The effective promotion, protection and fulfilment of economic, social and cultural rights (ESC rights) is an important but underexplored component of international human rights law, of which ESC rights form an essential part. They are fundamental to the dignity of every person. At the international level ESC rights are protected in several international instruments, the most comprehensive being the International Covenant on Economic, Social and Cultural Rights, which has been ratified by a majority of states. However, claims of violations of ESC rights are treated less seriously. This book subjects ESC rights protected in the Covenant to a deeper analysis in light of the practice of the Committee on Economic, Social and Cultural Rights while taking into account other relevant sources of ESC rights at national, regional and international levels. It also analyses key issues relevant to ESC rights, with particular emphasis on various themes including state obligations; non-state actor’s obligations; women’s ESC rights; domestic protection of ESC rights; and state reservations to ESC rights. The book further makes a thorough examination of the rights to work, health, and education. By so doing, it demonstrates that ESC rights are justiciable and must not be marginalised. The book also brings together a collection of essential materials on ESC rights needed to understand and analyse the subject. Written by an international human rights scholar, this timely work will be of value to all those interested in human rights and international law.
Economic, Social and Cultural Rights in International Law

Manisuli Ssenyonjo
Preface

Economic, social and cultural rights (ESC rights) are protected in several international human rights instruments, the most comprehensive being the International Covenant on Economic, Social and Cultural Rights (ICESCR or ‘the Covenant’), which has been ratified by a vast majority of states. One of the most recent developments with respect to the international protection of ESC rights has been the unanimous adoption on 10 December 2008 by the United Nations General Assembly of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (GA resolution A/RES/63/117).

In adopting the Optional Protocol, the General Assembly took note of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol. The Optional Protocol provides the Committee on Economic, Social and Cultural Rights (CESCR or ‘the Committee’), the body of independent experts that monitors implementation of the ICESCR by its states parties, competence to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant.

The Optional Protocol reaffirms ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms’. Significantly, in recent years ESC rights have received increasing attention from various international organisations and in academic writing, and the the contents of specific ESC rights have been clarified by the CESCR and the courts in many national legal systems. Regardless of these positive developments, and the fact that ESC rights are fundamental to the dignity of every person, many actors working with human rights law still focus solely or mainly on issues relating to civil and political rights and tend to pay lip-service to the interdependence and interrelatedness of all human rights. Claims of violations of ESC rights are still treated less seriously. This means that in practice ESC rights are still marginalised.

Economic, Social and Cultural Rights in International Law subjects ESC rights protected in the Covenant to a deeper analysis in the light of the practice of the CESCR while taking into account other relevant sources of ESC rights at national, regional and international levels.

This book analyses key issues relevant to ESC rights, with particular emphasis on various themes including state obligations; non-state actor obligations; women’s ESC rights; domestic protection of ESC rights; and state reservations to ESC rights. The book further makes a thorough examination of selected rights, in particular the rights to work, health and education. By so doing, it demonstrates that ESC rights are human rights just as much as the traditional civil and political rights and do not
deserve to be marginalised. It is noted that even if the Optional Protocol to the Covenant eventually comes into force, the views of the Committee under the Protocol would not be legally binding in a strict legal sense.

Thus, states could easily ignore them. In this context, the book questions whether there is a need for a World Court of human rights which could also consider claims involving alleged violations of ESC rights in legally binding judgments against willing States and non-State actors. Finally, the book also brings together a collection of selected essential materials on ESC rights needed to understand and analyse the subject. This timely study will be of value to all those interested in human rights and international law.

I would like to express my special thanks to all colleagues and to Professors David Harris and Robert McCorquodale who helped me to study international human rights law at the University of Nottingham. I would also like to express my special thanks to my family for their love over the years. Thanks also to Ife Ogbonna. Richard Hart and the team at Hart Publishing deserve my thanks for seeing this book through completion. Special tribute to Nick Allen who edited the book with skill. The book states the law as at 31 January 2009.

Finally, this book is dedicated to Jamilah, Yaseen and Zainab for their hard work.

Manisuli Ssenyonjo
Senior Lecturer, Brunel University
London
January 2009
Happily, the legal protection of economic, social and cultural rights has come more to the fore in recent years than previously. Although United Nations texts have consistently over time stressed the indivisibility and equal importance of civil and political rights and economic, social and cultural rights, in practice there has been a great divide, with the latter not being given the same legal priority as the former. The International Covenant on Economic, Social and Cultural Rights initially did not have an independent treaty-monitoring body, let alone one that could receive individual complaints. This omission was partially remedied by the creation of the Committee on Economic, Social and Cultural Rights, which became competent to receive and review national reports. The most recent and hugely encouraging development has been the adoption of the Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 which will provide a right of individual complaint when it enters into force.

At the regional level, there was largely the same pattern of difference. The European Convention on Human Rights 1950, despite its all-embracing name, is concerned almost exclusively with civil and political rights. It took another generation before the European Social Charter was adopted and a further generation before a right of collective (but not individual) complaints was introduced under it. As to the inter-American human rights system, the American Convention on Human Rights 1969 likewise emphasises civil and political rights; only later was the San Salvador Protocol on Economic, Social and Cultural Rights—with its partial system of individual complaint—adopted. The African Charter on Human and Peoples’ Rights 1981 was a great improvement in that it included from the outset a comprehensive guarantee of the full range of human rights, including economic, social and cultural rights, and made these subject to a right of individual complaint.

At the national level, the courts of some countries have shown the way, with the jurisprudence of the Indian and South African courts being particularly well known, demonstrating that economic, social and cultural rights can be enforced through the courts. Celebrated judgments by the South African Constitutional Court, such as that in the Grootboom case, have been particularly influential, showing that such rights are justiciable and providing a public law model for deciding cases concerning them. What emerges is that it is not the nature of the rights that is crucial, but the nature of the obligations that are imposed by national law concerning them. Two other points have become clear. First, that the argument about justiciability, which has now largely been resolved, concerns social and, to some extent, cultural rights only. Economic rights, both individual and collective, have long been enforced in national courts without difficulty. Second, national courts have in fact been applying social rights,
such as the rights to health and education, without knowing it, deciding cases that are about these rights (though not necessarily in compliance with them) under different rubrics, such as health or education law.

All of these considerations make the present book very timely and valuable. It offers a comprehensive analysis of the basic elements of the legal regime of the International Covenant on Economic, Social and Cultural Rights and of certain key economic and social rights and themes more generally. Of considerable importance is the focus upon the economic, social and cultural rights of women. The book also critically reviews the jurisprudence of selected national courts. With the anticipated arrival of the right of individual communication following the entry into force of the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights, together with the increased interest in and awareness of economic, social and cultural rights resulting from the adoption of the Protocol and other developments, the present study will be particularly welcome in both the academic and practitioner world.

David Harris

Professor Emeritus and Co-Director of the Human Rights Law Centre
School of Law
University of Nottingham
March 2009
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<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ACmHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>AHRLR</td>
<td>African Human Rights Law Reports</td>
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<tr>
<td>AIDS</td>
<td>acquired immunodeficiency syndrome</td>
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<tr>
<td>AmCHR</td>
<td>American Convention on Human Rights</td>
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<td>ASIL</td>
<td>American Society of International Law</td>
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<tr>
<td>BCLR</td>
<td>Butterworths Constitutional Law Reports</td>
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<td>CC</td>
<td>Constitutional Court</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, social and Cultural rights</td>
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<tr>
<td>CESTS</td>
<td>Council of Europe Treaty Series</td>
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<tr>
<td>CIL</td>
<td>Customary International Law</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>CERD Committee</td>
<td>Committee on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>Committee on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
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<td>CHR Res</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRC Committee</td>
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<tr>
<td>CRC-AC</td>
<td>Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict</td>
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<td>CESSR</td>
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<td>DAC</td>
<td>Development Assistance Committee</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECObHR</td>
<td>European Commission of Human Rights</td>
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<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EFA</td>
<td>Education for All</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>ESC(s)</td>
<td>European Social Charter(s)</td>
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<td>ESCR/ESC</td>
<td>economic, social and cultural rights</td>
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<td>ETS</td>
<td>European Treaty Series</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>GA</td>
<td>United Nations General Assembly</td>
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<td>GA res</td>
<td>United Nations General Assembly Resolution</td>
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<td>GAOR</td>
<td>General Assembly Ordinary Resolution</td>
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<td>GDP/GNP</td>
<td>Gross Domestic/National Product</td>
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<td>GNI</td>
<td>Gross National Income</td>
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<td>HIV</td>
<td>human immunodeficiency virus</td>
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<td>HRA</td>
<td>Human Rights Act</td>
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<td>Human Rights Committee</td>
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<td>IACmHR</td>
<td>Inter-American Commission on Human Rights.</td>
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<td>IACHR</td>
<td>Inter American Court of Human Rights.</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court.</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
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<td>ICERD/CERD</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILC</td>
<td>International Law Commision</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>IPEC</td>
<td>International Programme on the Elimination of Child Labour</td>
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<td>NHRIs</td>
<td>National Human Rights Institutions</td>
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<td>NGO</td>
<td>non-governmental organisation</td>
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<td>NSA</td>
<td>non-state actor</td>
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<td>OAS</td>
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<td>ODA</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>OP</td>
<td>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>TS</td>
<td>Treaty Series</td>
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<tr>
<td>TNC</td>
<td>transnational corporation</td>
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<td>TRIPs</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UHRC</td>
<td>Uganda Human Rights Commission</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
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<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>WHO</td>
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Part I

Reinforcing Economic, Social and Cultural Rights
The International Legal Protection of Economic, Social and Cultural Rights

I. INTRODUCTION

[1.01] Economic, social and cultural rights (ESC rights or ESCR) in international law include a variety of rights, such as: (i) the right to work and to just and favourable conditions of work; to rest and leisure; to form and join trade unions and to strike; (ii) the right to social security; to protection of the family, mothers and children; (iii) the right to an adequate standard of living, including adequate food, clothing and housing; (iv) the right to the highest attainable standard of physical and mental health; (v) the right to education; and (vi) the right to participate in cultural life and enjoy the benefits of scientific progress. The effective respect, protection and fulfilment of these rights is an important but under-explored component of international human rights. This is despite the fact that the Universal Declaration of Human Rights (UDHR) recognised two sets of human rights, ie civil and political rights (CPR), as well as ESC rights, without separating these categories. In transforming

1 See the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, entered into force 3 January 1976 (Annex A) and section IV in this chapter.
3 The UDHR protects ESC rights in Arts 22–6. On the inclusion of these rights in the UDHR, see Morsink, above n 2, 157–238.
the provisions of the UDHR into legally binding obligations, the UN adopted two separate covenants: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR or ‘the Covenant’). The two covenants constitute the core of the international human rights and, as shown below, the universality, indivisibility, interdependence and interrelatedness of all human rights protected in the two covenants has been affirmed.6

[1.02] Despite some academic debate on whether human rights are ‘relative’, ‘universal’ or ‘relatively universal’,7 it is recognised that the two sets of human rights in the two covenants are ‘universal, indivisible and interdependent and interrelated’ and should be treated in a ‘fair and equal manner, on the same footing, and with the same emphasis’.8 However, in practice, greater emphasis is typically still accorded to civil and political rights than to ESC rights. As a result, many ESC rights have not been given adequate attention.

[1.03] To cite one example—the right to adequate food—the Committee on Economic, Social and Cultural Rights (CESCR or ‘the Committee’), an expert body monitoring the implementation of the Covenant by states parties, was alarmed in May 2008 at the rapid worldwide rise in food prices and the soaring energy prices that have precipitated a global food crisis and are adversely affecting the right to adequate food and freedom from hunger as well as other human rights of more than 100 million people. The Committee concluded that that there has been ‘a failure to meet the obligations to ensure an equitable distribution of world food supplies in relation to need’. It also noted that the ‘food crisis also reflects failure of national and international policies to ensure physical and economic access to food for all’. Ideologically ESC rights are perceived as being about social policy, benefits and welfare rather than accepted as legal entitlements for immediate realisation. As a result, inadequate application tends to be viewed as social injustice not as rights violations. As Daniel J Whelan and Jack Donnelly wrote:

In fact, the understanding of economic and social rights as directive rather than justiciable was shared by all states [at the time of drafting the ICESCR]. No state, Western or non-Western, seriously proposed—in the sense of being willing to adopt as a matter of

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4 999 UNTS 171, entered into force 23 March 1976.
5 993 UNTS 3, above n 1.
6 See below n 8.
10 Ibid, para 9.
11 Ibid.
enforceable national law—treating economic, social, and cultural rights as matters of imme-
diate rather than progressive realisation.12

[1.04] The purpose of this chapter is to give an overview of the international protec-
tion of ESC rights at the global level, under the auspices of the UN system, as
recognised under the ICESCR. This is intended to set the stage and a general context
for the examination of several issues covered in chapters 2–9. As noted above, while
lip-service is paid to the interdependence, indivisibility and interrelatedness of all
human rights, in actual practice ESC rights are accorded second-rank status as
compared to civil and political rights.13 This can, inter alia, be discerned from the con-
siderable opposition that existed for a long period of time to the proposal to establish
an individual complaints mechanism under the ICESCR.14 It has been stated for a
long time (albeit unjustifiably) that ESC rights, unlike civil and political rights, are too
vague to be justiciable, and that their justiciability intrudes fundamentally into an
area where the democratic process ought to prevail.15 Consequently, the implementa-
tion of the ICESCR faces particular difficulties in view of the ‘perceived vagueness of
many of the principles contained therein, the relative lack of legal texts and judicial
decisions, and the ambivalence of many States in dealing with economic, social and
cultural rights’.16 For example, the US government continues to oppose ESC rights
within the UN and has claimed:

At best, economic, social and cultural rights are goals that can only be achieved progres-
sively, not guarantees. Therefore, while access to food, health services and quality education
are at the top of any list of development goals, to speak of them as rights turns the citizens
of developing countries into objects of development rather than subjects in control of their
own destiny.17

The statement above clearly indicates that the US is still opposed to giving ESC rights
the same status as civil and political. Although the US is no longer in the Cold War,
the US view of the Covenant as a ‘socialist manifesto thinly veiled in the language of
rights’ has not completely changed.18 There is still a debate as to whether ESC rights

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12 DJ Whelan and J Donnelly, ‘The West, Economic and Social Rights, and the Global Human Rights
189–216.
14 See eg W Vandenhole, ‘Completing the UN Complaint Mechanisms for Human Rights Violations Step
by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social
and Cultural Rights’ (2003) 21(3) Netherlands Quarterly of Human Rights 423–62; M Dennis and D Stewart,
‘Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints
Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?’ (2004) 98 (3) American Journal
of International Law 462.
www.wcl.american.edu/hrbrief/13/132.pdf.
17 Comments submitted by the United States of America, Report of the Open-Ended Working Group on the
Right to Development, UN ESCOR, Commission on Human Rights, 57th Session, UN Doc E/CN4/2001/26
(2001), para 8 (emphasis added).
and Cultural Rights and the Right to Education in American Jurisprudence: Barriers and Approaches to
are real human rights, and assertions such as ‘the communist system promised to fulfil economic, social and cultural rights but failed to deliver them’. This chapter attempts to clarify the general legal nature of obligations applicable to ESC rights with respect to the general provisions of the ICESCR.

[1.05] The structure of this chapter is as follows. First, in order to provide a coherent analysis, a general overview of human rights obligations under international law (section I) and the tripartite typology of obligations (section II) is provided from which to mount a critique of the state of ESC rights (section III). Finally, a conclusion is made linking the general human rights obligations under the Covenant with the substantive rights guaranteed under the Covenant (section IV).

II. HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW

A. Background

[1.06] Generally, the history of human rights is a long one, but its contemporary legal expression can be traced only since World War II with the founding of the UN in 1945 and the proclamation by the UN General Assembly of the UDHR in 1948. While there was considerable academic acceptance of international human rights law from an early date, and some national constitutions specifically provided for the protection of the human rights of their citizens, development of the protection and implementation of human rights in international law has generally been subsequent to the promulgation of the UN Charter. The UN Charter, widely considered as the centre of an international ‘constitutional order’, imposes obligations on Member


22 Adopted 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945.

States to achieve international co-operation in promoting and encouraging respect for human rights.\textsuperscript{24}

\textbf{[1.07]} The UN Charter became the first international treaty to call for general respect for human rights. The Charter, reaffirmed ‘faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women’.\textsuperscript{25} Under the Charter, the protection and respect of human rights became a central purpose of the UN\textsuperscript{26} with obligations imposed upon Member States through ‘joint and separate action’ to achieve international co-operation in promoting and encouraging ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.\textsuperscript{27} By virtue of these Charter provisions, seen in the context of Article 103,\textsuperscript{28} the UN Member States are obliged to observe, promote and encourage universal respect for human rights including ESC rights. However, apart from the Charter’s non-discrimination clause, the concise content of human rights under the Charter is lacking. Although the full scope of human rights remained to be defined, states could no longer validly claim that human rights were essentially domestic in character.

\textbf{[1.08]} The obligation imposed by Article 56 on the UN Member States provided the UN with the requisite legal basis to define and codify these rights. As a result, since 1945, a considerable number of rules of international law, both customary and treaty, have been developed at the international\textsuperscript{29} and regional levels—in Europe,\textsuperscript{30} character’). But see B Conforti, \textit{The Law and Practice of the United Nations} (The Hague/London/Boston, Kluwer Law International, 2nd edn, 2000), 10. Benedetto Conforti has noted that ‘The constitutional aspect of the UN should not be exaggerated. The Charter is and remains a treaty.’


\textsuperscript{25} UN Charter, Preamble.

\textsuperscript{26} UN Charter, Art 1(3): The purposes of the UN are to ‘achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’.

\textsuperscript{27} UN Charter, Arts 55 and 56. In its opinion on ‘the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 260 (1970)’ (1971) \textit{ICJ Report} 58, para 29, the ICJ stated that: ‘To establish instead, and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin, which constitutes a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the Charter.’

\textsuperscript{28} Art 103 of the UN Charter states: ‘In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ For a discussion, see R Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’ (2008) 57 \textit{ICLQ} 583–612.


\textsuperscript{30} The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, UKTS (1953), 213 UNTS 221. For a discussion, see generally C Ovey and R White, \textit{Jacobs and White: The European Convention on Human Rights} (Oxford University Press, 4th edn, 2006); MW Janis et al, Euro-
Foremost amongst the UN documents that together constitute the principal international human rights instruments because of their comprehensive coverage of human rights are the 1948 UDHR; and the two 1966 international covenants, ICESCR and ICCPR. In addition, other international human rights treaties have been adopted dealing with genocide, torture, racial discrimination, discrimination against women and the rights of children. Every state in the world (despite a wide variety of historical, political, religious, social and cultural traditions) has ratified at least one of these human rights treaties, which indicates the increasing trend towards universal acceptance of human rights in the international legal system, viewed in terms of ratification. Some of these treaties may be viewed as creating an entire body of customary international lawmaking, making it increasingly difficult for non-states parties to claim that the human rights guarantees proclaimed in these
treaties, particularly those from which derogation is not permitted, do not impose legal obligations on them.\textsuperscript{38}

\textbf{[1.10]} It is, therefore, not surprising that this period has been described as the ‘age of rights’ and human rights as the ‘only political-moral idea that has received universal acceptance’.\textsuperscript{39} It has also been argued that the

characterisation of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge, and generally endows it with an aura of timelessness, absoluteness and universal validity.\textsuperscript{40}

\section*{B. Towards Some Definition}

\textbf{[1.11]} What are human rights? Human rights are difficult to define, but in general terms, they are regarded as fundamental and inalienable claims or entitlements which are essential for life as a human being.\textsuperscript{41} Human rights are ‘the rights that one has simply as a human being’,\textsuperscript{42} without any supplementary condition being required.\textsuperscript{43} In the words of the CESCR:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person.\textsuperscript{44}

In international law, human rights have been commonly (although, as seen below, albeit unjustifiably and inaccurately) divided into three ‘generations’.\textsuperscript{45} Professor Rebecca Wallace put it this way:

Traditionally, human rights have been sub-divided into three classifications: ‘first, second, and third generation’ rights. According to this classification ‘first generation’ rights are those which may be characterised as civil and political rights; economic, social and cultural rights, as ‘second generation’ and group rights as ‘third generation’ or ‘solidarity’ human rights.\textsuperscript{46}

\textbf{[1.12]} The so-called ‘first generation’, civil and political rights, derive primarily from the seventeenth- and eighteenth-century reformist theories, associated mainly with the

\textsuperscript{38} Buergenthal, above n 21 at 790.

\textsuperscript{39} L Henkin, \textit{The Age of Rights} (New York, Columbia University Press, 1990), ix.


\textsuperscript{43} M Cranston, \textit{What are Human Rights} (London, Bodley Head, 1973), 36.

\textsuperscript{44} See CESCR, General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (C), of the Covenant), UN Doc E/C.12/GC/17 (12 January 2006), para 1.


\textsuperscript{46} Wallace, above n 41, 226.
English, French and American revolutions. These rights are now protected under the ICCPR and traditionally conceptualised as ‘negative’ rights in that they were seen as demanding ‘freedom from’ state intervention and were therefore viewed as justiciable and capable of immediate implementation by all states. Consequently, ‘[i]n practice, civil and political rights have almost always been given precedence at both international and domestic levels’.

[1.13] The so-called ‘second generation’, ESC rights, have been associated primarily with the socialist tradition prevalent in early nineteenth-century France. Since then ESC rights have been promoted through various revolutionary struggles and welfare movements, now recognised under the ICESCR. Such rights were conceived as positive ‘rights to’ and thus seen as demanding state intervention (eg to provide health, education and social security). As a result such rights were regarded as susceptible only of ‘progressive realisation’ subject to a state’s ‘available resources’, which allegedly makes them ‘principles and programmatic objectives rather than legal obligations that are justiciable’. However, the growing jurisprudence on ESC rights makes this position untenable. Although this division reflected essentially the contrasting interests of the Cold War division between the West and the East, it continues to impact negatively on the realisation of ESC rights. This means that any right not considered a ‘first generation’ civil or political right is not given the same value by the international community, and, as such, violations of ‘lesser’ valued ‘second or third generation’ human rights are more tolerated.

[1.14] The so-called ‘third generation’, group or solidarity rights, follows from the late twentieth-century thinking and essentially reflects the emergence and concerns of

48 The rights protected under the ICCPR (Arts 1, 6–27) include: self-determination; life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery/forced labour; right to liberty and security of person; freedom of movement; fair hearing; privacy; freedom of thought, conscience and religion; freedom of expression; peaceful assembly; freedom of association; and the right to take part in the conduct of public affairs.
52 See ICESCR, Art 2 examined in chapter 2 below.
53 For example, as shown in chapter 4, this is the view of the UK in relation to most rights under the ICESCR.
mainly developing states. This is evident in the emphasis on the collective rights such as the rights to development, self-determination, peace and freedom of groups from genocide, a clean environment, and humanitarian assistance. Most of such rights are protected under the African Charter. Such rights cannot generally be exercised only individually but are asserted by collections of individuals as a group. Although some scholars have expressed the view that ‘people’s’ rights should be regarded as a sub-category of human rights, some states and writers have indicated a certain degree of scepticism. Sieghart, for example, argued that, according to classical theory, only the rights of human individuals can be human rights; any rights belonging to entities of some other kind may be highly desirable, accepted, valid and even enforceable, but, whatever else they may be, they cannot be human rights. Thus, it is commonly suggested, or assumed, that (apart from the right to self-determination) the ‘third generation’ of human rights are not part of the existing law, but are ‘emerging’. Emerging trends towards recognition of collective rights reflect the West/North’s evolving acceptance of norms from the developing world.

[1.15] It is imperative to note that the notion of ‘generations’ is problematic, since it may focus on divergencies rather than convergencies or interdependence. It could suggest a hierarchy within human rights, which implies that some rights can only be respected, protected and fulfilled after other rights. In particular, it may suggest


61 Alston, above n 57.

62 See eg ACHPR, Arts 19–24 providing for peoples’ rights such as the right to self-determination; right to development; national and international peace and security; and the right to a general satisfactory environment favourable to development.


64 See eg AH Robertson and JG Merrills, Human Rights in the World (Manchester, Manchester University Press, 4th edn, 1996), 294–5 noting that ‘the rights which can properly be called “human rights” are rights of individual human beings stemming from their nature as human beings, and not rights of groups, associations, or other collectivities’.


66 ICCPR and ICESCR, Common Art 1.

67 I Brownlie, Principles of Public International (Oxford University Press, 7th edn, 2008), 567.


that the so-called ‘second generation’ ESC rights can only be achieved after what are regarded as the ‘first generation’ civil and political rights have been achieved. Similarly, one might believe that the so-called ‘third generation’ rights can only be achieved after achieving the ‘second generation’. The generation approach may also suggest that the more established civil and political rights are in some way less relevant today because one might believe that the new generations of human rights make the older generations obsolete.71 Indeed,

it must be asked whether any theory of human rights law which . . . condemns arbitrary imprisonment but not death by starvation, and which finds no place for the rights to access to primary health care [and to other ESC rights such as education, social security, work, food, water and housing] is not flawed both in terms of human rights and of United Nations doctrine.72

[1.16] As shown in the next chapter, all human rights, both civil and political rights and ESC rights, entail negative and positive obligations. Hence, the attempt to rank civil and political rights as superior to ESC rights based upon the purported negative character of the former and the positive character of the latter ‘can only breed confusion’.73 Thus, the ‘generation’ approach to human rights is a generalisation since all rights (whether civil and political rights or ESC rights) have both negative and positive dimensions and in particular ESC rights are not immune to justiciability (see chapters 4, 8 and 9). What has to be noted is that the real driving force behind the distinction was based not on legal or empirical rationality but rather on Cold War politics.74 The US and the West advocated mainly civil and political rights, while the then socialist bloc advocated ESC rights.75 Thus, in the UN, ESC rights are an ‘orphan of the cold war’ monitored until the Optional Protocol comes into force by a fairly weak state reporting system.76 Accordingly, this text does not adhere to the categorisation of rights in the terms of ‘generations’, especially since the history of the evolution of human rights does not make it possible to place the emergence of different human rights into ‘clear-cut stages’.77 Indeed civil and political rights and ESC rights were historically often developed together, rather than as one set neatly following the other.78 As Cees Flinterman states:

the various so-called generations of human rights, especially the first generation of civil and

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71 C Tomuschat, Human Rights: Between Idealism and Realism (Oxford University Press, 2003), 25.
political rights and the second of social (economic and cultural) rights have themselves grown and expanded in a more or less parallel way.79

Thus, one part of the transition from human rights rhetoric to human rights reality is to take the indivisibility of rights seriously.80 Support for this proposition can also be drawn from numerous international proclamations, particularly the Proclamation of Tehran (1968)81 and the Vienna Declaration (1993).82 It is less satisfactory to have a guarantee of a right to vote if one is too sick to lift the ballot paper, too poor to afford the costs of healthcare and the underlying determinants of health (chapter 8), or too illiterate to make an informed choice. Conversely it is not meaningful to have a right to health or education if your freedom to speak out on the lack (or inadequacy) of these rights is muzzled. It makes no difference whether one dies due to a lack of access to healthcare facilities or to a lack of underlying determinants of health (a violation of ESC rights) or from torture (a violation of a civil and political right). Clearly then, what is the right to life without the right to health, food, water or adequate housing? Without an education, how is there a right to meaningful free speech? What is the value in the right to work if individuals are not permitted to assemble and associate in groups to discuss the conditions of work? Therefore, the emphasis in this text is to view the rights recognised under the ICESCR in a holistic way as being 'universal, indivisible and inter-dependent and interrelated' with other human rights.83

More substantive support for this position can be taken from the UDHR, which together with the UN Charter is considered to spell out the general human rights obligations of all UN Member States.84 The UDHR recognised in one consolidated text that human beings are ‘born free and equal in dignity and rights’ and are entitled to civil, political, economic, social and cultural rights and freedoms as ‘the foundation of freedom, justice and peace in the world’.85 While there is little common understanding of what dignity requires substantively within or across jurisdictions, it would be difficult to deny ESC rights are an essential component of human dignity. Although in the UDHR, ‘[m]ore space and importance are allotted to civil and political rights than to economic, social and cultural rights, and no mention at all is made of the rights of peoples’,86 this was made without any sense of separateness or priority.

79 Flinterman, above n 70, 76.
81 Proclamation of Tehran, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, UN Doc A/CONF 32/41 at 3 (1968), para 13. ‘Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.’
82 See Vienna Declaration, above n 8, para 5.
83 Ibid.
84 See Alfredsson and Eide, above n 2, 453–632; Buergenthal, above n 21, 787.
85 UDHR, Art 1 and Preamble, para 1. Arts 2–11 of the UDHR focus on civil and political rights, while Arts 22–7 deal with ESC rights. For a discussion of dignity, see C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) European Journal of International Law 655–724.
86 A Cassese, International Law (Oxford University Press, 2001), 358 states: ‘On the whole, the view of human rights expressed in it [UDHR] is western.’ As noted above, only 5 of the 30 Arts of the UDHR refer to ESC rights: Arts 22 (social security); 23 (work, just and favourable conditions of work, and right to form and join trade unions); 24 (rest and leisure); 25 (adequate standard of living including food, clothing, housing and medical care); 26 (education); 27 (participation in cultural life); 28 (social and international order).
However, since then, the arena of human rights discourse and practice, at both a theoretical and practical level, has been predominantly centred on civil and political rights, as guaranteed under the ICCPR. By contrast, ESC rights as guaranteed under the ICESCR have been marginalised.87 Despite some growing recognition of ESC rights, only rarely do ESC rights form the subject of concerted political will, consistent media campaigns, enforcement, effective monitoring and accountability or critical reportage. ESC rights are still widely perceived as appertaining to development rather than as being central to the international human rights regime. Even where these rights have been recognised, they have not in most states generated the national legal frameworks for their effective implementation. Historically, ‘the great majority of NGOs [non-governmental organisations] pay little more than lip service to ESCR’88 and are based in, or funded by those living in, developed states, and tend to be concerned primarily with civil and political rights. This reflects the marginalisation of vulnerable individuals and groups, who are meant to be the primary beneficiary of this category of rights. This is due to the fact that the people suffering the most from violations of ESC rights—eg violation of the right to water—are poor people in general and poor women in particular who often lack the political voice needed to assert their claims to ESC rights.89 Not only is there a lacklustre approach to the effective realisation of ESC rights, but also lingering questions about their conception as human rights.90

In many respects, violations of ESC rights are treated far less seriously by states and non-state actors (NSAs) than if they occurred in relation to civil and political rights, when they would provoke ‘expressions of horror and outrage’.91 It is rare, for example, to hear of the discussions of ‘massive and direct denials of economic, social and cultural rights’92 (such as systematic and large-scale violations of rights to health and education) in relation to the subject of torture or cruel, inhuman or degrading treatment,93 genocide, or crimes against humanity.94 As noted above, the denial of civil and political rights is considered as a ‘violation’, while the denial of ESC rights is generally viewed as a form of ‘injustice’ as opposed to a human rights violation.95 Yet, the reality is that, in some contexts, violations of ESC rights may give rise to serious human rights violations.96

92 CESCR, Report on the Seventh Session, Annex III.
95 See UNHCR Standing Committee, 12th meeting (UN DOC EC/48/SC/CRP.29).
96 See eg M Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (Cambridge University Press, 2007), ch 5.
Despite this, a general consensus, at the UN level and within the African regional human rights system, has emerged that civil and political rights on the one hand and ESC rights on the other, as noted above, are ‘universal, indivisible, and interdependent and interrelated’. This means that they form a single, unified body of rights and must be treated ‘globally in a fair and equal manner, on the same footing, and with the same emphasis’. Thus, human rights must not be subjected to a hierarchical subclassification, as this prejudices the effective realisation of ESC rights.

It has to be noted, however, that this formal consensus, although restated by the UN General Assembly in its 2005 resolution creating the Human Rights Council, masks a deep and enduring disagreement over the proper status of ESC rights generally. The reality is that these rights continue to be marginalised in practice by many states, state agents and NSAs. Their marginalisation can be discerned from the low level of international attention paid to them, exemplified by the approach of governments, judges, NSAs and academics who state that ‘economic and social human rights are costly to secure’. As noted above, at the international level, the roots of marginalisation of ESC rights can be traced to the ideological stand-off of the Cold War era coupled with the process of decolonisation and the ensuing North–South divide in international politics. Despite the end of the Cold War, the current univalved and influential global superpower, the United States, continues to oppose enhanced recognition and enforceability of ESC rights. The ‘United States generally views civil and political rights as the only “real”, or enforceable, human rights.’

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98 See Vienna Declaration, above n 8, para 5. The first World Conference on Human Rights in Tehran (1968) also proclaimed that ‘human rights and fundamental freedoms are indivisible’ (Proclamation of Tehran, UN Sales No E.68.XIV.2 (1968), Art 13) as well as the Declaration on the Right to Development, Art 6 (1986).
99 Vienna Declaration, ibid.
100 But see T Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001) 12(5) European Journal of International Law 917–14 at 920 and 925 for the view that non-derogable rights (eg Art 4 of the ICCPR) because of their normative specificity and status are often regarded as ‘core human rights, jus cogens and obligations erga omnes’ and therefore ‘To this extent, the interdependency and indivisibility of human rights should be denied and a hierarchy of human rights appears.’ It should be noted, however, that the existence of non-derogable rights does not, per se, contradict the principle of the interdependence and indivisibility of all human rights. See D Prémont (ed), *Non-derogable Rights and States of Emergency* (Bruxelles, Bruylant, 1996).
101 UN Doc A/RES/60/251 (3 April 2006), preamble, para 3.
102 See Steiner and Alston (2008), above n 33, 262–374 at 263.
105 Oloka-Onyango, above n 87, 853.
106 Stark, above n 18, 79–80 observes that ‘the United States is the only major industrialized democracy that has not yet ratified the [ICESCR] despite having ratified the ICCPR on 8 June 1992. M Robinson, ‘Shaping Globalisation: The Role of Human Rights’ in ASIL, *Proceedings of the 97th Annual Meeting* (2–5 April 2003), 1–12 at 11 notes that during her five years at the UN she found the ‘United States reluctant to embrace the full corpus of human rights law’.
107 N Saito, ‘Beyond Civil Rights: Considering “Third Generation” International Human Rights Law in the United States’ (1997) 28 University of Miami Inter-American Law Review 387, at 392. The ICCPR and the ICESCR were opened for signature in 1966 and signed by President Carter in 1977. The ICCPR was not, however, ratified by the US Senate until 1992, and the ICESCR has not as yet been ratified.
This impacts on ESC rights in other states because ‘the United States, clearly the global hegemony, traditionally champions [the so-called] first-generation rather than second-generation rights’. As noted above, many other states take a similar approach and regard most ESC rights as non-binding ‘principles and programmatic objectives rather than legal obligations that are justiciable’. This undermines the realisation of rights falling within the category of ESC rights. The more extreme view is that ESC rights do not constitute rights at all but ‘societal goals’ or ‘luxuries’ of the developed states, and that treating them as human rights undermines the enjoyment of individual freedom, distorts the functioning of free markets by justifying large-scale state intervention in the economy, and provides an excuse to downgrade the importance of civil and political rights.

