Social and Cultural Rights

http://www.nordichumanrights.net/tema/tema3/books

XX. General Comments of the Committee on Economic, Social and Cultural Rights

A. No. 1-Reporting by States Parties (1989)[*]

1. The reporting obligations which are contained in part IV of the Covenant are designed principally to assist each State Party in fulfilling its obligations under the Covenant and, in addition, to provide a basis on which the Council, assisted by the Committee, can discharge its responsibilities for monitoring States Parties' compliance with their obligations and for facilitating the realization of economic, social and cultural rights in accordance with the provisions of the Covenant. The Committee considers that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State Party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant, the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.

2. A first objective, which is of particular relevance to the initial report required to be submitted within two years of the Covenant's entry into force for the State Party concerned, is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.

3. A second objective is to ensure that the State Party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The Committee is aware that this process of monitoring and gathering information is a potentially time-consuming and costly one and that international assistance and cooperation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be required in order to enable some States Parties to fulfil the relevant obligations. If that is the case, and the State Party concludes that it does not have the capacity to undertake the monitoring process which is an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective implementation of the Covenant, it may note this fact in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

[*] UN Doc. E/1989/22.

4. While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a third objective of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken. While the Covenant makes this obligation explicit only in article 14 in cases where "compulsory primary education, free of charge" has not yet been secured for all, a comparable obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the Covenant is clearly implied by the obligation in article 2, paragraph 1 "to take steps ... by all appropriate means...".

5. A fourth objective of the reporting process it to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. In examining reports submitted to it to date, the Committee has welcomed the fact that a number of States Parties, reflecting different political and economic systems, have encouraged inputs by such non-governmental groups into the preparation of their reports under the Covenant. Other States have ensured the widespread dissemination of their reports with a view to enabling comments to be made by the public at large. In these ways, the preparation of the report, and its consideration at the national level can come to be of at least as much value as the constructive dialogue conducted at the international level between the Committee and representatives of the reporting State.

6. A fifth objective is to provide a basis on which the State Party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc. In many of these areas, global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress.

7. In this regard, the Committee wishes to note that the Covenant attaches particular importance to the concept of "progressive realization" of the relevant rights and, for that reason, the Committee urges States Parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights. By the same token, it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.

8. A sixth objective is to enable the State Party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights. For this reason, it is essential that States Parties report in detail on the "factors and difficulties" inhibiting such realization. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.

9. A seventh objective is to enable the Committee, and the States Parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant. In order to underline the importance which the Committee attaches to this objective, a separate general comment on those articles will be discussed by the Committee at its fourth session.

B. No. 2- International Technical Assistance Matters (Art.22 of the Covenant), (No.2)[*]

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant "which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... Covenant". While the primary responsibility under article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.

2. Recommendations in accordance with article 22 may be made to any "organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance". The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development cooperation. It would therefore be appropriate for recommendations in accordance with article 22 to be addressed, inter alia, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women, other bodies such as UNDP, UNICEF and CDP, agencies such as the World Bank and IMF, and any of the other specialized agencies such as ILO, FAO, UNESCO and WHO.

3. Article 22 could lead either to recommendations of a general policy nature or to more narrowly focused recommendations relating to a specific situation. In the former context, the principal role of the Committee would seem to be to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development cooperation activities undertaken by, or with the assistance of, the United Nations and its agencies. In this regard the Committee notes that the Commission on Human Rights, in its resolution 1989/13 of 2 March 1989, invited it "to give consideration to means by which the various United Nations agencies working in the field of development could best integrate measures designed to promote full respect for economic, social and cultural rights in their activities".

4. As a preliminary practical matter, the Committee notes that its own endeavours would be assisted, and the relevant agencies would also be better informed, if they were to take a greater interest in the work of the Committee. While recognizing that such an interest can be demonstrated in a variety of ways, the Committee observes that attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies. The Committee considers that a deeper understanding of the relevance of economic, social and cultural rights in the context of international development cooperation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies. At the very least, the day of general discussion on a specific issue, which the Committee undertakes at each of its sessions, provides an ideal context in which a potentially productive exchange of views can be undertaken.

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[*] UN Doc. HRI\GEN\1\Rev.1.

5. On the broader issues of the promotion of respect for human rights in the context of development activities, the Committee has so far seen only rather limited evidence of specific efforts by United Nations bodies. It notes with satisfaction in this regard the initiative taken jointly by the Centre for Human Rights and UNDP in writing to United Nations Resident Representatives and other field-based officials, inviting their "suggestions and advice, in particular with respect to possible forms of cooperation in ongoing projects [identified] as having a human rights dimension or in new ones in response to a specific Government's request". The Committee has also been informed of long-standing efforts undertaken by ILO to link its own human rights and other international labour standards to its technical cooperation activities.

6. With respect to such activities, two general principles are important. The first is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights.

7. The second principle of general relevance is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalization of the principle contained in article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures which merit consideration by the relevant bodies:

   (a) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular. The Committee notes in this regard the failure of each of the first three United Nations Development Decade Strategies to recognize that relationship and urges that the fourth such strategy, to be adopted in 1990, should rectify that omission;

   (b) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979 1/ that a "human rights impact statement" be required to be prepared in connection with all major development cooperation activities;

(c) The training or briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles;

(d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

9. A matter which has been of particular concern to the Committee in the examination of the reports of States Parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States Parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" or as promoting "the human dimension of development" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.

10. Finally, the Committee wishes to draw attention to the important opportunity provided to States Parties, in accordance with article 22 of the Covenant, to identify in their reports any particular needs they might have for technical assistance or development cooperation.

Note

1/ "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs" (E/CN.4/1334, para. 314).

C. No. 3-Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant) (1990)[*]

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States Parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States Parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States Parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States Parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State Party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States Parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

[*] UN Doc. E/1991/23.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States Parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, inter alia, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period

of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States Parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State Party to take the necessary steps "to the maximum of its available resources". In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment with a human face: protecting the vulnerable and promoting growth, 1/ the analysis by UNDP in its Human Development Report 1990 2/ and the analysis by the World Bank in the World Development Report 1990 3/.

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States Parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized ...".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States Parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).

Notes

* Contained in document E/1991/23.
1/ G.A. Cornia, R. Jolly and F. Stewart, eds., Oxford, Clarendon Press, 1987.
2/ Oxford, Oxford University Press, 1990.
3/ Oxford, Oxford University Press, 1990.

D. No. 4- The Right to Adequate Housing (Art. 11(1)) (1991)[*]

1. Pursuant to article 11 (1) of the Covenant, States Parties "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 human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

2. The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third (see E/1989/22, para. 312) and fourth sessions (E/1990/23, paras. 281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987 1/ . The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities 2/ .

3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing 3/ article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.

4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed 4/ . There is no indication that this number is decreasing. It seems clear that no State Party is free of significant problems of one kind or another in relation to the right to housing.

5. In some instances, the reports of States Parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the State concerned. This General Comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age,

[*] UN Doc. E/1992/23.

economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

8. Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

   (a) *Legal security of tenure*. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. 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;

   (b) *Availability of services, materials, facilities and infrastructure*. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

   (c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States Parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States Parties should establish housing subsidies for those unable to obtain affordable housing, as

well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States Parties to ensure the availability of such materials;

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States Parties to comprehensively apply the *Health Principles of Housing* 5/ prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States Parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or

unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

10. Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a State Party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11 (1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

11. States Parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States Parties overall living conditions declined during the 1980s. However, as noted by the Committee in its General Comment 2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

12. While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State Party to another, the Covenant clearly requires that each State Party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures". Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.

13. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State Party to satisfy its obligations under article 11 (1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasize the need to "provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing". They include, in particular, homeless persons and families, those

inadequately housed and without ready access to basic amenities, those living in "illegal" settlements, those subject to forced evictions and low-income groups.

14. Measures designed to satisfy a State Party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States Parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.

15. Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind. Nevertheless, the role of formal legislative and administrative measures should not be underestimated in this context. The Global Strategy for Shelter (paras. 66-67) has drawn attention to the types of measures that might be taken in this regard and to their importance.

16. In some States, the right to adequate housing is constitutionally entrenched. In such cases the Committee is particularly interested in learning of the legal and practical significance of such an approach. Details of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18. In this regard, the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19. Finally, article 11 (1) concludes with the obligation of States Parties to recognize "the essential importance of international cooperation based on free consent". Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States Parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting

measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States Parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.

Notes

* Contained in document E/1992/23.

1/ Official Records of the General Assembly, Forty-third Session, Supplement No. 8, addendum (A/43/8/Add.1).

2/ Commission on Human Rights resolutions 1986/36 and 1987/22; reports by Mr. Danilo Türk, Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/1990/19, paras. 108-120; E/CN.4/Sub.2/1991/17, paras. 137-139); see also Sub-Commission resolution 1991/26.

3/ See, for example, article 25 (1) of the Universal Declaration on Human Rights, article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, article 27 (3) of the Convention on the Rights of the Child, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements, 1976 (Report of Habitat: United Nations Conference on Human Settlements (United Nations publication, Sales No. E.76.IV.7 and corrigendum), chap. I), article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115).

4/ See footnote 1/.

5/ Geneva, World Health Organization, 1990.

E. No. 5- Persons with Disabilities (1994)[*]

1. The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community 1/ . Thus a 1992 review by the Secretary-General of the implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons concluded that "disability is closely linked to economic and social factors" and that "conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes" 2/ . Even in countries which have a relatively high standard of living, persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covenant.

2. The Committee on Economic, Social and Cultural Rights, and the working group which preceded it, have been explicitly called upon by both the General Assembly 3/ and the Commission on Human Rights 4/ to monitor the compliance of States Parties to the Covenant with their obligation to ensure the full enjoyment of the relevant rights by persons with disabilities. The Committee's experience to date, however, indicates that States Parties have devoted very little attention to this issue in their reports. This appears to be consistent with the Secretary-General's conclusion that "most Governments still lack decisive concerted measures that would effectively improve the situation" of persons with disabilities 5/ . It is therefore appropriate to review, and emphasize, some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.

3. There is still no internationally accepted definition of the term "disability". For present purposes, however, it is sufficient to rely on the approach adopted in the Standard Rules of 1993, which state: "The term 'disability' summarizes a great number of different functional limitations occurring in any population ... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature" 6/ .

4. In accordance with the approach adopted in the Standard Rules, this General Comment uses the term "persons with disabilities" rather than the older term "disabled persons". It has been suggested that the latter term might be misinterpreted to imply that the ability of the individual to function as a person has been disabled.

5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States Parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability.

[*] UN Doc. E/1995/22.

6. The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

7. In accordance with this approach, the international community has affirmed its commitment to ensuring the full range of human rights for persons with disabilities in the following instruments: (a) the World Programme of Action concerning Disabled Persons, which provides a policy framework aimed at promoting "effective measures for prevention of disability, rehabilitation and the realization of the goals of 'full participation' of [persons with disabilities] in social life and development, and of 'equality'" 7/ ; (b) the Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies, adopted in 1990; 8/ (c) the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted in 1991; 9/ (d) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter referred to as the "Standard Rules"), adopted in 1993, the purpose of which is to ensure that all persons with disabilities "may exercise the same rights and obligations as others". 10/ The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States Parties under the Covenant.