[1.23] It is vital to note that the continuing reluctance to accord ESC rights the same level of recognition and enforceability affects disproportionately the more vulnerable members of societies. While vulnerability will vary according to context, vulnerable groups may include the following: ethnic, religious and racial minorities; indigenous persons; internally displaced persons; refugees; children and young persons; non-nationals; persons living in rural areas; elderly persons; persons with disabilities; migrants; trafficked persons and groups that are more often the victims of poverty and discrimination such as women especially in post-conflict situations. For example, unsafe abortions kill at least some 68,000–70,000 women each year and leave close to five million women with temporary or permanent disability. The women most affected are those living mainly in developing states with restrictive abortion laws who often resort to unsafe, clandestine abortions, jeopardising their lives and health. In addition, by the end of 2003, a study by the United Nations Educational, Scientific and Cultural Organization (UNESCO) disclosed that girls in 54 states still faced discrimination in access to education, with girls in sub-Saharan Africa, Pakistan, India and China especially affected.

[1.24] Thus, the widespread international ratification of the ICESCR (Appendix C) has not been accompanied by targeted and effective steps to entrench those rights within the domestic legal system of several states as human rights. Similarly, no effective administrative measures have been implemented (in several states) to give effect to

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110 Steiner and Alston (2008), above n 33, 263.
ESC rights in practice or to provide effective means of redress to individuals or groups who are victims of violations of ESC rights. At an international level, the lack of a world court for human rights to give binding decisions about violations of human rights, including ESC rights, continues to undermine the effective accountability for human rights violations. Without independent and effective accountability, a state can use scarcity of resources as an excuse to do virtually nothing or to neglect vulnerable groups.

C. Human Rights Obligations and Responsibilities

[1.25] There are two features that characterise legally guaranteed human rights: entitlement (for the right holder) to the ‘substance of the right’ and obligation (for the obligation holder). Traditionally, rights relations are conceptualised as vertical in the sense that they involve the obligation of a governing actor (the state or agents of the state) towards individuals (groups of individuals) within a state’s jurisdiction. This is based on the principle of state responsibility to guarantee human rights on the basis that the state/individual relationship involves unequal power dynamics between the parties. A state’s potential to abuse its position of authority to the detriment of an individual’s interests is the basis for human rights law to insulate the latter against state interference and abuse of power. In this context, human rights are viewed primarily as being exercisable against the ‘state’, and the state has the primary responsibility to respect, protect and fulfil human rights.

[1.26] Thus, the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (2001) state:

Article 4
Conduct of organs of a State
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

118 For example, under Art 2 of the ICCPR and the ICESCR, it is only each ‘State party’ to the each Covenant that undertakes obligations.
Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Therefore, all organs and branches of the state (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the state party with respect to human rights violations irrespective of whether these are ESC rights or civil and political rights.120

[1.27] By contrast, under traditional approaches to international human rights law, relationships in the private sphere have been regarded as being based on a degree of parity between free and autonomous parties, and thus NSAs are regarded as being beyond the direct reach of international human rights law.121 They cannot be parties to the relevant human rights treaties (meant for states) and so they are only bound to the extent that obligations accepted by states can be applied to them by governments. The result is that entities, including NGOs such as the UN, the World Bank and the International Monetary Fund, private security contractors, and transnational corporations, along with many others, are generally considered not to be bound directly by human rights law.122 How effective is this state-based approach in the era of globalisation?

D. Globalisation and ESC Rights

[1.28] Globalisation has set in motion a process of far-reaching change that is affecting international human rights law. Although it is capable of multiple and diverse definitions, globalisation is a phenomenon which has brought fundamental changes within every society. New technology, supported by more open policies, has created a world more interconnected than ever before. This spans not only growing interdependence in economic relations—trade, investment, finance and the organisation of production globally—but also social and political interaction among organisations and individuals across the world.123 Globalisation is primarily an economic process, although it is also a political, social and cultural process.124 As the CESCR stated in its Statement on Globalisation:

120 See also HRC, General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 4.
121 See eg S Wood and B Scharffs, ‘Applicability of Human Rights Standards to Private Corporations: An American Perspective’ (2002) 50 American Journal of Comparative Law 531, at 544–5 (Section IV) asserting that ‘On their face, international human rights instruments do not appear to apply to corporations.’
123 See World Commission on the Social Dimension of Globalisation, A Fair Globalisation: Creating Opportunities for All (Geneva: International Labour Office, 2004), x, available at www.ilo.org/public/english/wesdg/docs/report.pdf. See also J Stiglitz, Globalisation and its Discontent (New York, WW Norton, 2002), 9 describing globalisation as ‘the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders’.
124 See eg J Oloka-onyango, ‘Who’s Watching “Big Brother”? Globalization and the Protection of Cul-
[Globalisation] is usually defined primarily by reference to the developments in technology, communications, information processing and so on that have made the world smaller and more interdependent in very many ways. But it has also come to be closely associated with a variety of specific trends and policies including an increasing reliance upon the free market, a significant growth in the influence of international financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the state and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and a corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations, and in civil society.\textsuperscript{125}

\[1.29\] Significantly, globalisation can be understood as a double movement—globalisation driven ‘from above’ and globalisation ‘from below’.\textsuperscript{126} The first and most dominant form of globalisation (neoliberal globalisation) is currently driven from above, by dominant states, international economic actors and institutions, mainly the Bretton Woods agencies\textsuperscript{127} and the World Trade Organization (WTO),\textsuperscript{128} as well as the economic and political elites that they serve.\textsuperscript{129} The second form of globalisation is driven from below, by broad participation at the local level, interaction among globally conscious NGOs and other organisations committed to international human rights.\textsuperscript{130} As Oloka-Onyango and Deepika Udagama have noted, the ‘globalisation-from-below activists have the potential to add a democratic dimension to the debates about globalisation from above’.\textsuperscript{131}

\[1.30\] The impact of globalisation on human rights has been a subject of great...
discussion. As noted above, globalisation is multidimensional, consisting of numerous complex and interrelated processes that can have a dynamism of their own, resulting in varied and sometimes unpredictable effects. While previous eras have experienced globalisation, the present-day version has a number of distinctive features, including though not limited to trade liberalisation, changing patterns of financial flows, a growth in the size and power of corporations, advances in information and communications technology, and changing flows of people. These phenomena or developments are not divinely ordained, and accordingly globalisation is not ‘a natural event, an inevitable global progression of consolidated economic growth and development’. The CESCR noted that while none of these developments in itself is necessarily incompatible with the principles of the ICESCR or with the obligations of governments under the Covenant, taken together, and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the UN Charter in general and the principal international human rights instruments in particular. This is especially the case in relation to ESC rights as globalisation affects individuals and groups everywhere (with special difficulties to developing countries and countries with economies in transition) and in many aspects of their daily lives—jobs, food, health, education, leisure time, etc. As noted in the UN Millennium Declaration (General Assembly Resolution 55/2 of 8 September 2000):

5. We believe that the central challenge we face today is to ensure that globalisation becomes a positive force for all the world’s people. For while globalisation offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognise that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalisation be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.

[1.31] As the CESCR explained, for example, respect for the right to work and the right to just and favorable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights contained in the Covenant. The right to form and join trade unions may be threatened by restrictions upon freedom of association, restrictions claimed to be ‘necessary’ in a global economy, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike for various occupational and other groups. The right of everyone to social security might not be ensured by arrangements which rely entirely upon private contributions and private schemes. Respect for the family

134 Ibid.
136 CESCR, above n 125 at para. 3.
and for the rights of mothers and children in an era of expanded global labour markets might require new and innovative policies rather than a mere laissez-faire approach. If not supplemented by necessary safeguards, the introduction of user fees, or cost-recovery policies, when applied to basic health and educational services for the poor, can easily result in significantly reduced access to services which are essential for the enjoyment of the rights recognised in the Covenant. An insistence upon higher and higher levels of payment for access to artistic, cultural and heritage-related activities risks undermining the right to participate in cultural life for a significant proportion of any community.137

[1.32] As will be shown in chapter 3, a wide range of NSAs have more powers than states and as such have the potential to respect or violate human rights. This situation threatens to make a mockery of much of the international system of accountability for human rights violations. As privatisation, outsourcing and downsizing place ever more public or governmental functions into the hands of NSAs, the human rights regime must adapt if it is to maintain its relevance. Non-state actors such as transnational corporations (TNCs) and armed opposition groups have committed, and continue to commit, massive human rights violations.138 Such developments, among others, provide a basis for the ‘horizontal’ extension of the application of human rights to NSAs to ensure some degree of accountability. It is in this context that there is increasing recognition that in the era of globalisation, ‘it is essential to ensure human rights obligations fall where power is exercised, whether it is in the local village or at the international meeting rooms of the WTO, the World Bank or the IMF’.139

[1.33] In this respect, it is argued in chapter 3 that while states are primarily obliged to ‘respect, protect, and fulfil’ all human rights, including ESC rights, in the era of globalisation, emerging global trends have increased the influence of NSAs such as TNCs, international financial institutions and other business enterprises on the economies of most states, resulting in economic activities beyond the actual capacities of any one national system. As a result the key NSAs involved in this process have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to harm the human rights and lives of individuals through their core and subsidiary business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments and other activities. This necessitates an increasing recognition of the human rights responsibilities of NSAs. Making space in the international legal regime to take account of the role of NSAs (in the progressive realisation of all human rights including ESC rights) is one of the most critical challenges facing international law today.

137 Ibid.
139 Robinson above n 80, 5–6.
E. Obligation of Conduct and Result in International Law

[1.34] The primary sources of international law laying down human rights obligations for states and from which obligations for NSAs may be derived are international treaty law, international customary law and the general principles of law. Generally, in the discussion of international human rights obligations, a distinction is usually made between ‘obligations of conduct’ and ‘obligations of result’. Regarding the obligation of conduct, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) provide for both obligations of conduct and result:

Article 2
Elements of an internationally wrongful act of a State
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) Is attributable to the State under international law; and
(b) Constitutes a breach of an international obligation of the State.

Article 12
Existence of a breach of an international obligation
There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

[1.35] It follows that ‘there is a breach by a State of an international obligation requiring to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation’. On the other hand, with respect to the obligation of result, the ILC noted:

there is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

[1.36] Thus, international human rights obligations may be fulfilled through a state’s behaviour (conduct) and/or the end result of this behaviour (result). As shown below, Article 2 of the ICESCR imposes both the obligation of conduct (eg to take steps and to guarantee against non-discrimination) and result (eg to achieve progressively the full realisation of the rights guaranteed under the Covenant). Some of these obligations (eg the prohibition of discrimination) require fewer resources and are immediate, while others (eg the introduction of free higher education on the basis of capacity)

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140 Art 38(1) of the Statute of International Court of Justice (widely considered as the most authoritative statement as to the sources of International law) provides that: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59 (stating that the decision of the Court has no binding force except between the parties and in respect of that particular case) , judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’ For a discussion, see Shaw, above n 16, ch. 3.

141 CESCR, General Comment 3, para 1.

142 Articles Finally Adopted by the International Law Commission on Second Reading (2001), above n 119.

143 Yearbook of International Law Commission, UN Doc A/CN.4/SER.a/1996 (Draft Art 20 of the ILC Draft Articles on State Responsibility).

144 Ibid, Art 21.
require more resources and are progressive, requiring states parties to the ICESCR to take deliberate, concrete and targeted steps within a reasonably short time after the Covenant’s entry into force for the states concerned.

III. TRIPARTITE TYPOLOGY OF OBLIGATIONS

[1.37] It has been widely established that the goal of full realisation of ESC rights, like other human rights, imposes three types or levels of multilayered state obligations: the obligations to respect, protect and fulfil.145 This approach has been applied by the CESCR in its General Comments,146 and the African Commission on Human and Peoples’ Rights in its decisions.147 These obligations are set out below briefly.

A. Obligation to Respect

[1.38] The obligation to respect entails obligations not to interfere with the enjoyment of ESC rights. It requires states, at a primary level, to refrain from interfering directly or indirectly with the enjoyment of all human rights and freedom of the individual to use material resources—alone or in association with others—to satisfy basic needs or enjoy the right in question.148 States should respect rights-holders, their freedoms, autonomy, resources and liberty of action.149 Respecting ESC rights obliges states parties, inter alia, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to ESC rights protected by human rights treaties. For example, to respect the right to social security, a state should refrain from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; and arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.150

[1.39] Furthermore, the policies of NSAs, as noted above and discussed further in chapter 3, increasingly affect the well-being of individuals and groups, and so have

145 This analysis follows Eide’s taxonomy, whereby state obligations for all human rights can be seen as involving obligations to ‘respect, protect and fulfil’ the rights in question. See A Eide, The Right to Adequate Food as a Human Right, UN Doc E/CN.4/Sub.2/1987/23, para 66.
146 See eg CESCR, General Comment 19 (2008), para 43; General Comment 18 (2005), para 22; General Comment 17, para 28 (2005); General Comment 16 (2005), paras 18–21; General Comment 15 (2002), paras 20–29; General Comment 14 (2000) para 33; and General Comment 13, (1999) para 46.
150 CESCR, General Comment 19, para 44.
tremendous human rights implications. To this end NSAs are obliged, as a minimum, to respect human rights in their policies and actions.

B. Obligation to Protect

[1.40] The obligation to protect requires states to take measures that prevent NSAs (third or private parties) including individuals, groups, corporations and other entities as well as agents acting under their authority from interfering in any way with ESC rights (see chapter 3). Both the Inter-American Court of Human Rights (IACtHR)151 and the European Court of Human Rights (ECtHR)152 have also interpreted the relevant regional human rights treaties as imposing positive obligations upon states to ensure the enjoyment of civil and political rights. The same principle applies to ESC rights, especially for vulnerable individuals and groups.

[1.41] The obligation to protect, therefore, generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals and groups will be able freely to realise their rights and freedoms. This demands that the state protect against harmful activities carried out by NSAs and prevent violations by such actors by creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement frameworks. As shown in chapter 3, when violations by NSAs occur, the state must not acquiesce in such violations. It is obliged to take appropriate measures or to exercise due diligence to prevent, punish, investigate the harm caused by NSAs and, where appropriate, provide effective remedy. This might be in the form of monetary compensation or restitution of property; rehabilitation (legal, psychological, medical and social measures); satisfaction (truth commissions, criminal prosecution of perpetrators); and guarantees of non-repetition (amendment of laws, abolition of certain institutions).

[1.42] For example, in its General Comment on the right to social security as protected by Article 9 of the ICESCR, the CESCR stated that where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, states parties to the ICESCR retain the responsibility of administering the national social security system and 'ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security'.153 To prevent such abuses an effective regulatory system must be established which includes framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance.154 One example of the violation of the right to social security is the failure to regulate the activities of individuals or groups so as to prevent them from violating this right to social security.155 This also extends to the failure to regulate the activities of NSAs so as to prevent them from violating other ESC rights.

151 Velásquez Rodríguez v Honduras, judgment of 29 July 1988, Inter-AmCtHR (Ser C) No 4 (1988).
153 CESCR, General Comment 19, para. 46.
154 Ibid.
155 Ibid, para 65.
C. Obligation to Fulfil

[1.43] The obligation to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures including relevant national policies to ensure the goal of full realisation of ESC rights to those who cannot secure rights through their personal efforts.\(^{156}\) The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.\(^{157}\)

[1.44] The obligation to ‘facilitate’ requires states, inter alia, to take positive measures that enable and assist individuals and communities to enjoy ESC rights.\(^{158}\) The obligation includes, inter alia, according sufficient recognition of the rights recognised in human rights treaties protecting ESC rights, such as the ICESCR, within the national political and legal systems, preferably by way of legislative implementation; adopting a national strategy and plan of action to realise ESC rights; ensuring that systems relevant to ESC rights (eg the social security system, education system or health system) will be adequate, and accessible to everyone.\(^{159}\)

[1.45] The obligation to ‘promote’ requires states to undertake actions that create, maintain and restore the realisation of all ESC rights. The steps to be taken to promote a particular right will depend on the right in question but generally involves appropriate education and public awareness concerning access to ESC rights. For example, to promote the equal rights of men and women in the enjoyment of ESC rights, the steps to be taken include:

- To conduct human rights education and training programmes for judges and public officials;
- To conduct awareness-raising and training programmes on equality for workers involved in the realization of economic, social and cultural rights at the grass-roots level;
- To integrate, in formal and non-formal education, the principle of the equal right of men and women to the enjoyment of economic, social and cultural rights, and to promote equal participation of men and women, boys and girls, in schools and other education programmes;
- To promote equal representation of men and women in public office and decision making bodies.\(^{160}\)

[1.46] States are also obliged to ‘provide’ ESC rights when individuals or groups are unable, on grounds reasonably considered to be beyond their control, to realise these rights themselves, with the means at their disposal. This is especially the case to those who are particularly vulnerable or disadvantaged, such as the poor\(^{161}\) or lower-income groups, disadvantaged and marginalised women, indigenous and tribal peoples, occu-

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156 Eide, above n 148, 172. Examples include the disadvantaged/marginalised; the elderly; during crisis or disaster.
158 Ibid.
159 See eg CESCR, General Comment 19, para 48.
161 S Skogly, ‘Is There a Right Not To Be Poor?’ 2(1) Human Rights Law Review 59–80 at 79–80 observes that ‘by virtue of living in poverty, [poor] people face systematic and widespread violations of large number of human rights . . . such as the right to equality, to participation, and to food, health, housing and education’.
pied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.162

D. Obligation to Recognise?

[1.47] In addition to the above typology of obligations, Roger Normand adds the obligation to recognise as another dimension to this typology which, according to him, ‘not only imposes an obligation on States to ratify human rights treaties, but also on non-State actors to accept human rights responsibilities’.163 Do states have an obligation to ratify human rights treaties? To consent to be bound is the most significant, positive act that a state can take in relation to any treaty.164 Therefore, the ‘obligation to recognise’, if understood as requiring states to ratify human rights treaties, takes human rights obligations too far when it claims an obligation on states to ratify human rights treaties regardless of whether or not a state consents. Ratification of treaties is, and should remain, a purely voluntary measure as each state should decide freely whether or not to ratify a particular treaty. Accordingly, this book simply adopts and applies the view that the full realisation of ESC rights requires states to take steps on all the three levels – to respect, protect and fulfil. It also contends that in order not to violate states' human rights obligations, NSAs should, at the very minimum, respect completely the human rights obligations of states in which they operate.

IV. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A. ICESCR—Adoption and Ratification

[1.48] The most comprehensive UN treaty on the protection of ESC rights is the 1966 ICESCR.165 As noted above, after the adoption of the UDHR, the next step was to translate the rights recognised in the Declaration into binding treaty obligations. The process lasted from 1949 to 1966 when the UN General Assembly adopted the ICESCR on 16 December 1966, at the same time as the ICCPR, followed later by numerous specific conventions. The original decision of the UN General Assembly was that ESC rights should be included in the single international covenant, which was then projected.166 Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both categories of rights.167 The

165 For the codification of the ICESCR, see M Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Clarendon Press, 1995), ch 1, at 6–29.
166 See General Assembly Resolution (GAR) 421 (V) of 4 December 1950; Robertson and Merrills, above n 60, 275.
Assembly changed its position in 1952,\textsuperscript{168} at the height of the Cold War,\textsuperscript{169} under pressure from the Western-dominated Commission, and decided that there should be two separate covenants dealing with the two categories of rights, but that they should contain ‘as many similar provisions as possible’ and be approved and opened for signature simultaneously, in order to emphasise the unity of purpose.\textsuperscript{170} This change in approach and the delay in adopting the international human rights covenants were due to a number of reasons, including ‘the Cold War, developing US opposition to the principle of international human rights treaties, and the scope and complexity of the proposed obligations’.\textsuperscript{171} The ICESCR came into force on 3 January 1976 once it had 35 ratifications.\textsuperscript{172}

[1.49] As of 5 January 2009, there were 160 states parties to the ICESCR compared to 162 states parties to the ICCPR (Annex C). Fewer than 40 states still remained outside the ICESCR. Only 42 of the 160 states parties to the Covenant had made reservations and declarations with respect to some provisions of the Covenant, while eight states objected to some of these reservations and declarations primarily on the ground that such reservations were incompatible with the object and purpose of the Covenant (Annex H). Since the ideological controversy has ended with the end of the Cold War, there should be no reason to continue ‘this rather sterile dichotomy between the two sets of rights’.\textsuperscript{173} In any case, as of January 2008, apart from only four states, all other states parties to the ICCPR, including Canada, Japan, Germany and the United Kingdom, were also parties to the ICESCR.

B. Overview of the ICESCR

[1.50] The ICESCR is divided into five parts. Part I (Article 1) recognises the right of all peoples to self-determination. Part II (Articles 2–5) contains general provisions that apply to all substantive rights under the Covenant. This includes Article 2(1) that defines the general nature of states parties obligations, Article 2(2) dealing with non-discrimination, Article 3 on equal rights for men and women, and Articles 4 and 5 focusing on general limitations. These are discussed in chapter 2. Part III (Articles 6–15) deals with the specific substantive rights, outlined in section D below, and three examples are discussed in chapters 7, 8 and 9. Part IV (Articles 16–25) focuses on international implementation and the system of supervision, and is examined in the next section below. Part V (Articles 26–31) centres on the ordinary provisions of a human rights treaty relating to the ratification, entry into force and process of amendment of the Covenant (Appendix A).

\textsuperscript{168} GAR 543 (VI) of 5 February 1952; M Nowak, \textit{United Nations Covenant on Civil and Political Rights: CCPR Commentary} (Kehr, NP Engel, 2nd edn, 2005), xxiii.

\textsuperscript{169} The USA, which had initially been supportive of ESC rights, following President Roosevelt’s avowal of ‘freedom from want’ in 1941, reversed its position, fearing that expansion of state obligations associated with these rights would lead to the growth of communism and Soviet influence. See J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in T Hervey and J Kenner (eds), \textit{Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective} (Oxford, Hart Publishing, 2003), 1–25 at 2.

\textsuperscript{170} UN Doc A/2929, above n 167, 7.

\textsuperscript{171} See Steiner and Alston (2000), above n 33, 244.

\textsuperscript{172} ICESCR, Art 27.

\textsuperscript{173} Eide, above n 148, 111.
C. Treaty-Monitoring Body: CESCR and the Examination of State Reports

[1.51] Articles 16 and 17 of the ICESCR require states to submit reports, at intervals defined by the UN Economic and Social Council (ECOSOC), on the ‘measures which they have adopted’ and ‘the progress made’ in achieving the observance of the rights in the Covenant. Reports should be made in accordance with the reporting guidelines.174 The compliance of states with their obligations under the Covenant is monitored by the CESCR.175 This Committee was established in 1985 by a decision of ECOSOC176 to merely ‘assist’ in the ‘consideration’ of state reports.177 Thus, the Committee is not a body established by treaty, but a subsidiary body of ECOSOC. It has the primary responsibility for ‘monitoring’ the implementation of ESC rights protected under the Covenant.178 The Committee is composed of 18 ‘experts with recognised competence in the field of human rights, serving in their personal capacity’, elected with due consideration given to ‘equitable geographical distribution and to the representation of different forms of social and legal systems’.179

[1.52] The reporting procedure under the ICESCR is based on a direct dialogue (characterised as a ‘constructive dialogue’)180 between the expert delegation of a state party and the Committee. This process is followed by the Committee’s adoption of its ‘Concluding Observations’ (since its seventh session, 1992) in relation to a specific state report. The observations contain an introduction to the dialogue; highlight the positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern; and any suggestions and recommendations which aim at a better implementation of the covenant.181 Although the observations are not legally binding, they provide guidance to the normative content of the Covenant and indicate the Committee’s evaluation of the extent to which progress has been made towards the realisation of the obligations contained in the Covenant in a particular state.

[1.53] The observations do not have a section which deals expressly, in-depth and consistently with the ‘violations of the Covenant’. Only rarely has the Committee expressly referred to a violation of the Covenant. For example, the Committee has emphasised that it considers the non-performance by a state of its reporting obligations not only as a violation of the Covenant but also as a grave impediment to an

174 Report of the CESCR, UN Doc E/C. 12/1991/1; HRI/GEN/2/Rev1; Appendix I.
176 ECOSOC Decision 1985/17.
179 ECOSOC Decision 1985/17, para b. It is noteworthy that, in the past, the Committee members have been predominantly lawyers with limited economic expertise. See M Dowell-Jones, ‘The Committee on Economic, Social and Cultural Rights: Assessing the Economic Deficit’ (2001) 1(1) Human Rights Law Review 11–34. For the current membership of the Committee, see http://www2.ohchr.org/english/bodies/cescr/members.htm.
adequate application of the Covenant. In 1999, the Committee found that Mexico was ‘in violation of article 7(a)(ii) [right to just and favourable conditions of work] of the Covenant’. Similarly, in 1998 the Committee found Israel in breach of the Covenant noting that:

The Committee takes the view that large-scale and systematic confiscation of Palestinian land and property by the State and the transfer of that property to these agencies constitute an institutionalized form of discrimination because these agencies by definition would deny the use of these properties to non-Jews. Thus, these practices constitute a breach of Israel’s obligations under the Covenant.

The finding of a violation is a form of condemnation by a treaty body that a state is not complying with its international human rights obligations: it goes beyond inability to fail to perform. This can contribute to pressures towards increased attention to ESC rights by reinforcing and legitimising domestic demands to protect ESC rights and even by helping to call into question, both internally and externally, the commitment of the state to its voluntarily accepted human rights obligations. Thus, it is useful to apply this approach consistently.

Since the 21st session (1999), Concluding Observations encourage follow-up action by requesting states to include detailed information in their periodic reports on the steps taken to implement the Committee’s recommendations. This acts as a form of permanent supervision, but its success depends largely upon a particular state’s willingness to co-operate with the Committee.

It has been a practice of the Committee to adopt ‘General Comments’ and ‘Statements’ outlining its views on the substantive and procedural aspects of the Covenant (see Appendix D). Statements have been used to highlight some general aspects relevant to the Covenant, eg globalisation, poverty, intellectual property, Millennium Development Goals, an evaluation of the obligation to take steps to maximise available resources, and the world food crisis. Although not formally legally binding, the comments draw upon the Committee’s experience in examining reports on states and thereby act as a tool for ‘normative development’ or standards setting. By May 2009, the Committee had adopted 20 General Comments, 13 of which relate to substantive rights while seven deal with other aspects of the Covenant. No state had raised any

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184 CESC, Concluding Observations: Israel, UN Doc E/C.12/1/Add.27 (4 December 1998), para 11.
187 Rights to adequate housing (General Comment 4, 1991); persons with disabilities (General Comment 5, 1994); older persons (General Comment 6, 1995); forced evictions (General Comment 7, 1997); plans of action for primary education (General Comment 11, 1999); adequate food (General Comment 12, 1999); education (General Comment 13, 1999); highest attainable standard of health (General Comment 14, 2000); the right to water (General Comment 15, 2002); the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (General Comment 17, 2005); the right to work (General Comment 18, 2006); the right to social security (General Comment 19, 2008); and non-discrimination in economic, social and cultural rights (General Comment 20, 2009). See Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.7 (12 May 2004).
188 Reporting by states parties (General Comment 1, 1989); international technical assistance measures
formal objections to the General Comments or Statements, suggesting wide acceptance of the Committee's interpretation by states. Despite the fact that such General Comments have ‘contributed significantly to the operationalisation of human rights obligations and . . . spelled out, in greater detail, the content of the different rights’ in the Covenant, they do not permit the same level of normative specificity that would be possible under a petition system. A report-based system alone is insufficient to result in any real changes, especially where the state is not subject to internal scrutiny by its population, before or after a report is presented, because of deliberate state restrictions on information and lack of NGO interest or activity.

D. A Complaints Procedure Under the ICESCR and the Optional Protocol to the ICESCR

[1.56] By 2008 only two of the seven major UN human rights treaties—the Convention on the Rights of the Child (CRC) and the ICESCR—lacked a complaints procedure that would allow individuals and groups to submit complaints involving alleged violations of rights recognised in these treaties. With respect to the ICESCR, the effect of this lacuna meant that the CESCR could not carry out an extensive and more in-depth inquiry into the real problems confronting specific individuals and groups, which would in turn lead to the development of international jurisprudence or case law on ESC rights that would prompt states to ensure the availability of more effective remedies at the national level. Where national remedies for violations of ESC rights are either not available or ineffective, the absence of a complaints procedure under the ICESCR ‘greatly limits the chances of victims of abuses of the Covenant obtaining international redress’. In this respect, the system of monitoring the ICESCR based exclusively on a state reporting system and making non-binding Concluding Observations, has been a fairly weak system in terms of accountability.

[1.57] Accordingly, it was recognised that there was a need to strengthen the supervision of the ICESCR by providing for a complaints procedure to compliment the existing supervisory mechanism in the form of an Optional Protocol (OP) to the ICESCR. This need for an OP to the ICESCR (in some respects similar to the OP...
procedure to the ICCPR), providing for a complaint/communication procedure for individuals and groups seeking redress in instances where they consider their human rights guaranteed under the Covenant to have been violated, has been a subject of discussion before the Committee since its fifth session in 1990 until its 15th session in 1996.\(^{194}\) The length of this debate at Committee level reflected the fact that not all Committee members were in agreement about the need for an OP, or about the content of the proposed protocol. The 1993 World Conference on Human Rights, held in Vienna, encouraged the UN Commission on Human Rights (CHR), replaced by the Human Rights Council in March 2006,\(^{195}\) to continue, in co-operation with the CESCR, the examination of OPs to the ICESCR.\(^{196}\) The CESCR worked on an OP to enable complaint procedures under the Covenant. In December 1992, the Committee adopted an ‘analytical paper’ that examined the various modalities of such protocol, inter alia, the possibility of the collective and individual complaints.\(^{197}\) Through this paper the Committee strongly supported the development of an OP. The Commission on Human Rights, in paragraph 6 of its resolution 1994/20, took note of the steps taken by the Committee . . . for the drafting of an optional protocol . . . granting the right of individuals or groups to submit communications concerning non-compliance with the Covenant, and invite[d] the Committee to report thereon to the Commission.

A draft OP was finally adopted in 1996 at the Committee’s 15th session.\(^{198}\)

\[1.58\] The draft OP of the CESCR was submitted to the UN Commission on Human Rights during its 53rd session in 1997 but, for the past decade, its future remained largely uncertain.\(^{199}\) For four consecutive years (1997–2000), the Commission called

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\(^{195}\) On 15 March 2006, the General Assembly adopted resolution A/RES/60/251 to establish the Human Rights Council. The Commission on Human Rights concluded its 62nd and final session on 27 March 2006 before the Optional Protocol was adopted.

\(^{196}\) World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, Part II, para 75.


\(^{198}\) Draft Optional Protocol to the ICESCR, UN Doc E/CN.4/1997/105. The draft provided for: (i) the justification for the Optional Protocol in the Preamble; (ii) the complaints to the competent supervisory body from individuals, and groups who are alleged victims or who act on behalf of alleged victims of violations of all rights in the Covenant contained in Arts 1–15; (iii) interim and follow-up measures; as well as (iv) a friendly settlement procedure. For comments on the Draft, see UN Doc E/CN.4/1998/84, and for the analysis, see Arambulo, above n 175, 199–342; The Report on the UN Workshop on the Justiciability of ESC Rights, UN Doc E/CN.4/2001/62/Add.2.

for comments from states, the UN, intergovernmental organisations and NGOs, but did not take any decision.\textsuperscript{200} While NGOs were strongly in favour of an OP,\textsuperscript{201} only a limited number of states submitted comments.\textsuperscript{202} This manifests the considerable lack of enthusiasm and political will on the part of most states to be held accountable for the progressive realisation of ESC rights by an independent international body. Some states expressed doubts on the desirability of an OP.\textsuperscript{203} Some commentators were strongly critical of the proposal to provide for a complaints procedure under the ICESCR. For example, two US State Department legal advisers, writing in their personal capacities, stated that the ‘proposal for a new individual-complaints mechanism remains an ill-considered effort to mimic the structures of the ICCPR—and largely for mimicry’s sake’; and that the rights and obligations contained in the ICESCR were ‘never intended to be susceptible to judicial or quasi-judicial determination’.\textsuperscript{204}

[1.59] However, in 2001, the Commission took an important step and appointed an independent expert, Professor Hatem Kotrane, to examine the question of the draft OP to the ICESCR.\textsuperscript{205} Professor Kotrane made two reports\textsuperscript{206} and concluded that ‘there is no longer any doubt about the essentially justiciable nature of all the rights guaranteed by the Covenant’.\textsuperscript{207} As some examples discussed below in chapters 4, 7, 8 and 9 demonstrate, the above conclusion is tenable.

[1.60] Professor Kotrane also noted that the procedure envisaged under the Optional Protocol would be both beneficial and practical because it would, inter alia:

- ensure that effect was given to every individual’s right to appeal, and contribute to the development of international law by producing a coherent body of principles covering all the rights set forth in the Covenant; these principles could gradually acquire an authority that would be recognised by all, both at the international level and in the various countries where they could be used in the drafting of national legislation. It would also be beneficial in that it would provide more vigorous support for the principle of the indivisibility and interdependence of all human rights.\textsuperscript{208}

Thus, he recommended that the Commission establish an open-ended working group mandated to elaborate an OP in the light of the draft OP as prepared by the CESCR,

\begin{itemize}
\item \textsuperscript{201} UN Docs E/CN.4/1998/84 and E/CN.4/2001/62.
\item \textsuperscript{204} MJ Dennis and DP Stewart, ‘Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health’ (2004) \textit{98 American Journal of International Law} 462 at 514.
\item \textsuperscript{207} Kotrane, \textit{ibid}, UN Doc E/CN.4/2003/53, para 2.
\item \textsuperscript{208} \textit{Ibid}, para. 3.
\end{itemize}
The Commission took a further significant step in 2003 by establishing an ‘Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ to ‘consider options’ regarding the elaboration of an OP. Pursuant to Human Rights Council resolution of 29 June 2006, the Chairperson-Rapporteur, Catarina de Albuquerque, submitted a first draft OP to the fourth session of the Open-ended Working Group. Based on the discussions held and proposals for amendments made during that session, the Chairperson prepared a revised draft which was considered at the first part of the Working Group’s fifth session. Based on discussions held at the first part of the fifth session, the Chairperson prepared a new revised version as a basis for negotiations at the second part of the fifth session.

On 18 June 2008 the UN Human Rights Council adopted without a vote an OP to the ICESCR, and recommended that the General Assembly adopt and open for signature, ratification and accession the OP, at a signing ceremony in Geneva in March 2009. The UK expressly reserved its position until such time as the final decision was ready to be taken by the General Assembly. On 10 December 2008, the General Assembly unanimously adopted the OP. It is important to note that in the OP debate there were several contentious issues, including the following:

(i) The scope of the complaints mechanism—whether the mechanism would allow states to pick and choose the right the Committee had the competence to adjudicate on, or whether a comprehensive approach would be adopted giving the Committee competence to consider all rights under the ICESCR.
(ii) Locus standi (standing)—who would have standing to bring complaints under the protocol? Individuals only or even groups including NGO-generated complaints or other collective complaints?
(iii) Admissibility—what admissibility criteria to be applied? Should applicants exhaust regional remedies? Should applications disclose that victims have suffered a ‘clear disadvantage’?
(iv) Criteria for review—what criteria should the Committee apply when examining complaints: reasonableness, appropriateness, margin of appreciation?
(v) International co-operation and assistance—how to include appropriate reference to the crucial role of ‘international assistance and cooperation’ in the realisation of ESC rights as enshrined in Article 2(1) of the ICESCR? Would this require the establishment of a trust fund?

214 Optional Protocol to the ICESCR, GA Res A/RES/63/117 (10 December 2008), Art 18. For the text see Appendix B.
(vi) Reservations—whether to allow or prohibit reservations in an express provision?215

[1.63] It is undeniable that the OP contains a number of progressive provisions. For example, under the OP, states parties to the Covenant that become parties to the OP recognise the competence of the Committee to receive and consider communications of three types, namely: (i) communications by or on behalf of individuals or groups of individuals; (ii) inter-state communications; and (iii) inquiry procedures. While the first one applies to all states parties to the OP, the last two are optional binding only on states that would declare that they have recognised the competence of the Committee in respect of inter-state communications and to conduct an inquiry. These methods are outlined below.

[1.64] The first type involves communications submitted by or on behalf of ‘individuals or groups of individuals’, under the jurisdiction of a state party, claiming to be victims of violations of any of the ESC rights set forth in the Covenant (Article 2). This has several advantages. First, this provision is not limited to individuals only but extends to groups of individuals such as minority groups, trade unions or NGOs. Thus, it offers a wider locus standi before the Committee. Second, communications are not limited to individuals or groups within a state’s territory. Communications could be submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party. This means that communications could be brought by anyone within the power, effective control or authority of a state. Third, communications under the OP could be brought alleging a violation of any provision of the Covenant and not some provisions. This confirms that all rights under the Covenant are justiciable. Therefore, like other existing communication procedures, the approach adopted in the OP is comprehensive and not selective or limited.

[1.65] The second type involves inter-state communications. Under this type the Committee can receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the Covenant (Article 10). This can only take place where a state party has made a declaration recognising in regard to itself the competence of the Committee to receive inter-state communications. This means that a state may not recognise this procedure. The inter-state communications mechanism reflects the fact that every state party has a legal interest in the performance by every other state party of its obligations.216 However, even if some states were to make Article 10 declarations, the inter-state communications mechanism is unlikely to be widely used because of the perceived diplomatic and political implications of such an action; states might fear retaliatory attacks on their own human rights records.217 Similar procedures for inter-state complaints under other human rights treaties have not been used so far.218 For

215 For an overview, see Mahon, above n 194.
216 See also HRC, General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2187th meeting), UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 2.
218 See CAT, Art 21; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, below n 234, Art 74; ICERD, Arts 11–3; and ICCPR, Arts 41–3.
example, despite the fact that Article 11 of the ICERD provides for a mandatory inter-state communication procedure which had entered into force in 1970, not one of the 173 state parties to ICERD has so far invoked the inter-state communication procedure against any of the other states parties, even where systematic racial discrimination and ethnic cleansing has even led to genocide. Since the contractual dimension of the Covenant involves any state party to the Covenant being obligated to every other state party to comply with its human rights obligations under the Covenant, it is desirable that states should ratify the OP and make the declaration contemplated in Article 10. But even if the inter-state procedure is not (widely) used, its mere existence provides useful tools for international diplomacy and leaves the door open for possible future developments in international human rights litigation. It is better to have it rather than to omit it.

[1.66] The third type is an inquiry procedure. This can be invoked by the Committee on its own initiative under Article 11 of the OP if the Committee ‘receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant’. There is no definition of what violations would be considered as ‘grave or systematic’, leaving this to the Committee to determine. The origin of such information is not specified; it is likely that in most cases this would be derived from reports by NGOs or the media. A similar procedure is provided for in Article 20 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 8 of the OP to the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), provided the relevant committees have received indications of grave or systematic practice of torture or forms of discrimination against women.

[1.67] The inquiry procedure involves, as a first step, an invitation to the state party concerned to submit observations with regard to the relevant information. In addition, the Committee may designate one or more of its members to conduct a confidential inquiry, which may include a visit to a state’s territory with the consent of the state party. The Committee then transmits the findings of the inquiry to the state party concerned together with any comments and recommendations. A state may then submit its observations to the Committee within six months of receiving the findings, and the Committee may, after consultations with the state party concerned, decide to include a summary account of the results of the proceedings in its annual report. A follow-up to the inquiry procedure is provided for under Article 12 of the OP, which allows the Committee to invite the state party concerned to inform it of the measures taken in response to such an inquiry. Thus, the success of the inquiry procedure would depend largely on the positive support and co-operation of states. It is likely that if this procedure is used, it would provide an opportunity to address grave or systematic violations of ESC rights. However, a state may at any time withdraw its declaration under Article 11 of the OP by notification to the Secretary-General.

[1.68] In practice the inquiry procedure has been rarely used. This has been the case with respect to both CEDAW and CAT. By 2008, the CEDAW Committee had only

completed one inquiry under Article 8 of the OP, which was concluded in July 2004 regarding the abduction, rape and murder of women in the Ciudad Juárez area of Chihuahua, Mexico. The Committee Against Torture had initiated inquiries on systematic practice of torture in only seven states parties and had published results of six procedures (against Turkey, Egypt, Peru, Sri Lanka, Mexico and Brazil).

[1.69] Although some states and some writers are generally sceptical as to the viability of the complaints mechanism in relation to ESC rights, which are regarded, incorrectly, as ‘non-justiciable’; the ratification and coming into force of the OP to the ICESCR, allowing complaints from both individuals and groups (which is likely, given its optional nature, to be progressively accepted by states), would be a vital asset to enhance the effective protection of ESC rights at an international level. The complaints procedure under the OP could contribute to the implementation by states parties of the obligations under the ICESCR in several ways, including the following:

First, concrete and tangible cases would be discussed by the Committee in a framework of inquiry that is otherwise absent under the abstract discussions that arise under the State reporting procedure. . . . Second, the views of a treaty monitoring body on a complaint can be more specific than General Comments on how provisions should be understood [and applied in a specific context]. In this way, the views of the Committee on ESCR can contribute to clarifying the content of the obligations from the provisions of the Covenant. Third, the mere possibility that complaints might be brought before an international forum could encourage governments to ensure that more effective local remedies are made available.

The fact that the protocol provides for the Committee to request a state concerned to take interim measures in ‘exceptional circumstances’ if a victim or victims of alleged violations faces possible ‘irreparable damage’ (Article 5) provides an opportunity to protect ESC rights before determination of a communication.

[1.70] This would in turn positively influence national legislation and administrative policy to give effect to these rights. It would stimulate the formulation of precise claims, attract political concerns of states and contribute to further clarity of the scope and content of the rights under the Covenant. Such a OP ‘should be adopted and ratified without delay’. If the OP comes into force and appropriate cases are brought before the CESCR, it would strengthen the Covenant and lead to the ‘detailed jurisprudential scrutiny at the international level’. In the words of one organisation in favour of the OP:


223 Maastricht Guidelines, above n 162, 31.

An OP to the ICESCR allowing individuals and groups of individuals to submit claims against violations of economic, social and cultural rights and providing for an inquiry procedure would advance the principle that all human rights are universal, indivisible and interdependent. Additionally it would help overcome the common misconception that economic, social and cultural rights are not “justiciable”—that their controversies cannot be decided by a court.225

[1.71] As a former UN High Commissioner for Human Rights stressed in March 2008, the establishment of a communication procedure under the ICESCR will truly be a ‘milestone’ in the history of universal human rights, sending a strong and unequivocal message about the equal value and importance of all human rights and putting to rest the notion that legal and quasi-judicial remedies are not relevant for the protection of ESC rights.226 Indeed, to the extent that there is still a need for further clarification of the meaning of ESC rights, the early ratification of the OP becomes more necessary.227 For this reason, there is a need for states to sign and ratify the OP so that it enters into force without delay.228

[1.72] However, even if the OP comes into force, such a Protocol has its own limitations. Two such limitations are significant. First, although the OP requires states to give ‘due consideration to the views of the Committee’ (Article 9(2)), the Committee’s views, like those of the Human Rights Committee (HRC), are likely to be considered by states as non-binding, and thus states might simply ignore the Committee’s recommendations. Yet there is no political body in the UN that feels responsible to supervise the implementation by state parties of treaty bodies’ decisions, leaving this to the relevant treaty bodies. Second, existing UN treaty-monitoring bodies have not handled many cases compared to regional human rights courts which grant binding judgments. For example, while the full-time ECtHR offers binding judgments on some 1,000 individual complaints per year (in relation to 46 state parties to the European Convention on Human Rights (ECHR)), all existing UN bodies competent to deal with individual communications together (the HRC, the Racial Discrimination Committee, the Committee against Torture and the Committee on the Elimination of Discrimination against Women) had by 2007 only handed down little more than 500 non-binding decisions (‘final views’) over almost 30 years in relation to more than 100 state parties!229 Therefore, as chapter 10 notes, the ultimate goal should be to establish a World Court of Human Rights so that rights-holders are able to hold duty bearers (states or NSAs) accountable for not living up to their legally binding human rights obligations before a fully independent international human rights court with the power to render binding judgments and to grant adequate reparation to the victims of human rights violations.230

228 See Kotrane, above n 206, UN Doc E/CN.4/2002/57, para 56(a).
229 Nowak, above n 115, 253.
E. Substantive Rights

[1.73] The substantive rights guaranteed in Part III of the ICESCR, Articles 6–15, are outlined in paragraph 1.01 above. Due to space constraints, only three substantive rights (work, health and education) will be discussed in some detail in chapters 7, 8 and 9. Other ESC rights, including the rights to adequate food, adequate housing, water, social security, the right to take part in cultural life, and property, have attracted some recent analysis elsewhere.231 It is also pertinent to note that cultural rights have tended to be dealt with in relation to the ICCPR under its non-discrimination clause (Article 2(1)) and the minorities provision (Article 27), or specific rights such as freedom of expression, religion, association and the right to take part in the conduct of public affairs.232 However, this approach has led to the neglect of the economic and social dimensions of cultural rights, which is being addressed. For example in May 2008 the CESCR held a Day of General Discussion on ‘the right to take part in cultural life’.233 It is clear that the Covenant contains more rights with more detailed definitions than those contained in the UDHR, except that the right to property, despite recognition in Article 17 of the UDHR, was not included in the Covenant primarily because there was no agreement on such principal issues as: (i) its inclusion or non-inclusion in the Covenants, (ii) the formulation of the right governing public takings and the compensation therefor, (iii) limitations on the right and (iv) restrictions on state action.234

[1.74] It is important to note that, under the ICESCR, there is no clear distinction between what rights are ‘economic’ and what rights are ‘social’ or ‘cultural’ as most rights evidence economic, social and cultural aspects.235 The original drafting rationale suggested that the rights contained in Articles 6–9 of the ICESCR, the rights of

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concern to the International Labour Organisation (ILO) (work, just and favourable conditions of work, trade unions, strike and social security) were ‘economic rights’.236

The rights in Articles 10–12, rights relevant to UN agencies such as the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) (the protection of the family; adequate standard of living, ie adequate food and nutrition, clothing, housing; health) were treated as ‘social’, while other rights which fell within the sphere of UNESCO in Articles 13–15 (education, and the right to take part in cultural life) were considered as ‘cultural rights’.237 It has been claimed that under international law, five human rights as listed below are generally understood as ‘cultural rights’:

1. The right to education; 2. The right to participate in cultural life; 3. The right to enjoy the benefits of scientific progress and its applications; 4. The right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author, and 5. The freedom for scientific research and creative activity.238

In general, however, the above distinction between ‘social’, ‘economic’ and ‘cultural’ rights does not hold both in theory and practice, and it is unproductive to seek to distinguish rights that are so closely intertwined.239 Although as shown in the next chapter, a definition of ‘economic rights’ is necessary in the context of Article 3 of the ICESCR, most of the rights in the Covenant fall into more than one category. For example, the CESCR has acknowledged that the right to education has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well.240

F. Non-Derogability of ESC Rights

[1.75] Does the ICESCR apply fully in time of armed conflict (which may be international, including military occupation, or internal, as defined in international humanitarian law), war or other public emergency? Other public ‘emergency’ could refer to any crisis situation due to natural causes such as earthquake, tsunami, flood or hurricane, or post-conflict situations, eg institutional collapse post-conflict, which impair or violate human rights.241

[1.76] It is crucial to note that unlike some other human rights treaties (eg ICCPR, Article 4(1); ECHR, Article 17; American Convention on Human Rights, Article 27) there are no clauses in the UN treaties protecting ESC rights (eg ICESCR, CEDAW, CRC, the International Convention on the Elimination of All Forms of Racial

237 Steiner et al, above n 232, 276.
Discrimination (ICERD), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families242) allowing for, or prohibiting, derogations in a state of emergency. The absence of specific derogation clauses from a treaty is not per se determinative of whether derogations are permitted or prohibited. In the case of the ICESCR, this may be taken to mean either (i) that derogations to ESC rights are not permissible (since they are not provided for, meaning that states have an obligation to respect, protect and fulfil ESC rights, whether or not an emergency situation prevails),243 or (ii) that they may be permissible for non-core obligations (since they are not explicitly prohibited).

[1.77] The African Commission on Human and Peoples’ Rights (‘the African Commission’) has taken the first view in a number of cases. For example, in Commission Nationale des Droits de l’Homme et des Libertes v Chad, the African Commission held that:

The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.244

The African Commission upheld a similar position in Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, holding that:

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.245

While it might be criticised as an unrealistically high standard to expect states never to derogate from rights even during legitimately declared states of emergency, occasioned by, for example, flooding, it is understandable in the African context where emergencies have been abused.246 In case of the ICESCR, the travaux préparatoires of the ICESCR do not reveal any specific discussion on the issue of whether or not a derogation clause was considered necessary, or even appropriate. Thus the possible reasons for its omission are open to speculation. It is possible that this could have been as a result of a combination of factors including (i) the nature of the rights protected in the Covenant; (ii) the existence of a general limitations clause in Article 4 of the Covenant; and (iii) the ‘more flexible and accommodating’ nature of the general obligation contained in Article 2(1).247

[1.78] In General Comment 3 (1990), the Committee confirmed that states parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights enunciated in the Covenant—eg at least essential health care, basic

243 See the African Commission on Human and Peoples’ Rights decisions cited in the next paragraph.
shelter and housing, water and sanitation, foodstuffs, and the most basic forms of
education (see chapter 2). Accordingly, the CESCR has taken the view that core obli-
gations arising from the rights recognised in the Covenant are non-derogable. This is
clear from some of the Committee’s General Comments cited below:

CESCR, General Comment 14, highest attainable standard of health para 47: ‘It should be
stressed, however, that a State party cannot, under any circumstances whatsoever, justify its
non-compliance with the core obligations set out . . ., which are non-derogable.’

CESCR, General Comment 15, the right to water para 40: ‘A State party cannot justify its
non-compliance with the core obligations set out . . . which are non-derogable.’

[1.79] It can thus be argued that without a clause providing for derogation in the
ICESCR, core obligations arising from ESC rights cannot be derogated from in an
emergency, including a situation of military occupation. This position is defensible
because in times of emergency, inequality and discrimination increase for marginal-
ised groups (such as women and girls, persons with disabilities, persons living with
HIV/AIDS, ethnic minorities, and indigenous and migrant communities) who suffer
double or perhaps multiple discrimination.248 The rights of these groups, therefore,
deserve more rather than less protection during emergencies.

[1.80] In the Legal Consequences of the Construction of a Wall in the Occupied Pales-
tinian Territory,249 the International Court of Justice (ICJ) asserted the applicability
of the ICESCR in Occupied Palestinian Territory. It cited Concluding Observations
of the CESCR and also stated that Israel ‘is under an obligation not to raise any
obstacle to the exercise of such rights in those fields where competence has been
transferred to Palestinian authorities’ (paragraph 112). Relevant provisions in-
clude the right to work (Articles 6 and 7); protection and assistance accorded to the
family and to children and young persons (Article 10); the right to an adequate stan-
dard of living, including adequate food, clothing and housing, and the right ‘to be
free from hunger’ (Article 11); the right to health (Article 12); the right to education
(Articles 13 and 14) and the right to take part in cultural life (Article 15). The ICJ also
stated that save through the effect of provisions for derogation, ‘the protection offered
by human rights conventions does not cease in case of armed conflict’ (paragraph
106).

[1.81] Similarly the UN General Assembly confirmed in 1970 the applicability
of human rights norms in times of armed conflict, stating that: ‘Fundamental human
rights, as accepted in international law and laid down in international instruments,
continue to apply fully in situations of armed conflict.’250 In principle this position
applies to situations of emergency induced not only by armed conflict but also by
natural disasters or other types of emergency. It also extends to ESC rights as
protected by the ICESCR and other UN human rights treaties. Some of the General
Comments of the CESCR have confirmed this position. For example in General
Comment 15, on the right to water, the Committee noted that ‘during armed conflicts,
emergency situations and natural disasters, the right to water embraces those

248 Muñoz, above n 241, paras 88–99.
250 See Basic Principles for the Protection of Civilian Populations in Armed Conflicts, UN General
Assembly Resolution 2675 (xxv), 9 December 1970, para 1.
obligations by which States parties are bound under international humanitarian law.\textsuperscript{251} This includes the 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.\textsuperscript{252} Thus, the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant generally continues to apply in times of emergency induced not only by armed conflict but also by natural disaster or any other type of emergency,\textsuperscript{253} and as a minimum, states cannot derogate from the Covenant’s core obligations. In the words of the CESCR, ‘because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster’.\textsuperscript{254} Does this mean that states can derogate from non-core obligations under the ICESCR provided they comply with the general rules of derogation? The Committee’s use of the word ‘non-derogable’ in relation to core obligations might be interpreted as implying that other non-core obligations are indeed derogable. However, it is vital to note that the statement of the Committee was not a general reference to derogations under the Covenant but a specific example of the non-derogable nature of core obligations in the context of poverty. Therefore, it cannot be taken as being conclusive on the question of whether or not states can derogate from non-core aspects of ESC rights. Given the nature of the rights protected in the Covenant, the existence of a general limitations clause in article 4, and the fact that states are not required to do more than what the maximum available resources permit, derogations from the ICESCR in situations of conflict, war, emergency and natural disaster would be unnecessary.

G. Extra-Territorial Application

[1.82] Are states parties’ human rights obligations arising under the ICESCR limited to individuals and groups within a state’s territory or can a state be liable for the acts and omissions of its agents which produce effects or are undertaken beyond national territory (eg to those individuals and groups who are not within the state’s territory but who are subject to a state’s jurisdiction)? The ICESCR, unlike the majority of other human rights treaties (eg the ICCPR, Article 2(1)), does not make any explicit reference to territory or jurisdiction. Thus, its scope of application is not specified. Although the CESCR seems to be encouraging states to regulate or otherwise impact upon acts of NSAs both within and outside its borders,\textsuperscript{255} it has not discussed state

\textsuperscript{251} CESCR, General Comment 15, para 22. For the interrelationship of human rights law and humanitarian law, the Committee noted 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), 226, para 25.


\textsuperscript{254} CESCR, ‘Statement on Poverty and the ICESCR’, UN Doc E/C.12/1/Add.59 (21 May 2001), para 18.

\textsuperscript{255} In 1999 one committee member asked ‘whether Germany exercised extraterritorial jurisdiction over German nationals who committed crimes against children abroad’. See CESCR, See CESCR, ‘Summary Record of the 49th Meeting: Germany’, UN Doc E/C.12/2001/SR.49 (30 August 2001), para 48.
duties regarding extraterritorial jurisdiction in detail or with great clarity. For example, with respect to the right to social security, the Committee stated:

States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction 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.256

In its Advisory Opinion on the Wall the ICJ considered the rights contained in the Covenant as ‘essentially territorial’.257 However, the ICJ did not state that the ICESCR obligations are exclusively territorial. Indeed, state obligations under international law in general,258 and international human rights law in particular, are not territorially limited.

[1.83] The above position was confirmed by the ICJ in its decision in Democratic Republic of Congo v Uganda, where the ICJ stated that:

international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.259

Thus, the principal international human rights treaties—the ICCPR, Article 2(1); the ECHR, Article 1; CAT, Article 2(1); and the AmCHR, Article 1(1)—expressly extend state obligations both to individuals within a state’s territory and to those individuals who are not within the state’s territory but are subject to a state’s jurisdiction.260 The term ‘jurisdiction’ has multiple meanings across different branches of the law, but as used in the present context it is meant to denote the power that a state exercises under international law over persons (both natural and legal) or territory and its inhabitants. It is not limited to the national territory of the states parties; state responsibility can be involved because of acts and omissions of their authorities which produce effects

256 CESCR, General Comment 19, para 54. See also CESCR, General Comment 15, para 33.
258 Extra-territorial responsibility has been established in international law for decades. See eg The Smelter Arbitral Tribunal Decision (United States of America, Canada) (1941) 35 The American Journal of International Law 78 at 82. The decision is available at untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf. It was held that ‘no state has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another’.
260 See eg HRC, General Comment No 31 (80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, (26 May 2004), para 10; Inter-American Commission on Human Rights, Víctor Saldaño v Argentina, Petition, Report No 38/99 (11 March 1999), OEA/Ser.L/VII.95 Doc 7 rev, 289 (1998), para 17. The Commission stated that ‘the term “jurisdiction” in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.’ On jurisdiction clauses in human rights treaties, see M Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 Human Rights Law Review 411–48.
outside their own territory. In this respect the Inter-American Commission of Human Rights (IACmHR) asserted:

Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

In principle the above position should also apply to states other than US states, and also to ESC rights subject to the limits imposed by the principle of non-intervention under the UN Charter and applicable international law. The extraterritorial (transnational, external, international or third state) application of the ICESCR is supported by the reference to ‘international assistance and cooperation’ in Article 2(1) of the ICESCR (see chapter 2) and the reference to ‘jurisdiction’ in Article 14. That such obligations exist is also reflected in a number of General Comments of the CESC that interpret state obligations as extending to individuals under its jurisdiction. General Comment 1 indicates that states parties to the ICESCR have to monitor the actual situation with respect to each of the rights on a regular basis and thus be 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.

In General Comment 8 the CESCR asserted that a state affected by the imposition of economic sanctions has to ‘provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction’. Further the Committee indicated that states imposing sanctions are under an obligation to take ESC rights fully into account when designing an ‘appropriate sanctions regime’, to monitor effectively and protect those rights of the affected persons and take appropriate steps ‘in order to respond to any disproportionate suffering experienced by vulnerable groups within

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263 Art 14 of the ICESCR provides that: ‘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.’


Therefore, state obligations with respect to the Covenant apply to individuals and groups within a state’s territory and to those individuals who are subject to a state’s jurisdiction. Hence there is an obligation to take ‘steps’ to prevent violations both within and outside a state’s borders.

By way of example, in General Comments 14 and 15 the CESCR noted that health facilities, goods, services and water have to be accessible to everyone ‘without discrimination, within the jurisdiction of the State party’. In its Concluding Observations of 1998 on Israel, the CESCR confirmed that ‘the State’s obligations under the Covenant apply to all territories and populations under its effective control’, and that ‘the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction’. Thus, under the OP, communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party. A state party to the OP is obliged to take all appropriate measures to ensure that ‘individuals under its jurisdiction’ are not subjected to any form of ill-treatment or intimidation as a consequence of submitting a communication to the Committee pursuant to the OP. This means that a state can be found to be in violation of its obligations under the ICESCR for actions taken by it extraterritorially, in relation to anyone within the power, effective control or authority of that state, as well as within an area over which that state exercises effective overall control. Where many actors (states and NSAs) have collectively or jointly contributed to human rights violations in another state, liability and responsibility for such violations should be divided based on the relative power of each entity in causing the violation and the ability to have ended such a violation. Where it is not possible to disaggregate such actions or omissions leading to human rights violations and attribute them to individual states, relevant states should be held jointly responsible under international law.

It is vital to note that in appropriate cases national courts can play a key role in holding states accountable for human rights violations beyond state borders. For example, on 13 June 2007, the Judicial Committee of the UK House of Lords, the country’s supreme judicial body, delivered an important ruling on the application of the UK’s Human Rights Act 1998 (which effectively incorporates most of the rights

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270 See Appendix B, Art 2.
contained in the ECHR into UK law) to the actions of British troops in Iraq in the case of *R (on the application of Al Skeini and Others) v the Secretary of State for Defence*. The case concerned the deaths of six Iraqi civilians in Basra in 2003. Five of them, Hazim Jum’aa Gatteh Al-Skeini, Muhammad Abdul Ridha Salim, Hannan Mahailas Sadde Shmailawi, Waleed Sayay Muzban and Raid Hadi Sabir Al-Musawi, were shot dead by British military patrols. The sixth, Baha Mousa, was arrested and died at the hands of British troops in a military base. The families of the six victims asked the UK courts to overturn the Defence Secretary’s refusal to order an independent inquiry into the killings. Thus, the House of Lords had to consider whether the Human Rights Act applies to acts done outside the territory of the UK.

By a majority of 4–1 the House of Lords upheld the decision of the Court of Appeal, that in principle the Human Rights Act does apply to UK public authorities when they act outside the territory of the UK in relation to a person who is within the ‘jurisdiction’ of the UK within the meaning of Article 1 of the ECHR. It was ruled that Baha Mousa, who was held in a British detention centre in Iraq when he died, did fall within the jurisdiction of the UK. This ruling represents a rejection of the argument that the UK Human Rights Act has a narrower scope than the ECHR. It also demonstrates that domestic courts can apply domestic law to reaffirm the principle that human rights treaties such as the ECHR can bind states parties even when they act outside their territory. Pursuant to the judgment, British forces can be held accountable for violations of the rights of individuals detained by them abroad. In principle there would be no justification for limiting the extraterritorial application of human rights treaties to protecting civil and political rights given the interdependent nature of all human rights. For example, unlawful detention or torture committed by state agents abroad could involve violations of a number of ESC rights, including the rights to adequate food, housing and health, for which a state could be held accountable.

However, the Law Lords rejected the proposition that the ECHR similarly applies to the killings of the other five victims. The Law Lords found that there was no sufficient link between the Iraqi victims and the UK because British troops did not have effective control over the area where the killings occurred. In so finding, the Law Lords followed the restrictive ECtHR decision in the *Bankovic* case, although it was acknowledged that ‘the judgments and decisions of the European Court do not speak with one voice’, thus perhaps foreshadowing a likely complaint to the European Court and further clarification of the law in the future. While this might be disappointing to the five claimants, it appears to reflect the reluctance of national courts to apply standards higher than those set by the Grand Chamber of the ECtHR in the *Bankovic* case.

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274 The Human Rights Act incorporated the following Arts 2–12 and 14 of the ECHR, Arts 1–3 of the First Protocol and Arts 1 and 2 of the Sixth Protocol, as read with Arts 16–18 of the ECHR, subject to any designated derogation or reservation.


276 *Bankovic v Belgium and others* (2001) 11 BHRC 435. The ECtHR stated in para 61 that ‘article 1 of the convention [ECHR] must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case’.

277 See above n 275, Lord Rodger of Earlsferry, para 67.
V. CONCLUSION

This chapter has provided a background to the international protection of ESC rights, primarily under the ICESCR. This sets the scene for the analyses that follow. It has been shown that states are obliged to respect, protect and fulfil ESC rights in international law. It is clear from the foregoing that ESC rights are now widely accepted by states at least viewed from the wide ratification of international treaties protecting this category of rights. However, it has to be noted that ratification of human rights treaties was not meant to be an end in itself. Nonetheless, in practice there is still ‘a serious rift between standard-setting and implementation’. While the existing international human rights system as regards ESC rights is rich in human rights norms and ideals it is largely wanting in political will and enforcement.

As shown above, until December 2008 when the OP to the ICESCR was adopted, the monitoring mechanism in respect of the ICESCR was still one of the weakest in the international human rights regime. Until the OP comes into force, the absence of a petition system under the ICESCR makes it difficult for normative standards to be specifically developed and to provide effective remedies to specific victims of violations of ESC rights. This means that states might not be held more accountable for individual or group violations of ESC rights at the UN level. Therefore, it is essential to strengthen the existing system as accountability tends to encourage the most effective use of limited resources, as well as a shared responsibility among all actors. Despite its limitations, the adoption of the OP to the ICESCR by the General Assembly (allowing communications by or on behalf of individuals or groups of individuals, inter-state communications as well as an inquiry procedure) to complement the periodic review of reports and the ratification of the OP by states would enhance the protection of ESC rights once its provisions are interpreted and implemented. This is because the complaints procedure would bring real problems confronting individuals and groups before an independent international body. Although NGOs were deliberately not provided with the *locus standi* to directly bring claims before the Committee, they could still bring claims of alleged violations of ESC rights ‘on behalf of’ victims. This has the potential to assist victims who lack the resources and awareness to submit a petition. This is likely to encourage states to ensure that more effective local remedies are available and accessible at a domestic level in respect of ESC rights. Since the views and recommendations of the CESCR under the OP would not be legally binding, the creation of a World Court of Human Rights which also considers, inter alia, claims of violations of ESC rights should be given attention in the future.

Nonetheless, individuals would not be guaranteed ESC rights generally merely because the international human rights treaties or the treaty monitoring bodies indicate that they are entitled to such rights. While this is useful, the ultimate determinant is what the state has implemented, or is genuinely willing to implement, at the domestic level. In addition, the awareness by individuals of their human rights and willingness to enforce them plays an essential role. There is a need to intensify human

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rights education, with sustained awareness-raising and legal literacy campaigns about ESC rights, since currently a limited élite inner circle of academics, activists and politicians tends to be aware of ESC rights, relevant state reports and the Concluding Observations of a UN Committee in respect of state reports.

[1.92] It has been shown that the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant generally continues to apply. The implication of this is significant for state parties to the Covenant because as a minimum states can not derogate from the Covenant’s core obligations. Finally, it has been argued that states’ human rights obligations under the ICESCR may extend to anyone within the power, effective control or authority of a state, as well as within an area over which that state exercises effective overall control. In this respect ESC rights, though essentially territorial, are not necessarily territorially limited. It is desirable if the CESCR and other treaty monitoring bodies were systematically to request states parties to include information about steps taken to prevent, regulate and adjudicate human rights violations in their periodic reports.
State Obligations under the ICESCR

I. INTRODUCTION

[2.01] The ICESCR (or the Covenant) is the most comprehensive human rights treaty on ESC rights in international law. The Covenant contains important provisions in Articles 2–5 that contain the basic obligations of the states parties and these have implications for the responsibilities of NSAs as shown in chapter 3. In this chapter, the human rights obligations of states arising from the general provisions in Part II of the ICESCR, Articles 2, 3 and 5, are examined since these directly inform all the substantive ESC rights protected in Part III of the Covenant. Several questions are considered in this chapter arising out of Articles 2–5 in the Covenant. Specifically, what are the human rights obligations of states parties to the ICESCR? What is the scope of ‘international assistance and co-operation’? Does international co-operation require the developed states in the North to provide the developing states in the South with resources to realise ESC rights in the latter? Does it also require states not to impose on other states measures, rules and policies that might work against the progressive realisation of ESC rights? To what extent is a state obliged to eliminate discrimination, and to promote equality, in the enjoyment of all ESC rights? Given the limited available resources, can developing states discriminate against non-nationals in the enjoyment of ESC rights? What limitations on ESC rights are permissible under the Covenant?

[2.02] In addressing the above questions, the structure of this chapter is as follows. Section II examines the human rights obligations arising from Article 2(1). Section III deals with the scope of the obligation to guarantee non-discrimination and to promote equality, while section IV deals with the obligations of developing states parties to the ICESCR with respect to non-nationals in developing states. Section V discusses the limitations on ESC rights and safeguards against abuse of these rights. Section VI concludes that the ICESCR lays down clear human rights obligations for states parties, noting that while the Covenant provides for ‘progressive realisation’ and acknowledges the constraints due to the limits of ‘available resources’, it also imposes various obligations which are of immediate effect and these can be enforced by judicial and quasi-judicial bodies at the national and international levels. One of the
immediate obligations is that states parties must take deliberate, concrete and targeted steps within a reasonably short time after the Covenant’s entry into force for the states concerned in order to achieve progressively the full realisation of ESC rights, and to guarantee that these rights are enjoyed without discrimination (Article 2(2) of the Covenant), and equally between men and women (Article 3 of the Covenant). It is noted that the ‘availability of resources’, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction.