I. GENERAL OBLIGATIONS OF STATES PARTIES

8. The United Nations has estimated that there are more than 500 million persons with disabilities in the world today. Of that number, 80 per cent live in rural areas in developing countries. Seventy per cent of the total are estimated to have either limited or no access to the services they need. The challenge of improving the situation of persons with disabilities is thus of direct relevance to every State Party to the Covenant. While the means chosen to promote the full realization of the economic, social and cultural rights of this group will inevitably differ significantly from one country to another, there is no country in which a major policy and programme effort is not required. 11/

9. The obligation of States Parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

10. According to a report by the Secretary-General, developments over the past decade in both developed and developing countries have been especially unfavourable from the perspective of persons with disabilities: "... current economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services ... If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support." 12/ As the Committee has previously observed (General Comment No. 3 (Fifth session, 1990), para. 12), the duty of States Parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.

11. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States Parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to "take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution". 13/

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces. Similarly, while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant. As the World Programme of Action concerning Disabled Persons states, "the ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments". World Programme of Action concerning Disabled Persons (see note 3 above), para. 3. 14/

II. MEANS OF IMPLEMENTATION

13. The methods to be used by States Parties in seeking to implement their obligations under the Covenant towards persons with disabilities are essentially the same as those available in relation to other obligations (see General Comment No. 1 (Third session, 1989)). They include the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State; the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or,

where necessary, seek international cooperation and assistance. In the latter respect, international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant.

14. In addition, it has been consistently acknowledged by the international community that policy-making and programme implementation in this area should be undertaken on the basis of close consultation with, and involvement of, representative groups of the persons concerned. For this reason, the Standard Rules recommend that everything possible be done to facilitate the establishment of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters. In doing so, Governments should take account of the 1990 Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies. 15/

III. THE OBLIGATION TO ELIMINATE DISCRIMINATION ON THE GROUNDS OF DISABILITY

15. Both *de jure* and *de facto* discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

16. Despite some progress in terms of legislation over the past decade, 16/ the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States Parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

17. Anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which, in the words of the World Programme of Action concerning Disabled Persons, "implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation. Disability policies should ensure the access of [persons with disabilities] to all community services". 17/

18. Because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.

IV. SPECIFIC PROVISIONS OF THE COVENANT

A. Article 3 - Equal rights for men and women

19. Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected. 18/ Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade. The neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action. 19/ The Committee therefore urges States Parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

B. Articles 6-8 - Rights relating to work

20. The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States.

21. The “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” (art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called “sheltered” facilities under substandard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this right. Similarly, in the light of principle 13 (3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, 20/ “therapeutical treatment” in institutions which amounts to forced labour is also incompatible with the Covenant. In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance.

22. According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market 21/ . For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed. As the International Labour Organisation has noted, it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed 22/ . For example, as long as workplaces are designed and built in ways that make them inaccessible to wheelchairs, employers will be able to “justify” their failure to employ wheelchair users. Governments should also develop policies which promote and

regulate flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.

23. Similarly, the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant.

24. The "technical and vocational guidance and training programmes" required under article 6 (2) of the Covenant should reflect the needs of all persons with disabilities, take place in integrated settings, and be planned and implemented with the full involvement of representatives of persons with disabilities.

25. The right to "the enjoyment of just and favourable conditions of work" (art. 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labour market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of non-disabled workers. States Parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.

26. Trade union-related rights (art. 8) apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market. In addition, article 8, read in conjunction with other rights such as the right to freedom of association, serves to emphasize the importance of the right of persons with disabilities to form their own organizations. If these organizations are to be effective in "the promotion and protection of [the] economic and social interests" (art. 8 (1) (a)) of such persons, they should be consulted regularly by government bodies and others in relation to all matters affecting them; it may also be necessary that they be supported financially and otherwise so as to ensure their viability.

27. The International Labour Organization has developed valuable and comprehensive instruments with respect to the work-related rights of persons with disabilities, including in particular Convention No. 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities. 23/ The Committee encourages States Parties to the Covenant to consider ratifying that Convention.

C. Article 9 - Social security

28. Social security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, "States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-r d employment opportunities". 24/ Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role. 25/

29. Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.

D. Article 10 - Protection of the family and of mothers and children

30. In the case of persons with disabilities, the Covenant's requirement that "protection and assistance" be rendered to the family means that everything possible should be done to enable such persons, when they so wish, to live with their families. Article 10 also implies, subject to the general principles of international human rights law, the right of persons with disabilities to marry and have their own family. These rights are frequently ignored or denied, especially in the case of persons with mental disabilities. 26/ In this and other contexts, the term "family" should be interpreted broadly and in accordance with appropriate local usage. States Parties should ensure that laws and social policies and practices do not impede the realization of these rights. Persons with disabilities should have access to necessary counselling services in order to fulfil their rights and duties within the family. 27/

31. Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood". 28/ The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide. 29/ Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).

32. Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10 (3) of the Covenant (reinforced by the corresponding provisions of the Convention on the Rights of the Child), entitled to special protection. related factors, have temporarily lost or received a reduction in their income or have been denied.

E. Article 11 - The right to an adequate standard of living

33. In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that "support services, including assistive devices" are available "for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights". 30/ The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned. Similarly, as already noted by the Committee in paragraph 8 of General Comment No. 4 (Sixth session, 1991), the right to adequate housing includes the right to accessible housing for persons with disabilities.

F. Article 12 - The right to physical and mental health

34. According to the Standard Rules, "States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society". 31/ The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration. 32/ Similarly, such persons should be provided with rehabilitation services which would enable them "to reach and sustain their optimum level of independence and functioning". 33/ All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

G. Articles 13 and 14 - The right to education

35. School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system. 34/ Thus the Standard Rules provide that "States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings". 35/ In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

H. Article 15 - The right to take part in cultural life and enjoy the benefits of scientific progress

36. The Standard Rules provide that "States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. ... States should promote the accessibility to and availability of places for cultural performances and services ... ". 36/ The same applies to places for recreation, sports and tourism.

37. The right to full participation in cultural and recreational life for persons with disabilities further requires that communication barriers be eliminated to the greatest extent possible. Useful measures in this regard might include "the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons". 37/

38. In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability. In particular, measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities, for example those that view epilepsy as a form of spirit possession or a child with disabilities as a form of punishment visited upon the family. Similarly, the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues.

Notes

1/ For a comprehensive review of the question, see the final report prepared by Mr Leandro Despouy, Special Rapporteur, on human rights and disability (E/CN.4/Sub.2/1991/31).

2/ See A/47/415, para. 5.

3/ See para. 165 of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982 (para. 1).

4/ See Commission on Human Rights resolutions 1992/48, para. 4 and 1993/29, para. 7.

5/ See A/47/415, para. 6.

6/ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Introduction, para. 17).

7/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 1.

8/ A/C.3/46/4, annex I. Also contained in the Report on the International Meeting on the Roles and Functions of National Coordinating Committees on Disability in Developing Countries, Beijing, 5-11 November 1990 (CSDHA/DDP/NDC/4). See also Economic and Social Council resolution 1991/8 and General Assembly resolution 46/96 of 16 December 1991.

9/ General Assembly resolution 46/119 of 17 December 1991, annex.

10/ Standard Rules, (see note 6 above), Introduction, para. 15.

11/ See A/47/415, passim.

12/ Ibid., para. 5.

13/ Standard Rules, (see note 6 above) Rule 1.

14/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 3.

15/ See note 8 above.

16/ See A/47/415, paras. 37-38.

17/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 25.

18/ See E/CN.4/Sub.2/1991/31 (see note 1 above), para. 140.

19/ See A/47/415, paras. 35, 46, 74 and 77.

20/ See note 9 above.

21/ Standard Rules (see note 6 above), Rule 7.

22/ See A/CONF.157/PC/61/Add.10, p. 12.

23/ See also Recommendation No. 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation No. 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities.

24/ Standard Rules (see note 6 above) Rule 8, para. 1.

25/ See A/47/415, para. 78.

26/ See E/CN.4/Sub.2/1991/31 (see note 1 above), paras. 190 and 193.

27/ See the World Programme of Action concerning Disabled Persons (see note 3 above) para. 74.

28/ Standard Rules (see note 6 above), Rule 9, para. 2.

29/ See E/CN.6/1991/2, paras. 14 and 59-68.

30/ Standard Rules (see note 6 above), Rule 4.

31/ Ibid., Rule 2, para. 3.

32/ See the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX) of 9 December 1975), para. 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paras. 95-107.

33/ Standard Rules (see note 6 above), Rule 3.

34/ See A/47/415 para. 73.

35/ Standard Rules (see note 6 above), Rule 6.

36/ ibid., Rule 10, paras.1-2

37/ See A/47/415 para. 79

F. No. 6- The Economic, Social and Cultural Rights of Older Persons (1995)

1. Introduction

1. The world population is ageing at a steady, quite spectacular rate. The total number of persons aged 60 and above rose from 200 million in 1950 to 400 million in 1982 and is projected to reach 600 million in the year 2001 and 1.2 billion by the year 2025, at which time over 70 per cent of them will be living in what are today's developing countries. The number of people aged 80 and above has grown and continues to grow even more dramatically, going from 13 million in 1950 to over 50 million today and projected to increase to 137 million in 2025. This is the fastest growing population group in the world, projected to increase by a factor of 10 between 1950 and 2025, compared with a factor of six for the group aged 60 and above and a factor of little more than three for the total population. 1/

2. These figures are illustrations of a quiet revolution, but one which has far-reaching and unpredictable consequences and which is now affecting the social and economic structures of societies both at the world level and at the country level, and will affect them even more in future.

3. Most of the States Parties to the Covenant, and the industrialized countries in particular, are faced with the task of adapting their social and economic policies to the ageing of their populations, especially as regards social security. In the developing countries, the absence or deficiencies of social security coverage are being aggravated by the emigration of the younger members of the population and the consequent weakening of the traditional role of the family, the main support of older people.

2. Internationally endorsed policies in relation to older persons

4. In 1982 the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing. This important document was endorsed by the General Assembly and is a very useful guide, for it details the measures that should be taken by Member States to safeguard the rights of older persons within the context of the rights proclaimed by the International Covenants on Human Rights. It contains 62 recommendations, many of which are of direct relevance to the Covenant. 2/

5. In 1991 the General Assembly adopted the United Nations Principles for Older Persons which, because of their programmatic nature, is also an important document in the present context. 3/ It is divided into five sections which correlate closely to the rights recognized in the Covenant. "Independence" includes access to adequate food, water, shelter, clothing and health care. To these basic rights are added the opportunity to remunerated work and access to education and training. By "participation" is meant that older persons should participate actively in the formulation and implementation of policies that affect their well-being and share their knowledge and skills with younger generations, and should be able to form movements and associations. The section headed "care" proclaims that older persons should benefit from family care, health care and be able to enjoy human rights and fundamental freedoms when residing in a shelter, care or treatment facility. With regard to "self-fulfilment", the Principles that older persons should pursue opportunities for the full development of their potential

through access to the educational, cultural, spiritual and recreational resources of their societies. Lastly, the section entitled "dignity" states that older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse, should be treated fairly, regardless of age, gender, racial or ethnic background, disability, financial situation or any other status, and be valued independently of their economic contribution.