II. ARTICLE 2(1)

[2.03] Article 2(1) of the ICESCR is fundamental to the understanding of state obligations with respect to ESC rights since it is the general legal obligation provision.1 It directly informs all of the substantive rights protected in Articles 6–15 of the Covenant. By 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

It is noteworthy that although, as pointed out in the previous chapter, some states have made reservations and declarations to the Covenant (Appendix H), none has made a reservation or declaration in respect of Article 2(1). It has to be borne in mind that since the Covenant is an international treaty, the human rights obligations undertaken by states under it, and consequently by the international community, must be performed in good faith (pacta sunt servanda).2

[2.04] Similarly, the Covenant as an international human rights treaty must generally be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.3 This can be supplemented by recourse to the preparatory work (travaux préparatoires) of the Covenant to confirm the meaning of the treaty provisions or to determine it where the ordinary meaning leaves the intention ‘ambiguous or obscure’ or ‘manifestly absurd or unreasonable’.4 Thus, in interpreting human rights obligations arising from

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3 Vienna Convention, above n 2, Art 31; Golder v United Kingdom, judgment of 21 February 1975, Series A, No 18; (1979–80) 1 EHRR 524.
4 Vienna Convention, above n 2, Art 32. For the discussion of treaty interpretation, see Aust, above n 2, 230–55. The ICJ recognised these principles as embodying customary international law (CIL) in Territorial Dispute (Libyan Arab Jamahiriya/Chad) (1994) ICJ Rep, para 41.
human rights treaties including the ICESCR, it is useful to consider the rules of treaty interpretation. This involves looking to the ‘ordinary meaning’ of the treaty terms. This has to be done in the ‘context’ of a treaty, which includes the treaty’s text, including its preamble and annexes. As noted in the introduction in chapter 1, the Covenant’s preamble and many other human rights instruments reiterate the indivisibility of ESC rights and civil and political rights. Treaty terms (of the Covenant) must be interpreted in the light of the Covenant’s ‘object and purpose’, which like other human rights instruments is the ‘effective protection of human rights’ of individuals and groups. Effectiveness demands that treaty provisions be given full effect and that treaty monitoring bodies adopt an ‘evolutionary’ view of human rights instruments as expanding in scope over time. It is in this context that Article 2 of the Covenant is examined below.

[2.05] It has been observed that ‘[r]elative to Article 2 of the ICCPR, Article 2 of the ICESCR is weak with respect to implementation’. Thus it has been noted:

Article 2(1) itself is somewhat confused and unsatisfactory provision. The combination of convoluted phraseology and numerous qualifying sub-clauses seems to defy any real sense of obligation. Indeed it has been read by some as giving States an almost total freedom of choice and action as to how the rights should be implemented.

The language of Article 2(1) is clearly wide and full of caveats, and any assessment of whether a state has complied or infringed its general obligation to protect rights under the Covenant of a particular individual is a complex matter. The obligation of state parties under Article 2(1) is subject to the availability of resources and is to be realised progressively. In the context of individual and collective communications, how would the CESCR apply the obligation under Article 2(1) ‘to take steps... to the maximum of its available resources’ to achieve progressively the full realisation of the rights recognised in the Covenant? More particularly, how would the CESCR decide

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5 Vienna Convention, above n 2, Art 31(2).
6 ICESCR, preamble, para 4 recognises 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’.
7 By way of analogy, the Inter-American Court of Human Rights (IACtHR), has stated in The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, (Ser A) No 16, para 114: ‘Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) [Advisory Opinion OC-10/89 of July 14, 1989, Series A No 10, para 43], and the European Court of Human Rights, in Tymer v United Kingdom (1978) [judgment of 25 April 1978, Series A No 26, 16–6, para 31], Marckx v Belgium (1979) [judgment of 13 June 1979, Series A No 31, 19, para 41], Loizidou v Turkey (1995) (Preliminary Objections) [Judgment of 23 March 1995, Series A No 310, 26, para 71], among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions’.
whether a state should have spent more on education relative to social security, health, housing, water or food? In a specific claim, how would the Committee decide whether a particular state’s resources were such that it should, for example, have provided a petitioner with a doctor/hospital treatment (in the context of the right to health)\textsuperscript{11} or with a teacher/school (in the context of the right to education).

[2.06] However, the nature and scope of the states parties’ obligations under the Covenant, including the provisions of Article 2(1) above, and the nature and scope of violations of ESC rights and appropriate responses and remedies, including the provisions of Article 2(1) above, have been examined by groups of experts in international law who adopted the Limburg Principles on the Implementation of the ICESCR in 1986 (‘the Limburg Principles’)\textsuperscript{12} and Maastricht Guidelines on Violations of Economic Social and Cultural Rights in 1997 (‘the Maastricht Guidelines’).\textsuperscript{13} Although the Limburg Principles and Maastricht Guidelines are not legally binding per se, they provide ‘a subsidiary means’ for the interpretation of the Covenant as ‘teachings of the most highly qualified publicists of the various nations’. Moreover the participants who adopted the Limburg Principles believed that they ‘reflect the present state of international law, with the exception of certain recommendations indicated by the use of the verb “should” instead of “shall”’. The participants who adopted the Maastricht Guidelines considered them to ‘reflect the evolution of international law since 1986’. The CESCR has also in numerous general comments (Appendix D) spelt out the content of the obligations and rights under the Covenant, to which no state has ever raised any formal objections. As pointed out above, the Covenant as an international treaty must be interpreted taking into account its object and purpose, the ordinary meaning, the preparatory work and relevant practice.\textsuperscript{14} Adopting this approach, the following obligations arise from Article 2(1):

A. Obligation to ‘Take Steps . . . by All Appropriate Means’

[2.07] Under Article 2(1) states\textsuperscript{15} undertake to ‘take steps . . . by all appropriate means, including particularly the adoption of legislative measures’ towards the full realisation of the rights guaranteed under the Covenant. The scope of this obligation was clarified by the CESCR in 1990 in General Comment 3 on the nature of states parties’ obligations as follows.\textsuperscript{16}

\textsuperscript{11} Ibid.
\textsuperscript{12} UN Doc E/CN.4/1987/17, Annex; and (1987) 9 Human Rights Quarterly 122–35 (Appendix E). The Limburg Principles were adopted by a group of 29 participants.
\textsuperscript{14} Vienna Convention, above n 3, Arts 31 and 32.
\textsuperscript{15} The obligations of the Covenant in general and Art 2 in particular are binding on every state party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the State Party. See Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 4.
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 recognised that there are also significant similarities. In particular, while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. . . . One of these, . . . , 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’engager . . . agir’) and in Spanish it is ‘to adopt measures’ (‘a adoptar medidas’). Thus while the full realisation 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.

[2.08] It is notable from General Comment 3 that Article 2(1) clearly imposes an ‘obligation of conduct’\(^{17}\) (obligation to take action—active or passive—to follow, or abstain from, a given conduct to realise the enjoyment of a particular right) to begin to take steps immediately (in a manner that constantly and consistently advances the full realisation of ESC rights). The obligation to ‘take steps’ is not qualified or limited by other considerations.\(^{18}\) A failure to comply with this obligation cannot be justified by reference to social, cultural or economic considerations within the state. Thus in 1998 the CESCR, while noting that sanctions and blockades of Iraq hampered the full implementation of certain rights under the Covenant, underlined that ‘the State party remains responsible for implementing its obligations under the Covenant “to the maximum of its available resources”, in accordance with article 2, paragraph 1, of the Covenant’. Furthermore while being aware that the embargo imposed on Iraq created ‘extremely difficult conditions with respect to the availability of food, medicines and medical articles’, the CESC recommended that

the [Iraqi] Government take all necessary measures, to the maximum extent of its available resources, to address the needs of the population, and in particular those of the most vulnerable groups, such as children, the elderly and nursing mothers, in relation to article 12 of the Covenant.\(^{19}\)

[2.09] In addition, after beginning to take steps, Article 2(1) obliges a state to continue taking steps consistently, without any deliberate regressive action.\(^{20}\) The steps taken

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\(^{17}\) Maastricht Guidelines, para 7. The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality.

\(^{18}\) CESC, General Comment 3, para 2; Limburg Principles, 16 and 21.


should be geared towards achieving the principal ‘obligation of result’\(^{21}\) (to achieve specific targets/standards), which is to achieve ‘progressively the full realisation of the rights guaranteed’ in the Covenant.\(^{22}\) In respect of the right to primary education, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to ensure that children are going to primary schools. The obligation of result requires that children are learning to read and write.

\[2.10\] Steps towards the goal of full realisation ‘must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned’ and such steps must be ‘deliberate, concrete and targeted’ towards the full realisation of the Covenant rights.\(^{23}\) Some steps that states parties are required to take are of an immediate nature, especially in cases involving negative obligations that largely require non-interference with limited direct resource implications.\(^{24}\) Others, progressive in nature, may be taken over a period of time, especially those requiring largely positive obligations that may have significant direct resource implications.\(^{25}\) This distinction is significant in determining state compliance/non-compliance or unwillingness or inability to comply with the Covenant obligations, as non-compliance or violation of an obligation can only arise if compliance is due at a particular point in time. In general terms states are required to adopt two types of measures: legislative and non-legislative measures.

\((i)\) Adoption of Legislative Measures

\[2.11\] The steps to be undertaken, whether immediate or progressive, should be by ‘all appropriate means’, which in terms of Article 2(1) includes ‘particularly the adoption of legislative measures’. Legislative measures include not only the adoption of new legislation, but also the duty to reform, amend and repeal legislation manifestly inconsistent with the Covenant.\(^{26}\) Does this mean that states are obliged to take legislative measures in order to give effect to the rights recognised in the Covenant?

\[2.12\] In general terms, every state has a ‘margin of discretion’ in assessing which measures are most suitable to meet the specific circumstances for implementing its respective obligations.\(^{27}\) However, the specific reference to ‘legislative measures’ is

\(^{21}\) Maastricht Guidelines, para 7 notes that: ‘The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.’

\(^{22}\) CESCR, General Comment 3, para 9.

\(^{23}\) CESCR, General Comment 13, para 43; CESCR, General Comment 14, para 30.

\(^{24}\) The prohibition of discrimination follows under this category. In General Comment 13, para 31, the CESCR stated: ‘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.’ See also Commission on Human Rights, Res 2002/23, para 4(b).

\(^{25}\) For example, the progressive introduction of free secondary and higher education. See ICESCR, Art 13(2)(b) and (c).

\(^{26}\) See eg CESCR, Concluding Observations: Cyprus, UN Doc E/C.12/1/Add.28 (4 December 1998), para 26.

\(^{27}\) Thus, in its General Comment 14, para 53, the CESCR stated ‘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’ (emphasis added). See also CESCR, General Comment 15, para 45.
indicative of the preferred method of implementation. Thus, while the Covenant does not formally oblige states to incorporate its provisions in domestic law,\(^{28}\) the Committee considers legislation to be ‘highly desirable’ and in some cases ‘indispensable’: It has thus affirmed 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.\(^{29}\)

[2.13] Indeed, the Committee strongly recommends, and rightly so, the incorporation of the Covenant into domestic law so that it may be directly invoked in the domestic courts.\(^{30}\) This involves amending of existing laws\(^{31}\) and the failure to do so, when such adoption is ‘indispensable’ (eg to eliminate \textit{de jure} discrimination), can amount to a violation. Unsurprisingly, in 2005 the CESCR, in General Comment 16 on the equal right of men and women to the enjoyment of all ESC rights, stated:\(^{32}\)

The principle of equality between men and women is fundamental to the enjoyment of each of the specific rights enumerated in the Covenant. Failure to ensure formal and substantive equality in the enjoyment of any of these rights constitutes a violation of that right. Elimination of \textit{de jure} as well as \textit{de facto} discrimination is required for the equal enjoyment of economic, social and cultural rights. Failure to adopt, implement, and monitor effects of laws, policies and programmes to eliminate \textit{de jure} and \textit{de facto} discrimination with respect to each of the rights enumerated in Articles 6 to 15 of the Covenant constitutes a violation of those rights.

[2.14] Legislative measures are indispensable in the protection of all human rights including ESC rights,\(^{33}\) since a sound legislative foundation provides a firm basis to protect and enforce such rights. Legislation is particularly essential to combat \textit{de jure} discrimination, such as that against women, minorities, children and persons with disabilities.\(^{34}\) For example, with respect to discrimination against women in Iraq, the Committee recommended that:

[A] thorough review of the domestic legislation be carried out in order to eliminate any remaining discriminatory legal provisions, specific remedies be made available to women

\(^{28}\) CESCR, General Comment 9, para 8.

\(^{29}\) CESCR, General Comment 3, para 3.

\(^{30}\) CESCR, Concluding Observations: UK of Great Britain and Northern Ireland, UN Doc E/C.12/1/ Add.79 (5 June 2002), para 24; Ireland, UN Doc E/C.12/1/Add.77 (17 May 2002), para 23; Czech Republic, UN Doc E/C.12/1/Add.76 (5 June 2002), para 25; Trinidad and Tobago, UN Doc E/C.12/1/Add.80 (17 May 2002), para 32. See also chapter 4 on the domestic protection of ESC rights.

\(^{31}\) CESCR, Concluding Observations: Yemen, UN Doc E/C.12/1/Add. 92 (28 November 2003). The Committee found that ‘there are still persisting patterns of discrimination [against women], particularly in family and personal status law, as well as inheritance law’ (para 9) and ‘strongly recommend[ed] that the State party amend existing legislation in accordance with the provisions of article 3 of the Covenant’ (para 28).

\(^{32}\) UN Doc E/C.12/2005/3 (2005), para 41.

\(^{33}\) See eg CESCR, General Comment 3, para 3; CESCR, General Comment 14, para 56: ‘States should consider adopting a framework law to operationalise their right to health national strategy.’

\(^{34}\) See eg CESCR, Concluding Observations: Iraq, UN Doc E/C.12/1/Add.17 (12 December 1997), paras 13–4; CESCR, Concluding Observations: Morocco, UN Doc E/C.12/1/Add.55 (1 December 2000), paras 34, 45 and 47; CESCR, General Comment 5, para 16.
victims of sexual discrimination, and information and education campaigns be carried out to that end.\textsuperscript{35}

\textbf{[2.15]} Therefore, states must change their laws so as to conform to their ICESCR obligations. In the context of substantive ESC rights such as health, social security and education, legislation should include: (a) targets or goals to be attained and the timeframe for their achievement; (b) the means by which the purpose could be achieved; (c) the intended collaboration with civil society, private sector and international organisations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedures.\textsuperscript{36} As shown above, the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of ESC rights is considered to be a clear ‘violation’ of the Covenant.\textsuperscript{37}

(ii) Non-Legislative Measures

\textbf{[2.16]} By requiring states parties to use ‘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.\textsuperscript{38} There are several non-legislative measures (eg the provision of judicial or other effective remedies, administrative, financial, educational/informational campaigns and social measures) that are regarded as ‘appropriate means’. As the CESCR stated in General Comment 3 (1990):

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 recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies . . .

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.

\textbf{[2.17]} The measures stated above are related to different forms of accountability. These are necessary to compel a state to explain what it is doing and why and how it is progressing, as expeditiously and effectively as possible, towards the realisation of ESC rights. Remedies may be sought from administrative authorities, ombudspersons and other national human rights institutions, courts and tribunals. For this reason, the Committee’s reporting guidelines require states 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’.\textsuperscript{39}

\textsuperscript{35} Concluding Observations: Iraq, above n 34, para 30. For similar recommendations see CEDAW Committee, Concluding Observations: Tanzania, UN Doc CEDAW/C/TZA/CO/6 (18 July 2008), paras 16, 17 and 55; CEDAW Committee, Concluding Observations: Nigeria, UN Doc CEDAW/C/NGA/CO/6 (18 July 2008), paras 13, 14 and 44.

\textsuperscript{36} CESCR, General Comment 15, para 50, the CESCR recommended the adoption of a framework legislation to operationalise the right to water strategy addressing similar areas.

\textsuperscript{37} CESCR, General Comment 13, para 59; CESCR, General Comment 14, para 48.

\textsuperscript{38} CESCR, General Comment 9, para 1.

[2.18] It is instructive to note that the transformation of ESC rights into positive law, whether in national constitutions or in legislation is not enough, rather the rights must be translated into realities so that they are realised in fact. This may require comprehensive administrative measures and social action. Accordingly mere legislation, though essential, is not enough per se and therefore other ‘appropriate means’ in addition to legislation must be undertaken to achieve the intended result. This calls for putting in place appropriate means of redress, or remedies, for any aggrieved individual or group, and appropriate means of ensuring governmental accountability.

[2.19] Any administrative remedies such as those provided by the national human rights commissions and ombudsperson institutions should be practically ‘accessible, affordable, timely, and effective’. In addition, they will invariably have to be supported by appropriate, well-directed policies and programmes that are appropriate both in their conception and their implementation. National remedies are quicker, and generally more convenient to use in terms of accessibility, as well as backed by more effective arrangements for enforcement. The remedies may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

[2.20] In addition, ‘appropriate means’ extends to ‘improved macroeconomic performance’ such as the reduction of foreign debt, the decrease in inflation and the growth of export capacity, all of which create an environment conducive to a more effective implementation of ESC rights. The CESCR has taken the view that there is an obligation, for example, ‘to work out and adopt a detailed plan of action for the progressive implementation’ of each of the rights contained in the Covenant which is clearly implied by the obligation in Article 2(1) ‘to take steps...by all appropriate means...’. In the light of paragraph 71 of the Vienna Declaration and Programme of Action, states should through an open and consultative process expedite the adoption of such a comprehensive national strategy and plan of action on human rights.

The strategy must:

(a) be based upon human rights law and principles [including non-discrimination, people’s participation, accountability, transparency and independence of the judiciary];
(b) cover all aspects of the right . . . 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

41 CESCR, General Comment 9, para 2.
42 See generally CESCR, General Comment 10.
43 CESCR, General Comment 9, para 9.
44 Harris and Joseph, above n 8, 6.
45 Maastricht Guidelines, para 23; CESCR, General Comment 14, para 59.
47 CESCR, General Comment 1, para 4; Maastricht Guidelines, para 7.
48 CESCR, Concluding Observation: Guatemala, UN Doc E/C.12/1/Add.93 (28 November 2003), para 46.
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.49

This means that a state must make a plan of action immediately with clearly stated and carefully targeted policies, and execute the plan consistently with due diligence—expeditiously and in a timely manner—and in good faith, and avoid taking any regressive measures (those that have as their object or effect a decline in the enjoyment of human rights) without ‘the most careful consideration’.50

[2.21] In the context of the substantive rights protected under Articles 6–15 of the ICESCR, for example, a state must have a programme, however limited its resources might be, to respect, protect and fulfil the Covenant rights. A state’s inertia or unreasonable delay in taking steps and/or the adoption of measures that constitute setbacks in enforcing guaranteed rights would be contrary to Article 2(1). As noted above, the obligations of the Covenant in general and Article 2 in particular are binding on every state party as a whole. Accordingly, states must ensure that the measures adopted are ‘reasonable’, ‘effective’ and produce results compatible with the Covenant.51 If measures are taken to incorporate civil and political rights, consideration via treaty obligations should generally be given to similar measures in relation to ESC rights since the two sets are indivisible and interdependent.52 A state must be able to justify any difference in the measures implementing one set of rights from another set. Thus, although each state party must decide for itself which means are the most ‘appropriate’ under the circumstances with respect to each of the rights, the ultimate determination as to whether ‘all appropriate’ measures have been taken is subject to the Committee’s review.53 It is in this context that states reports are required to indicate the basis upon which the steps taken are considered to be the most ‘appropriate’.54

B. Obligation of Progressive Realisation

[2.22] As noted above, the steps taken should be geared towards obliging states to ‘achiev[e] progressively the full realisation’ of the Covenant rights. The appropriateness of the steps taken should therefore be examined by reference to the standard of ‘progressive realisation’. What, then, is meant by ‘progressive realisation’? Does the word ‘progressive’ enable the obligations of states parties ‘to be postponed to an indefinite time in the distant future’ as argued by Hungary during the preparatory work on the Covenant?55 According to its ordinary meaning, the term ‘progressive’ means ‘moving forward’ or ‘advancing by successive stages’56 in a manner that is

49 CESCR, General Comment 15, para 47.
50 Regressive measures are only valid if fully justified under strict scrutiny. See ICESCR, Arts 4–5; CESCR, General Comment 3, para 9.
52 CESCR, Concluding Observations: Switzerland, UN Doc E/C.12/1/Add.30 (7 December 1998), para 27.
53 CESCR, General Comment 3, para 4.
54 Ibid.
55 10 UN GAOR para 9, UN Doc A/2910/Add.6 (1955).
‘continuous, increasing, growing, developing, ongoing, intensifying, accelerating, escalating; gradual, step by step’. Thus, states parties are obliged to improve continuously the conditions of ESC rights, and generally to abstain from taking regressive measures. This notion of progressive realisation of ESC rights over a period of time constitutes a recognition of the fact that full realisation of all [ESC rights] will generally not be able to be achieved in a short period of time . . . reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of [ESC rights].

This obligation contrasts with the immediate obligation imposed by Article 2(1) of the ICCPR that obliges states to ‘respect and ensure’ the substantive rights under the ICCPR. Despite this,

[2.23] As a result states are required to take positive measures to realise civil and political rights. For example, the guarantee of humane treatment in detention under Article 10(1) of the ICCPR ‘imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty’. This necessitates the construction of a sufficient number of detention centres and the development of alternative measures to imprisonment, such as community service orders and bail arrangements to prevent overcrowding and ensure that detainees live in healthy conditions and have adequate access to healthcare and food, and otherwise ensure that conditions of detention in the country’s prisons are compatible with the UN Standard Minimum Rules for the Treatment of Prisoners. Similarly the right to a fair trial as protected by Article 14(1) ICCPR and Article 6 of the European Convention on Human Rights (ECHR) encompasses the right of access to a court in cases of determination of criminal charges, and rights and obligations in a suit at law, and the provision of free legal aid if this is ‘indispensable for an effective access to court’, eg for individuals who do not have sufficient means to pay. Accordingly the right to a fair trial necessitates the provision of independent and accessible organs of justice. The above examples demonstrate that the notion of progressive realisation is not limited to ESC rights; it extends also to civil and political rights.

58 CESCR, General Comment 3, para 9. Under the CRC, which includes ESC rights and corresponding state obligations, there is no reference to the qualifying clause ‘progressive realisation’. Thus, its obligations arise immediately, although implementation is qualified by the phrase ‘within their means’.
61 HRC, General Comment 21, Article 10 (44th Session, 1992), UN Doc HRI/GEN/1/Rev.1 at 33 (1994), para 3.
63 HRC, General Comment 32: Article 14—Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32 (23 August 2007), para 9; Golder v United Kingdom, judgment of 21 February 1975, Series A, No 18; (1979–80) 1 EHRR 524 paras 34–5.
64 Airey v Ireland, judgment of 9 October 1979, Series A, No 32; (1979–80) 3 EHRR 305, para 26.
65 HRC, General Comment 32, n 63 above, para 10.
Since the obligation upon states under ICESCR, Article 2(1) is the progressive achievement of the Covenant rights, it might be argued that to demand their immediate implementation is not required by the Covenant. Two responses are essential here. First, as shown below, some rights under the Covenant, such as freedom from discrimination in the enjoyment of all ESC rights and core obligations, give rise to obligations of immediate effect. Thus, a state cannot argue that it is providing primary education or primary healthcare to boys immediately but would extend it to girls progressively. Similarly, the argument that a state is paying women less than men for work of equal value would not be acceptable since the right of women to an equal remuneration for equal work should be implemented immediately (chapter 7). Second, the CESCR has explained that Article 2 ‘imposes an obligation to move as expeditiously and effectively as possible’ towards the Covenant’s goal of full realisation of the substantive rights under the Covenant. However, the Committee did not specify how ‘expeditiously and effectively’ a state should achieve the full realisation of all ESC rights. In order to comply with the obligation to achieve the realisation of ESC rights ‘progressively’, states parties are required to monitor the realisation of ESC rights and to devise appropriate strategies and clearly defined programmes (including indicators—carefully chosen yardsticks for measuring elements of the right—and national benchmarks, or targets, for each indicator) for their implementation. A human rights approach to government actions must begin with a proper understanding of the actual situation in respect of each right, accurate identification of the most vulnerable groups, and the formulation of appropriate laws, programmes and policies.

In order to monitor progressive realisation effectively, the CESCR should be in a position to measure consistently and scrutinise progress made by states by reference to reliable quantitative and qualitative data, and indicators/benchmarks in respect of the rights guaranteed under the Covenant. Some of these indicators have been developed, inter alia, by the relevant UN specialised agencies such as the ILO, the FAO, UNESCO and the WHO. For example, in assessing the realisation of the right to health, the WHO provides possible sources of data. These include: (1) Service Availability Mapping (SAM), which is a free, online service that includes only government-released data; (2) WHO country fact sheets; (3) the WHO database which includes census data, vital registration and population studies; and (4) relevant WHO...

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66 See eg CESCR, General Comment 3, para 9; General Comment 13, para 44; General Comment 14, para 31; and General Comment 15, para 18; Limburg Principles, 21.
67 CESCR, General Comment 14, paras 57–8; P Alston, ‘Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 332–81 at 357–8; Maastricht Guidelines, para 8. For example, in the 2002 World Summit on Sustainable Development Plan of Implementation, states made a commitment 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.
68 CESCR, Concluding Observations: Republic of Korea, UN Doc E/C.12/1/Add.59 (21 May 2001), para 34.
70 Useful information on these agencies is available on the website of the UN Economic and Social Council at http://www.un.org/docs/ecosoc/unagencies.html.
reports—e.g. the core goals of a good functioning health system as set out in the *World Health Report 2000* may provide a useful set of generic indicators against which all states can be monitored with respect to their provision of the right to health (good health, responsiveness and fair financial contribution).71 Since national averages reveal little about the real situation of specific (vulnerable and disadvantaged) groups and communities, much of this data, in order to be meaningful, must be disaggregated into relevant categories, including gender, race, ethnicity, religion, socioeconomic group and urban/rural divisions.72 Unfortunately, few states parties have either the requisite data or the willingness to share such detailed data with a UN supervisory body or with NGOs.73

[2.26] In determining progressive realisation, the Committee applies a strong presumption against ‘any deliberately retrogressive measures’.74 Unless otherwise justified ‘after the most careful consideration of all alternatives’ and ‘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’,75 the adoption of measures (legislation or policy) that cause a clear deterioration in the protection of rights afforded violates the Covenant.76 For example, unless justified in accordance with the above criteria, ‘the re-introduction of fees at the tertiary level of education . . . constitutes a deliberately retrogressive step’,77 especially where adequate arrangements are not made for students from poorer segments of the population or lower socioeconomic groups.78 Similarly, the reintroduction of direct user-fees for health facilities would have the same effect. As noted above, progressive realisation is subject to maximum available resources.

C. Obligation to Utilise ‘Maximum Available Resources’

[2.27] The steps that a state party is obliged to take under Article 2(1) to progressively realise the enumerated rights must be ‘to the maximum of its available resources’.79 What is meant by this? Does it refer to the resources existing within a state? Or does it also include those resources available from the international community through international co-operation and assistance? Chapman noted that evaluating progressive realisation within the context of resource availability ‘considerably complicates

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73 See eg CESCR, Concluding Observations: Republic of Moldova, UN Doc E/C.12/1/Add.91 (28 November 2003), para 18, stating that: ‘The Committee is concerned about the absence of adequate statistical data on social benefits since 1997 in the State party’s report.’

74 CESCR, General Comment 3, para 9.

75 CESCR, General Comment 13, para 45; CESCR, General Comment 14, para 32; CESCR, General Comment 15, para 19.

76 Maastricht Guidelines, para 14(e).


78 CESCR, Concluding Observations: United Kingdom, UN Doc E/C.12/1/Add.79 (5 June 2002), paras 22 and 41.

79 See CESCR, General Comment 3, para 9; General Comment 13, para 44; and General Comment 14, para 31; Limburg Principles, para 21.
the methodological requirements’ for monitoring.\textsuperscript{80} There are two practical difficulties in applying this requirement to measure state compliance with the full use of maximum available resources. The first is in determining what resources are ‘available’ to a particular state to give effect to the substantive rights under the Covenant. The second difficulty is to determine whether a state has used such available resources to the ‘maximum’. It has been suggested that the word ‘available’ leaves too much ‘wiggle room for the State’,\textsuperscript{81} making it difficult to define the content of the progressive obligation and to establish when a breach of this obligation arises.\textsuperscript{82} Nonetheless, it is clear that the Covenant does not make an absurd (or impossible) demand: a state is not required to take steps beyond what its available resources permit. The implication is that more would be expected from high-income states than low-income states. This means that both the content of the obligation and the rate at which it is achieved are subject to the maximum use of available resources.

\[2.28\] The position of the CESCR regarding the meaning of a state’s ‘maximum available resources’ has been stated as follows:

The undertaking by a State party to use ‘the maximum’ of its available resources towards fully realizing the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase ‘to the maximum of its available resources’ refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.\textsuperscript{83}

This means that the availability of resources refers not only to those controlled by or filtered through the state or other public bodies, but also to the social resources that can be mobilised by the widest possible participation in development, as necessary for the realisation by every human being of ESC rights.\textsuperscript{84} In this respect ‘available resources’ refers to resources available within the society as a whole, ‘from the private sector as well as the public. It is the State’s responsibility to mobilise these resources, not to provide them all directly from its own coffers.’\textsuperscript{85} As noted by the CESCR, and further discussed below, available resources also include those available through international co-operation and assistance.

\[2.29\] Article 2(1) requires states to use the available resources equitably and effectively targeted to subsistence requirements and essential services.\textsuperscript{86} To comply with


\textsuperscript{81} See R Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realising Economic, Social and Cultural Rights’, (1994) 16 Human Rights Quarterly 693 at 694.


\textsuperscript{84} See A Eide, ‘Economic and Social Rights’, in J Symonides (ed), Human Rights: Concepts and Standards (Dartmouth, Ashgate/UNESCO, 2000); Declaration on the Right to Development (GAR 41/128, 4 December 1986), Art 2 stating in part: ‘1. The human being is a central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively.’

\textsuperscript{85} Chapman and Russell, above n 80, 11.

\textsuperscript{86} Limburg Principles, 23, 27 and 28.
this obligation states should address all factors that adversely affect the availability of resources. For example, states must combat corruption since corruption diverts available resources that could have been invested in providing human rights. It also affects the poor disproportionately, due to their powerlessness to change the status quo and inability to pay bribes, creating inequalities that violate their human rights. In its assessment of whether a state party has taken reasonable steps to the maximum of its available resources to achieve progressively the realisation of the provisions of the Covenant, the Committee places great importance on transparent and participative decision-making processes at the national level. Such processes help to reduce corruption. In this respect, it is important to note that although states generally have a ‘margin of discretion’ to decide how to allocate the available resources and to prioritise certain resource demands over others, ‘due priority’ should be given to the realisation of human rights including ESC rights. Thus, it is important for every state to make appropriate choices in the allocation of the available resources in ways which ensure that the most vulnerable are given priority. All domestic resources must be considered for use by the state because human rights generally deserve priority over all other considerations.

In determining state compliance with the obligation to utilise the ‘maximum available resources’ the CESC has developed some useful indicators in its Concluding Observations. One indicator is to consider the percentage of the national budget allocated to specific rights under the Covenant (e.g., health, education, housing, social security), relative to areas outside the Covenant (e.g., defence or debt-servicing). Many resource problems revolve around the misallocation of available resources—e.g., purchasing expensive weapons systems rather than investing in primary education or primary or preventive health services. In 2001, for example, with respect to Senegal the CESC stated:

The Committee [was] concerned that funds allocated by the State party for basic social services . . . fall far short of the minimum social expenditure required to cover such services.

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90 CESCR, Statement above n 83, para 11.
91 CESCR, General Comments 14, 15 and 16, paras 53, 45 and 32 respectively. See also CESCR, Statement, above n 75, para 11, stating that ‘in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances’.
92 Limburg Principles, 28. See also CRC, Concluding Observations: Rwanda, UN Doc CRC/C/15/Add.236 (4 June 2004), para 18.
93 See A Eide, ‘The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights’, in Eide, Krause and Rosas (eds), above n 40, 545–51 at 549.
94 Robertson, above n 81, 700.
95 See eg CESCR, Concluding Observations: Philippines, UN Doc E/C.12/1995/7, para 21, stating that ‘in terms of the availability of resources, the Committee notes with concern that a greater proportion of the national budget is devoted to military spending than to housing, agriculture and health combined’.
In this regard the Committee note[d] with regret that more is spent by the State party on the military and on servicing its debt than on basic social services.\textsuperscript{96}

It is, accordingly, imperative to consider the priority or rate of resource allocation to military expenditure in comparison to the expenditure on ESC rights.\textsuperscript{97} A reordering of priorities may alleviate some of the resource burden of any state. Another indicator that may be applied is to consider the resources spent by a particular state in the implementation of a specific Covenant right and that which is spent by other states at the same level of development.