6. In 1992, the General Assembly adopted eight global targets on ageing for the year 2001 and a brief guide for setting national targets. In a number of important respects, these global targets serve to reinforce the obligations of States Parties to the Covenant. 4/

7. Also in 1992, and in commemoration of the tenth anniversary of the adoption of the Vienna International Plan of Action by the Conference on Ageing, the General Assembly adopted the Proclamation on Ageing in which it urged support of national initiatives on ageing so that older women are given adequate support for their largely unrecognized contributions to society and older men are encouraged to develop social, cultural and emotional capacities which they may have been prevented from developing during breadwinning years; families are supported in providing care and all family members encouraged to cooperate in caregiving; and that international cooperation is expanded in the context of the strategies for reaching the global targets on ageing for the year 2001. It also proclaimed the year 1999 as the International Year of Older Persons in recognition of humanity's demographic "coming of age". 5/

8. The United Nations specialized agencies, especially the International Labour Organization, have also given attention to the problem of ageing in their respective fields of competence.

3. The rights of older persons in relation to the International Covenant on Economic, Social and Cultural Rights

9. The terminology used to describe older persons varies considerably, even in international documents. It includes: "older persons", "the aged", "the elderly", "the third age", "the ageing", and, to denote persons more than 80 years of age, "the fourth age". The Committee opted for "older persons" (in French, personnes âgées; in Spanish, personas mayores), the term employed in General Assembly resolutions 47/5 and 48/98. According to the practice in the United Nations statistical services, these terms cover persons aged 60 and above (Eurostat, the statistical service of the European Union, considers "older persons" to mean persons aged 65 or above, since 65 is the most common age of retirement and the trend is towards later retirement still).

10. The International Covenant on Economic, Social and Cultural Rights does not contain any explicit reference to the rights of older persons, although article 9 dealing with "the right of everyone to social security, including social insurance", implicitly recognizes the right to old-age benefits. Nevertheless, in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognized in the Covenant. This approach is also fully reflected in the Vienna International Plan of Action on Ageing. Moreover, in so far as respect for the rights of older persons requires special measures to be taken, States Parties are required by the Covenant to do so to the maximum of their available resources.

11. Another important issue is whether discrimination on the basis of age is prohibited by the Covenant. Neither the Covenant nor the Universal Declaration of Human Rights refers explicitly

to age as one of the prohibited grounds. Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now.

12. This is not determinative of the matter, however, since the prohibition of discrimination on the grounds of "other status" could be interpreted as applying to age. The Committee notes that while it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited. Moreover, it must be emphasised that the unacceptableness of discrimination against older persons is underlined in many international policy documents and is confirmed in the legislation of the vast majority of States. In the few areas in which discrimination continues to be tolerated, such as in relation to mandatory retirement ages or access to tertiary education, there is a clear trend towards the elimination of such barriers. The Committee is of the view that States Parties should seek to expedite this trend to the greatest extent possible.

13. Accordingly, the Committee on Economic, Social and Cultural Rights is of the view that States Parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons. The Committee's own role in this regard is rendered all the more important by the fact that, unlike the case of other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area.

14. By the end of its thirteenth session, the Committee and, before that, its predecessor, the Sessional Working Group of Governmental Experts, had examined 144 initial reports, 70 second periodic reports and 20 initial and periodic global reports on articles 1 to 15. This examination made it possible to identify many of the problems that may be encountered in implementing the Covenant in a considerable number of States Parties that represent all the regions of the world and have different political, socio-economic and cultural systems. The reports examined to date have not provided any information in a systematic way on the situation of older persons with regard to compliance with the Covenant, apart from information, of varying completeness, on the implementation of article 9 relating to the right to social security.

15. In 1993, the Committee devoted a day of general discussion to this issue in order to plan its future activity in this area. Moreover, it has, at recent sessions, begun to attach substantially more importance to information on the rights of older persons and its questioning has elicited some very valuable information in some instances. Nevertheless, the Committee notes that the great majority of States Parties reports continue to make little reference to this important issue. It therefore wishes to indicate that, in future, it will insist that the situation of older persons in relation to each of the rights recognized in the Covenant should be adequately addressed in all reports. The remainder of this General Comment identifies the specific issues which are relevant in this regard.

4. General obligations of States Parties

16. Older persons as a group are as heterogeneous and varied as the rest of the population and their situation depends on a country's economic and social situation, on demographic, environmental cultural and employment factors and, at the individual level, on the family situation, the level of education, the urban or rural environment and the occupation of workers and retirees.

17. Side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries, and who feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring of the economy, older persons are particularly at risk. As the Committee has previously stressed (General Comment No. 3 (1990), para. 12), even in times of severe resource constraints, States Parties have the duty to protect the vulnerable members of society.

18. The methods that States Parties use to fulfil the obligations they have assumed under the Covenant in respect of older persons will be basically the same as those for the fulfilment of other obligations (see General Comment No. 1 (1989)). They include the need to determine the nature and scope of problems within a State through regular monitoring, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation and the need to ensure the relevant budget support or, as appropriate, to request international cooperation. In the latter connection, international cooperation in accordance with articles 22 and 23 of the Covenant may be a particularly important way of enabling some developing countries to fulfil their obligations under the Covenant.

19. In this context, attention may be drawn to Global target No. 1, adopted by the General Assembly in 1992, which calls for the establishment of national support infrastructures to promote policies and programmes on ageing in national and international development plans and programmes. In this regard, the Committee notes that one of the United Nations Principles for Older Persons which Governments were encouraged to incorporate into their national programmes is that older persons should be able to form movements or associations of older persons.

5. Specific provisions of the Covenant

Article 3: Equal rights of men and women

20. In accordance with article 3 of the Covenant, by which States Parties undertake "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights", the Committee considers that States Parties should pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations.

21. To deal with such situations and comply fully with article 9 of the Covenant and paragraph 2 (h) of the Proclamation on Ageing, States Parties should institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without

resources on attaining an age specified in national legislation. Given their greater life expectancy and the fact that it is more often they who have no contributory pensions, women would be the principal beneficiaries.

Articles 6 to 8: Rights relating to work

22. Article 6 of the Covenant requires States Parties to take appropriate steps to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted. In this regard, the Committee, bearing in mind that older workers who have not reached retirement age often encounter problems in finding and keeping jobs, stresses the need for measures to prevent discrimination on grounds of age in employment and occupation. 6/

23. The right "to the enjoyment of just and favourable conditions of work" (Covenant, art. 7) is of special importance for ensuring that older workers enjoy safe working conditions until their retirement. In particular, it is desirable, to employ older workers in circumstances in which the best use can be made of their experience and know-how. 7/

24. In the years preceding retirement, retirement preparation programmes should be implemented, with the participation of representative organizations of employers and workers and other bodies concerned, to prepare older workers to cope with their new situation. Such programmes should, in particular, provide older workers with information about: their rights and obligations as pensioners; the opportunities and conditions for continuing an occupational activity or undertaking voluntary work; means of combating detrimental effects of ageing; facilities for adult education and cultural activities, and the use of leisure time. 8/

25. The rights protected by article 8 of the Covenant, namely, trade union rights, including after retirement age, must be applied to older workers.

Article 9: Right to social security

26. Article 9 of the Covenant provides generally that States Parties "recognize the right of everyone to social security", without specifying the type or level of protection to be guaranteed. However, the term "social security" implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person's control.

27. In accordance with article 9 of the Covenant and the provisions concerning implementation of the ILO social security conventions - Convention No. 102 concerning Social Security (Minimum Standards) (1952) and Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967) - States Parties must take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law.

28. In keeping with the recommendations contained in the two ILO Conventions mentioned above and Recommendation No. 162, the Committee invites States Parties to establish retirement age so that it is flexible, depending on the occupations performed and the working ability of elderly persons, with due regard to demographic, economic and social factors.

29. In order to give effect to the provisions of article 9 of the Covenant, States Parties must guarantee the provision of survivors' and orphans' benefits on the death of the breadwinner who was covered by social security or receiving a pension.

30. Furthermore, as already observed in paragraphs 20 and 21, in order fully to implement the provisions of article 9 of the Covenant, States Parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.

Article 10: Protection of the family

31. On the basis of article 10, paragraph 1, of the Covenant and recommendations 25 and 29 of the Vienna International Plan of Action on Ageing, States Parties should make all the necessary efforts to support, protect and strengthen the family and help it, in accordance with each society's system of cultural values, to respond to the needs of its dependent ageing members. Recommendation 29 encourages Governments and non-governmental organizations to establish social services to support the whole family when there are elderly people at home and to implement measures especially for low-income families who wish to keep elderly people at home. This assistance should also be provided for persons living alone or elderly couples wishing to remain at home.

Article 11: Right to an adequate standard of living

32. Of the United Nations Principles for Older Persons, principle 1, which stands at the beginning of the section relating to the independence of older persons, provides that: "Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help". The Committee attaches great importance to this principle, which demands for older persons the rights contained in article 11 of the Covenant.

33. Recommendations 19 to 24 of the Vienna International Plan of Action on Ageing emphasize that housing for the elderly must be viewed as more than mere shelter and that, in addition to the physical, it has psychological and social significance which should be taken into account. Accordingly, national policies should help elderly persons to continue to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of those persons to gain access to and use them (recommendation 19). Recommendation 20 stresses the need for urban rebuilding and development planning and law to pay special attention to the problems of the ageing, assisting in securing their social integration, while recommendation 22 draws attention to the need to take account of the functional capacity of the elderly in order to provide them with a better living environment and facilitate mobility and communication through the provision of adequate means of transport.

Article 12: Right to physical and mental health

34. With a view to the realization of the right of elderly persons to the enjoyment of a satisfactory standard of physical and mental health, in accordance with article 12, paragraph 1, of the Covenant, States Parties should take account of the content of recommendations 1 to 17 of the Vienna International Plan of Action on Ageing, which focus entirely on providing guidelines on health policy to preserve the health of the elderly and take a comprehensive view, ranging from prevention and rehabilitation to the care of the terminally ill.

35. Clearly, the growing number of chronic, degenerative diseases and the high hospitalization costs they involve cannot be dealt with only by curative treatment. In this regard, States Parties should bear in mind that maintaining health into old age requires investments during the entire life span, basically through the adoption of healthy lifestyles (food, exercise, elimination of tobacco and alcohol, etc.). Prevention, through regular checks suited to the needs of the elderly, plays a decisive role, as does rehabilitation, by maintaining the functional capacities of elderly persons, with a resulting decrease in the cost of investments in health care and social services.

Articles 13 to 15: Right to education and culture

36. Article 13, paragraph 1, of the Covenant recognizes the right of everyone to education. In the case of the elderly, this right must be approached from two different and complementary points of view: (a) the right of elderly persons to benefit from educational programmes; and (b) making the know-how and experience of elderly persons available to younger generations.

37. With regard to the former, States Parties should take account of: (a) the recommendations in principle 16 of the United Nations Principles for Older Persons to the effect that older persons should have access to suitable education programmes and training and should, therefore, on the basis of their preparation, abilities and motivation, be given access to the various levels of education through the adoption of appropriate measures regarding literacy training, life-long education, access to university, etc.; and (b) recommendation 47 of the Vienna International Plan of Action on Ageing, which, in accordance with the concept of life-long education promulgated by the United Nations Educational, Scientific and Cultural Organization (UNESCO), recommends informal, community-based and recreation-oriented programmes for the elderly in order to develop their sense of self-reliance and the community's sense of responsibility. Such programmes should enjoy the support of national Governments and international organizations.

38. With regard to the use of the know-how and experience of older persons, as referred to in the part of the recommendations of the Vienna International Plan of Action on Ageing dealing with education (paras. 74-76), attention is drawn to the important role that elderly and old persons still play in most societies as the transmitters of information, knowledge, traditions and spiritual values and to the fact that this important tradition should not be lost. Consequently, the Committee attaches particular importance to the message contained in recommendation 44 of the Plan: "Educational programmes featuring the elderly as the teachers and transmitters of knowledge, culture and spiritual values should be developed".

39. In article 15, paragraphs 1 (a) and (b), of the Covenant, States Parties recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. In this respect, the Committee urges States Parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7: "Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations"; and principle 16: "Older persons should have access to the educational, cultural, spiritual and recreational resources of society".

40. Similarly, recommendation 48 of the Vienna International Plan of Action on Ageing encourages Governments and international organizations to support programmes aimed at providing the elderly with easier physical access to cultural institutions (museums, theatres, concert halls, cinemas, etc.).

41. Recommendation 50 stresses the need for Governments, non-governmental organizations and the ageing themselves to make efforts to overcome negative stereotyped images of older persons as suffering from physical and psychological disabilities, incapable of functioning independently and having neither role nor status in society. These efforts, in which the media and educational institutions should also take part, are essential for achieving a society that champions the full integration of the elderly.

42. With regard to the right to enjoy the benefits of scientific progress and its applications, States Parties should take account of recommendations 60, 61 and 62 of the Vienna International Plan of Action and make efforts to promote research on the biological, mental and social aspects of ageing and ways of maintaining functional capacities and preventing and delaying the start of chronic illnesses and disabilities. In this connection, it is recommended that States, intergovernmental organizations and non-governmental organizations should establish institutions specializing in the teaching of gerontology, geriatrics and geriatric psychology in countries where such institutions do not exist.

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Notes

* Contained in document E/1996/22.

1/ Global targets on ageing for the year 2001: a practical strategy. Report of the Secretary-General (A/47/339), para. 5.

2/ Report of the World Assembly on Ageing, Vienna, 26 July-6 August 1982; (United Nations publication, Sales No. E.82.I.16).

3/ General Assembly resolution 46/91 of 16 December 1991, “Implementation of the International Plan of Action on Ageing and related activities”, annex.

4/ Global targets on ageing for the year 2001: a practical strategy (A/47/339), chapters III and IV.

5/ General Assembly resolution 47/5 of 16 October 1992, “Proclamation on Ageing”.

6/ See ILO Recommendation 162 (1980) concerning Older Workers, paras. 3-10.

7/ Ibid., paras. 11-19.

8/ Ibid., para. 30.

G. No. 7- The Right to Adequate Housing (Art.11(1), Forced Evictions) (1997)*

1. In its General Comment No. 4 (1991), the Committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. It concluded that forced evictions are *prima facie* incompatible with the requirements of the Covenant. Having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States Parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.

2. The international community has long recognized that the issue of forced evictions is a serious one. In 1976, the United Nations Conference on Human Settlements noted that special attention should be paid to "undertaking major clearance operations should take place only when conservation and rehabilitation are not feasible and relocation measures are made". 1/ In 1988, in the Global Strategy for Shelter to the Year 2000, adopted by the General Assembly in its resolution 43/181, the "fundamental obligation [of Governments] to protect and improve houses and neighbourhoods, rather than damage or destroy them" was recognized. 2/ Agenda 21 stated that "people should be protected by law against unfair eviction from their homes or land". 3/ In the Habitat Agenda Governments committed themselves to "protecting all people from, and providing legal protection and redress for, forced evictions that are contrary to the law, taking human rights into consideration; [and] when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided". 4/ The Commission on Human Rights has also indicated that "forced evictions are a gross violation of human rights". 5/ However, although these statements are important, they leave open one of the most critical issues, namely that of determining the circumstances under which forced evictions are permissible and of spelling out the types of protection required to ensure respect for the relevant provisions of the Covenant.

3. The use of the term "forced evictions" is, in some respects, problematic. This expression seeks to convey a sense of arbitrariness and of illegality. To many observers, however, the reference to "forced evictions" is a tautology, while others have criticized the expression "illegal evictions" on the ground that it assumes that the relevant law provides adequate protection of the right to housing and conforms with the Covenant, which is by no means always the case. Similarly, it has been suggested that the term "unfair evictions" is even more subjective by virtue of its failure to refer to any legal framework at all. The international community, especially in the context of the Commission on Human Rights, has opted to refer to "forced evictions", primarily since all suggested alternatives also suffer from many such defects. The term "forced evictions" as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among

* UN Doc. E/1998/22, annex IV.

all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

5. Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States Parties. Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is required so that any limitations imposed must be "determined by law only insofar as this may be compatible with the nature of these [i.e. economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society".

6. Many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.

8. In essence, the obligations of States Parties to the Covenant in relation to forced evictions are based on article 11.1, read in conjunction with other relevant provisions. In particular, article 2.1 obliges States to use "all appropriate means" to promote the right to adequate housing. However, in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (as defined in paragraph 3 above). Moreover, this approach is reinforced by article 17.1 of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, inter alia, the right to be protected against "arbitrary or unlawful interference" with one's home. It is to be noted that the State's obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

9. Article 2.1 of the Covenant requires States Parties to use "all appropriate means", including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its General Comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also

apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States Parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States Parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.

10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.

12. Forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction.

13. 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. Legal remedies or procedures should be provided to those who are affected by eviction orders. States Parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States Parties to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”.

14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. In this regard it is especially pertinent to recall General Comment 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person’s home can only take place “in cases envisaged by the law”. The Committee observed that the law “should be in accordance with the provisions, aims and objectives of the Covenant

and should be, in any event, reasonable in the particular circumstances". The Committee also indicated that "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted".

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. 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.

17. The Committee is aware that various development projects financed by international agencies within the territories of State Parties have resulted in forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which states, inter alia, that "international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account". 6/

18. Some institutions, such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of and human suffering associated with forced evictions. Such practices often accompany large-scale development projects, such as dam-building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and States Parties to the Covenant. The Committee recalls in this respect the statement in the Vienna Declaration and Programme of Action to the effect that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights" (Part I, para. 10).

19. In accordance with the guidelines for reporting adopted by the Committee, State Parties are requested to provide various types of information pertaining directly to the practice of forced evictions. This includes information relating to (a) the "number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction", (b) "legislation concerning the rights of tenants to security of tenure, to protection from eviction" and (c) "legislation prohibiting any form of eviction". 7/

20. Information is also sought as to "measures taken during, *inter alia*, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics and other sporting competitions, exhibitions, conferences, etc.) 'beautiful city' campaigns, etc. which guarantee protection from eviction or guarantee rehousing based on mutual consent, by any persons living on or near to affected sites". 8/ However, few States Parties have included the requisite information in their reports to the Committee. The Committee therefore wishes to emphasize the importance it attaches to the receipt of such information.

21. Some States Parties have indicated that information of this nature is not available. The Committee recalls that effective monitoring of the right to adequate housing, either by the Government concerned or by the Committee, is not possible in the absence of the collection of appropriate data and would request all States Parties to ensure that the necessary data is collected and is reflected in the reports submitted by them under the Covenant.

Notes

1/ Report of Habitat: United Nations Conference on Human Settlements, Vancouver, 31 May - 11 June 1976 (A/CONF.70/15), chap. II, recommendation B.8, para. C (ii).

2/ Report of the Commission on Human Settlements on the work of its eleventh session, Addendum (A/43/8/Add.1), para. 13.

3/ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (A/CONF.151/26/Rev.1(vol.I), annex II, Agenda 21, chap. 7.9 (b).

4/ Report of the United Nations Conference on Settlements (Habitat II) (A/CONF.165/14), annex II, The Habitat Agenda, para. 40 (n).

5/ Commission on Human Rights resolution 1993/77, para. 1.

6/ E/1990/23, annex III, paras. 6 and 8 (d).

7/ E/C.12/1999/8, annex IV.

8/ Ibid.

H. No. 8-The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights (1997)[*]

1. Economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. The purpose of this general comment is to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights. The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (arts. 1, 55 and 56) must still be considered to be fully applicable in such cases.

2. During the 1990s the Security Council has imposed sanctions of varying kind and duration in relation to South Africa, Iraq/Kuwait, parts of the former Yugoslavia, Somalia, the Libyan Arab Jamahiriya, Liberia, Haiti, Angola, Rwanda and the Sudan. The impact of sanctions upon the enjoyment of economic, social and cultural rights has been brought to the Committee's attention in a number of cases involving States Parties to the Covenant, some of which have reported regularly, thereby giving the Committee the opportunity to examine the situation carefully.

3. While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive Élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged Élites which manage it, enhancement of the control of the governing Élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights.

4. In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing Élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country.

5. However, a number of recent United Nations and other studies which have analysed the impact of sanctions have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not address, for example, the question of access to primary education, nor do they provide for repairs to infrastructures which are essential

[*] UN Doc. E/C.12/1997/8.

to provide clean water, adequate health care etc. The Secretary General suggested in 1995 that there is a need to assess the potential impact of sanctions before they are imposed and to enhance arrangements for the provision of humanitarian assistance to vulnerable groups.(1) In the following year, a major study prepared for the General Assembly by Ms. Graça Machel, on the impact of armed conflict on children, stated that "humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently. ... Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages. ...[Their effects] inevitably fall most heavily on the poor".(2) Most recently, an October 1997 United Nations report concluded that the review procedures established under the various sanctions committees established by the Security Council "remain cumbersome and aid agencies still encounter difficulties in obtaining approval for exempted supplies. ... [The] committees neglect larger problems of commercial and governmental violations in the form of black marketing, illicit trade, and corruption."(3)

6. It is thus clear, on the basis of an impressive array of both country specific and general studies, that insufficient attention is being paid to the impact of sanctions on vulnerable groups. Nevertheless, for various reasons, these studies have not examined specifically the nefarious consequences that ensue for the enjoyment of economic, social and cultural rights, per se. It is in fact apparent that in most, if not all, cases, those consequences have either not been taken into account at all or not given the serious consideration they deserve. There is thus a need to inject a human rights dimension into deliberations on this issue.

7. The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State (see also General Comment 3 (1990), para. 10).

8. While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it. Most of the non permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant 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 present Covenant by all appropriate means ...". When the affected State is also a State Party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.

9. Although the Committee has no role to play in relation to decisions to impose or not to impose sanctions, it does, however, have a responsibility to monitor compliance by all States Parties with the Covenant. When measures are taken which inhibit the ability of a State Party to meet its obligations under the Covenant, the terms of sanctions and the manner in which they are implemented become appropriate matters for concern for the Committee.

10. The Committee believes that two sets of obligations flow from these considerations. The first set relates to the affected State. The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State Party. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps "to the maximum of its available resources" to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction. While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.