\textbf{[2.31]} As noted above in chapter 1, if the OP to the Covenant as adopted by the General Assembly in December 2008 comes into force, it would be possible for the Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant against states parties to the OP.\textsuperscript{98} If a communication was brought against a state party to the ICESCR and its OP, and the state used ‘resource constraints’ as an explanation for any retrogressive steps taken, the Committee has indicated that it would consider such information on a country- by-country basis in the light of objective criteria such as:

\begin{itemize}
  \item[(a)] the country’s level of development;
  \item[(b)] the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
  \item[(c)] the country’s current economic situation, in particular whether the country was undergoing a period of economic recession;
  \item[(d)] the existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;
  \item[(e)] whether the State party had sought to identify low-cost options; and
  \item[(f)] whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.\textsuperscript{99}
\end{itemize}

\textbf{[2.32]} The obligation to take steps to the maximum of a state’s ‘available resources’ means that in making any assessment as to whether a state is in breach of its obligations to fulfil the rights recognised under the Covenant of a particular individual or group, an assessment must be made as to whether the steps taken were ‘adequate’ or ‘reasonable’ by taking into account, inter alia, the following considerations:

\begin{itemize}
  \item[(a)] the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
  \item[(b)] whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
  \item[(c)] whether the State party’s decision (not) to allocate available resources is in accordance with international human rights standards;
\end{itemize}

\begin{footnotes}
\footnote{96}{CESCR, Concluding Observations: Senegal, UN Doc E/C.12/1/Add.62 (24/9/2001), para 23.}
\footnote{97}{Eide rightly argued that: ‘The “expenditure of death” should be turned into “expenditure of life” (public action to combat poverty) . . .’ See Eide, above n 40, 28.}
\footnote{98}{Optional Protocol to the ICESCR, Appendix B, Arts 1 and 2.}
\footnote{99}{CESCR, Statement above n 83, para 9.}
\end{footnotes}
(d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
(e) the time frame in which the steps were taken;
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.\textsuperscript{100}

\textbf{[2.33]} In the context of an OP, where the Committee considers that a state party has not taken reasonable or adequate steps, the Committee could make recommendations, inter alia, along four principal lines:

(a) recommending remedial action, such as compensation, to the victim, as appropriate;
(b) calling upon the State party to remedy the circumstances leading to a violation. In doing so, the Committee might suggest goals and parameters to assist the State party in identifying appropriate measures. These parameters could include suggesting overall priorities to ensure that resource allocation conformed with the State party’s obligations under the Covenant; provision for the disadvantaged and marginalised individuals and groups; protection against grave threats to the enjoyment of economic, social and cultural rights; and respect for non-discrimination in the adoption and implementation of measures;
(c) suggesting, on a case-by-case basis, a range of measures to assist the State party in implementing the recommendations, with particular emphasis on low-cost measures. The State party would nonetheless still have the option of adopting its own alternative measures;
(d) recommending a follow-up mechanism to ensure ongoing accountability of the State party; for example, by including a requirement that in its next periodic report the State party explain the steps taken to redress the violation.\textsuperscript{101}

\textbf{D. Minimum Core obligations}

\textbf{[2.34]} When a state ratifies the Covenant, the ultimate result is to implement fully all the components of the rights recognised under the Covenant. In order to \textit{fulfil} this, a state should in circumstances where resources are highly scarce tackle first certain ‘elements of the right that are the most essential or fundamental’.\textsuperscript{102} Such elements constitute the ‘minimum core content’ of a right, which translates into ‘minimum core entitlements’ for individuals/groups, and ‘minimum core obligations’ for states:\textsuperscript{103}

[The minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.\textsuperscript{104} Generally, the ‘core content’ of a human right refers to the entitlements which make up the right, while the ‘minimum core content’ has been described as the non-negotiable foundation of a right to which all individuals, in all contexts, and under all circumstances are entitled.\textsuperscript{105} As the CESCR put it:

\begin{itemize}
\item \textit{Ibid}, para 8.
\item \textit{Ibid}, para 13.
\item Chapman and Russell, above n 80, 9.
\item \textit{Government of South Africa v Grootboom}, 2001 (1) SA 46 (CC), para 31 (Yacoob, J).
\end{itemize}
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.106

[2.35] It follows that the lack of sufficient resources, does not exonerate a state party, including developing states, from a threshold or the ‘minimum core obligation’ to ensure, at the very least, ‘minimum essential levels’ of each of the rights guaranteed under the Covenant.107 It is not subject to the notions of progressive realisation and resource availability.108 Accordingly,

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.109

[2.36] This view has been echoed by the IACmHR, which states that the Organization of American States (OAS) Member States are ‘obligated . . . , regardless of the level of economic development, to guarantee a minimum threshold of [ESC] rights’.110 The African Commission has taken a similar view and stated that rights have a ‘minimum core’.111 Without the minimum core entitlements and obligations, the Covenant ‘is largely deprived of its raison d’être’.112 Is the minimum core in a least-developed state with limited available resources the same as the minimum core in a more-developed state with more available resources? In other words, is a minimum core relative (state-specific), universal or relatively universal? While there are different views on this issue,113 there would be no point in having a minimum core of state responsibility if it were state-specific and not universal.114 The ‘minimum core content’ that gives rise to the ‘minimum core obligations’ is, therefore, that part of a right, which must be respected and protected at all times, whatever the state’s level of development and available resources. It is an absolute international minimum, and constitutes a basic level of subsistence necessary to live in dignity. Alston described the minimum core as ‘an absolute minimum entitlement, in the absence of which a state party is considered to be in violation of its obligations’.115 He rightly observed:

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106 CESCR, General Comment 3, para 10.
107 Ibid; D Turk, Second Progress Report of UN Special Rapporteur on ESCR, UN Doc E/CN.4/Sub.2/1991/17, para 10 notes: ‘States are obliged, regardless of their level of economic development, to ensure respect for minimum subsistence rights for all.’
109 CESCR, General Comment 3, para 11.
112 CESCR, General Comment 3, para. 10.
The fact that there must exist such a core . . . would seem to be a logical implication of the use of the terminology of rights . . . 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 its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything.116

The minimum core can, therefore, be seen as a ‘base-line’,117 below which all states must not fall, and should endeavour to rise above.118 It should be noted, however, that the minimum core is not static but evolves upwards over time.119

[2.37] Therefore, ‘the lack of development may not be invoked to justify the abridgment of internationally recognised human rights’120 including the minimum core obligations of ESC rights. Every effort is required to be made to use all resources at the disposition of a state party in an effort to satisfy, as a matter of priority, the minimum core obligations121 and to protect vulnerable members of society even in times of severe resource constraints.122 The CESCR has emphasised three points in relation to ‘minimum core obligations’:

First, because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster. Second, because poverty is a global phenomenon, core obligations have great relevance to some individuals and communities living in the richest States. Third, after a State party has ensured the core obligations of economic, social and cultural rights, it continues to have obligations to move as expeditiously and effectively as possible towards the full realisation of all rights in the Covenant.123

Thus, minimum core obligations apply at all times not only to developing states but such obligations even have significance to (economically disadvantaged) individuals and groups in developed states. In this way, they apply universally and establish an ‘international minimum threshold’.124 The fact that the minimum core content of a right must be realised immediately does not suggest that the remainder of a right sufficiently unimportant to justify inertia or its neglect or denial. Rather the minimum core should be viewed as a ‘springboard’ for further action by the state.125 After the state has substantially met its minimum core obligations, it is obliged to realise progressively the remainder of a right.

[2.38] In this regard, states should avoid taking regressive steps that actually worsen access to ESC rights such as cutting back investment in basic services such as healthcare or primary education, even under pressure from international lenders such

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121 CESCR, General Comment 3, para 10.
124 Ibid, para 16.
as the International Monetary Fund (IMF) and the World Bank. The CESCR has pointed out that

any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.\(^{126}\)

\[2.39\] The idea of a ‘minimum core content’ has been criticised, inter alia, out of concern that using the word ‘minimum’ limits the full guarantee of rights by setting a lower standard for states to meet.\(^{127}\) However, as Provea, a Venezuelan NGO working since 1992 to promote the right to health, noted:

We consider that by establishing a minimum, uniform ‘floor’ below which a state may not descend does not weaken the right in question, provided that the content is understood as a starting point and not as the arrival point. Furthermore, establishing a framework assures a uniform basis to be respected, even by the states with insufficient economic resources or subjected to critical economic situations.\(^{128}\)

But one possible weakness in the ‘minimum core obligation’ approach is that its basic assumption—that minimum state obligations are by definition affordable—may in particular contexts be untenable in practice without considerable and sustained international assistance and co-operation.\(^{129}\) In other words, states are assumed to have access to the resources required to meet their minimum state obligations, but in reality some may not have such resources. For example, while free and compulsory primary education is considered to be part of the minimum core state obligation, primary education in many states is not free.\(^{130}\) The issue that arises here is whether this is a violation of the minimum core obligations or reflects the inability (as opposed to unwillingness) of states to meet their minimum state obligations? The answer depends on a number of factors (see paragraph 2.31 above) including whether the state had sought co-operation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.

\[2.40\] It is essential to point out that the obligation to monitor the extent of the (non)realisation of ESC rights and to devise strategies and programmes for their promotion is not subject to resource constraints.\(^{131}\) Accordingly, states must constantly monitor progress achieved and review strategies where there is no progress or where progress is insufficient. All states parties to the ICESCR must collect disaggregated data and identify vulnerable groups as the first essential step.\(^{132}\) The second step is to


\(^{126}\) CESCR, General Comment 3, para 9.

\(^{127}\) Russell, above n 103, 15.


\(^{129}\) Russell, above n 103, 16.

\(^{130}\) See Right-to-Education, Countries Without Free Public Primary Education Available to all School Age Children by Region, available at http://www.right-to-education.org/.

\(^{131}\) CESCR, Genera Comment 3, para 11; CESCR, General Comment 1, para 4.

\(^{132}\) CESCR, General Comment 1, para 3.
set ‘specific benchmarks or goals’\textsuperscript{133} to move progressively beyond the core content and to harness the national resources to realise ESC rights and improve of the situation of the worse-off regions or areas, and of specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.\textsuperscript{134}

\textbf{[2.41]} As pointed out above, the phrase ‘available resources’ in Article 2(1), in the view of the CESCR, extends not only to what is existing within a state, but also to resources ‘available from the international community through international cooperation and assistance’\textsuperscript{135} Therefore, where a state party is demonstrably unable to develop a plan of action for the realisation of the core obligations in respect of its minimum core obligations—such as primary education and essential primary healthcare—such a state should seek international co-operation and assistance to meet its human rights obligations for the most vulnerable groups. As regards the right to health, for example, the Committee holds 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 enable developing countries to fulfil their core and other obligations.\textsuperscript{136}

The Committee has clarified that economically developed states parties have ‘a special responsibility for and interest in assisting’ the developing countries in this regard.\textsuperscript{137} In respect of the right to primary education, the Committee holds that:

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 \textit{clear obligation to assist}.\textsuperscript{138}

What, then, is the content of this clear obligation to ‘assist’?

\textbf{E. Obligations Regarding International Assistance and Co-operation}

\textbf{[2.42]} Article 2(1) takes into account the fact that some steps required of states will be taken ‘through international assistance and co-operation, especially economic and technical’. This has been understood to give rise to the right to international assistance and co-operation. The origins of this contested right may be traced to Article 1 of the UN Charter, which states that one of the purposes of the UN is:

To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.

The notion of this right extends, through Articles 55 and 56 of the Charter, to Articles 22 and 28 of the UDHR. According to Article 22 of the UDHR:

Everyone . . . is entitled to realisation, through national effort and international cooperation . . . of the economic, social and cultural rights indispensable for his dignity and free development of his personality.

\textsuperscript{133} \textit{Ibid}, para 6.
\textsuperscript{134} \textit{Ibid}, para 3.
\textsuperscript{135} CESCR, General Comment 3, para 13. See also the next section below.
\textsuperscript{136} CESCR, General Comment 14, para 45.
\textsuperscript{137} CESCR, General Comment 19, para 55.
\textsuperscript{138} CESCR, General Comment 11, para 9 (emphasis added).
This was reinforced in Article 28 of the UDHR which has been understood to require that social order (political and economic relations within states) and international order (between states) be restructured to make possible the equal enjoyment of human rights throughout the world.\(^{139}\)

**[2.43]** The ICESCR refers to international assistance and co-operation, or similar formulations, in five articles.\(^{140}\) Under Article 23 states parties to the ICESCR:

agree that international action for the achievement of the rights recognised in the . . . 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 organised in conjunction with the Governments concerned.

This provision specifically recognises the role of not only the ratifying state, but also of other states in the achievement of ESC rights. This is because every state party has a legal interest in the performance by every other state party of its human rights obligations.\(^{141}\) This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of both the ICESCR and the ICCPR, there is a UN Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Clearly then, the furnishing of international technical assistance is a key feature of the ICESCR. What is uncertain is the extent to which states and other actors must discharge this obligation to furnish assistance for the realisation of ESC rights.

**[2.44]** International assistance has also found explicit recent expression in another universally ratified binding treaty: the CRC.\(^{142}\) Importantly, the Committee on the Rights of the Child (‘CRC Committee’) has noted:

> When States ratify the Convention, they take on obligations not only to implement it within their jurisdiction but to contribute, through international cooperation, to global implementation.\(^{143}\)

It follows that programmes of ‘donor states should be rights-based’.\(^{144}\) International assistance and co-operation may be regarded as one element of the more extensive right to development which was affirmed in the Declaration on the Right to Development (1986)\(^{145}\) and the Vienna Declaration and Programme of Action (1993).\(^{146}\) In the year 2000, 147 heads of state and government—191 states in total—recognised explicitly in the Millennium Declaration the link between the realisation of the right

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\(^{139}\) UDHR, Art 28 provides: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.’ For the analysis, see A Eide, ‘Article 28’, in G Alfredsson and E Eide (eds), *The Universal Declaration of Human Rights* (The Hague, Martinus Nijhoff, 1999), 597–632.

\(^{140}\) ICESCR, Arts 2(1), 11, 15, 22 and 23.

\(^{141}\) See eg HRC, General Comment 31, above n 15, para 2.

\(^{142}\) For text, see UN Doc A/44/49 (1989); 1577 UNTS 3, Arts 4, 7(2), 11(2), 17(b), 21(e), 22(2), 23(4), 24(4), 27(4), 28(3), 34 and 35.


\(^{144}\) Ibid, para 61.

\(^{145}\) GA res 41/128; annex, 41 UN GAOR Supp (No 53), 186, UN Doc A/41/53 (1986).

\(^{146}\) A/CONF.157/23 (12 July 1993), paras 9, 12 and 34.
to development and poverty reduction, and committed themselves to make ‘the right
to development a reality for everyone’ and to free ‘the entire human race from want’.147

[2.45] Scholars differ in their opinions as to whether or not drafters of the ICESCR
envisaged explicitly including extraterritorial obligations (to assist other states) in the
realisation of ESC rights. It has been contended that, from the travaux préparatoires,
states did not agree about the existence of any well-defined legal obligation upon any
particular state to provide any particular form of assistance under Article 2(1).148
Nevertheless, others have asserted that extraterritorial obligations were envisaged by
the drafters of the ICESCR.149 Whatever the answer to that question, the key issue for
present purposes is whether in the era of globalisation the Covenant can (or should)
be interpreted as establishing extraterritorial obligations for developed states to assist
developing states. It is striking to recall that the object and purpose of the Covenant,
as a human rights treaty, requires that its provisions be interpreted so as to make its
safeguards practical and effective.150 It is suggested below that effectiveness requires
that the human rights obligations in the Covenant to ‘respect, protect and fulfil’
equally apply at an international level when a state deals with NSAs and other
states.151 For example, in negotiations with international financial institutions, a state
has to ‘take into account its international legal obligations to protect, promote and
fulfil economic, social and cultural rights’.152

[2.46] Although ‘from the standpoint of public international law, the jurisdictional
competence of a State is primarily territorial’,153 as shown in chapter 1, a state’s
human rights obligations are not territorially limited. Human rights obligations may
extend beyond a state’s borders to areas where a state exercises power, authority or
effective control over individuals, or where a state exercises effective control of an area
of territory within another state.154 The ICJ acknowledged some space, albeit in a
restrictive way, for the extraterritorial application of the ICESCR. In its Advisory

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147 United Nations Millennium Declaration, General Assembly Resolution 55/2 (8 September 2000),
available at http://www2.ohchr.org/english/law/millennium.htm, para 11; Office of the UNHCHR, Draft
http://www.unhchr.ch/pdf/povertyfinal.pdf. As Mary Robinson observed: ‘There are not two worlds, rich
and poor. There is only one. We must decide if we are committed to working together to shape it into one
based on human rights and social justice, as the best hope of achieving peace and security.’ See American
Society of International law (ASIL), Proceedings of the 97th Annual Meeting (2–5 April, 2003), 12.

148 P Alston and G Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International

149 See F Coomans and M Kamminga, ‘Comparative Introductory Comments on the Extraterritorial
Application of Human Rights Treaties’, in F Coomans and M Kamminga (eds), Extraterritorial Application
of Human Rights Treaties (Antwerp, Intersentia, 2004), 2; S Skogly, Beyond National Borders: States’

150 This is a firmly established approach of the ECtHR. See for example ECtHR, Soering v UK, judgment
A, No 37, (1981) 3 EHRR 1 and Loizidou v Turkey (Preliminary Objections) (App 15318/89) judgment of 23

151 See CESCR, Concluding Observations: Cameroon, UN Doc E/C.12/1/Add.40 (8 December 1999),
para 38.

152 Ibid.

153 ECtHR, Bankovic v Belgium and Others, Grand Chamber Decision of 12 December 2001, Decision No
52207/99, Reports 2001-XII, EHRR SE5, para 59.

154 See R McCorquodale and P Simons, ‘Responsibility Beyond Borders: State Responsibility for Extra-
Review 598–625 at 624.
Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ held:

The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State 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’.155

[2.47] In accordance with the above, states are legally responsible for policies that violate human rights beyond their own borders, and for policies that indirectly support violations by third parties. Thus where a corporation registered in its home state operating abroad (through a foreign subsidiary) violates, for example, fundamental labour rights protected under the ICESCR, eg through the use of forced labour,

it may be argued that states are under an obligation to regulate, investigate and even bring before the courts conduct of a transnational corporation under its home state jurisdiction where a ‘threshold of gravity’ of human rights violations is at stake.156

International co-operation under Article 2(1) of the ICESCR enjoins states parties to view violations of the Covenant guarantees by any state party as deserving their attention. The drawing of attention to possible breaches of the ICESCR obligations by other states parties should not be regarded as an unfriendly act but as a reflection of legitimate concern of the international community. In what follows, the obligations arising from international co-operation and assistance are discussed at three levels—respect, protect and fulfil.

(i) Obligation to Respect

[2.48] International co-operation requires states parties to refrain from actions that interfere, directly or indirectly, with the progressive realisation of ESC rights in other states.157 It follows that any activities undertaken within each state party’s jurisdiction should not deprive, at a primary level, another state of the ability to realise progressively ESC rights for individuals and groups within another state’s jurisdiction. The CESCR has made it clear that states have to respect the enjoyment of ESC rights in other states. While interpreting Article 12(1) ICESCR, in which the states parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the CESCR stated that to comply with their international obligations in relation to Article 12, states parties have ‘to respect

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155 ICJ Reports 2004, 136, para 112.
158 CESCR, General Comment 14, para 39.
the enjoyment of the right to health in other countries’. A similar obligation to ‘respect’ would extend to all other substantive rights under the Covenant, including respecting the rights to food and water in other countries. This obligation further entails refraining from participation in decisions of intergovernmental bodies, such as the IMF, the World Bank and the WTO, that are reasonably foreseeable to obstruct or hinder the progressive realisation of ESC rights in other states. Entitlements to ESC rights such as education and health should not be replaced by purchasing power. However, as Tomaševski noted in 2005:

Progressive liberalisation of trade in education and health is replacing progressive realisation of economic, social and cultural rights. Unless this is effectively countered, we may continue talking about economic, social and cultural rights but purchasing power will have replaced entitlements.

In sum, the ICESCR imposes on states an obligation to abstain from any act or omission that may cause harm outside its territory, eg by not supporting armed conflicts in other states in violation of international law and by not assisting corporations or other entities to violate ESC rights in other states. This is consistent with international law, which provides a general duty on states not to act in such a way as to cause harm outside their territories.

(ii) Obligation to Protect

At a secondary level, states are obliged to take measures such as legislation and administrative practices to ensure that all other private parties, including individuals, groups and other bodies (such as domestically based corporations), subject to their control respect the enjoyment of human rights in other states. This is part of a state’s obligation to exercise due diligence not to violate ESC rights in other states either via acts of state authorities, whether performed within or outside national boundaries, which have consequences outside its own territory, or via a state’s intraterritorial omissions which have extraterritorial consequences for ESC rights, eg omission to regulate the extraterritorial activities of corporations registered within a particular state. This obligation to protect against extraterritorial violations of ESC rights has been clarified in the General Comments of the CESCR, eg on the rights to health, water and social security. In the context of the right to health, for example, the CESCR has stated:

To comply with their international obligations in relation to article 12, States parties have . . . 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.

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158 CESCR, General Comment 12, para 36 and CESCR, General Comment 15, para 31.
161 See eg The Rainbow Warrior (New Zealand v France) (Arbitration Tribunal) (1990) 82 ILR 449.
162 CESCR, General Comment 14, para 39.
A similar obligation to protect by way of legal or political means against human rights violations by third parties would equally extend to all other substantive rights under the Covenant. For example, as regards the right to water, the CESCR asserted:

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.\footnote{CESCR, General Comment 15, para 33.}

Regarding the right to social security, the CESCR stated that states parties should extraterritorially protect the right to social security by preventing their own citizens and national entities within their jurisdiction from violating this right in other countries.\footnote{CESCR, General Comment 19, para 54.} In order to realise the right to adequate food, the CESCR has called on states to address the underlying causes of food insecurity, malnutrition and undernutrition (at the national and international levels) that have persisted for so long.\footnote{CESCR, The World Food Crisis, UN Doc E/C.12/2008/1 (20 May 2008) para 12.} The protective measures recommended to be undertaken include revising the global trade regime under the WTO to ensure that global agricultural trade rules promote, rather than undermine, the right to adequate food and freedom from hunger, especially in developing and net food-importing countries.\footnote{Ibid., para 13.} As a logical conclusion, states should undertake necessary legislative and non-legislative measures to address the underlying violations of all ESC rights.

(iii) Obligation to Fulfil

\[2.51\] The scope and content of the obligation to fulfil (facilitate, promote or provide) at a tertiary international level is somewhat uncertain. The issue here is whether developed states parties to the ICESCR are obliged to facilitate, promote and provide assistance for the realisation of ESC rights in developing states, at least in the least-developed States?\footnote{‘Developing states’ is used here in a broader context to refer not only to those states classified as the ‘least developed countries’ (LDCs)—those with per capita income under US$500—but also to those states classified as ‘other low income countries’ (OLIC) such as India, Vietnam, Nigeria and Pakistan as well as to refer to those states classified as ‘lower-middle income countries’ (LMIC), such as China, Indonesia and the Philippines.} It is useful to consider, first, what states are considered to be ‘developed’, ‘developing’ and ‘least developed’ in international law. While there is no legal definition of developed, developing and least-developed countries, the following UN definition has been widely used and provides some useful guidance. According to the UN:

There is no established convention for the designation of ‘developed’ and ‘developing’ countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania and Europe are considered ‘developed’ regions or areas. In international trade statistics, the Southern African Customs Union is also treated as developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries;
and countries of eastern Europe and the former USSR countries in Europe are not included under either developed or developing regions.\footnote{169 United Nations, Standard Country or Area Codes for Statistical Use, Series M, No 49, Rev 4 (UN publication, Sales No M.98.XVII.9), available in part at http://unstats.un.org/unsd/methods/m49/m49regin.htm.}

Least-developed countries are classified on the basis of low income, weak human assets based on indicators of nutrition, health, school enrolment and literacy; and economic vulnerability.\footnote{170 UNCTAD, The Least Developed Countries Report 2004 (New York and Geneva, United Nations, 2004), 317–62; UNCTAD, FDI in Least Developed Countries at a Glance: 2005/6, UN Publication UNCTAD/ITE/IIA/2005/7 (New York and Geneva, United Nations, 2006), iii.} Economic growth in these countries faces long-term impediments—such as structural weaknesses and low human resources development.\footnote{171 World Bank, Beyond Economic Growth Student Book: Glossary, available at http://www.worldbank.org/depweb/english/beyond/global/glossary.html.} By 2004 50 countries were designated by the UN as ‘least-developed countries’.\footnote{172 See Appendix J.}

\[2.51\] CESCR practice indicates that the full realisation of ESC rights requires international assistance and co-operation. Thus, in its General Comment on the nature of states parties obligations in 1990, the CESCR stated that:

in accordance with Articles 55 and 56 of the Charter of the United Nations,\footnote{173 Art 55 provides, inter alia, that one of the purposes of the UN is the promotion of ‘higher standards of living, full employment, and conditions of economic and social progress and development’, while under Art 56, Member States pledge themselves ‘to take joint and separate action in cooperation with the organisation’ to this end.} with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus the realisation of [ESC 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 . . . in the absence of an active programme of international assistance and cooperation on the part of all those States that are in position to undertake one, the full realisation of [ESC rights] will remain an unfulfilled aspiration in many countries.\footnote{174 CESCR, General Comment 3, para 14.}

\[2.52\] It follows therefore that states parties have a joint and individual responsibility, to co-operate especially in ‘providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons’, giving priority to the most vulnerable or marginalised groups.\footnote{175 See eg CESCR, General Comment 12, Right to Adequate Food (Art 11), UN Doc E/C.12/1999/5 (12 May 1999), para 38.} As regards the right to health, for example, the Committee has stressed:

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.\footnote{176 CESCR, General Comment 14, para 39 (emphasis added).}

Similarly, with respect to the right to water, one of the underlying determinants of health, the Committee noted that depending on the availability of resources, ‘States should facilitate realisation of the right to water in other countries’, eg through
provision of water resources, financial and technical assistance, and provide the necessary aid when required.\(^{177}\) In the Committee’s view:

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.\(^{178}\)

\[2.53\] According to the Committee, one example where such an obligation to assist might arise could be found in the context of Article 14 of the ICESCR.\(^{179}\) This requires each state party that 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.\(^{180}\) In spite of the obligations undertaken in accordance with Article 14, a number of states parties have neither drafted nor implemented such a plan of action.\(^{181}\) If this is due to the lack of the financial resources and/or expertise required to ‘work out and adopt’ a detailed plan, the Committee holds that the ‘international community has a clear obligation to assist’.\(^{182}\)

\[2.54\] A number of questions arise from the Committee’s approach regarding international assistance and co-operation. What does ‘international assistance and co-operation’ entail? In particular, what are those (economically developed) states with a ‘special responsibility’ and in a position to assist? Are ‘poorer developing states’ legally obliged actively to seek or receive assistance, and are ‘economically developed states’ legally obliged to assist? Can a particular ‘poorer developing state’ claim or possess a legally enforceable right to (economic, technical or other) assistance from a ‘specific economically developed state’? How is the obligation to assist to be discharged? Is there a particular level of resources that a (developed) state is legally obliged to devote to international assistance and co-operation under Article 2(1)? When would a state be said to be in violation of the obligation to assist (or to be assisted)? Are receiving/developing states obliged to devote such resources, or a significant part thereof, to the realisation of ESC rights? Admittedly, many of these questions are complex and yet to be fully settled.\(^{183}\) An attempt is made below to comment on some of these questions.

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\(^{177}\) CESCR, General Comment 15, para 34 (emphasis added).
\(^{178}\) Ibid.
\(^{179}\) CESCR, General Comment 11, para 9.
\(^{180}\) ICESCR, Art 14.
\(^{181}\) By 2003, for example, in 58 states primary education was not free, or it was not compulsory, or it was neither free nor compulsory. See Right to Education, ‘Is the Right to Education Realised in Practice?’ available at http://www.right-to-education.org/.
\(^{182}\) CESCR, General Comment 11, para 9.
F. The Application of International Co-operation and Assistance

[2.55] This section considers the human rights obligations arising from the application of international co-operation and assistance to (i) developed states; (ii) developing states; (iii) NSAs.

(i) Developed States: Any Obligation to Assist?

[2.56] In general, while most developed states give assistance to developing states, developed states have consistently denied the existence of any clear legal obligation to transfer resources to developing states. It has further been argued that although there is clearly an obligation to cooperate internationally, it is not clear whether this means that wealthy States Parties are obliged to provide aid to assist in the realisation of the rights in other countries.

In debates surrounding the drafting of an OP to the ICESCR, the representatives of the United Kingdom, the Czech Republic, Canada, France and Portugal believed that international co-operation and assistance was an ‘important moral obligation’ but ‘not a legal entitlement’, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid. However, if there is no legal obligation underpinning the human rights responsibility of international assistance and co-operation, then inescapably all international assistance and cooperation fundamentally rests upon charity. Is such a position tenable and acceptable in the twenty-first century? Paul Hunt has stated that: ‘While such a position might have been tenable in years gone by, it is unacceptable in the twenty-first century.’ While this is still debateable, the approach of the CESCR suggests that the economically developed states parties to the Covenant are under an obligation to assist developing states parties to fulfil their core obligations with respect to the realisation of ESC rights. As noted above, the CESCR has stressed that ‘it is particularly incumbent on all those who can assist, to help developing countries respect . . . international minimum threshold’.

[2.57] By way of illustration, after identifying core obligations in relation to the right to water, the Committee emphasised:

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185 Alston and Quinn, above n 148, 186–91.
188 See Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, Addendum: Missions to the World Bank and the International Monetary Fund in Washington, DC (20 October 2006); and Uganda, UN Doc A/HRC/7/11/Add.2 (5 March 2008), para 133.
189 Hunt, above n 188.
it is particularly incumbent on States parties, and other actors in position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations.\textsuperscript{191}

What is the content of the responsibility to provide international assistance and co-operation? This is not defined in international human rights treaties. It appears logical to state that since states are only obliged to realise ESC right to the ‘maximum of available resources’, equally the human rights responsibility to provide international assistance and co-operation is also subject to the resources available to a donor state (or NSA). How much should a donor state provide in light of resource availability? In the course of examination of state reports, the Committee has inquired into the percentage of gross domestic product/gross national product (GDP/GNP) that developed reporting states dedicate to international co-operation\textsuperscript{192} and overseas development assistance (ODA).\textsuperscript{193} The UN-recommended target/benchmark of 0.7 per cent GDP originally proposed by the Pearson Commission in 1968 and adopted in 1970,\textsuperscript{194} as reaffirmed in the Copenhagen Declaration on Social Development 1995\textsuperscript{195} and in the Millennium Development Goals,\textsuperscript{196} has been adopted by the CESCR. The Committee on the Rights of the child has also endorsed this approach.\textsuperscript{197} This goal of 0.7 per cent GDP was reiterated along with other targets in the Monterrey Consensus, arising from the 2002 International Conference on Financing for Development.\textsuperscript{198} However, by 2000 only five states had reached or exceeded the target of 0.7 per cent of GNP in ODA.\textsuperscript{199} Most developed states (particularly the Group of Eight industrialised states: USA, Japan, Germany, UK, France, Italy, Canada and Russia) were far below the level of 0.7 per cent with an average of 0.22 per cent, ie only about a third of the target.\textsuperscript{200} By 2007 there had not been any significant increase in ODA as the following report indicates:

In 2007, the only countries to reach or exceed the United Nations target of 0.7 per cent of their gross national income (GNI) were Denmark, Luxembourg, the Netherlands, Norway and Sweden. The average effort by the 22 member countries of the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD) was just 0.45 per cent of GNI, but when weighted by the size of their economies,

\textsuperscript{191} CESCR, General Comment 15, para 38 (emphasis added).
\textsuperscript{192} See eg CESCR, Summary Record: Ireland, UN Doc E/C.12/1999/SR.14, para 38.
\textsuperscript{193} See eg CESCR, Summary Record: Japan UN Doc E/C.12/2001/SR.42, para 10; Germany, UN Doc E/C.12/2001/SR.48, para 37.
\textsuperscript{194} GA Res 2226, 25 UN GAOR Supp (No 28), para 43, UN Doc A/8028 (1970); K Tomasevski, Development Aid and Human Rights Revisited (London, Pinter, 1993), 32.
\textsuperscript{195} UN Doc A/CONF.166/9 (14 March 1995), Commitment 9, para 1.
\textsuperscript{197} CRC Committee, General Comment 5, para 61. ‘The Committee urges States to meet internationally agreed targets including the United Nations target for international development assistance of 0.7 per cent of gross domestic product.’
\textsuperscript{199} These states are Denmark (1.06%), Netherlands (0.82%), Sweden (0.81%), Norway (0.80%) and Luxembourg (0.70%). Source: OECD, Press Release, 20 April 2001.
\textsuperscript{200} ODA as a percentage of GDP was as follows: Belgium (0.36%); Switzerland (0.34%); France (0.33%); Finland and UK (0.31%); Ireland (0.30); Japan, Germany and Australia (0.27%); New Zealand and Portugal (0.26); Canada and Austria (0.25); Spain (0.24%); Greece (0.19%); Italy (0.13%) and the United States (0.10%). \textit{Ibid.} See also UN Wire, World Bank Head Blasts Rich Nations for Record on Aid, 5 May 2004.
total net aid flows from the DAC members represented only 0.28 per cent of their combined national income. In addition to the aforementioned countries, only Belgium, Ireland and the United Kingdom of Great Britain and Northern Ireland have met the target of providing aid to LDCs amounting to at least 0.15–0.20 per cent of their GNI; the average for all DAC countries was just 0.09 per cent.201

It is not unusual for the CESCR to express regret regarding this state of affairs. Thus, in May 2008, the CESCR stated as follows with respect to France:

The Committee regrets that in 2007 the State party devoted only 0.39 percent of its gross domestic product (GDP) to official development assistance (ODA), whereas the United Nations target for ODA is 0.7 per cent of GDP for industrialised countries. The Committee further regrets that the achievement of the objective of devoting 0.7 percent of its GDP to international co-operation has been postponed from 2012 to 2015.202

Consequently, the Committee ‘recommends’ and ‘encourages’ developed states parties ‘to increase [international official development assistance/cooperation] ODA as a percentage of GNP to a level approaching the 0.7 per cent goal established by the United Nations’. States have been criticised where the levels devoted to international assistance and co-operation fall below this target and urged to ‘review . . . budget allocation to international cooperation’ with a view to ensuring that the UN target of 0.7% GNP is reached ‘as quickly as possible’. Other states that have donated more than this target have been commended for contributing to the realisation of ESC in other countries. Given a large and growing gap between developed and developing states, and the fact that half the world—nearly three billion people—live on less than US$2 a day, economically developed states can play a key role in enhancing the enjoyment of ESC rights in other states by granting further assistance, especially technical or economic, to developing states targeted to the

203 CESCR, Concluding Observations: Belgium, UN Doc E/C.12/1/Add.54 (1 December 2000), paras 16 and 30; France, UN Doc E/C.12/1/Add.72 (30 November 2001), paras 14 and 24; Finland, UN Doc E/C.12/1/Add.52 (1 December 2000), paras 13 and 23; Ireland, UN Doc E/C.12/1/Add.77 (5 June 2002), para 38; Germany, UN Doc E/C.12/1/Add.68 (24 September 2001), paras 15 and 33; Japan, UN Doc E/C.12/1/Add.67 (24 September 2001), paras 37; Spain, UN Doc E/C.12/1/Add.99 (7 June 2004), paras 10 and 27. In May 2008 the CESCR recommended that France ‘increase its official development assistance to 0.7 per cent of its GDP, as agreed by the Heads of State and Government at the International Conference on Financing for Development, held in Monterrey (Mexico) on 18–22 March 2002’. See CESCR, Concluding Observations: France, above n 202, para 32.
204 See eg CESCR, Concluding Observations: Finland, UN Doc E/C.12/1/Add.52 (1 December 2000), paras 13 and 23; Belgium, UN Doc E/C.12/1/Add.54 (1 December 2000), paras 16 and 30; Germany, UN Doc E/C.12/1/Add.68 (24 September 2001), paras 15 and 33; Iceland, UN Doc E/C.12/1/Add.89 (23 May 2003), paras 11 and 20; Spain, UN Doc E/C.12/1/Add.99 (7 June 2004), paras 10 and 27.
205 CESCR, Concluding Observations: Belgium, UN Doc E/C.12/1/Add.54 (1 December 2000), para 30.
206 CESCR, Concluding Observations: Ireland, UN Doc E/C.12/1/Add.77 (17 May 2002), para 38.
207 See eg CESCR, Concluding Observations: Denmark, UN Doc E/C.12/1/Add.34 (14 May 1999), para 11 and UN Doc E/C.12/1/Add.102 (14 December 2004), para 5; Luxembourg, UN Doc E/C.12/1/Add.86 (23 May 2003), para 6; Sweden UN Doc E/C.12/1/Add.70 (30 November 2001), para 7; Norway, UN Doc E/C.12/1/Add.109 (23 June 2005), para 3.
realisation of human rights, including ESC rights. The large investment requirements of developing states imply that a successful transition to increased reliance on domestic resources and private capital inflows will require more, rather than less, overseas development assistance.209

[2.59] In order to monitor the use of transferred resources, the Committee has sought to establish whether resources transferred are used to promote respect for the provisions of the ICESCR and whether conditionality is attached to such resources.210 While the Committee can investigate all such issues, it is questionable whether the Committee can find a particular state to be in violation of Article 2(1) for the failure to devote 0.7 per cent of its GDP to international assistance or for the failure to link such assistance to human rights, including ESC rights. It would appear that a gradual increase in official development assistance would be satisfactory to the Committee. For example, in 2006 the Committee noted that Canada’s level of official development assistance was raised from about 0.27 per cent of GDP in 2004 to a current estimated level of 0.33 per cent of GDP.211 The Committee considered this to be a positive aspect and did not criticise Canada for not devoting 0.7 per cent of its GDP to international assistance. It is also unlikely that the Committee can direct a specific developed state to assist a particular developing state party since there are no criteria for doing so in the Covenant, and it is unlikely that the Committee would develop this in the near future.