11. The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural human rights.

12. First, these rights must be taken fully into account when designing an appropriate sanctions regime. Without endorsing any particular measures in this regard, the Committee notes proposals such as those calling for the creation of a United Nations mechanism for anticipating and tracking sanctions impacts, the elaboration of a more transparent set of agreed principles and procedures based on respect for human rights, the identification of a wider range of exempt goods and services, the authorization of agreed technical agencies to determine necessary exemptions, the creation of a better resourced set of sanctions committees, more precise targeting of the vulnerabilities of those whose behaviour the international community wishes to change, and the introduction of greater overall flexibility.

13. Second, effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force. When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population.

14. Third, the external entity has an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

15. In anticipating the objection that sanctions must, almost by definition, result in the grave violation of economic, social and cultural rights if they are to achieve their objectives, the Committee notes the conclusion of a major United Nations study to the effect that "decisions to reduce the suffering of children or minimize other adverse consequences can be taken without jeopardizing the policy aim of sanctions.(4) This applies equally to the situation of all vulnerable groups.

16. In adopting this general comment the sole aim of the Committee is to draw attention to the fact that the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.

Notes

1/ Supplement to an Agenda for Peace, (A/50.60 S/1995/1, paras. 66 to 76.

2/ Impact of Armed Conflict on children: Note by the Secretary General, (A/51/306, annex) (1996), para. 128.

3/ L. Minear, et al., Toward More Humane and Effective Sanctions Management : Enhancing the Capacity of the United Nations System, Executive Summary. Study prepared at the request of the United Nations Department of Humanitarian Affairs on behalf of the Inter agency Standing Committee, 6 October 1997.

4/ Ibid.

I. No. 9- The Domestic Application of the Covenant (1998)[*]

A. The duty to give effect to the Covenant in the domestic legal order

1. In its General Comment No. 3 (1990) on the nature of States Parties' obligations (art. 2, para. 1, of the Covenant) 1/ the Committee addressed issues relating to the nature and scope of States Parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States Parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

2. But this flexibility coexists with the obligation upon each State Party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, 2/ is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights, which obligates States Parties to, inter alia, "develop the possibilities of judicial remedy". Nevertheless, a State Party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual

[*] UN Doc. E/C.12/1998/24.

claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State Party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State Party. The means chosen are also subject to review as part of the Committee's examination of the State Party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

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

C. The role of legal remedies

Legal or judicial remedies?

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State Party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, 3/ in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability

10. 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. Thus, in General Comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. 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. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Self-executing

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered "non-self-executing" were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the

legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

D. The treatment of the Covenant in domestic courts

12. In the Committee's guidelines for States' reports, States are requested to provide information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities". 4/ Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States Parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

Notes

* Adopted at the 51st meeting on 1 December 1998 (nineteenth session).

1/ E/19991/23, annex III.

2/ United Nations, Treaty Series, vol. 1155, p. 331.

3/ Pursuant to article 2, paragraph 2, of the Covenant, States “undertake to guarantee” that the rights therein are exercised “without discrimination of any kind”.

4/ See E/1991/23, annex IV, chap. A, para. 1 (d) (iv).

J. No.10- The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights (1998)[*]

1. Article 2, paragraph 1, of the Covenant obligates each State Party "to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means". The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights. In recent years there has been a proliferation of these institutions and the trend has been strongly encouraged by the General Assembly and the Commission on Human Rights. The Office of the United Nations High Commissioner for Human Rights has established a major programme to assist and encourage States in relation to national institutions.

2. These institutions range from national human rights commissions through Ombudsman offices, public interest or other human rights "advocates", to "defensores del pueblo". In many cases, the institution has been established by the Government, enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country concerned, and is mandated to perform various activities designed to promote and protect human rights. Such institutions have been established in States with widely differing legal cultures and regardless of their economic situation.

3. The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:

   (a) The promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;

   (b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;

   (c) Providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;

   (d) The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;

   (e) Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realised, either within the State as a whole or in areas or in relation to communities of particular vulnerability;

[*] UN Doc. E/C.12/1998/25.

(f) Monitoring compliance with specific rights recognised under the Covenant and providing reports thereon to the public authorities and civil society; and

(g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.

4. The Committee calls upon States Parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights and requests States Parties to include details of both the mandates and the principal relevant activities of such institutions in their reports submitted to the Committee.

*K. No.11- Plans of Action for Primary Education (1999)**

1. Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State Party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. In spite of the obligations undertaken in accordance with article 14, a number of States Parties have neither drafted nor implemented a plan of action for free and compulsory primary education.

2. The right to education, recognised in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.

3. In line with its clear and unequivocal obligation under article 14, every State Party is under a duty to present to the Committee a plan of action drawn up along the lines specified in paragraph 8 below. This obligation needs to be scrupulously observed in view of the fact that in developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two thirds are girls. 1/ The Committee is fully aware that many diverse factors have made it difficult for States Parties to fulfil their obligation to provide a plan of action. For example, the structural adjustment programmes that began in the 1970s, the debt crises that followed in the 1980s and the financial crises of the late 1990s, as well as other factors, have greatly exacerbated the extent to which the right to primary education is being denied. These difficulties, however, cannot relieve States Parties of their obligation to adopt and submit a plan of action to the Committee, as provided for in article 14 of the Covenant.

4. Plans of action prepared by States Parties to the Covenant in accordance with article 14 are especially important as the work of the Committee has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.

5. Article 14 contains a number of elements which warrant some elaboration in the light of the Committee's extensive experience in examining State Party reports.

6. *Compulsory*. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be

* UN Doc. E/C.12/1999/4.

adequate in quality, relevant to the child and must promote the realization of the child's other rights.

7. *Free of charge*. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. This provision of compulsory primary education in no way conflicts with the right recognized in article 13.3 of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".

8. *Adoption of a detailed plan*. The State Party is required to adopt a plan of action within two years. This must be interpreted as meaning within two years of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation. This obligation is a continuing one and States Parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential. Without those elements, the significance of the article would be undermined.

9. *Obligations*. A State Party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources. By the same token, and for the same reason, the reference to "international assistance and cooperation" in article 2.1 and to "international action" in article 23 of the Covenant are of particular relevance in this situation. Where a State Party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist.

10. *Progressive implementation*. The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be "within a reasonable number of years" and moreover, that the time-frame must "be fixed in the plan". In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State Party's other obligations, such as non-discrimination, are required to be implemented fully and immediately.

11. The Committee calls upon every State Party to which article 14 is relevant to ensure that its terms are fully complied with and that the resulting plan of action is submitted to the Committee as an integral part of the reports required under the Covenant. Further, in appropriate cases, the Committee encourages States Parties to seek the assistance of relevant international agencies, including the International Labour Organization (ILO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), the International Monetary Fund (IMF) and the World Bank, in relation both to the preparation of plans of action under article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist States Parties to the greatest extent possible to meet their obligations on an urgent basis.

Notes

* Contained in document E/C.12/1999/4.

1/ See generally UNICEF, The State of the World's Children 1999.

L. No.12- The Right to Adequate Food (Article 11) (1999)[*]

Introduction and basic premises

1. The human right to adequate food is recognized in several instruments under international law. The International Covenant on Economic, Social and Cultural Rights deals more comprehensively than any other instrument with this right. Pursuant to article11.1 of the Covenant, States Parties 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", while pursuant to article 11.2 they recognize that more immediate and urgent steps may be needed to ensure "the fundamental right to freedom from hunger and malnutrition". The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in Article 11.1 to "himself and his family" does not imply any limitation upon the applicability of this right to individuals or to female-headed households.

2. The Committee has accumulated significant information pertaining to the right to adequate food through examination of State Parties' reports over the years since 1979. The Committee has noted that while reporting guidelines are available relating to the right to adequate food, only few States Parties have provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization. This General Comment aims to identify some of the principal issues which the Committee considers to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit, for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.

3. In response to these requests, the Committee reviewed the relevant reports and documentation of the Commission on Human Rights and of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to adequate food as a human right; devoted a day of general discussion to this issue at its seventeenth session in 1997, taking into consideration the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations; participated in two expert consultations on the right to adequate food as a human right organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in Geneva in December 1997, and in Rome in November 1998 co-hosted by the Food and Agriculture Organization of the United Nations (FAO), and noted their final reports. In April 1999 the Committee participated in a symposium on "The substance and politics of a human rights approach to food and nutrition policies and programmes", organized by the Administrative Committee on Co-ordination/Sub-Committee on Nutrition of the United Nations at its twenty-sixth session in Geneva and hosted by OHCHR.

4. The Committee affirms that 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

[*] UN Doc. E/C.12/1999/5.

enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

5. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world. More than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of natural disasters, the increasing incidence of civil strife and wars in some regions and the use of food as a political weapon. The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger, also exist in some of the most economically developed countries. Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population.

Normative content of article 11, paragraphs 1 and 2

6. The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.

Adequacy and sustainability of food availability and access

7. The concept of adequacy is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant. The notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations. The precise meaning of "adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while "sustainability" incorporates the notion of long-term availability and accessibility.

8. The Committee considers that the core content of the right to adequate food implies:

   The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

   The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. *Dietary needs* implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.

10. *Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. *Cultural or consumer acceptability* implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. *Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

13. *Accessibility* encompasses both economic and physical accessibility:

    Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

    Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

Obligations and violations

14. The nature of the legal obligations of States Parties are set out in article 2 of the Covenant and has been dealt with in the Committee's General Comment No. 3 (1990). The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is

obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States Parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. 1/ The obligation to respect existing access to adequate food requires States Parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.

16. Some measures at these different levels of obligations of States Parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State Party to comply. Should a State Party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State Party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State

to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

20. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector – national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

Implementation at the national level

21. The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State Party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State Party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.

22. The strategy should be based on a systematic identification of policy measures and activities relevant to the situation and context, as derived from the normative content of the right to adequate food and spelled out in relation to the levels and nature of State Parties' obligations referred to in paragraph 15 of the present general comment. This will facilitate coordination between ministries and regional and local authorities and ensure that related policies and administrative decisions are in compliance with the obligations under article 11 of the Covenant.

23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

24. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time-frame for the implementation of the necessary measures.

25. The strategy should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. Care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels.

26. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).

27. As part of their obligations to protect people's resource base for food, States Parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.

28. Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

Benchmarks and framework legislation

29. In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, 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. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States Parties should actively involve civil society organizations.

30. Appropriate United Nations programmes and agencies should assist, upon request, in drafting the framework legislation and in reviewing the sectoral legislation. FAO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of food and agriculture. The United Nations Children's Fund (UNICEF) has equivalent expertise concerning legislation with regard to the right to adequate food for infants and young children through maternal and child protection including legislation to enable breast-feeding, and with regard to the regulation of marketing of breast milk substitutes.

Monitoring

31. States Parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

Remedies and accountability

32. Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.

33. The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.

34. Judges and other members of the legal profession are invited to pay greater attention to violations of the right to food in the exercise of their functions.

35. States Parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food.

International obligations

States Parties

36. In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States Parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States Parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States Parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

37. States Parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

States and international organizations

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR),

and increasingly that of UNICEF and FAO is of particular importance in this respect and should be strengthened. Priority in food aid should be given to the most vulnerable populations.

39. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.

The United Nations and other international organizations

40. The role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance. Coordinated efforts for the realization of the right to food should be maintained to enhance coherence and interaction among all the actors concerned, including the various components of civil society. The food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD) in conjunction with the United Nations Development Programme (UNDP), UNICEF, the World Bank and the regional development banks, should cooperate more effectively, building on their respective expertise, on the implementation of the right to food at the national level, with due respect to their individual mandates.

41. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's General Comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.

Notes

1/ Originally three levels of obligations were proposed: to respect, protect and assist/fulfil. (See Right to adequate food as a human right, Study Series No. 1, New York, 1989 (United Nations publication, Sales No. E.89.XIV.2).) The intermediate level of "to facilitate" has been proposed as a Committee category, but the Committee decided to maintain the three levels of obligation.

M. No.13- The Right to Education (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (1999)[*]

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

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law. The Committee has already adopted General Comment 11 on article 14 (plans of action for primary education); General Comment 11 and the present general comment are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States Parties.

3. With a view to assisting States Parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 13 (Part I, paras. 4-42), some of the obligations arising from it (Part II, paras. 43-57), and some illustrative violations (Part II, paras. 58-59). Part III briefly remarks upon the obligations of actors other than States Parties. The general comment is based upon the Committee's experience in examining States Parties, reports over many years.

I. NORMATIVE CONTENT OF ARTICLE 13

Article 13 (1): Aims and objectives of education

4. States Parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality".

[*] UN Doc. E/C.12/1999/10.

5. The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States Parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13 (1) of the Covenant, they also include elements which are not expressly provided for in article 13 (1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13 (1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world. 2/

Article 13 (2): The right to receive an education - some general remarks

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State Party, education in all its forms and at all levels shall exhibit the following interrelated and essential features: 3/

(a) ***Availability*** - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) ***Accessibility*** - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States Parties are required to progressively introduce free secondary and higher education;

(c) ***Acceptability*** **-** the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) ***Adaptability*** - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these "interrelated and essential features" the best interests of the student shall be a primary consideration.

Article 13 (2) (a): The right to primary education

8. Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. 4/

9. The Committee obtains guidance on the proper interpretation of the term "primary education" from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community" (art. 5). "[B]asic learning needs" are defined in article 1 of the World Declaration. 5/ While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: "Primary education is the most important component of basic education." 6/

10. As formulated in article 13 (2) (a), primary education has two distinctive features: it is "compulsory" and "available free to all". For the Committee's observations on both terms, see paragraphs 6 and 7 of General Comment 11 on article 14 of the Covenant.

Article 13 (2) (b): The right to secondary education

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. 7/

12. While the content of secondary education will vary among States Parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. 8/ Article 13 (2) (b) applies to secondary education "in its different forms", thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages "alternative" educational programmes which parallel regular secondary school systems.

13. According to article 13 (2) (b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation of "accessible", see paragraph 6 above. The phrase "every appropriate means" reinforces the point that States Parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

14. "[P]rogressive introduction of free education" means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. For the Committee's general observations on the meaning of the word "free", see paragraph 7 of General Comment 11 on article 14.

Technical and vocational education

15. Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6 (2)). Article 13 (2) (b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. Article 6 (2), however, does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping "to achieve steady economic, social and cultural development and full and productive employment". Also, the Universal Declaration of Human Rights states that "[t]echnical and professional education shall be made generally available" (art. 26 (1)). Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.9/

16. An introduction to technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education. According to the UNESCO Convention on Technical and Vocational Education (1989), TVE consists of "all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life" (art. 1 (a)). This view is also reflected in certain ILO Conventions. 10/ Understood in this way, the right to TVE includes the following aspects:

    (a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State Party's economic and social development;

    (b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;

    (c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;

(d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;

(e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

Article 13 (2) (c): The right to higher education

17. Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels. 11/

18. While article 13 (2) (c) is formulated on the same lines as article 13 (2) (b), there are three differences between the two provisions. Article 13 (2) (c) does not include a reference to either education "in its different forms" or specifically to TVE. In the Committee's opinion, these two omissions reflect only a difference of emphasis between article 13 (2) (b) and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available "in different forms". As for the lack of reference in article 13 (2) (c) to technical and vocational education, given article 6 (2) of the Covenant and article 26 (1) of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education. 12/

19. The third and most significant difference between article 13 (2) (b) and (c) is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13 (2) (c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.

20. So far as the wording of article 13 (2) (b) and (c) is the same (e.g. "the progressive introduction of free education"), see the previous comments on article 13 (2) (b).

Article 13 (2) (d): The right to fundamental education

21. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. 13/

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All. 14/ By virtue of article 13 (2) (d), individuals "who have not received or completed the whole period of their primary education" have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

23. Since everyone has the right to the satisfaction of their "basic learning needs" as understood by the World Declaration, the right to fundamental education is not confined to those "who have not received or completed the whole period of their primary education". The right to

fundamental education extends to all those who have not yet satisfied their "basic learning needs".

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

Article 13 (2) (e): A school system; adequate fellowship system; material conditions of teaching staff

25. The requirement that the "development of a system of schools at all levels shall be actively pursued" means that a State Party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States Parties to prioritize primary education (see para. 51). "[A]ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

26. The requirement that "an adequate fellowship system shall be established" should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

27. While the Covenant requires that "the material conditions of teaching staff shall be continuously improved", in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States Parties in recent years. Not only is this inconsistent with article 13 (2) (e), but it is also a major obstacle to the full realization of students' right to education. The Committee also notes the relationship between articles 13 (2) (e), 2 (2), 3 and 6-8 of the Covenant, including the right of teachers to organize and bargain collectively; draws the attention of States Parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States Parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

Article 13 (3) and (4): The right to educational freedom

28. Article 13 (3) has two elements, one of which is that States Parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions. 15/ The Committee is of the view that this element of article 13 (3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

29. The second element of article 13 (3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to "such minimum educational standards as may be laid down or approved by the State". This has to be read with the complementary provision, article 13 (4), which affirms "the liberty of individuals and bodies to establish and direct educational institutions", provided the institutions conform to the educational objectives set out in article 13 (1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13 (1).

30. Under article 13 (4), everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to "bodies", i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society.

Article 13: Special topics of broad application

Non-discrimination and equal treatment

31. The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2 (2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues.

32. The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

33. In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2 (2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960). 16/

34. The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status.

35. Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.

36. The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36-42 of its General Comment 6, which address the issue of older persons in relation to articles 13-15 of the Covenant.

37. States Parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.

Academic freedom and institutional autonomy 17/

38. In the light of its examination of numerous States Parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom and many of the following observations have general application.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

Discipline in schools 18/

41. In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. 19/ Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State Party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States Parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

Limitations on article 13

42. The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State Party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

II. STATES PARTIES' OBLIGATIONS AND VIOLATIONS

General legal obligations

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States Parties various obligations which are of immediate effect. 20/ States Parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art. 2 (2)) and the obligation "to take steps" (art. 2 (1)) towards the full realization of article 13. 21/ Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education.

44. The realization of the right to education over time, that is "progressively", should not be interpreted as depriving States Parties' obligations of all meaningful content. Progressive realization means that States Parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13. 22/

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State Party's maximum available resources. 23/

46. The right to education, like all human rights, imposes three types or levels of obligations on States Parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and n obligation to provide.

47. The obligation to respect requires States Parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States Parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States Parties have an obligation to fulfil (provide) the right to education. As a general rule, States Parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States Parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State Party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States Parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States Parties.

Specific legal obligations

49. States Parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13 (1). 24/ They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13 (1).

50. In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

51. As already observed, the obligations of States Parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States Parties are obliged to prioritize the introduction of compulsory, free primary education. 25/ This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States Parties.

52. In relation to article 13 (2) (b)-(d), a State Party has an immediate obligation "to take steps" (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State Party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.

53. Under article 13 (2) (e), States Parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups. 26/ The obligation to pursue actively the "development of a system of schools at all levels" reinforces the principal responsibility of States Parties to ensure the direct provision of the right to education in most circumstances. 27/

54. States Parties are obliged to establish "minimum educational standards" to which all educational institutions established in accordance with article 13 (3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State Party has no obligation to fund institutions established in accordance with article 13 (3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.

55. States Parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7 (2) of the Worst Forms of Child Labour Convention, 1999 (Convention No. 182). 28/ Additionally, given article 2 (2), States Parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups.

56. In its General Comment 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, such as the right to education. 29/ Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States Parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States Parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States Parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.

57. In its General Comment 3, the Committee confirmed that States Parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education". In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy

which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4)).

Violations

58. When the normative content of article 13 (Part I) is applied to the general and specific obligations of States Parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States Parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with article 13 (1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13 (2) (b)-(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the "minimum educational standards" required by article 13 (3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

III. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

60. Given article 22 of the Covenant, the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realization of article 13. Coordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their cooperation for the mplementation of the right to education at the national level, with due respect to their specific mandates, and building on their respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis. 30/ When examining the reports of States Parties, the Committee will consider the effects of the assistance provided by all actors other than States Parties on the ability of States to meet their obligations under article 13. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to education.

Notes

1/ Contained in document E/C.12/1999/10.

2/ The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States Parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

3/ This approach corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education. In its General Comment 4, the Committee identified a number of factors which bear upon the right to adequate housing, including "availability", "affordability", "accessibility" and "cultural adequacy". In its General Comment 12, the Committee identified elements of the right to adequate food, such as "availability", "acceptability" and "accessibility". In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out "four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability", (E/CN.4/1999/49, para. 50).

4/ See para. 6.

5/ The Declaration defines "basic learning needs" as: "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning" (art. 1).

6/ Advocacy Kit, Basic Education 1999 (UNICEF), section 1, p. 1.

7/ See para. 6.

8/ See International Standard Classification of Education 1997, UNESCO, para. 52.

9/ A view also reflected in the Human Resources Development Convention 1975 (Convention No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention No. 117) of the International Labour Organization.

10/ See note 8.

11/ See para. 6.

12/ 11 See para. 15.

13/ 12 See para. 6.

14/ See para. 9.

15/ This replicates article 18 (4) of the International Covenant on Civil and Political Rights (ICCPR) and also relates to the freedom to teach a religion or belief as stated in article 18 (1) ICCPR. (See Human Rights Committee General Comment 22 on article 18 ICCPR, forty-eighth session, 1993.) The Human Rights Committee notes that the fundamental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of that Covenant.

16/ According to article 2:

"When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level."

17/ See UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

18/ In formulating this paragraph, the Committee has taken note of the practice evolving elsewhere in the international human rights system, such as the interpretation given by the Committee on the Rights of the Child to article 28 (2) of the Convention on the Rights of the Child, as well as the Human Rights Committee's interpretation of article 7 of ICCPR.

19/ The Committee notes that, although it is absent from article 26 (2) of the Declaration, the drafters of ICESCR expressly included the dignity of the human personality as one of the mandatory objectives to which all education is to be directed (art. 13 (1)).

20/ See the Committee's General Comment 3, para. 1.

21/ See the Committee's General Comment 3, para. 2.

22/ See the Committee's General Comment 3, para. 9.

23/ See the Committee's General Comment 3, para. 9.

24/ There are numerous resources to assist States Parties in this regard, such as UNESCO's Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13 (1) is to "strengthen the respect of human rights and fundamental freedoms"; in this particular context, States Parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education - especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education.

25/ On the meaning of "compulsory" and "free", see paragraphs 6 and 7 of General Comment 11 on article 14.

26/ In appropriate cases, such a fellowship system would be an especially appropriate target for the international assistance and cooperation anticipated by article 2 (1).

27/ In the context of basic education, UNICEF has observed: "Only the State can pull together all the components into a coherent but flexible education system". UNICEF, The State of the World's Children, 1999, "The education revolution", p. 77.

28/ According to article 7 (2), "(e)ach Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour" (ILO Convention 182, Worst Forms of Child Labour, 1999).

29/ See the Committee's General Comment 3, paras. 13-14.

30/ See the Committee's General Comment 2, para. 9.

N. No.14-The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000)[*]

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable. (1)

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "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". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States Parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States Parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights, (2) as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments. (3)

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-

[*] UN Doc. E/C.12/2000/4

economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States Parties.

6. With a view to assisting States Parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States Parties' obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States Parties are addressed in Part V. The General Comment is based on the Committee's experience in examining States Parties' reports over many years.

I. NORMATIVE CONTENT OF ARTICLE 12

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States Parties' obligations.

8. The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict. (4) Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the

rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State Party:

    (a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State Party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State Party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs. (5)

    (b) *Accessibility*. Health facilities, goods and services (6) have to be accessible to everyone without discrimination, within the jurisdiction of the State Party. Accessibility has four overlapping dimensions:

        Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. (7)

        Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

        Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.

Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

Information accessibility: accessibility includes the right to seek, receive and impart information and ideas (8) concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) *Acceptability*. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs. (9)

Article 12.2 (a). The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a)) (10) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, (11) emergency obstetric services and access to information, as well as to resources necessary to act on that information. (12)

Article 12.2 (b). The right to healthy natural and workplace environments

15. "The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. (13) Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment. (14) Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

Article 12.2 (c). The right to prevention, treatment and control of diseases

16. "The prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States' individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d). The right to health facilities, goods and services (15)

17. "The creation of conditions which would assure to all medical service and medical attention in the event of sickness" (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

Article 12. Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, 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. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any

discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. (16) Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

Children and adolescents

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness. (17)

    The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children. (18) Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States Parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

Older persons

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of General Comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

Persons with disabilities

26. The Committee reaffirms paragraph 34 of its General Comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples, (19) the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State Party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

II. STATES PARTIES' OBLIGATIONS

General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States Parties various obligations which are of immediate effect. States Parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health. (20)

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States Parties' obligations of all meaningful content. Rather, progressive realization means that States Parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12. (21)

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources. (22)

33. The right to health, like all human rights, imposes three types or levels of obligations on States Parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. (23) The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties

from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

Specific legal obligations

34. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. (24)

    In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to fulfil requires States Parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying

determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States Parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services. (25)

37. The obligation to fulfil (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States Parties are also obliged to fulfil (provide) a specific right contained in the Covenant 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 (promote) the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and 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.

International obligations

38. In its General Comment No. 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, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States Parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States Parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries. (26)

39. To comply with their international obligations in relation to article 12, States Parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. (27) States Parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States Parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States Parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States Parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States Parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States Parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States Parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State Parties should therefore provide an environment which facilitates the discharge of these responsibilities.

Core obligations

43. In General Comment No. 3, the Committee confirms that States Parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, (28) the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

    (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

    (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

    (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

    (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;

    (e) To ensure equitable distribution of all health facilities, goods and services;

    (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority:

    (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

    (b) To provide immunization against the major infectious diseases occurring in the community;

    (c) To take measures to prevent, treat and control epidemic and endemic diseases;

    (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

    (e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States Parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical" (29) which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

III. VIOLATIONS

46. When the normative content of article 12 (Part I) is applied to the obligations of States Parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State Party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State Party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State Party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through acts of commission include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.

49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through acts of omission include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

Violations of the obligation to respect

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States Parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

IV. IMPLEMENTATION AT THE NATIONAL LEVEL

Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States Parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should 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 action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States Parties should identify the factors and difficulties affecting implementation of their obligations.

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State Party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States Parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State Party. Scoping involves the joint consideration by the State Party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State Party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State Party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. (30) All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures

and should be encouraged in all cases. (31) Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States Parties to pay greater attention to violations of the right to health in the exercise of their functions.

62. States Parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

V. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States Parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States Parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, The International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States Parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States Parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States Parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

Notes

1/ For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

2/ In its resolution 1989/11.

3/ The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

4/ Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, art. 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, art. 4 (a).

5/ See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

6/ Unless expressly provided otherwise, any reference in this General Comment to health facilities, goods and services includes the underlying determinants of health outlined in paras. 11 and 12 (a) of this General Comment.

7/ See paras. 18 and 19 of this General Comment.

8/ See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

9/ In the literature and practice concerning the right to health, three levels of health care are frequently referred to: primary health care typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; secondary health care is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes in-patient care at comparatively higher cost; tertiary health care is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States Parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

10/ According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.

11/ Prenatal denotes existing or occurring before birth; perinatal refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); neonatal, by contrast, covers the period pertaining to the first four weeks after birth; while post-natal denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.

12/ Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

13/ The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

14/ ILO Convention No. 155, art. 4.2.

15/ See para. 12 (b) and note 8 above.

16/ For the core obligations, see paras. 43 and 44 of the present General Comments.

17/ Article 24.1 of the Convention on the Rights of the Child.

18/ See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".

19/ Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or

Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous Peoples.

20/ See General Comment No. 13, para. 43.

21/ See General Comment No. 3, para. 9; General Comment No. 13, para. 44.

22/ See General Comment No. 3, para. 9; General Comment No. 13, para. 45.

23/ According to General Comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to facilitate and an obligation to provide. In the present General Comment, the obligation to fulfil also incorporates an obligation to promote because of the critical importance of health promotion in the work of WHO and elsewhere.

24/ General Assembly resolution 46/119 (1991).

25/ Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

26/ Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, “Health for All” Series, No. 1, WHO, Geneva, 1978.

27/ See para. 45 of this General Comment.

28/ Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.

29/ Covenant, art. 2.1.

30/ Regardless of whether groups as such can seek remedies as distinct holders of rights, States Parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

31/ See General Comment No. 2, para. 9.

O. No.15- The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) *

I. INTRODUCTION

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.(1) The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States Parties have to adopt effective measures to realize, without discrimination, the right to water, as set out in this general comment.

The legal bases of the right to water

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

3. Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1, (see General Comment No. 6 (1995)).(2) The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)(3) and the rights to adequate housing and adequate food (art. 11, para. 1).(4) The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

4. The right to water has been recognized in a wide range of international documents, including treaties, declarations and other standards.(5) For instance, Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that States Parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to […] water supply". Article 24, paragraph 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".

5. The right to water has been consistently addressed by the Committee during its consideration of States Parties' reports**,** in accordance with its revised general guidelines regarding the form and content of reports to be submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, and its general comments.

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* UN Doc. E/C.12/2002/11

6. Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.(6)

Water and Covenant rights

7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment No.12 (1999)).(7) Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States Parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.(8)

8. Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (*b*), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.(9) For example, States Parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States Parties should monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.(10)

9. With a view to assisting States Parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses in Part II on the normative content of the right to water in articles 11, paragraph 1, and 12, on States Parties' obligations (Part III), on violations (Part IV) and on implementation at the national level (Part V), while the obligations of actors other than States Parties are addressed in Part VI.

II. NORMATIVE CONTENT OF THE RIGHT TO WATER

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

11. The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.(11)

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

    (*a*) *Availability.* The water supply for each person must be sufficient and continuous for personal and domestic uses.(12) These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.(13) The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.(14) Some individuals and groups may also require additional water due to health, climate, and work conditions;

    (*b*) *Quality.* The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health.(15) Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

    (*c*) *Accessibility.* Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State Party. Accessibility has four overlapping dimensions:

        (i) *Physical accessibility*: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.(16) All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;

        (ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;

        (iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and

        (iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning water issues.(17)

Special topics of broad application

Non-discrimination and equality

13. The obligation of States Parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, 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 water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of

severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

14. States Parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States Parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.

15. With respect to the right to water, States Parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

16. Whereas the right to water applies to everyone, States Parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States Parties should take steps to ensure that:

    (*a*) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;

    (*b*) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency;

    (*c*) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;

    (*d*) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

    (*e*) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

    (*f*) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals;

(*g*) Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners;(18)

(*h*) Groups facing difficulties with physical access to water, such as older persons,]persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water.

III. STATES PARTIES' OBLIGATIONS

General legal obligations

17. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States Parties various obligations which are of immediate effect. States Parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para.1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water.

18. States Parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water. Realization of the right should be feasible and practicable, since all States Parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.

19. There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant.(19) If any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources.

Specific legal obligations

20. The right to water, like any human right, imposes three types of obligations on States Parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*.

(a) Obligations to respect

21. The obligation to *respect* requires that States Parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

22. The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States Parties are bound under international humanitarian law.(20) This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.(21)

(b) Obligations to protect

23. The obligation to *protect* requires State Parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States Parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

(c) Obligations to fulfil

25. The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State Party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States Parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

26. The obligation to fulfil requires States Parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

27. To ensure that water is affordable, States Parties must adopt the necessary measures that may include, inter alia: (*a*) use of a range of appropriate low-cost techniques and technologies; (*b*) appropriate pricing policies such as free or low-cost water; and (*c*) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially

disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

28. States Parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.(22) Such strategies and programmes may include: (*a*) reducing depletion of water resources through unsustainable extraction, diversion and damming; (*b*) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (*c*) monitoring water reserves; (*d*) ensuring that proposed developments do not interfere with access to adequate water; (*e*) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity;(23) (*f*) increasing the efficient use of water by end-users; (*g*) reducing water wastage in its distribution; (*h*) response mechanisms for emergency situations; (*i*) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

29. Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources.(24) In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States Parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

International obligations

30. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States Parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States Parties have to respect the enjoyment of the right in other countries. International cooperation requires States Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State Party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.(25)

32. States Parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water.(26) Water should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights.

33. Steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States Parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States Parties have a special responsibility and interest to assist the poorer developing States in this regard.

35. States Parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States Parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

36. States Parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States Parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.

Core obligations

37. In General Comment No. 3 (1990), the Committee confirms that States Parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

(*a*) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

(*b*) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(*c*) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;

(*d*) To ensure personal security is not threatened when having to physically access to water;

(*e*) To ensure equitable distribution of all available water facilities and services;

(*f*) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

(*g*) To monitor the extent of the realization, or the non-realization, of the right to water;

(*h*) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(*i*) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;

38. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States Parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations indicated in paragraph 37 above.

IV. VIOLATIONS

39. When the normative content of the right to water (see Part II) is applied to the obligations of States Parties (Part III), a process is set in motion, which facilitates identification of violations of the right to water. The following paragraphs provide illustrations of violations of the right to water.

40. To demonstrate compliance with their general and specific obligations, States Parties must establish that they have taken the necessary and feasible steps towards the realization of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State Party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable.

41. In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State Party to comply with its obligations in relation to the right to water. This follows from articles 11, paragraph 1, and 12, which speak of the right to an adequate standard of living and the right to health, as well as from article 2, paragraph 1, of the Covenant, which obliges each State Party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State Party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

42. Violations of the right to water can occur through *acts of commission*, the direct actions of States Parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of retrogressive measures incompatible with the core obligations (outlined in para. 37 above), the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water.

43. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to water, the failure to have a national policy on water, and the failure to enforce relevant laws.