[2.60] Interestingly, EU Member States have made commitments to increase ODA over a period of time. The targets were stated as follows: (i) 0.33 per cent by 2006 according to the EU Barcelona commitment; and (ii) 0.51 per cent by 2010 and 0.7 per cent by 2015 according to the May 2005 EU Council agreement.212 While this progressive commitment to increase ODA is a step in the right direction, it is important to note that international assistance and co-operation should not be understood as encompassing only financial and technical assistance. International co-operation requires that a state (whether acting independently or through international organisations) should not impose on another state measures that might be foreseen to work against the progressive realisation of ESC rights. It also includes a responsibility to work actively towards equitable multilateral trading, investment and financial systems that are conducive to the realisation of human rights and the elimination of poverty.213 This equitable system is yet to be realised. In 2006, for example, Joseph Stiglitz, former Chief Economist of the World Bank, noted that:

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212 See (2006) 7(3) OECD Journal on Development 38.

We see an unfair global trade regime that impedes development and an unsustainable global financial system in which poor countries repeatedly find themselves with unmanageable debt burdens. Money should flow from the rich to poor countries, but increasingly, it goes in the opposite direction.\textsuperscript{214}

In 2002 Oxfam International estimated that an increase of 5 per cent in the share of world trade by low-income states ‘would generate more than $350 billion—seven times as much as they receive in aid’.\textsuperscript{215} If Africa, East Asia, South Asia and Latin America were each to increase their share of world exports by 1 per cent, the resulting gains in income could lift 128 million people out of poverty.\textsuperscript{216} In Africa alone, this would generate US$70 billion—approximately five times what the continent receives in aid.\textsuperscript{217} Reduced poverty would contribute to improvements in the enjoyment of ESC rights such as health and education since ‘poverty is the greatest human rights scourge of our time’,\textsuperscript{218} and indeed, ‘poverty, especially extreme poverty, is the worst form of degradation of human dignity, a denial of the most basic human rights—economic, social, cultural, civil, and political rights’.\textsuperscript{219} Given this reality, international co-operation and assistance should be understood as entailing genuine special and preferential treatment of developing states so as to provide such states with better access to developed states’ markets.\textsuperscript{220} In addition, international assistance and co-operation entails procedural fairness. Thus, donor states and NSAs have a responsibility not to withdraw critical aid without first giving the recipient state reasonable notice and an opportunity to make alternative arrangements.\textsuperscript{221}

(ii) Developing States: Obligation to Seek and Use Effectively International Assistance?

\textbf{[2.61]} Where a developing state party to the ICESCR considers that taking steps to realise core obligations in respect of ESC rights is beyond the maximum resources available to it, it is appropriate for such a state actively to seek international assistance to fulfil its core obligations. To enable developed states and other actors in a position to assist in rendering the necessary assistance, states must refrain from obstructing other states and NSAs in their legitimate efforts to assist in the enjoyment of ESC rights.\textsuperscript{222} In addition, states should not reject offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason compatible with international law. Furthermore, every effort should be made by states in need of international assistance to comply with their

\begin{itemize}
\item \textsuperscript{214} J Stiglitz, ‘We Have Become Rich Countries of Poor People’, \textit{Financial Times}, 7 September 2006.
\item \textsuperscript{216} Ibid, 5.
\item \textsuperscript{217} Ibid, 8.
\item \textsuperscript{219} A Sengupta, ‘A Rights-Based Approach to Removing Poverty’, in World Bank, \textit{ibid}.
\item \textsuperscript{221} See Hunt, above n 188, and Uganda, UN Doc A/HRC/7/11/Add.2 (5 March 2008), para 29.
\item \textsuperscript{222} See eg CESCR, Concluding Observations: El Salvador, UN Doc E/C.12/1/Add.4 (28 May 1996), paras 25 and 39.
\end{itemize}
human rights obligations to obtain such assistance. By way of example, in its concluding observations on Sri Lanka in 1998, the Committee urged ‘the Government to seek further international assistance in its efforts to provide permanent housing to displaced persons who have been living in “temporary” shelters since the war began 15 years ago’. Such assistance is required to be used towards the realisation of ESC rights, giving priority to core obligations and to benefit the most vulnerable and disadvantaged groups. With regard to developing states receiving such assistance, the CESCR has asked states how transferred resources have been used, particularly whether these have benefited those most in need.

[2.62] It is, however, uncertain whether the Committee would find non-compliance or a violation of the Covenant where a receiving state diverts resources from international assistance to other areas outside the Covenant such as the purchase of arms or involvement in armed conflict. It is submitted that the Committee should do so because the Covenant obliges states to use available resources (including ODA) to the ‘maximum’ effect. Accordingly the ‘essential governmental human rights obligation is to accord priority to human rights in resource allocation’. This means that, in the absence of compelling reasons to the contrary, states that receive international aid and assistance must clearly dedicate a substantial part of that aid to human rights. In addition, a mechanism should be put in place to ensure that all receiving states invest resources from international assistance in carrying out ‘rights-based programmes’ consistent with the Covenant.

(iii) Non-State Actors: Any Obligation to Assist?

[2.63] As noted above in interpreting Article 2(1), the CESCR has invoked the provisions of Articles 22 and 23 of the Covenant. Article 22 provides:

The Economic and Social Council [ECOSOC] may bring to the attention of other organs of the United Nations, their subsidiary organs and specialised 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.

223 See eg CESCR, General Comment 4, para 10.
225 CESCR, General Comment 15, para 37(f)
226 CESCR, List of Issues: Sudan, UN Doc E/C.12/Q/SUD/1 (13 December 1999), para 3, stating that: ‘Kindly provide statistics, disaggregated according to different foreign sources or States, concerning amounts of financial assistance received by the Sudan over the last five years and to what purpose that aid was directed and eventually allocated.’
227 CESCR, List of Issues: Venezuela, UN Doc E/C.12/Q/VEN/1 (23 May 2000), para 11, stating that: ‘The Committee, aware of the challenge the State party has had to face in reacting rapidly and effectively to the catastrophic rains and floods that have drawn a sympathetic response from the international community, would like to know the extent of international relief and the measures taken by the State party to bring it to those most in need.’
228 K Tomasevski, ‘Economic Costs of Human Rights’, in P Baehr, C Flinterman and M Senders (eds), Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights (Amsterdam, Royal Netherlands Academy, 1999), 49–69 at 53.
229 CRC, General Comment 5, para 61.
The CESCR considered this provision for furnishing technical assistance to involve virtually all United Nations organs and agencies involved in any aspect of international development cooperation, ... agencies such as the World Bank and IMF, and any of the other specialised agencies such as ILO, FAO, UNESCO and WHO.231

[2.64] Therefore, the CESCR has insisted that the activities of international agencies should involve a human rights impact assessment so that they do not negatively impact on human rights.232 It has further questioned whether states parties (both debtor and creditor states) to the ICESCR take into account the ICESCR obligations when negotiating technical assistance.233 In effect, while debtor states are principally obliged to protect the ESC rights of those within their jurisdiction, creditor states are required to co-operate internationally to achieve progressively the full realisation of ESC rights in states parties to the ICESCR.234 This offers a potential for holding creditor states responsible for actions taken in the international economic (financial, trade or investment) institutions or other bodies that fail to respect their obligation to co-operate internationally as obliged by Article 2(1).

[2.65] Apparently, the failure of a state party to take into account its international human rights legal obligations—including those regarding the ICESCR—when entering into agreements with NSAs or with international organisations, is a violation of its international obligation to assist and co-operate. Accordingly, states parties should ensure that their actions as members of international organisations take due account of international human rights obligations. States parties that are members of international institutions, notably the IMF, the WTO, the World Bank and regional development banks, should take steps to ensure that human rights generally, and ESC rights in particular, are taken into account in their lending policies, credit agreements and other international measures.235 As Hunter Clark rightly put it:

The World, especially the wealthy nations, can and should help [developing states in] Africa [and presumably other developing states outside Africa particularly the least developed ones]. The places to start are with debt relief; preferential, or at least genuinely open, trade relations with African states; increased aid and technical assistance; and beneficial policy making by international economic institutions like the IMF and World Bank.236

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231 CESCR, General Comment 2, para 2. See also CESCR, Summary Record of the 37th Meeting of the 21st Session: Solomon Islands, UN Doc E/C.12/1999/SR.37 (19 November 1999), para 26; CESCR, General Comment 19, para 82. The CESCR stated: ‘The United Nations specialised agencies and other international organisations concerned with social security, such as ILO, WHO, the United Nations Food and Agriculture Organisation, the United Nations Children’s Fund, the United Nations Human Settlements Programme, the United Nations Development Programme and ISSA [International Social Security Association], as well as international organisations concerned with trade such as the World Trade Organisation, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to social security.’

232 Ibid, paras 6 and 8.


235 Ibid.

In the light of the foregoing, states in need of assistance should seek assistance not only from other states able to assist but also from NSAs able to assist. In this respect both the CESCR and the CRC Committee have recommended that states pursue additional avenues for co-operation and seek the assistance (for the progressive realisation of ESC rights and in the preparation of state reports) of the UN, particularly the Office of the High Commissioner for Human Rights and the relevant specialised agencies—inter alia, WHO, UNESCO and the United Nations Children's Fund (UNICEF).\textsuperscript{237} Regarding the right to social security, the CESCR asserted that:

States parties may obtain guidance on appropriate [right to social security] indicators from the ongoing work of the International Labour Organisation (ILO), World Health Organization (WHO) and International Social Security Association (ISSA).\textsuperscript{238}

The Committee has also indicated that when examining the reports of states parties and their ability to meet their obligations to realise the right to social security, it will consider the ‘effects of the assistance provided by all other actors’.\textsuperscript{239} Therefore, the incorporation of human rights law and principles in the programmes and policies of NSAs, including international organisations, will greatly facilitate the implementation of ESC rights.

\section*{III. ARTICLES 2(2) AND 3: OBLIGATION TO ‘GUARANTEE’ NON-DISCRIMINATION AND PROMOTE EQUALITY}

Since all human beings are born ‘free and equal in dignity and rights’,\textsuperscript{240} the ICESCR is emphatic on the principles of non-discrimination and equality.\textsuperscript{241} These two principles are included in various international human rights instruments.\textsuperscript{242} Non-discrimination and equality are key elements of human rights protection which states must respect, regardless of their legal traditions and their domestic law. Thus, the IACtHR has asserted that the principle of equality and non-discrimination ‘forms part of general international law’ because it is applicable to all states, regardless of

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\item \textsuperscript{237} See eg CESCR, Concluding Observations: Cameroon, UN Doc E/C.12/1/Add.40 (8 December 1999), para 46; Togo, UN Doc E/C.12/1/Add.61 (21 May 2001), para 18; Senegal, UN Doc E/C.12/1/Add.62 (24 September 2001), para 62. See also CRC Committee, Concluding Observations: Rwanda, UN Doc CRC/C/15/Add.234 (4 June 2004), para 49(e); and CRC Committee, Concluding Observations: Liberia, UN Doc CRC/C/15/Add.236 (4 June 2004), para 57(g).
\item \textsuperscript{238} CESCR, General Comment 19, para 75.
\item \textsuperscript{239} \textit{Ibid}, para 84.
\item \textsuperscript{240} UDHR, Art 1.
\item \textsuperscript{241} Craven, above n 1, 153–93, 192 concludes that: ‘In broad terms, the essence of the Covenant may be seen as to encompass an appeal to equality.’
\item \textsuperscript{242} The UN Charter preamble reaffirms faith in the ‘equal rights of men and women and of nations large and small’ and its Art 1(3) declares as one of the purposes of the UN the promotion and encouragement of respect ‘for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’. See also UDHR, Art 2; ICCPR, Art 2(1) and 26; ICESCR, Arts 2(2) and 3; ICERD, Art 1(1); CEDAW, Art 1; ECHR, Art 14; AmCHR, Art 1; ACHPR, Art 2; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (CIS), Art 20(2); Arab Charter on Human Rights, Art 2.
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whether or not they are a party to a specific international treaty. The CESCR has stated that ‘the philosophy of the Covenant [is] based on the principle of non-discrimination’ and on ‘absolute non-discrimination against women’. Therefore, non-discrimination, together with equality, constitutes a basic and general principle relating to the protection of human rights. These two principles apply to all ESC rights protected in the Covenant, and in virtually every international human rights instrument. Although the principles of equality and non-discrimination can be differentiated, it has to be noted that the prohibition against non-discrimination has been understood as the negative restatement of the principle of equality. In other words, equality and non-discrimination are positive and negative statements of the same principle. This is because the goal of equality is usually achieved in the first instance through a prohibition on discrimination. Thus, the Permanent Court of International Justice considered that ‘[e]quality in law precludes discrimination of any kind’. As Professor Hilary Charlesworth put it, the international legal understanding of equality (which she considers to be narrow) is that ‘equality means absence of discrimination and non-discrimination between groups will produce equality’.

A. Prohibition of Discrimination

[2.68] Article 2(2) of the ICESCR contains an important absolute guarantee against non-discrimination in the enjoyment of the substantive rights protected in Articles 6–15 of the Covenant. By Article 2(2) of the Covenant:

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.

It is notable that the above text does not establish an autonomous right to be free from discrimination. It only prohibits discrimination (distinction, exclusion, restriction or preference without reasonable or objective criteria) in the exercise of

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substantive rights enunciated in the Covenant. In this respect, Articles 2(2) and 3 of
the ICESCR (see section III.B below) ‘are not stand-alone provisions, but should be
read in conjunction with each specific right guaranteed under Part III of the Coven-
ant’.\footnote{253 CESCR, General Comment 16, para 2.} It is also interesting to note that Article 2(2) makes no reference to
‘progressive realisation’ or to the availability of ‘resources’.\footnote{254 CESCR, General Comment 13, para 31.} Under Article 2(2)
states parties to the ICESCR undertake to ‘guarantee’ that ESC rights enunciated in
the Covenant will be exercised ‘without discrimination of any kind’ as to any of the
prohibited grounds. Ten grounds are listed by Article 2(2) namely: ‘race, colour, sex,
language, religion, political or other opinion, national or social origin, property, birth
or other status’.\footnote{255 Similar grounds are provided under the ICCPR, Art 26. See N Jayawickrama, *The Judicial Application
of Human Rights Law* (Cambridge University Press, 2002), 816–41. On race, see generally S Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001).} This list is notably longer than that contained in the UN Charter
that mentions only ‘race, sex, language, and religion’.\footnote{256 UN Charter, Arts 1 and 55.}

does not specifically prohibit discrimination on the basis of disability, age, sexual
orientation, genetic features, membership of a national minority, health status, and
marital and family status. Such grounds may, nonetheless, be read into the Covenant
in the reference to ‘other status’—a term which signifies that the list is open-ended,
not exhaustive and evolves over time and context—in the text of Article 2(2). Indeed,
the CESCR has used ‘other status’ to broaden the prohibited grounds of differentia-
tion to extend to discrimination on other grounds such as mental or physical
disability,\footnote{258 CESCR, General Comment 5, para 5; General Comment 15, para 13.} age,\footnote{259 CESCR, General Comment 6, paras 11–2.} sexual orientation,\footnote{260 CESCR, Concluding Observations: China [Hong Kong], UN Doc E/C.12/1/Add.58 (21 May 2001),
para 15; Sweden, UN Doc E/C.12/1/Add.70 (30 November 2001), para 8; Ireland, UN Doc E/2000/22
(1999), para 127.} health status (including the HIV/AIDS),\footnote{261 CESCR, Concluding Observations: Algeria, UN Doc E/C.12/1/Add.71, para 39; Egypt, UN Doc E/2001/22, para 180; Russian Federation, UN Doc E/1998/22, para 126.} and civil, political, social or other status, which has the intention or effect of nulli-
Fying or impairing the equal enjoyment or exercise of the rights guaranteed under the
Covenant.\footnote{262 CESCR, General Comment 14, para. 18; General Comment 15, para 13; see also CESCR, General
Comment 20, paras 27–35.}

[2.70] The use of the term ‘guarantee’ implies an immediate obligation to eliminate
discrimination on the prohibited grounds.\footnote{263 CESCR, General Comment 3, para. 1; General Comment 11, para 10; General Comment 13, paras 31 and 43; General Comment 14, para. 30; General Comment 15, para 17. See also P Alston, ‘The International Covenant on Economic, Social and Cultural Rights’, in *Manual on Human Rights Reporting under Six Major International Human Rights Instruments*, UN Doc GVE.97.0.16 (Geneva, United Nations, 2nd edn, 1997), 89.} As explained in General Comment 20 of
the CESCR,\footnote{264 UN Doc E/C.12/GC/20 (25 May 2009) paras 7–10.} prohibited discrimination under the Covenant covers several aspects.
First, it covers *de jure* (or formal) discrimination, which includes ensuring that the laws and policies of states parties do not discriminate. Second, states parties must take steps to eliminate *de facto* (or substantive) discrimination, which requires states to ensure that laws, policies and practices seek to address the unequal enjoyment of ESC rights which individuals face due to discrimination (see further section III.C below). Third, it extends to *direct* and *indirect* discrimination. Direct discrimination occurs when a difference in treatment relies directly on distinctions based on prohibited grounds—eg denying healthcare to persons of particular race, colour or descent. Such differential treatment is contrary to the Covenant if it has the purpose of impairing the exercise of particular Covenant rights. *Indirect discrimination* occurs when a law, policy, programme or procedure does not appear to be discriminatory, but has a discriminatory effect when implemented, thus leaving the existing inequality in place, or even exacerbating it. It typically involves the imposition of a requirement which members of one particular group are less likely to be able to satisfy than others. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates. Similarly, the general admissions policy of some academic institutions to exclude ‘native foreign language qualifications’ (ie mother-tongue qualifications) from consideration when assessing an applicant for admission to certain courses or programmes, though equally applicable to all ‘native languages’, may constitute unlawful indirect discrimination on the grounds of race against those regarded as possessing the ‘native language qualifications’. Discrimination also includes incitement to discriminate and harassment.

[2.71] In effect, each substantive Article under the Covenant contains an additional obligation by which the state must not discriminate on any of the internationally prohibited grounds. For example, one must not be denied access to available health facilities, education or social security on the basis of race, colour, sex or other prohibited grounds. Whereas the rights guaranteed under the Covenant apply to everyone without discrimination, states parties should give special attention to those individuals and groups who have traditionally been discriminated against, including women, children (particularly those belonging to the most vulnerable groups, eg girls, abandoned and orphan children, children with disabilities, children born out of wedlock, children belonging to minority ethnic groups, and children living in rural areas), minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.265 In particular, states parties should take steps to eliminate discrimination against women and the girl child.266 As An-Naim put it,

No country can develop effectively if it excludes half of the human race—half of its national population—on grounds of gender [or] . . . religion.267

In addition, in those states where minorities exist, concrete measures should be

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265 CESC, General Comment 15, para 16.
undertaken to combat and eliminate discrimination against minority groups in all fields of human rights. Any discrimination based on any prohibited ground(s) with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of ESCR constitutes a violation of the Covenant.

B. Equality between Men and Women

[2.72] Article 3 supplements the non-discrimination guarantee in Article 2(2) by specifically making provision for equality between men and women in the enjoyment of ESC rights protected in the Covenant. Thus, states parties to the Covenant under Article 3 'undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the . . . Covenant'. This demands de jure (or formal) equality and de facto (or substantive) equality for men and women in the enjoyment of ESC rights. In its General Comment 16 the CESCR stated:

2. The travaux preparatoires state that Article 3 was included in the Covenant, as well as in the ICCPR, to indicate that beyond a prohibition of discrimination, 'the same rights should be expressly recognised for men and women on an equal footing and suitable measures should be taken to ensure that women had the opportunity to exercise their rights . . . Moreover, even if Article 3 overlapped with Article 2(2), it was still necessary to reaffirm the equal rights of men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasised, especially as there were still many prejudices preventing its full application.'

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

[2.73] Equality between men and women in the enjoyment of all ESC rights extends to all rights set forth in the Covenant, including women's ESC rights. Article 3 implies that all human beings should enjoy the rights protected in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right protected in the Covenant. Consequently, states should ensure that men and women equally enjoy all rights provided for in the Covenant. Article 3 is a recognition of the fact that the

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268 See eg CESCR, Concluding Observations: Slovakia, UN Doc E/C.12/l/Add.81 (2002), paras 9, 22 and 33; ICCPR, Art 27.
269 Maastricht Guidelines, paras 11 and 12. Art 2 of the CEDAW obliges states to ‘take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise’. Discrimination might attain a level of severity which constitutes a special affront to human dignity so as to amount to degrading treatment, a violation of a civil and political right. See Cyprus v Turkey, judgment of 10 May 2001, (2001) 35 EHRR 731 paras 302–11 (ECtHR).
271 See chapter 6 and Annex G.
human rights of women and of the girl child are an inalienable, integral, [holistic] and indivisible part of universal human rights.\textsuperscript{273}

The neglect and subordination of these rights is directly related to the neglect and subordination of women.\textsuperscript{274} Accordingly, efforts to progressively realise ESC rights cannot be effective without the meaningful participation of women at all levels.\textsuperscript{275} Similarly, the subordination of women cannot be overcome without the realisation of ESC rights.\textsuperscript{276}

[2.74] Despite this reality,

inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.\textsuperscript{277}

It follows that in order to ensure the equal right of men and women to the enjoyment of all ESC rights, states and other actors should give priority to the promotion of the role of women in society, and an end to all \textit{de jure} and \textit{de facto} discrimination against them.\textsuperscript{278} In particular, measures and programmes should be adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns, particularly in rural areas.\textsuperscript{279}

[2.75] Article 3 has to be understood in the light of the standard of equality for women under CEDAW.\textsuperscript{280} That standard requires the elimination of all forms of discrimination against women, including gender\textsuperscript{281} discrimination arising out of social, cultural and other structural disadvantages.\textsuperscript{282} It is a reflection of the fact that women have historically not enjoyed their human rights.\textsuperscript{283} Moreover,

in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.\textsuperscript{284}

\begin{footnotesize}
\textsuperscript{273} Vienna Declaration (1993), para 18.


\textsuperscript{275} Ibid.

\textsuperscript{276} Ibid.

\textsuperscript{277} HRC, General Comment 28, above n 272, para 5. See also Montreal Principles, Annex G.


\textsuperscript{279} Ibid., para. 10.

\textsuperscript{280} General Assembly Resolution 34/180 of 18 December 1979.

\textsuperscript{281} According to the United Nations \textit{1999 World Survey on the Role of Women in Development} (1999), ix, ‘Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.’

\textsuperscript{282} Maastricht Guidelines, para 11.


\textsuperscript{284} CEDAW, preamble, para 8.
\end{footnotesize}
Six different grounds of discrimination may deprive women of the recognition or exercise of their equal human rights:

(1) sex, (2) pregnancy and child bearing, (3) maternity, (4) marital status, (5) family status, and (6) family and/or household duties and responsibilities.\(^{285}\)

[2.76] Furthermore, certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple discrimination based on additional grounds—e.g. race, ethnic or religious identity, disability, age or class.\(^{286}\) For example, there have been cases where Muslim women have been denied education or employment on the basis of the Islamic headscarf perceived to be a religious obligation.\(^{287}\) Such women often suffer multiple forms of discrimination, for example, discrimination on the basis of sex, ethnic origin and on the basis of religion. Such multiple discrimination may affect these groups of women primarily, or to a different degree or in different ways than men.\(^{288}\) As noted in paragraph 15 of General Comment 16 (see section III.D below), this may require states to adopt specific temporary measures to eliminate such multiple discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality.

[2.77] Like Article 3 of the ICCPR, Article 3 of the ICESCR underlines the Covenant's commitment to sexual equality. The obligation under Article 3 is, therefore, to 'ensure' gender equality in the enjoyment of the rights guaranteed under the Covenant. This is in conformity with the UN Charter, which affirms explicitly 'the equal rights of men and women' in its Preamble and includes sex among the prohibited grounds of discrimination. Indeed, discrimination against women is 'fundamentally unjust' and violates the principles of equality of rights and respect for human dignity.\(^{289}\) It is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their states, hampers the growth of the prosperity of society and the family, and makes more difficult the full development of the potentialities of women.\(^{290}\) However, as argued below, the principle of equality does not prevent the maintenance or adoption of temporary special measures providing for specific advantages in favour of women.

C. Eradication of De Jure and De Facto Discrimination

[2.78] Although the ICESCR prohibits discrimination, it does not provide a definition of 'discrimination'. However, the CESCR has confirmed in its General Comment 16 that:

\(^{286}\) CEDAW, General Recommendation 25, para 12; HRC, General Comment 28, above n 257, para 30.
\(^{288}\) Ibid.
\(^{289}\) Declaration on the Elimination of Discrimination against Women, UN Doc A/48/49 (1993), Art 1; CEDAW, preamble, para 7.
\(^{290}\) CEDAW, preamble, para 7.
11. Discrimination against women is ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’ Discrimination on the basis of sex may be based on the differential treatment of women because of their biology, such as refusal to hire women because they could become pregnant; or stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.

Therefore, discrimination under the Covenant includes ‘any distinction, exclusion, restriction or preference’ between individuals or groups of individuals, made on the basis of any of the prohibited ground(s), ‘unless the distinction is based on objective criteria’ and the aim is to achieve a purpose that is legitimate under the Covenant. It is important to note that non-discrimination and equality under Articles 2(2) and 3 of the ICESCR entail two essential obligations. First, there is an obligation to eradicate de jure discrimination (immediately/without delay). For example in its Concluding Observations on Zimbabwe in 1997, the CESCR stressed the need to address de jure discrimination immediately in the following terms:

Although many provisions of the Covenant are to be implemented progressively and in accordance with the maximum of the State party's available resources, there are other rights that must be ensured immediately, such as de jure non-discrimination and protection of the cultural rights of minorities.

Second, there is an obligation to take ‘effective steps’ to combat de facto discrimination on the prohibited grounds in public and private spheres/fields, in the enjoyment of all ESC rights. This must include adopting programmes as speedily as possible to bring to an end de facto discrimination against women, attributable to traditional practices and cultural views on women’s role in society. Significantly, in order to eliminate de jure and de facto discrimination, states have to respect, protect and fulfil the right to non-discrimination. The obligation to respect requires states parties to ensure that all public authorities and public institutions shall refrain from discriminatory acts. The obligation to protect requires states parties to take steps to ensure that individuals and entities in their private capacity do not discriminate on prohibited grounds (see section III.E below). The obligation to fulfil requires states parties to ensure that all public authorities and public institutions shall refrain from discriminatory acts.

291 As defined in Art 1 of the CEDAW.
293 CESCR, Concluding Observations: Japan, UN Doc E/C.12/1/Add.67 (30 Aug 2001), para 39. The Committee requested ‘the State party to take note of its position that the principle of non-discrimination, as laid down in article 2(2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria’. See also CESCR, Concluding Observations: Croatia, UN Doc E/C.12/1/Add. 73 (30 November 2001), para 11.
parties to take steps to eliminate *de jure* and *de facto* inequality, as well as implement obligations related to non-discrimination (see Draft General Comment 20, Part IV, and paragraph 2.80 below).

**[2.79]** It should be noted that discrimination is prohibited by other international human rights treaties. By way of example, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, Article 1 of the CEDAW, which is followed in Article 1(f) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, provides that ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**[2.80]** While these Conventions deal only with cases of discrimination on specific grounds, it is arguable, in line with the jurisprudence of the HRC, that the terms ‘discrimination’ and ‘inequality’ under the Covenant should be understood to imply any distinction, exclusion, restriction or preference (without reasonable and objective criteria or legitimate aim under the Covenant) which is based on any prohibited ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, mental or physical disability, age, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, and which has the *purpose* (direct) or *effect* (indirect) of nullifying or impairing the recognition, equal enjoyment or exercise by all individuals and groups, on an equal footing, of all rights and freedoms contained in the Covenant. Therefore, treatment is discriminatory or unequal if similar situations are treated differently, or different situations are treated similarly, without reasonable and objective criteria.

**[2.81]** States parties are under an obligation to guarantee and ensure the right to be free from discrimination and the equal right of women and men in the enjoyment of all rights contained in the ICESCR. The obligation to ensure that all individuals enjoy the rights recognised in the Covenant, established in Articles 2 and 3 of the Covenant, requires that states parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of ESC rights ‘not only [in] the public sphere, but also the private sphere’.

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299 HRC, General Comment 18, paras 6–7, 13 and 29; HRC, General Comment 28, para 31.
300 See eg CESCR, General Comment 12, para 18.
302 CESCR, General Comment 5, para 11. See also CESCR, General Comment 14, para 26 in which the CESCR stressed ‘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’.
education of the population and of state officials, including judges, in human rights and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant.303 In addition, states must require public and private institutions to develop plans of action to address non-discrimination. As noted above, discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.304 States parties should, therefore, address the ways in which any instances of discrimination on other grounds affect women in a particular way in order to attain the goal of equality.

[2.82] The CESCR and other treaty monitoring bodies must fully integrate gender perspectives into all their working methods. This requires, in particular, the consideration of the gender implications of each issue discussed under each of the articles of the Covenant.305 At a national level, it is essential for states to provide effective remedies (such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes) against non-discrimination in the field of ESC rights against public and private actors.306 One of the means of realising de facto or substantive equality for marginalised groups like women, rather than an exception to the norms of non-discrimination and equality relates to the application of ‘temporary special measures’ in favour of historically marginalised individuals and groups.307

D. Temporary Special Measures

[2.83] Although everyone is a beneficiary of human rights (UDHR, Article 22), in practice some individuals and groups are more vulnerable than others or have traditionally been subjected to discrimination or suffered disadvantage. As shown in chapter 6, throughout the world women are in general economically, socially, politically, legally and culturally disadvantaged compared with similarly situated men. Some groups of women (such as women of ethnic and minority communities, immigrant women and women asylum seekers, women internally displaced by violence and conflict, women with disabilities, older women, and women in detention) are particularly vulnerable depending on context and suffer more violations of their ESC rights. For example, in the United Kingdom the CEDAW Committee expressed its concern on ‘vulnerable groups of women’ in 2008 as follows:

The Committee is concerned that women of different ethnic and minority communities, including traveller communities, continue to suffer from multiple discrimination, particularly in access to education, employment and health care. The Committee notes that ethnic and minority women are underrepresented in all areas of the labour market, particularly in senior or decision-making positions, have higher rates of unemployment and face a greater pay gap in their hourly earnings compared to men. Women of different ethnic and minority

303 HRC, General Comment 28, para 3.
304 Ibid, para 30.
306 See chapter 3; and CESCR, Draft General Comment 20, UN Doc E/C.12/GC/20/CRP.2 (9 September 2008), para 36.
307 CEDAW, Art 4(1).
communities are also greatly underrepresented in political and public life. The Committee notes that women of traveller communities experience high numbers of miscarriages and still-births, and have the highest maternal mortality rate among all ethnic groups. It also notes that women of minority and ethnic communities suffer higher rates of depression and mental illness, while women of Asian descent have higher suicide and self-harm rates.\footnote{CEDAW/C/GBR/CO/6 (18 July 2008), para 45.}

[2.84] The disadvantages faced by women, and especially by vulnerable groups of women, operate on a number of levels—international, regional, national, local, communal and familial. Treating unequals equally can have the effect of widening inequality. Therefore, in order to achieve substantive equality, such disadvantaged groups may require special protection of their rights in order to redress disadvantage, sometimes through the adoption of temporary special measures in both the public and private sectors,\footnote{‘Temporary Special measures’ in its corrective, compensatory and promotional sense, is often equated with the terms ‘affirmative action’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’, and ‘positive discrimination’. In this text, and in accordance with the CEDAW, the term ‘temporary special measures’ is used solely. For a discussion of these measures see I Boerefijn et al. (eds), Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (Oxford, Hart Publishing, 2003); CEDAW, General Recommendation 25, para 17.} such as quota systems to advance women’s integration into education, the economy, politics and employment.\footnote{CEDAW, General Recommendation 5 (1988).} Such action may consist of measures such as ensuring that, for example, women are not denied healthcare, primary/secondary/higher education, access to employment, or social security. This is meant to ensure substantive equal enjoyment of ESC rights by addressing structural and systematic discrimination.\footnote{Limburg Principles, 37–9.} Consequently, the adoption of temporary special measures for the sole purpose of securing adequate advancement of certain (vulnerable, marginalised or disadvantaged) groups or individuals requiring such protection, as may be necessary in order to ensure such groups or individuals have equal enjoyment of ESC rights, are not generally deemed as discriminatory.\footnote{See eg CESCR, General Comment 5, para 18; CEDAW, Art 4(1); CEDAW, General Recommendation 25; CESRR, Concluding Observations: Guatemala, UN Doc E/1997/22 (1997), para 140 which reads: ‘The Committee recommends that all legislative and other reforms take into account the need to promote equality and reverse the devastating effects of discrimination against the indigenous populations, in particular through affirmative action.’}

[2.85] In this respect, Article 4 of the CEDAW provides:

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

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

[2.86] The adoption of temporary special measures is not restricted to civil and political rights but extends to ESC rights. Thus the CESCR has confirmed the applicability of temporary special measures to ESC rights, and called on states to adopt these measures. For example, in 2006 the Committee noted with concern that in
the former Yugoslav Republic of Macedonia, women, in particular Roma women and women living in rural areas, only had limited economic opportunities and frequently worked in the informal or low-paid sectors or were employed in lower positions and received lower salaries than men, irrespective of their qualifications. It recommended that the former Yugoslav Republic of Macedonia as a state party to the ICESCR

adopt temporary special measures to ensure that women, in particular Roma and other minority women as well as women living in rural areas, have the same access to the regular labour market as men, including to senior positions, and that the principle of equal remuneration for work of equal value is implemented in practice.

The Committee has also explained in General Comment 16, paragraph 15, that:

The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others. Temporary special measures aim at realising not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination, and are terminated when de facto equality is achieved, such differentiation is legitimate.

Therefore, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations that are contrary to justice, to reason or to the nature of things.

The need to bring disadvantaged or marginalised persons or groups of persons (such as women) to the same substantive level as others (such as men) is a legitimate purpose under the Covenant and other international human rights treaties to justify the adoption of temporary special measures aimed at accelerating de facto equality between men and women. However, such measures must not, as a consequence, lead to the maintenance of unequal or separate standards for different groups, and such measures must not be continued after their intended objectives of equality of opportunity and treatment have been achieved and sustained for a period of time. In respect of the right to education, the CESCR clearly stated in 1999 that:

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.

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314 Ibid, para 33.
315 However, there is one exception to this general principle: reasons specific to an individual male candidate may tilt the balance in his favour, which is to be assessed objectively, taking into account all criteria to the individual candidates. This is a requirement of the principle of proportionality.
317 Ibid.
318 CEDAW, General Recommendation 25, para 20.
319 CESCR, General Comment 13, para 32.
In summary, the following conclusions can be drawn from the foregoing. (i) Historically marginalised and vulnerable groups such as women may require states and other actors to adopt and implement temporary special measures ‘in order to diminish or eliminate conditions which cause or help to perpetuate discrimination’, or eliminate disadvantage caused by past and current discriminatory laws, traditions and practices, so as to enhance the enjoyment of their human rights.\(^{320}\) (ii) In the context of ESC rights, in some cases, the adoption of temporary special measures may be ‘necessary’ to accelerate the equal enjoyment by women of all ESC rights and to improve the de facto position of women.\(^{321}\) (iii) Such temporary special measures encompass a wide variety of legislative, executive, administrative or other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.\(^ {322}\) (iv) The nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require. The results of such measures should be monitored with a view to discontinuing these measures when their objectives have been achieved.\(^ {323}\)

E. Discrimination by Non-State Actors

The non-discriminatory clause of the Covenant includes discriminatory acts of both public authorities and NSAs. The state obligation to protect (as outlined in chapter 1) equally applies in the context of non-discrimination. Thus, states parties to the ICESCR are obliged to take steps to ensure that individuals and entities acting in a private capacity do not discriminate on prohibited grounds—eg imposing penalties on employers who discriminate on the basis of race, sex, pregnancy, marital status or other prohibited grounds. As a result, states should take effective measures to ensure that NSAs (eg in the context of the right to adequate housing, private housing agencies and private landlords) refrain from engaging in discriminatory practices on any prohibited ground including nationality or race.\(^ {324}\) In FA v Norway\(^ {325}\) the CERD was made aware of housing advertisements in Norway that contained discriminatory requirements such as ‘no foreigners desired’, ‘whites only’ and ‘Norwegians with permanent jobs’.\(^ {326}\) In response, the CERD urged Norway to take effective measures to ensure that housing agencies refrain from engaging in discriminatory practices and ‘recommended that Norway give full effect to its obligations under article 5(e)(iii) of the [International] Convention on the Elimination of All Forms of Racial Discrimination’\(^ {327}\).

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\(^{320}\) HRC, General Comment 18, para 10.

\(^{321}\) CESCR, General Comment 16, para 35. The Comment made reference to CEDAW, General Recommendation 25 on Art 4.1 of CEDAW.

\(^{322}\) CEDAW, General Recommendation 25, para 22.

\(^{323}\) CESCR, General Comment 16, para 36.


\(^{325}\) Communication No 18/2000, UN Doc CERD/C/58/D/18/2000 (21 March 2001); UN Doc A/56/18, annex III.

\(^{326}\) Ibid, para 2.1.

\(^{327}\) Ibid, para 8.
To comply with states' international human rights obligations, it is important to hold NSAs to account under national law. For example, section 8 of the South African Constitution places specific human rights obligations on NSAs. In some states, eg India, courts have placed human rights obligations upon NSAs. In one case, dealing with whether doctors could deny treatment to patients, the court held that the right to life meant every doctor, including a doctor not working for the state, ‘had a professional obligation to extend his service with due expertise for protecting life’. The implication is that private doctors cannot discriminate in the provision of healthcare services. Perhaps more pertinent, in a case relating to the prevention of occupational disease, a court decided it could:

give appropriate directions to the employer, be it the state or its undertaking or private employer to make the right to life meaningful; to prevent pollution of workplace; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people.

It is thus clear that states can hold NSAs to account for human rights violations under national law. In this regard, 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 party’s conduct, together with the conduct of appropriate NSAs, is consistent with its obligations under the Covenant.

IV. ARTICLE 2(3): NON-NATIONALS IN DEVELOPING COUNTRIES

As a general rule the Covenant applies equally to nationals and non-nationals residing in the jurisdiction of the state party. Thus, any differential treatment between nationals and non-nationals may constitute discrimination and needs justification. Consequently, the Committee requires states parties to the ICESCR to indicate in their reports: to what extent and in what manner are non-nationals not guaranteed the rights recognised in the Covenant? What justification is there for any difference? However, Article 2(3) of the ICESCR states that:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the . . . Covenant to non-nationals.

328 The Constitution of the Republic of South Africa, 1996, s 8(2) provides: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’
Although the Covenant did not define ‘developing countries’ and ‘economic rights’, it has been suggested that the phrase ‘developing countries’ was meant to refer to economically weak states, particularly those that had been under colonialism. This is supported by the travaux préparatoires, which indicate that the inclusion of this provision was proposed by a delegate of Indonesia in order to protect the rights of the nationals of former colonies which had recently gained independence against powerful economic groups of non-nationals who control important sectors of the economy. The purpose of Article 2(3) was, therefore, to end the domination of certain economic groups of non-nationals during colonial and postcolonial times.

By way of illustration, the African Commission on Human and Peoples’ Rights has affirmed that during colonialism:

the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa’s precious resources and people still vulnerable to foreign misappropriation.

As a result of this history and painful legacy, many states that were subjected to colonial exploitation have limited resources to guarantee ‘economic rights’ to non-nationals. It is in this context that they are permitted, as an exception, to determine to what extent they guarantee ‘economic rights’ to non-nationals.

The limitation in Article 2(3) only extends to ‘economic rights’ but not to ‘social and cultural rights’. It is uncertain what is meant by ‘economic rights’ in this Article and how different such rights are from ‘social and cultural rights’. This has led to some lack of clarity in determining whether some rights—such as the rights to health, education, social security, participation in cultural life of a community—would fall in the category of ‘economic’ rights under Article 2(3). Although generally these may be considered to be ‘social rights’ rather than ‘economic rights’, as noted in chapter 1, the ICESCR does not make a clear-cut distinction between what rights are ‘social’ or ‘cultural’ and what rights are ‘economic’. So far, in the practice of the CESCR, no clear distinction between ‘social rights’ and ‘economic rights’ can be discerned. As yet, the Committee has not dealt with Article 2(3) in any detail. In any case, no developing state has sought to invoke it, and in any case discrimination on the basis of nationality is prohibited in several developing states. As regards education, for example, the Committee has noted:

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334 Dankwa, ibid, 235.
337 Dankwa suggested that ‘economic rights, in the context of the Covenant, are rights that enable a person to earn a living or that relate to that process’. He cited, as examples, rights to: work (Art 6); just and favourable conditions of work (Art 7); improved material conditions for teaching staff (Art 13(2)(e)); rights to form and join a trade union and to strike (Art. 8(a) and (b)). See Dankwa, above n 333, 240.
338 For example, in Africa, the African Charter on Human and Peoples’ Rights guarantees ‘every individual . . . without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status’ (Art 2) to the enjoyment of all
The right to education . . . has been variously classified as an economic right, a social right and a cultural right. It is all of these.\textsuperscript{339}

The same could be applied to health and most other rights under the Covenant. Thus, in addition to being ‘social rights’, health, education, social security could be seen as ‘economic rights’ since these rights have economic dimensions as they enable individuals to earn a living.

\textbf{[2.94]} Whatever view is taken as to what rights in the ICESCR are ‘economic rights’, it has to be borne in mind that Article 2(3) is only an exception to the general rule in Article 2(2).\textsuperscript{340} Therefore, in the light of the object and purpose of the Covenant, and the universality of human rights in general, Article 2(3) should be interpreted narrowly since what is paramount is the general right to equality and non-discrimination, rather than the exception.\textsuperscript{341} This narrow interpretation applies in particular to the notion of ‘economic rights’ and to the notion of ‘developing countries’.\textsuperscript{342} The latter notion refers to those states which have gained independence and which fall within the appropriate UN classification of a developing country.\textsuperscript{343}

\textbf{[2.95]} In the context of the rights which are generally seen as social rights (eg rights to health and education), the narrow interpretation should lead to the result that developing states parties to the ICESCR should not rely widely on this provision to discriminate against non-nationals in the enjoyment of ‘economic rights’. Similarly, Article 2(3) should not be used to deny adequate compensation to non-nationals in the event of compulsory deprivation of property owned by non-nationals in developing states in the interest of the national economy of a developing state or other public interest. With respect to Article 2(3), the Belgian government declared that ‘this provision cannot infringe the principle of fair compensation in the event of expropriation or nationalisation’.\textsuperscript{344} This is consistent with Article 17 of the UDHR, which guarantees everyone ‘the right to own property alone as well as in association with others’ and that no one ‘shall be arbitrarily deprived of his property’. Therefore, developing countries should not use Article 2(3) in a manner inconsistent with international law. In practice most developing countries protect the right to property without distinguishing between nationals and non-nationals. To mention one example, Uganda’s Constitution (1995) protects the right to property of ‘every person’ in the following terms:

(1) Every person has a right to own property either individually or in association with others.
(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

rights under the charter including rights to work (Art 15), health (Art 16) and education (Art 17), emphasis added.

\textsuperscript{339} CESCR, General Comment 11, para 2.
\textsuperscript{340} Limburg Principles, para 43.
\textsuperscript{341} \textit{Ibid}.
\textsuperscript{342} \textit{Ibid}, para 44.
\textsuperscript{343} \textit{Ibid}.
(a) the taking of possession or acquisition is necessary for public use or in the interest of
defence, public safety, public order, public morality or public health; and
(b) the compulsory taking of possession or acquisition of property is made under a law
which makes provision for—
(i) prompt payment of fair and adequate compensation, prior to the taking of posses-
sion or acquisition of the property; and
(ii) a right of access to a court of law by any person who has an interest or right over
the property.345

V. ARTICLES 4 AND 5: LIMITATIONS ON ESC
RIGHTS AND SAFEGUARDS AGAINST ABUSE

[2.96] The rights guaranteed under the Covenant do not exist in a vacuum and so may
be subjected to certain legitimate limitations in accordance with Article 4, which
provides:

The States Parties to the present Covenant recognise 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.

[2.97] As at the time of writing (in December 2008), the CESCR had not adopted a
General Comment in respect of this Article, and its Concluding Observations had
rarely addressed the question of limitations since states have generally not sought to
invoke limitations under Article 5. From the text of Article 4, it is clear that this
Article was primarily intended to regulate permissible limitations under the Cov-
enant. In this way, it was meant to be protective of the rights of individuals rather than
permissive of the impositions of limitations by the state.346 It is clearly an exception to
the general rule (to protect ESC rights) and must necessarily be interpreted restrict-
ively in the light of the general rule, since the intention is to ‘regulate’ the exercise of
these rights not to extinguish them.347 Since the text of Article 5 requires the limita-
tion to be ‘compatible with the nature of these [ESC] rights’ and ‘solely for the
purpose of promoting the general welfare in a democratic society’, any limitation to
the Covenant must be ‘necessary in a democratic society’, which implies the existence
of a ‘pressing social need’ or ‘a high degree of justification’ for the limitation in ques-
tion.348

[2.98] In order for any limitation to comply with Article 4, it must satisfy three essen-
tial features. Firstly, the limitation must be ‘determined by law’. This means that the
limitation should have a basis specifically in domestic law consistent with the
Covenant; the law must be adequately accessible; the relevant domestic law must be

184–5.
formulated with sufficient precision; and the law must not be arbitrary, unreasonable, discriminatory or incompatible with the principle of interdependence of all human rights. Thus, there must be a measure of legal protection in domestic law against arbitrary interference by public as well as private authorities with ESC rights and adequate safeguards against abuse.349

[2.99] Secondly, the limitation must be ‘compatible with the nature’ of ESC rights, meaning that the substance of the limitation shall not be interpreted or applied so as to jeopardise the essence of the ESC rights.350 Implicit in this standard is the notion that the limitation, even if justified by compelling governmental interests, must not be so framed or applied so as to limit the protected rights under the Covenant more than is necessary.

[2.100] Thirdly, the limitation should have a legitimate (and not arbitrary, unreasonable or discriminatory) aim, solely to promote ‘the general welfare in a democratic society’. The phrase ‘general welfare’ has been understood to mean ‘furthering the wellbeing of the people as a whole’, including their economic, social and cultural wellbeing.352 But such well-being must be viewed in the context of a ‘democratic society’—a society that respects human rights set forth in the UN Charter and the UDHR, including minority rights.354 A democratic society is characterised by pluralism, ‘tolerance and broad-mindedness’ and ‘based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives’. As a result, any limitation of the rights guaranteed under the Covenant must meet the proportionality test. In particular whether there are adequate and sufficient reasons for the limitation (a pressing social need) and whether such reasons are proportionate to any limitation (legitimate aim pursued) of the enjoyment of the rights guaranteed under the Covenant.357 This restricts the imposition of limitations under the Covenant and thus the burden rests on the state to prove that any limitations are taken in response to a pressing social need, and that the limitation of the rights protected in the Covenant is no greater than is necessary to address that pressing social need in order to ensure the continuous and effective protection of ESC rights. In no case may the limitations be applied or invoked in a manner that would impair the essence of any right protected in the Covenant or impair the democratic functioning of society.

349 Limburg Principles, 48–51.
350 Ibid, 56.
351 Ibid, 52.
353 Limburg Principles, 55.
355 Vienna Declaration, para 8.
357 The ECtHR has applied a similar test under the ECHR. The classic formulation of the test is to be found in Silver v United Kingdom, judgment of 25 March 1983, Series A, No 61; (1983) 5 EHRR 347, para 97.
Article 5(1) provides for safeguards against abuse of rights guaranteed under the ICESCR by the state and other actors in the following terms:

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 recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.

Similar provisions are found in other human rights treaties. In contrast to most other provisions of the Covenant, Article 5 refers not merely to a state party but rather generally to ‘any State’, ‘group’ or ‘person’. This can be taken to mean that even non-states parties to the Covenant including NSAs (discussed in chapter 3) must not engage in any activity aimed at the destruction of ESC rights. A similar provision in the ECHR contained in Article 17 was interpreted to mean that the general purpose of such a provision is to prevent individuals and groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention. In principle, the same general purpose is valid for the Covenant. In light of Article 5, any limitation of the rights guaranteed under the Covenant must not be greater in extent than that envisaged under Article 4. Thus, Article 5(1) underlines the fact that there is no general, implied or residual right for a state to impose limitations beyond those which are specifically provided for in the law. Article 5(2) provides that the ICESCR must not be used as a pretext to lower the level of protection provided for ESC rights under other international treaties, or under municipal law or custom. It is a ‘savings’ provision, which preserves the sanctity of any laws that provide a higher level of protection for ESC rights than is required by the ICESCR. Thus, individuals and groups may rely on other laws providing for more favourable protection. For example, a state party that guarantees the right to property domestically or by ratification of another human rights instrument (eg the African Charter on Human and Peoples’ Rights or the First Additional Protocol to the ECHR) may not limit or derogate from this right on the basis that it has ratified the Covenant, which does not contain such a provision.

VI. CONCLUSION

This chapter has considered states’ human rights obligations in respect of ESC rights, primarily under Articles 2–5 of the ICESCR. The Article 2(1) state obligation to ‘take steps’ to the ‘maximum of available resources’ and the Article 2(2) state obligation to ‘guarantee’ without reservation that ESC rights will be exercised

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358 See eg UDHR, Art 30; ICCPR, Art 5(1); ECHR, Art 17; AmCHR, Art 29(a).
361 Limburg Principles, para 57.
362 Art 5(2) of the ICESCR states: ‘No restriction upon or derogation from any of the fundamental human rights recognised 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 recognise such rights or that it recognises them to a lesser extent.’ See also Limburg Principles, para 58.
'without discrimination'\textsuperscript{363} are obligations of \textit{immediate} effect and subject neither to 'progressive realisation' nor to the 'availability of resources'. One key component of state obligations under the ICESCR arises in the context of 'international assistance and co-operation'. As argued above, this includes the obligation to work actively towards equitable multilateral trading, investment and financial systems conducive to the elimination of poverty, a key obstacle to the progressive realisation of ESC rights. Indeed the United Nations Conference on Trade and Development (UNCTAD) noted in its 2008 report that:

Achieving a more sustainable type of economic growth and better poverty reduction and social outcomes in LDCs [less-developed countries] requires effective national development strategies, effective development aid and development-friendly international regimes for trade, investment and technology.\textsuperscript{364}

It has been noted that Articles 2(2) and 3 oblige states to adopt and implement measures to prevent discrimination (including the adoption of temporary special measures to compensate for past discrimination or to redress disadvantage) that go beyond the enactment of legislation. This is necessary in order to ameliorate disadvantage suffered by particular groups, and to accelerate the achievement of the overall \textit{de facto} or substantive equality. As noted above, Articles 2(2) and 3 of the ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under the Covenant.

\textbf{[2.103]} Finally, it should be observed that while the CESCR has adopted several useful General Comments, it is yet to adopt General Comments with respect to the obligations of developing states to guarantee the ‘economic rights’ to non-nationals in developing countries (Article 2(3)) and the general limitations on ESC rights (Articles 4 and 5). It is possible that these Articles have not been a priority because states have generally not invoked them. Nonetheless, in view of the importance of the limitations in the above Articles, a General Comment is vital to clarify their application, and to serve as a guideline in examining state reports with greater consistency. It would also assist the states parties in the implementation of the Covenant. As noted above, to be compatible with the Covenant, limitations must meet three basic conditions: (i) limitations must be ‘determined by law’; (ii) limitations must be compatible with the nature of the rights protected in the Covenant and not the destruction of any of the rights or freedoms recognised in the Covenant; and (iii) the purpose of the limitation must be to promote ‘the general welfare in a democratic society’.

\textsuperscript{363} CESCR, Concluding Observations: Kuwait, UN Doc E/C.12/1/Add.98 (7 June 2004), paras 9 and 28. The Committee noted that Kuwait’s reservations and declarations made in respect of the provisions regarding Arts 2(2) and 3 of the ICESCR ‘negate the core purposes and objectives of the Covenant’ and encouraged Kuwait to consider withdrawing such reservations and declarations.

Non-State Actors and the ICESCR

I. INTRODUCTION

[3.01] In recent years, it is increasingly being acknowledged that the policies and activities of NSAs, sometimes referred to as ‘private’ actors, as distinct from the public realm of government, can affect virtually all internationally recognised human rights, and ESC rights in particular. These NSAs include TNCs, civil society groups, international organisations including the WTO, the World Bank and the IMF, as well as armed opposition or terrorist groups. This has arisen in the context of neoliberal globalisation, which calls upon governments:

to relinquish regulatory control over production, trade, and investment, both domestically and across international borders, and to transfer as many assets and functions as possible to private actors. It also advocates restructuring government so that remaining state operations will emulate private enterprise more closely.1

It is not surprising, therefore, that TNCs are the most visible manifestation of globalisation. By the early 1990s, there were an estimated 37,000 TNCs in the world, with at least 170,000 foreign affiliates.2 Of these, 33,500 were parent corporations based in developed countries.3 By 2007 the number of TNCs had risen to some 78,000, with at least 780,000 foreign affiliates, almost half of which are now located in developing countries.4 Despite this development, NSAs are still not bound directly by existing international human rights treaties which apply to states parties. The fact, however, is that the growth in the wealth and power of NSAs has meant an enhanced potential for NSAs to promote or undermine respect for human rights. As shown in paragraph 3.06 below, this raises two fundamental questions which are examined in this chapter.

3 Ibid.
Making space in the international legal regime to take account of the role of NSAs in the realisation of ESC rights, and their accountability for the violations of these rights, remains a critical challenge facing international human rights law today. Under traditional approaches to human rights generally, and to ESC rights in particular, NSAs are considered to be beyond the direct reach of international human rights law. As is well known, traditionally, human rights relations are conceptualised as ‘vertical’ in the sense that they involve the obligation of a governing actor (the state or agents of the state) towards individuals (or groups of individuals) within a state’s jurisdiction. This is based on the principle that the state has responsibility to guarantee human rights given that the state/individual relationship involves unequal power dynamics between the parties. A state’s potential to abuse its position of authority to the detriment of interests of individuals and groups was the basis for human rights to insulate the latter against state interference.

The UN Charter, widely considered as the centre of an international ‘constitutional order’, imposes obligations on Member States to achieve international co-operation in promoting and encouraging respect for human rights. In this context, human rights are viewed primarily as being exercisable against the state, and the state has the primary responsibility to respect, protect and fulfil human rights. For example, under the two principal human rights treaties—the ICCPR and the ICESCR—it is only each ‘state party’ to these Covenants that undertakes human rights obligations. This is binding on all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—and thus all government organs and authorities are in a position to engage the responsibility of the state.

It is, therefore, clear that human rights treaties are principally addressed to

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8 1 UNTS xvi.
12 993 UNTS 3.
13 ICCPR, Art 2(1), ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.’ ICESCR, Art 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 realisation of the rights recognised in the present Covenant.’
14 HRC, General Comment 31, para 4.
states and NSAs cannot, at present, be parties to the existing human rights treaties. The general obligations under Article 2(1) of the ICCPR and the ICESCR ‘are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law’. In the words of the CESCR: ‘A State party cannot divest itself of its obligations under the Covenant by privatising governmental functions.’ As such, the traditional view of international human rights instruments is that they impose only ‘indirect’ responsibilities on NSAs provided under domestic law in accordance with the international and domestic human rights obligations of states. This means that NSAs are currently only bound to the extent that obligations accepted by states can be applied to them by states. The result is that a wide range of actors other than states, including international financial institutions, notably the IMF and the World Bank; international organisations concerned with trade such as the WTO; and TNCs, along with many others, are generally considered not to be bound directly by human rights law. This means that NSAs are only indirectly accountable through states, while the states will be directly liable for human rights violations committed by NSAs within their respective jurisdictions. NSAs are thus, by definition, placed at the margins of the international human rights legal regime. The major argument against the direct application of human rights obligations to NSAs stresses that this would carry the risk that states might defer their responsibility to these actors, which might diminish existing state obligations and accountability.

In addition, where governance is weak, it is argued that shifting obligations onto NSAs to protect and even fulfill the broad spectrum of human rights may further undermine domestic political incentives to make governments more responsive and responsible for their own citizenry, which is stated to be the most effective way to realise rights.

This situation threatens to make a mockery of the international system of protecting human rights generally, and ESC rights in particular, and providing accountability for human rights violations. This is especially so given the fact that since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state through privatisation of functions previously performed by governments and to rely on private actors to resolve problems of human welfare, most of which directly relate to ESC rights to work, social security, adequate food, education, health, housing and water. The increasing powers of NSAs means that they are uniquely positioned to affect, positively and/or negatively, the level of

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16 HRC, General Comment 31, para 8.
17 CESCR, Concluding Observations: Israel, UN Doc E/C.12/1/Add.90 (23 May 2003), para 11.
18 The term ‘transnational corporation’ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively. See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter ‘UN Norms’), UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003), para 20.
21 See generally K De Feyter and F Gomez Isa (eds), Privatisation and Human Rights in the Age of Globalisation (Antwerp, Intersentia, 2005).
enjoyment of ESC rights. Despite this, the means by which NSAs might be held accountable for human rights violations remain unclear.22

[3.06] This chapter attempts to examine the role of NSAs in the progressive realisation of ESC rights. As a subject of enormous complexity and variation, examination is restricted to two highly contentious questions: (i) How should international human rights law ensure that the activities of NSAs are consistent with international human rights standards with respect to ESC rights? (ii) How should accountability of NSAs be promoted effectively when violations of international human rights law occur? The chapter is divided into four sections. Section II defines the term ‘non-state actors’. While contextualising the debate on issues surrounding state obligation to protect against human rights violations by NSAs, section III examines the scope and limits of the state-centred approach. Section IV discusses the direct human rights responsibilities of NSAs with respect to ESC rights. Finally, section IV provides a number of concluding observations. It is concluded that in order to ensure more accountability for human rights violations by NSAs, it is relevant to consider the creation of a global ombudsman function that could receive and handle complaints of human rights violations by NSAs or to consider the adoption of a Statute of an International Court of Human Rights, to which NSAs, in addition to states, could also possibly become parties. Before examining the questions set out above, it is useful, by way of context, to first define the term NSA as used in this chapter.

II. DEFINITION OF NON-STATE ACTOR

[3.07] The term ‘non-state actor’ is virtually open-ended.23 Its meaning depends on the context in which it is used. For example, the International Campaign to Ban Landmines has used the term NSAs to refer to ‘armed opposition groups who act autonomously from recognised governments’.24 In this context (of arms control), NSAs include ‘rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, and de facto territorial governing bodies’.25

[3.08] Several attempts have been made to define NSAs.26 According to Josselin and Wallace, NSAs include all organisations meeting the following three characteristics.27 First, NSAs include organisations (emanating from civil society, or from the market economy, or from political impulses beyond state control and direction) that are largely or entirely autonomous from central government funding and control. It is not
clear, however, what level of governmental funding or control might disqualify an organisation as a NSA. Secondly, NSAs include organisations operating or participating in networks that extend across the boundaries of two or more states. Therefore, they engage in ‘transnational’ relations, linking political systems, economies and societies. Under this criterion, actors engaged solely at the domestic level in one state are not part of the definition since the focus is limited to those actors with a transnational dimension. Thirdly, NSAs include organisations acting in ways that affect political outcomes, either within one or more states or within international relations—either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities. This is very widely defined and has the potential to include a diverse range of actors.

According to the African Commission on Human and Peoples’ Rights (ACmHPR), the term ‘non-state actor’ has been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the state and its organs. NSAs are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates. In this chapter, the term NSA is used broadly to refer to all ‘actors other than states’. This includes TNCs, professional bodies, civil society groups and other NGOs. It also extends to the UN agencies, other international organisations and other relevant bodies within the UN system. It further includes international organisations concerned with trade such as the WTO, and international financial institutions, notably the World Bank, the IMF and regional development banks.

III. STATE OBLIGATION TO PROTECT AGAINST HUMAN RIGHTS VIOLATIONS BY NON-STATE ACTORS

A. State Obligation to Protect

Both universal and regional human rights systems emphasise that states have a duty to protect those living within their jurisdictions from human rights violations,

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31 Ibid. See eg CESCR, General Comment 19: The Right to Social Security (39th Session, 2007), UN Doc E/C.12/GC/19 (2008), paras 82–3; CESCR, General Comment 14, above n 30, para 64.
and this duty is also generally agreed to exist under customary international law. Therefore the existing human rights regime rests upon the bedrock role of states to protect against violations of human rights by NSAs. As shown in chapter 2, according to Article 2(1) of the ICESCR, each state party to the Covenant undertakes the obligation:

- to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

**[3.11]** Thus, states are required by Article 2(1) to adopt legislative measures and/or non-legislative measures (eg the provision of judicial or other effective remedies, administrative, financial, educational/informational campaigns and social measures) to protect ESC rights. Legislative measures include the adoption of legislation to hold NSAs accountable under national law, eg the US Alien Tort Claims Act (ATCA), and also the duty to reform, amend and repeal legislation manifestly inconsistent with the progressive realisation of ESC rights. It is essential to revise existing laws in order to protect individuals and groups against human rights violations by NSAs. One recent example is the revised UK Companies Act which requires directors to ‘have regard’ to such matters as ‘the impact of the company’s operations on the community and the environment’. In *Purohit and Moore v The Gambia* the ACmHPR found the Lunatics Detention Act (LDA) of the Gambia incompatible with several provision of the African Charter on Human and Peoples’ Rights (ACHPR) because it failed, inter alia, to ‘meet standards of anti-discrimination and equal protection of the law’. The Commission strongly urged the government of the Gambia to repeal the LDA and replace it with a new legislative regime for mental health compatible with the ACHPR.

**[3.12]** The state obligation to protect requires states to take measures that prevent NSAs (third or private actors/parties) —individuals, groups, corporations and other...
entities as well as agents acting under their authority from interfering with ESC rights. Such measures include, for example, the adoption of legislation or other non-legislative measures to ensure that NSAs do not violate ESC rights, eg to ensure that NSAs do not engage in the marketing and dumping of hazardous or dangerous products, or the protection against the use of inhuman or degrading disciplinary measures such as corporal punishment or public humiliation in private schools so as to protect the child’s dignity and right to education.

[3.13] The obligation to protect, therefore, generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals and groups will be able freely to realise their rights and freedoms. This demands that the state protect against harmful activities carried out by NSAs and prevent human rights violations by NSAs through creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement frameworks. For example, where areas involving state obligations with respect to ESC rights (eg social security schemes, health and education systems) are operated or controlled by NSAs, states parties to the ICESCR retain the responsibility of administering the relevant national system and ensuring that private actors do not compromise equal, adequate, affordable and accessible social security, health and education systems. To prevent such abuses an effective regulatory system must be instituted—one that includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

[3.14] With respect to the right to work, under Article 6(1) of the ICESCR, states parties recognise 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.

(ECTHR): Velasquez Rodriguez v Honduras, judgment of 29 July 1988, Series C, No 4 (IACtHR) holding that a State has a positive duty to prevent human rights violations occurring in the territory subject to its effective control, even if such violations are carried out by third parties; Union des Jeunes Avocats v Chad, Communication 74/92, 9th Annual Activity Report 1995, (2000) AHRLR 66 (ACmHPR).

42 CESCR, General Comment 15 (2002), para 23.
44 CESCR, General Comment 13, para 41: ‘corporal punishment is inconsistent with . . . the dignity of the individual. . . . 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.’ See also CRC, Concluding Observations: Zimbabwe, UN Doc CRC/C/15/Add.55 (7 June 1996), para 18: The Committee expressed its concern at the acceptance in the legislation of the use of corporal punishment in school, as well as within the family. It stresses the incompatibility of corporal punishment, as well as any other form of violence, injury, neglect, abuse or degrading treatment, with the provisions of the Convention.’ See also CRC, Concluding Observations: Guyana, UN Doc CRC/C/15/Add.224 (30 January 2004), paras 31–2; India, UN Doc CRC/C/5/Add.228 (30 January 2004), paras 44–5; Indonesia, UN Doc CRC/C/15/Add.223 (30 January 2004), paras 43–4; Japan, UN Doc CRC/C/15/Add.231 (30 January 2004), paras 35–6; Papua New Guinea, UN Doc CRC/C/15/Add.229 (30 January 2004), paras 37–8; Campbell and Cosans v UK, judgment of 25 February 1982, Series A, No 48, (1982) 4 EHRR 293 (ECTHR). See also CRC, Art 28(2); CRC, General Comment 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (42nd session, 2006), UN Doc CRC/C/GC/8 (21 August 2006), paras 16–29; African Charter on the Rights and Welfare of the Child, Art 11(5).
45 On social security, see CESCR, General Comment 9, above n 31, para 46. Health and education are discussed in chapters 8 and 9, respectively.
46 Ibid.
To this end, the CESCR has noted:

Obligations to protect the right to work include, inter alia, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatisation measures do not undermine workers’ rights. Specific measures to increase the flexibility of labour markets must not render work less stable or reduce the social protection of the worker. The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.\textsuperscript{47}

\textbf{[3.15]} It follows that a state’s ‘failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others’ amounts to a violation of the right to work.\textsuperscript{48} For example, the failure to protect workers against unlawful dismissal or against being subjected to forced or compulsory labour, slavery or servitude by NSAs would be a clear violation of a state’s positive obligation to protect as held by the ECtHR in the case of \textit{Siliadin v France}.\textsuperscript{49} In this case the ECtHR considered the issue of whether France had fulfilled its positive obligations to protect effectively Siliadin (the applicant) against forced labour or servitude as required by Article 4 of the ECHR.\textsuperscript{50} The applicant, a Togolese national, Ms Siliadin, who was an adolescent girl and a minor (less than 16 years old) at the relevant time, had worked for years for Mr and Mrs B for almost 15 hours a day, seven days a week, without respite, against her will, and without being paid. The applicant was unlawfully present in a foreign country and was afraid of being arrested by the police. She was entirely at Mr and Mrs B’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

\textbf{[3.16]} In these circumstances, the Court considered that Ms Siliadin had, at the least, been subjected to forced labour and had been held in servitude (ie obliged to provide services under coercion) within the meaning of Article 4 of the ECHR at a time when she was a minor. The Court considered that the criminal law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. In paragraph 112 of the judgment, the Court noted

\begin{quote}
in accordance with contemporary norms and trends in this field, the member States’ positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation [slavery, servitude and forced or compulsory labour].\end{quote}

It emphasised (in paragraphs 121 and 148) that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties

\textsuperscript{47} CESCR, General Comment 18: The Right to Work, adopted on 24 November 2005, UN Doc E/C.12/GC/18 (6 February 2006), para 25. Under Art 2 of the International Labour Convention (No 29) Concerning Forced or Compulsory Labour (adopted on 28 June 1930 by the General Conference of the ILO at its 14th session, Geneva, Switzerland, entered into force 1 May 1932), the term ‘forced or compulsory labour’ is defined to mean ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.