44. While it is not possible to specify a complete list of violations in advance, a number of typical examples relating to the levels of obligations, emanating from the Committee's work, may be identified:

(*a*) Violations of the obligation to respect follow from the State Party's interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health;

(*b*) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.(27) This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction; and

(*c*) Violations of the obligation to fulfil occur through the failure of States Parties to take all necessary steps to ensure the realization of the right to water. Examples includes, inter alia: (i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) failure to monitor the realization of the right to water at the national level, for example by identifying right-to-water indicators and benchmarks; (iv) failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

V. IMPLEMENTATION AT THE NATIONAL LEVEL

45. In accordance with article 2, paragraph 1, of the Covenant, States Parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures" in the implementation of their Covenant obligations. Every State Party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State Party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible. Any national measures designed to realize the right to water should not interfere with the enjoyment of other human rights.

Legislation, strategies and policies

46. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

47. The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy or plan of action to realize the right to water. The strategy must: (*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; (*c*) define clear objectives; (*d*) set targets or goals to be achieved and the time frame for their achievement; (*e*) formulate adequate policies and corresponding benchmarks and indicators. The strategy should also establish institutional responsibility for the process; identify resources available to attain the objectives, targets and goals; allocate resources appropriately according to institutional responsibility; and establish accountability mechanisms to ensure the implementation of the strategy. When formulating and implementing their right to water national strategies, States Parties should avail themselves of technical assistance and cooperation of the United Nations specialized agencies (see Part VI below).

48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States Parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

50. States Parties may find it advantageous to adopt framework legislation to operationalize their right to water strategy. Such legislation should include: (*a*) targets or goals to be attained and the time frame for their achievement; (*b*) the means by which the purpose could be achieved; (*c*) the intended collaboration with civil society, private sector and international organizations; (*d*) institutional responsibility for the process; (*e*) national mechanisms for its monitoring; and (*f*) remedies and recourse procedures.

51. Steps should be taken to ensure there is sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies. Where implementation of the right to water has been delegated to regional or local authorities, the State Party still retains the responsibility to comply with its Covenant obligations, and therefore should ensure that these authorities have at their disposal sufficient resources to maintain and extend the necessary water services and facilities. The States Parties must further ensure that such authorities do not deny access to services on a discriminatory basis.

52. States Parties are obliged to monitor effectively the realization of the right to water. In monitoring progress towards the realization of the right to water, States Parties should identify the factors and difficulties affecting implementation of their obligations.

Indicators and benchmarks

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State Party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State Party's territorial jurisdiction or under their control. States Parties may obtain guidance on appropriate indicators from the ongoing work of WHO, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the International Labour Organization (ILO), the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the United Nations Commission on Human Rights.

54. Having identified appropriate right to water indicators, States Parties are invited to set appropriate national benchmarks in relation to each indicator.(28) During the periodic reporting procedure, the Committee will engage in a process of "scoping" with the State Party. Scoping involves the joint consideration by the State Party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State Party will use these national benchmarks to help monitor its implementation of the right to water. Thereafter, in the subsequent reporting process, the State Party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered (see General Comment No.14 (2000), para. 58). Further, when setting benchmarks and preparing their reports, States Parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.

Remedies and accountability

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (see General Comment No. 9 (1998), para. 4, and Principle 10 of the Rio Declaration on Environment and Development).(29) The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.

56. Before any action that interferes with an individual's right to water is carried out by the State Party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (*a*) opportunity for genuine consultation with those affected; (*b*) timely and full disclosure of information on the proposed measures; (*c*) reasonable notice of proposed actions; (*d*) legal recourse and remedies for those affected; and (*e*) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

57. The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant.

58. Judges, adjudicators and members of the legal profession should be encouraged by States Parties to pay greater attention to violations of the right to water in the exercise of their functions.

59. States Parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water.

VI. OBLIGATIONS OF ACTORS OTHER THAN STATES

60. United Nations agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Fund for Agricultural Development (IFAD), as well as international organizations concerned with trade such as the World Trade Organization (WTO), should cooperate effectively with States Parties, building on their respective expertise, in relation to the implementation of the right to water at the national level. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2 (1990)), so that the enjoyment of the right to water is promoted. When examining the reports of States Parties and their ability to meet the obligations to realize the right to water, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and principles in the programmes and policies by international organizations will greatly facilitate implementation of the right to water. The role of the International Federation of the Red Cross and Red Crescent Societies, International Committee of the Red Cross, the Office of the United Nations High Commissioner for Refugees (UNHCR), WHO and UNICEF, as well as non-governmental organizations and other associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies. Priority in the provision of aid, distribution and management of water and water facilities should be given to the most vulnerable or marginalized groups of the population.

Notes

1/ In 2000, the World Health Organization estimated that 1.1 billion persons did not have access to an improved water supply (80 per cent of them rural dwellers) able to provide at least 20 litres of safe water per person a day; 2.4 billion persons were estimated to be without sanitation. (See WHO, *The Global Water Supply and Sanitation Assessment 2000,* Geneva, 2000, p.1.) Further, 2.3 billion persons each year suffer from diseases linked to water: see United Nations, Commission on Sustainable Development, *Comprehensive Assessment of the Freshwater Resources of the World*, New York, 1997, p. 39.

2/ See paras. 5 and 32 of the Committee's General Comment No. 6 (1995) on the economic, social and cultural rights of older persons.

3/ See General Comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (*a*), (*b*) and (*d*), 15, 34, 36, 40, 43 and 51.

4/ See para. 8 (*b*) of General Comment No. 4 (1991). See also the report by Commission on Human Rights' Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E.CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

5/ See art. 14, para. 2 (*h*), Convention on the Elimination of All Forms of Discrimination Against Women; art. 24, para. 2 (*c*), Convention on the Rights of the Child; arts. 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; arts. 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; arts. 54 and 55 of Additional Protocol I thereto of 1977; arts. 5 and 14 Additional Protocol II of 1977; preamble, Mar Del Plata Action Plan of the United Nations Water Conference; see para. 18.47 of Agenda 21, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8), vol I: *Resolutions adopted by the Conference*, resolution 1, annex II; Principle No. 3, The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (A/CONF.151/PC/112); Principle No. 2, Programme of Action, *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex; paras. 5 and 19, Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realization of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

6/ See also World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (*c*).

7/ This relates to both *availability* and to *accessibility* of the right to adequate food (see General Comment No. 12 (1999), paras. 12 and 13).

8/ See also the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which declared that, in determining vital human needs in the event of conflicts over the use of watercourses "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation"..

9/ See also para. 15, General Comment No. 14.

10/ According to the WHO definition, vector-borne diseases include diseases transmitted by insects (malaria, filariasis, dengue, Japanese encephalitis and yellow fever), diseases for which aquatic snails serve as intermediate hosts (schistosomiasis) and zoonoses with vertebrates as reservoir hosts.

11/ For a definition of sustainability, see the *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992*, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.

12/ "Continuous" means that the regularity of the water supply is sufficient for personal and domestic uses.

13/ In this context, "drinking" means water for consumption through beverages and foodstuffs. "Personal sanitation" means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. "Food preparation" includes food hygiene and preparation of food stuffs, whether water is incorporated into, or comes into contact with, food. "Personal and household hygiene" means personal cleanliness and hygiene of the household environment.

14/ See J. Bartram and G. Howard, "Domestic water quantity, service level and health: what should be the goal for water and health sectors", WHO, 2002. See also P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", *Water International*, 21, pp. 83-92.

15/ The Committee refers States Parties to WHO, *Guidelines for drinking-water quality,* 2nd edition, vols. 1-3 (Geneva, 1993) that are "intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health."

16/ See also General Comment No. 4 (1991), para. 8 (*b*), General Comment No. 13 (1999) para. 6 (*a*) and General Comment No. 14 (2000) paras. 8 (*a*) and (b). Household includes a permanent or semi-permanent dwelling, or a temporary halting site.

17/ See para. 48 of this General Comment.

18/ See arts. 20, 26, 29 and 46 of the third Geneva Convention of 12 August 1949; arts. 85, 89 and 127 of the fourth Geneva Convention of 12 August 1949; arts. 15 and 20, para. 2, United Nations Standard Minimum Rules for the Treatment of Prisoners, in *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.88.XIV.1).

19/ See General Comment No. 3 (1990), para. 9.

20/ For the interrelationship of human rights law and humanitarian law, the Committee notes the conclusions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports (1996)* p. 226, para. 25.

21/ See arts. 54 and 56, Additional Protocol I to the Geneva Conventions (1977), art. 54, Additional Protocol II (1977), arts. 20 and 46 of the third Geneva Convention of 12 August 1949, and common article 3 of the Geneva Conventions of 12 August 1949.

22/ See footnote 5 above, Agenda 21, chaps. 5 ,7 and 18; and the World Summit on Sustainable Development, Plan of Implementation (2002), paras. 6 (*a*), (*l*) and (*m*), 7, 36 and 38.

23/ See the Convention on Biological Diversity, the Convention to Combat Desertification, the United Nations Framework Convention on Climate Change, and subsequent protocols.

24/ Article 14, para. 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates States Parties shall ensure to women the right to "adequate living conditions, particularly in relation to […] sanitation". Article 24, para. 2, of the Convention on the Rights of the Child requires States Parties to "To ensure that all segments of society […] have access to education and are supported in the use of basic knowledge of […] the advantages of […] hygiene and environmental sanitation."

25/ The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States Parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs: see arts. 5, 7 and 10 of the Convention.

26/ In General Comment No. 8 (1997), the Committee noted the disruptive effect of sanctions upon sanitation supplies and clean drinking water, and that sanctions regimes should provide for repairs to infrastructure essential to provide clean water.

27/ See para. 23 for a definition of "third parties".

28/ See E. Riedel, "New bearings to the State reporting procedure: practical ways to operationalize economic, social and cultural rights - The example of the right to health", in S. von Schorlemer (ed.), *Praxishandbuch UNO*, 2002, pp. 345-358. The Committee notes, for example, the commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.

29/ Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*, see footnote 5 above), states with respect to environmental issues that "effective access to judicial and administrative proceedings, including remedy and redress, shall be provided".

The Activist's Manual on the International Covenant on Economic, Social and Cultural Rights

This book is dedicated to the promotion of economic and social rights by means of parallel reporting to the United Nations Committee on Economic, Social and Cultural Rights. The Committee reviews State reports on the progress made in implementing the human rights set forth in the International Covenant on Economic, Social and Cultural Rights. The Covenant recognises the following rights:

1. to work,
2. to just and favourable conditions of work,
3. to form unions and strike,
4. to social security,
5. to protection of the family,
6. to an adequate standard of living (including food and shelter),
7. to health,
8. to education,
9. to participate in cultural life.

The Committee invites activists and NGOs to help it evaluate State reports by presenting alternative sources of information both in writing and in person. No special status is required to do so. But activists must do more than say that people are homeless, health care is poor, and education remains an aspiration for most. They must show that the government failed to act in a specific way the Covenant obligates it to act. This manual aims to outline the precise scope of the Covenant's obligations in simple and direct language.

Part I explains how to participate in the Committee's review process, the general nature of obligations under the Covenant, and the basic scope of most rights. The explanations are straightforward and helpful checklists are provided to ensure proper coverage. Part II consists of thematic chapters that may be of use for workshops, background reading, and for those who draft special reports. Part III is a collection of annexes, including the full text of the Covenant, some practical guides to web research and addresses, and the full text of the Committee's General Comments as of 2004.