\textsuperscript{48} CESCR, \textit{ibid}, para 35.

\textsuperscript{49} Appl No 73316/01 (judgment of 26 July 2005), (2006) 43 EHRR 16.

\textsuperscript{50} 213 UNTS 222. Art 4 ‘(1) No one shall be held in slavery or servitude. (2) 2 No one shall be required to perform forced or compulsory labour.’
correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies. Consequently, the Court concluded that France had not fulfilled its positive obligations under Article 4. This decision marks the first recognition by the ECtHR that Article 4 of the ECHR, concerning slavery, servitude and forced labour, imposes positive obligations on states to protect individuals from being subjected to forced labour by NSAs.51

[3.17] Perhaps one of the most recent controversial cases on state responsibility for human rights violations by NSAs is the case decided by the ACmHPR in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.52

[3.18] Among others, the ACmHPR’s decision addressed the responsibility of Zimbabwe for the violations of human rights committed by the ZANU (PF) and other militia. The Commission absolved Zimbabwe from responsibility for human rights violations committed by the ruling political party, ZANU (PF), and its associated militia on the ground that they were ‘non-state actors’.53 The Commission drew a thin line of distinction between the ruling party, ZANU (PF) as a NSA, and the Zimbabwean government. In its opinion, ZANU (PF) was a political party in Zimbabwe, just like any other party in the country, which was distinct from the government. According to the Commission:

> It [ZANU (PF)] has an independent identity from the government with its own structures and administrative machinery, even though some of the members of the Zimbabwe Government—cabinet ministers, also hold ranking positions in the party. For example, President Robert Mugabe is the President and First Secretary General of the Party.54

[3.19] The Commission’s manner of attribution of responsibility under the special regime of human rights law is open to question. While purporting to apply the decision of the IACtHR in *Velásquez Rodríguez v Honduras*,55 in which that court held that a state fails to comply with its duty to protect human rights when it allows private persons or groups to act freely and with impunity to the detriment of the enjoyment of human rights, the ACmHPR adopted an elastic view of the effect of that decision.56 The Commission reasoned that what would otherwise be wholly private conduct is transformed into a constructive act of a state if there is a lack of due diligence to prevent the violation or respond to it as required by the African Charter. On this faulty premise, the ACmHPR concluded that the complainant had not demonstrated collusion by the Zimbabwean state to either aid or abet the NSAs in

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51 See also H Cullen, *Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights (2006) 6(3) *Human Rights Law Review* 585–92 at 592, stating that: ‘*Siliadin v France* presents Council of Europe Member States with a challenge to adopt clearer and stronger laws to criminalise trafficking for forced labour. This is despite the fact that only one Member State has yet ratified the Council of Europe’s new convention on people trafficking. They will be expected, in order to fulfil their positive obligations under Article 4, to establish adequate and clear criminal offences in relation to forced labour practices, slavery and servitude, and to impose appropriate sentences, especially where children are involved.’


56 Beyani, above n 52, 606.
committing violations of human rights, and equally had failed to show that Zimbabwe remained indifferent to the violence that took place. Consequently, the Commission failed to find that Zimbabwe had not fulfilled its obligations within Article 1 of the African Charter. The correct interpretation of the findings of the IACtHR in Velásquez Rodríguez, however, is that the responsibility of the state for human rights is engaged when there is failure to prevent violations by NSAs where the possibility of such violation is reasonably foreseeable. Transformation of private conduct into a constructive act of the state is not the point, and the search for evidence of collusion was unnecessary. The possibility of violations of human rights was clearly reasonably foreseeable in the aftermath of the referendum, and violence did indeed break out in Zimbabwe. It was not disputed that such violations had taken place. Instead, the dispute centred on the attribution of such responsibility. The Commission ignored its own resolution condemning Zimbabwe for violating human rights under the Charter with impunity and it gave no weight at the merits stage to the statement it had made when deciding the admissibility of the complaint. The requirement for collusion before holding a state responsible for human rights violations by NSAs is likely to undermine the effectiveness of a state-centred approach to protect individuals and groups within a state’s jurisdiction against human rights violations whether emanating from the state or from other actors.

[3.20] In practice various factors limit the effectiveness of a state-centred approach to protect against human rights violations by NSAs, without holding NSAs directly liable for human rights violations. First, states, especially developing states where governance challenges are greatest, or states that have just emerged from or are still in conflict, as well as states where the rule of law is weak and levels of corruption high, may lack the institutional capacity to enforce national laws and regulations against NSAs, eg TNCs doing business in their territory, even when the will is there. Second, developing states may be reluctant to take the (costly) measures necessary to ensure human rights compliance by NSAs in order to compete internationally for investment from NSAs. To attract foreign investment, host states offer investor protections through bilateral investment treaties and host government agreements in which they usually undertake to treat investors fairly, equitably, without discrimination, and to make no unilateral changes to investment conditions. Some bilateral agreements promise to ‘freeze’ the existing regulatory regime for the project’s duration, which can be 50 years for major infrastructure and extractive industries projects. These agreements are treated as ‘commercial agreements’ and disputes arising are generally

57 On this issue in the context of the ECHR, see Akkoc v Turkey 2000-X 389; (2000) 34 EHRR 1173.
58 Beyani, above n 52, 606.
62 Ibid, para 34.
63 Ibid, 35.
treated as ‘commercial disputes’ in which human rights play little if any role.\textsuperscript{64} Third, home states of TNCs may be reluctant to regulate against extraterritorial harm by these corporations because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those corporations might lose investment opportunities or relocate their headquarters.\textsuperscript{65}

\section{B. Protection against Discrimination}

[3.21] As noted in chapter 2, the principle of non-discrimination is at the core of international human rights law. Protection against human rights violations by NSAs is essential in the area of discrimination since the elimination of discrimination is fundamental to the universal enjoyment of human rights, including ESC rights, on a basis of equality. Some human rights treaties require states to specifically combat discrimination by NSAs by prohibiting discrimination on specific groups (eg discrimination on the basis of race and discrimination against women) by ‘any persons, group or organisation’\textsuperscript{66} or by any ‘enterprise’\textsuperscript{67} and within specific contexts such as ‘bank loans, mortgages and other forms of financial credit’.\textsuperscript{68}

[3.22] It is important to recall that Article 2(2) of the ICESCR prohibits discrimination on the basis of sex, among other grounds.\textsuperscript{69} As observed in chapter 2, discrimination includes ‘any distinction, exclusion, restriction or preference’ between individuals or groups of individuals, made on the basis of any of the prohibited ground(s),\textsuperscript{70} ‘unless the distinction is based on objective criteria’.\textsuperscript{71} Therefore, discrimination might arise when ‘States treat differently persons in analogous situations without providing an objective and reasonable justification’.\textsuperscript{72} A distinction will not be based on objective and reasonable justification if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.\textsuperscript{73} Discrimination might also arise ‘when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’.\textsuperscript{74} Discrimination might also arise as a

\textsuperscript{64} \textit{Ibid}, para 37.
\textsuperscript{65} \textit{Ibid}, para 14.
\textsuperscript{66} See ICERD, 660 UNTS 195, Art 2(1).
\textsuperscript{67} CEDAW, Art 2(e).
\textsuperscript{68} \textit{Ibid}, Art 13(b).
\textsuperscript{69} ICESCR, Art 2(2) provides: ‘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.’
\textsuperscript{70} See CESCR, Revised General Reporting 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 (17 June 1991), para 3; CESCR, General Comment 5, para 15; CESCR, General Comment 16, para 11.
\textsuperscript{71} CESCR, Concluding Observations: Japan, UN Doc E/C.12/1/Add.67 (30 August 2001), para 39. The Committee requested ‘the State party to take note of its position that the principle of non-discrimination, as laid down in article 2(2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria’. See also CESCR, Concluding Observations: Croatia, UN Doc E/C.12/1/Add. 73 (30 November 2001), para 11.
\textsuperscript{72} \textit{Thlimmenos v Greece}, Appl No 34369/97, judgment of 6 April 2000; (2001) 31 EHRR 411, para 44.
\textsuperscript{74} \textit{Thlimmenos v Greece}, Appl No 34369/97, judgment of 6 April 2000; (2001) 31 EHRR 411, para 44.
result of a state’s failure to monitor and regulate the conduct of NSAs to ensure that they do not discriminate in the field of ESC rights. This might arise where a state fails to ensure that NSAs do not treat differently persons in analogous situations without providing an objective and reasonable justification, and where a state fails to ensure that NSAs, without an objective and reasonable justification, do not fail to treat differently persons whose situations are significantly different.

[3.23] Significantly, as noted in chapter 2, the principle of non-discrimination mentioned in Article 2(2) of the Covenant is immediately applicable and is neither subject to progressive implementation nor dependent on available resources. It is reinforced by Article 3 of the ICESCR, which provides for the equal right of men and women to the enjoyment of the ESC rights it articulates. This provision is founded on Article 1(3) of the UN Charter and Article 2 of the UDHR. In relation of NSAs, the CESCR noted in its General Comment 16:

19. The obligation to protect requires States parties to take steps aimed directly towards the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women. States parties’ obligation to protect under Article 3 of the ICESCR includes inter alia, the respect and adoption of constitutional and legislative provisions on the equal right of men and women to enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.

20. States parties have an obligation to monitor and regulate the conduct of non-state actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatised.

[3.24] It is thus clear that while only states are parties to international human rights instruments protecting ESC rights and held accountable for compliance with these, states are nevertheless required to consider regulating the responsibility resting on NSAs to respect ESC rights. A state’s failure, for example, to prohibit racial discrimination in the admission of students to private educational institutions would be a clear violation of the obligation to protect the right to education. The IACtHR may have moved away from the traditional view when it recognised that non-discrimination ‘gives rise to effects with regard to third parties’, including in private employment relationships, ‘under which the employer must respect the human rights of his workers’.

75 CESCR, General Comment 16, para 33.
76 ICESCR, Art 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.’
77 GA res 217A (III), UN Doc A/810, 71 (1948).
78 CESCR, General Comment 16 (emphasis added).
79 See eg CESCR, General Comment 17, para 55.
80 See ICERD, Arts 5(e)(v) and s(l)(d).
The main international institutions which form the backbone of the current international economic system and which have had an impact on ESC rights are the IMF, the World Bank and the WTO. It is noteworthy that today the IMF and World Bank lend exclusively to developing and emerging economies. Furthermore, their loans are linked to externally imposed conditions that increasingly impinge on the domestic policies of the state.

Similarly, the unfair trade rules and policies of the WTO (such as dumping of products of interest to African states, such as cotton; lack of duty-free, quota-free access to markets in rich states for least-developed countries; overly complex rules of origin; and non-tariff barriers) impede the capacity of developing states to raise resources from trade to invest in ESC rights. With respect to such global actors, it has been observed that:

States determine the policies of some global actors, including the World Bank, the IMF and the WTO. When determining the policies of such global actors, a State must conform to its international human rights duties and must be respectful of other States’ international human rights obligations. How a State discharges its duties when determining the policies of global actors must be subject to monitoring and accountability procedures as outlined in the preceding section.

Therefore, influential states parties to human rights treaties as members of the IMF, the World Bank and the WTO are obliged to do all that they can...
to ensure that the policies and decisions of those organisations are in conformity with the obligations of states parties under the Covenant [ICESCR].

This may be achieved by, for example, voting against policies such as Structural Adjustment Policies (SAPs) and Poverty Reduction Strategy Papers (PRSPs) to be implemented by states seeking IMF/World Bank loans, where such policies fail to integrate adequately ESC rights and make provision for adequate social safety nets (SSNs) or human rights impact assessments. As a matter of law, a state’s failure to take into account its human rights obligations when entering into agreements with NSAs would amount to a violation of the obligation to respect human rights. To this end, the CESCR noted with respect to the right to work that:

The failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other States, international organisations and other entities, such as multinational entities, constitutes a violation of their obligation to respect the right to work.

[3.27] Similarly, when states are dealing with NSAs, the obligation to protect demands that states take into account their domestic and international human rights obligations in all their activities with NSAs (including global actors such as the World Bank, the IMF and the WTO) to ensure that the ESC rights, in particular, of the most vulnerable, disadvantaged and marginalised groups of society, are not undermined. In a highly indebted state, this would mean that the state must give priority to the obligation to respect, protect and fulfil its international human rights obligations over the obligations relating to membership and agreements with the IMF and the World Bank. It follows, therefore, that it is legitimate, for example, for a debtor state to ‘integrate fully human rights, including economic, social and cultural rights, in the formulation of the Poverty Reduction Strategy Paper’ or refuse to implement loans and credit conditions that conflict with its international human rights obligations assumed under the UN Charter and international human rights treaties if this is necessary to ensure that its human rights obligations are duly protected. However, in practice the need for financial resources (in the least-developed states) could outweigh human rights considerations, which limits the practical effectiveness of this approach.

[3.28] In order to ensure that human rights issues are integrated into the policies of global NSAs there is a need for a more concerted engagement with such actors. It is

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88 See the Concluding Observations of the CESCR: United Kingdom, UN Doc E/C.12/1/Add.79 (5 June 2002), para 26; Ireland, UN Doc E/C.12/1/Add.77 (5 June 2002), para 37; Italy, UN Doc E/C.12/1/Add.43 (23 May 2000), para 20; Germany, UN Doc E/C.12/1/Add.68 (24 September 2001), para 31; Belgium, UN Doc E/C.12/1/Add.54 (1 December 2000), para 31; Japan, UN Doc E/C.12/1/Add. 67 (24 September 2001), para 37.
89 CESCR, General Comment 16, para 33.
90 The CESCR has affirmed this position in several of its Concluding Observations. See eg Colombia, UN Doc E/C.12/1/Add.74 (30 November 2001), para 29; Ecuador, UN Doc UN Doc E/C.12/1/Add.100 (7 June 2004), para 53; Egypt, UN Doc E/C.12/1/Add.44 (23 May 2000), para 28; Morocco, UN Doc E/C.12/1/Add.55 (1 December 2000), para 38; Honduras, UN Doc E/C.12/1/Add.57 (21 May 2001), paras 30 and 34; Syrian Arab Republic, UN Doc E/C.12/1/Add.63 (24 September 2001), para 29.
91 This conclusion can be drawn from the recommendations of the CESCR. See CESCR, Concluding Observations: Zambia, UN Doc E/C.12/1/add 106 (23 June 2005), para 36; Concluding Observations: Senegal, UN Doc E/C.12/1/add 62 (24 September 2001), para 60.
essential to ensure that there is greater complementarity between the basic tenets of international economic law and international human rights law, while also combating some of the recent theorising that seeks to privilege trade law.\textsuperscript{94} In addition, it is necessary to re-engage in a dialogue with the Member States of the WTO, the IMF and the World Bank who, in the final analysis, will be vital to a determination of the extent to which the policies and decisions of these global actors are in conformity with the human rights obligations of states parties.\textsuperscript{95}

D. Remedies against Violations by Non-State Actors

[3.29] When violations of human rights by NSAs occur, the state must not acquiesce to, or grant amnesty for, such violations. The state is obliged to take appropriate measures or to exercise due diligence\textsuperscript{96} to prevent, punish and investigate the harm caused by NSAs\textsuperscript{97} and, where appropriate, provide access to effective and transparent judicial or other appropriate remedies at the national level to any person or group who is a victim of a violation of any ESC rights by NSAs. All victims of human rights violations by NSAs should be entitled to remedies—not merely charity or philanthropy—such as adequate reparation, which may, inter alia, take the form of restitution, compensation, satisfaction or guarantee of non-repetition, changes in relevant law and public apologies. In \textit{Zimbabwe NGO Forum v Zimbabwe},\textsuperscript{98} the ACmHPR considered the offer of clemency made by the Zimbabwean government to the ZANU (PF) and other militia for ‘politically motivated’ offences committed between January and July 2000. The Commission held that by pardoning ‘every person liable for any politically motivated crime’ the Clemency Order had effectively foreclosed the complainant or any other person from bringing criminal action against persons who could have committed the acts of violence during the period in question and the complainant had been denied access to local remedies by virtue of the Clemency Order.\textsuperscript{99} Thus, the Commission held that this act of the state


\textsuperscript{95} See eg CESCR: Concluding Observations, United Kingdom, UN Doc E/C.12/1/Add.79 (5 June 2002), para 26; Germany, UN Doc E/C.12/1/Add.68 (24 September 2001), para 31; France, UN Doc E/C.12/1/Add.72 (30 November 2001), para 32; Japan, UN Doc E/C.12/1/Add.67 (24 September 2001), para 37; Belgium, UN Doc E/C.12/1/Add.54 (1 December 2000), para 31.

\textsuperscript{96} Due diligence has been defined as ‘the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation’. See \textit{Black’s Law Dictionary} (St Paul, MN, West /Thomson, 8th edn, 2004), 488.


\textsuperscript{99} See the Commission’s previous jurisprudence on amnesties: Communications 54/91, 61/91, 98/93, 164/97 and 196/97, \textit{Malawi African Association, Amnesty International, Diop et al, Union Interafrique des
did not only prevent victims from seeking redress, but also encouraged impunity, and thus [Zimbabwe] reneged on its obligation[s] in violation of Articles 1 and 7(1) of the African Charter.\textsuperscript{100}

It is therefore clear that since blanket amnesties for human rights violations encourage impunity, states should refrain from grant of such amnesties to NSAs for human rights violations.

\textbf{[3.30]} In its Concluding Observations on state reports, the CESCR has urged states to protect against human rights violations by NSAs. Some few examples are cited below for illustrative purposes. In 2001 the CESCR strongly urged Honduras to adopt and implement legislative and ‘other measures’ to protect workers from the occupational health hazards resulting from the use of toxic substances such as pesticides in the banana-growing sector and cyanide in gold-mining industries.\textsuperscript{101} Similarly, in 1997 the CESCR was alarmed at reports that the economic rights of indigenous peoples in the Russian Federation were being exploited with impunity by oil and gas companies which signed agreements under circumstances which were clearly illegal, and that the state party had not taken adequate steps to protect the indigenous peoples from such exploitation.\textsuperscript{102} The Committee recommended to the Russian Federation that ‘action be taken to protect the indigenous peoples from exploitation by oil and gas companies’.\textsuperscript{103} In Bosnia and Herzegovina, following privatisation, employers arbitrarily dismissed employees or failed to pay employees’ timely salaries or social security contributions.\textsuperscript{104} The CESCR Committee recommended that

the State party takes effective measures to ensure that [private] employers respect their contractual obligations towards their employees, namely by refraining from arbitrarily dismissing them or by paying their salaries or social security contributions on time.\textsuperscript{105}

\textbf{[3.31]} However, states where human rights protection is most needed are often those least able to enforce them against NSAs, such as TNCs, who possess much desired investment capital or technology and wield unprecedented power and influence in local and global markets and domestic and international affairs.\textsuperscript{106} As noted above, the scale of NSA power is illustrated by the fact that some 78,000 TNCs currently span the globe, with about 780,000 subsidiaries and millions of suppliers.\textsuperscript{107} The 2003

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\textsuperscript{100} Zimbabwe NGO Forum v Zimbabwe, Communication 245/2002, Annex III, 21st Annual Activity Report 54, para 215. Art 1 of the ACHPR obliges states parties to adopt legislative or other measures to give effect to the rights protected in the charter, while Art 7(1) guarantees every individual the right to a fair trial.

\textsuperscript{101} CESCR, Concluding Observations: Honduras, UN Doc E/C.12/1/Add.57 (21 May 2001), paras 24 and 38.


\textsuperscript{103} Ibid, para 30.

\textsuperscript{104} CESCR, Concluding Observations: Bosnia and Herzegovina, UN Doc E/C.12/BHI/CO/1 (24 January 2006), para 15.

\textsuperscript{105} Ibid, para 36.


\textsuperscript{107} UNCTAD, World Development Report 2007, above n 4, xvi.
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sale of the world’s biggest company, Wal-Mart, for $256 billion made it larger than the economies of all but the world’s 30 richest nations.\(^{108}\) Given the current limitations of state power with respect to NSAs, what is presently required is to secure broad agreement among NSAs as to their human rights responsibility and the effective implementation of norms applicable to NSAs,\(^ {109}\) so that they are directly accountable to human rights standards for their actions that impact on human rights, particularly those of vulnerable groups, such as women.\(^ {110}\) NSAs should not be complicit in human rights abuses. Such complicity could arise in several ways: (i) where a NSA has knowingly funded, supported (actively, openly and deliberately) or benefited from human rights abuse; (ii) where a NSA complies with national laws and policies which are manifestly in violation of international human rights;\(^ {111}\) or (iii) where a NSA has been a silent witness of systematic human rights abuse committed by a government or others.\(^ {112}\) Establishing an effective framework acknowledging the human rights responsibilities of NSAs remains a challenge. One of the main problems in such arrangements is the question of who the NSAs will be responsible and accountable to in respect of ESC rights, which is now addressed below.

IV. DIRECT HUMAN RIGHTS RESPONSIBILITIES OF NON-STATE ACTORS WITH RESPECT TO ESC RIGHTS

[3.32] While there is no doubt that the UDHR, the ICCPR and the ICESCR envisage positive or negative obligations of states, and that the procedures for the implementation of the ICCPR and the ICESCR envisage actions only against states, it is obvious that NSAs—groups or persons—can also act in violation of the human rights of other persons enumerated in the above instruments.\(^ {113}\) As noted above, this is particularly true in the case of ESC rights given the general marginalisation of this category

113 See eg the ECt HR acknowledgement in the *Ireland v UK*, judgment of 18 January 1978, Series A, No 25; (1979–80) 2 EURHR 25, para 149, that ‘it is not called upon to take cognizance of every single aspect of the tragic situation prevailing in Northern Ireland. For example, it is not required to rule on the terrorist activities in the six counties of individuals or groups, *activities that are in clear disregard of human rights*’ (emphasis added), quoted by C Warbrick, ‘Terrorism and Human Rights’, in J Symonides (ed), *Human Rights: New Dimensions and Challenges* (Aldershot, Dartmouth/UNESCO, 1998), 225.
of rights. For example, many companies operating in South Africa during the apart-
heid era not only followed the discriminatory laws of that time, but some of them also
aided and abetted the South African government’s policies—by providing technology,
infrastructure and other means to implement its policies.\(^{114}\) This affected not only
civil and political rights but also ESC rights.

[3.33] As noted above, human rights law has traditionally concentrated on the actions
of states. The assumption has been that it is states that have the obligation both for
protecting human rights and for ensuring that human rights are not infringed, either
by the state (or its agents) or by NSAs. But in the era of globalisation, how credible is
this concentration on state action? A plethora of NSAs now act on the international
stage with an enhanced potential given their greater powers to promote or undermine
respect for human rights. But what direct human rights responsibilities, if any, do
NSAs have under human rights law?

A. Responsibilities of NSAs in International Human Rights Instruments

[3.34] Do international human rights instruments establish direct legal responsibilities
for NSAs? There is a duty on NSAs to respect human rights including ESC rights,
and thus NSAs must be held responsible for human rights violations. The ILC Arti-
cles on the Responsibility of States for Internationally Wrongful Acts indicates that
responsibility for human rights violations ‘may accrue directly to any person or entity
other than a State’.\(^{115}\) The UDHR, arguably, establishes the basis of responsibilities
for NSAs. Article 29 of the UDHR provides that everyone has ‘duties to the commu-
nity’. In its preamble, the UDHR provides:

> every individual and every organ of society . . . shall strive . . . to promote respect for these
rights and . . . to secure their universal and effective recognition and observance.

[3.35] This statement recognises that human rights obligations apply not only to states
but also to NSAs, in particular to ‘every individual’ and ‘every organ of society’. NSAs
such as corporations can be seen as ‘organs of society’, and therefore respon-
sible under the UDHR to respect human rights.\(^{116}\) As Louis Henkin put it:

> Every individual includes juridical persons. Every individual and every organ of society
excludes no one, no company, no market, no cyberspace. The Universal Declaration applies
to them all.\(^{117}\)

More significantly, it implies that NSAs may shoulder more than the negative obliga-
tion engendered by human rights since they are obliged to ‘secure’ the observance of
human rights. As Barbara Alexander noted:

\(^{114}\) Khan, above n 112, 6–7.
\(^{115}\) ILC, Final Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc
A/56/10 (2001), Art 33(2).
Journal of Transnational Law 810–15
\(^{117}\) L Henkin, ‘The Universal Declaration at 50 and the Challenge of Global Markets (1999) 25(1)
Brooklyn Journal of International Law 17 at 25.
if the drafters of the [Universal Declaration] intended to limit the scope of who should promote and recognise human rights to public, state actors, they could have used the phrase ‘every State’ rather than ‘every organ of society’. 

[3.36] However, the UDHR provision above simply sets a common standard of achievement but does not equate to legally binding effect. Nonetheless it is strengthened by other provisions in legally binding international human rights treaties. For example, both the ICESCR and the ICCPR expressly declare in their preambles that the individual is ‘under responsibility to strive for the promotion and observance of the rights’ recognised in the Covenants. It is important to note that the operational paragraphs in both Covenants do not address the issue of NSAs explicitly. Common Article 5(1) of the ICCPR and the ICESCR provides that the Covenants should not be interpreted as implying ‘for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights . . . recognised herein’. But it was not intended to establish substantive legal obligations on individuals or groups, nor have the treaty bodies interpreted it as such.

[3.37] While international human rights treaty obligations ‘do not . . . have direct horizontal effect as a matter of international law’—ie they take effect as between NSAs only under domestic law, it is increasingly recognised that NSAs have responsibilities regarding the realisation of human rights, including ESC rights. In its interpretation of the ICESCR, the CESCR has recognised that various private actors have responsibilities regarding the realisation of ESC rights. With respect to the right to health, for example, the CESCR has stated unambiguously:

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 organisations, civil society organisations, as well as the private business sector—have responsibilities regarding the realisation of the right to health.

[3.38] The implication here is twofold. First, states should provide an environment that facilitates the discharge of such human rights responsibilities of NSAs. It follows that there may be circumstances in which a failure to progressively realise ESC rights as required by Article 2(1) ICESCR would give rise to violations by states parties of those rights, as a result of these parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. In The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, it was alleged that the military government of Nigeria had been directly involved in oil


120 HRC, General Comment 31, para 8.

121 CESCR, General Comment 14, para 42; See also CESCR, General Comment 12, para 20. See also CRC, General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5 (27 November 2003), para 56, which states that the state duty to respect ‘extends in practice’ beyond the state and state-controlled services and institutions to include ‘non-State services and organisations’.

122 Communication No 155/96, above n 29.
production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations had caused environmental degradation and consequent health problems to the Ogoni people. It was argued that this breached several rights guaranteed under the ACHPR. The ACmHPR observed, inter alia, in paragraph 54:

Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken . . . and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

[3.39] The Commission concluded in paragraph 58:

despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

[3.40] Consequently, states must ensure that there are accessible, transparent and effective monitoring and accountability mechanisms to regulate the conduct of NSAs such as TNCs in order to ensure compliance with human rights responsibilities. Secondly, NSAs—local, national, regional and transnational—should take into account the human rights dimension of their policies and activities. At the very minimum NSAs must in all situations not infringe (do no harm to) the rights of others. Soft law mechanisms such as the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as well as the Organisation for Economic Co-operation and Development’s (OECD) Guidelines for Multinational Enterprises (revised in 2000) proclaim that NSAs, including multinational enterprises and firms, should respect the human rights of those affected by their activities as recognised in the UDHR and the corresponding international covenants. Although various non-legally binding codes of conduct that take into account some human rights issues have been adopted by a number of TNCs (eg not to use child labour), this is only a step in a long journey to accountability. Obviously voluntary

123 Specifically, alleged violations of Arts 2, 4, 14, 16, 18(1), 21 and 24 of the ACHPR.
124 Art 21(1) of the ACHPR provides: ‘All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.’
codes are only respected by those who chose to respect them and too often the codes are not respected when there is a clash with ‘hard commercial interests’. Each NSA must do all in its power to ensure that there are no human rights violations within its sphere of influence and that it also does not benefit from human rights abuses by other parties. In the context of the right to health, for example, pharmaceutical companies have a ‘soft law’ human rights responsibility under the multilateral corporate codes of conduct to respect developing states’ efforts to protect the right to affordable HIV/AIDS treatment for all, including disadvantaged individuals, communities and populations, such as children, the elderly and those living in poverty. However, there is no external body that sets standards for the voluntary codes and no independent adjudicating body to assess human rights impact assessments and compliance or to award remedies in the event of non-compliance. It is, therefore, less surprising that Patrick Macklem has described a voluntary corporate code as at best a form of public relations for powerful multinationals and at worst a misleading seal of approval affixed by those with no legitimate claim to judge these matters.

[3.41] It is also vital to note that both universal and regional human rights instruments prohibit both states and NSAs from engaging in any activity aimed at the destruction of human rights. For example, Article 30 of the UDHR states that groups or persons have no right to ‘engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein’. Similarly, both the ICCPR and ICESCR, in common Article 5(1)—using almost identical language to that of Article 30 of the UDHR—stipulate that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

[3.42] Similar provisions can be found in the American Declaration of the Rights and Duties of Man (Articles 29–38), the ECHR (Article 10(2)), the American Convention on Human Rights (ACHR) (Articles 13, 17 and 32) and the ACHPR (Articles 27–9). Although these provisions are widely considered as mere guidelines for the behaviour of both individuals and states as opposed to imposing any direct accountability for NSAs, they are not without legal implications. At the time of writing, the


132 See Macklem, above n 106.

133 OAS Res XXX, adopted by the Ninth International Conference of American States (1948).

134 OAS Treaty Series No 36; 1144 UNTS 123.

135 See the study prepared for the Sub-Commission by the Special Rapporteur, Ms E.-A Daes, Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights (Geneva/New York, United Nations, 1990), Human Rights Study Series No 3, Sales No E.89.XIV.5, para 2.
jurisprudence on these provisions is scarce, but the CERD has commented that a person's exercise of the right to freedom of opinion and expression carries special duties and responsibilities, specified in Article 29(2) of the UDHR, ‘among which the obligation not to disseminate racist ideas is of particular importance’.136

[3.43] In sum, these provisions clearly apply not only to states but also to NSAs—groups and individuals. They forbid the abuse of human rights and forbid the misuse and exploitation of human rights instruments as a pretext for violating human rights.137 As the CESCR has observed with respect to the right to work:

Private enterprises—national and multinational—while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognise the labour standards elaborated by ILO and aim at increasing the awareness and responsibility of enterprises in the realisation of the right to work.138

[3.44] Therefore, while only states are parties to the existing human rights treaties and thus ultimately accountable for compliance with them, all members of society (including NSAs—individuals, local communities, trade unions, civil society and private sector organisations) have responsibilities regarding the realisation of ESC rights. As a minimum, NSAs must respect the human rights obligations of states. They must, therefore, refrain from acts or omissions that violate human rights. Respecting ESC rights requires NSAs not to adopt, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to states' human rights obligations, including those with respect to ESC rights. One has to note that the shift in state sovereignty accompanying globalisation has meant that NSAs are increasingly getting more involved in activities that impact (directly and/or indirectly) on human rights, and have gained more power to violate human rights.139 Therefore, limiting human rights obligations to only states would defeat the object and purpose of human rights since:

Human rights are about upholding humans and protecting individuals and groups Search Term End from oppressive power primarily in the context Search Term End of the communities within which they live. That oppressive power can come from any source [which may be a State or a NSA]. It does not have to be political; it can be economic, social, cultural, or any other type of power.140

[3.45] According to the UN Truth Commission on El Salvador, NSAs—in this case referring to the Farabundo Marti National Liberation Front—are subject to international human rights law. In the words of the Commission:

136 General recommendation XV on Art 4 of the Convention, UN Doc HRI.1 at 68 (1994), para 4.
138 CESCR, General Comment 18, para 52.
When insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding for the State under international human rights law.\(^{141}\)

As shown below, this view should extend to all other NSAs exercising powers akin to or even greater than that of a state especially in the field of marginalised ESC rights.\(^{142}\)

[3.46] However, the great majority of NSAs pay little more than lip service to ESC rights and are based in, or funded by those living in, developed states; they tend to be concerned primarily with civil and political rights. This means that most NSAs are able to violate ESC rights without being questioned.\(^{143}\) This is partly because of the view that 'economic and social human rights are costly to secure',\(^{144}\) or that ESC rights are non-binding 'principles and programmatic objectives rather than legal obligations that are justiciable'.\(^{145}\) Such views reflect the marginalisation of vulnerable individuals and groups, who are meant to be the primary beneficiary of this category of rights. It is vital to note that the continuing reluctance to accord ESC rights the same level of recognition and enforceability as that accorded to civil and political rights demonstrates the ‘gendered’ character of international human rights law.\(^{146}\) This is because it is generally girls and women as a social class and as primary care-givers who most acutely experience the violation and non-realisation of this category of rights.\(^{147}\)

[3.47] It is important to recall that treaties are made to be performed.\(^{148}\) NSAs, therefore, should not (as a minimum) contribute to a state’s failure to comply with a treaty obligation concerning ESC rights.\(^{149}\) Indeed human rights treaties are of a special character since such treaties:

\(^{141}\) UN Doc S/25500, annex, 20


\(^{149}\) See Vienna Convention on the Law of Treaties (VCLT) 1969, UKTS (1980) No 58, vol II, Art 26, stating: ‘Every treaty in force is binding on the parties to it and must be performed by them in good faith.’ (Although this provision of the VCLT does not apply directly to NSAs since they are not ‘parties to it’, the object and purpose of the VCLT would be defeated if NSAs undermine states’ obligations to perform treaty obligations in good faith. Indeed, Art 26 VCLT might be seen as declaratory of customary international
are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.150

[3.48] If the object and purpose is to be meaningfully achieved, NSAs must not undermine state efforts to comply with their human rights obligations. In order to avoid undermining the human rights obligations of states, NSAs can undertake ‘due diligence’ when examining (i) the country contexts in which their activities take place, to highlight any specific human rights challenges they may pose; (ii) the human rights impacts their own activities may have within that context—eg in the case of businesses in their capacity as producers, service providers, employers and neighbours; (iii) whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, state agencies and other NSAs.151 Therefore, there is a dire need for NSAs to take more seriously their human rights responsibilities with respect to ESC rights on the international, regional and domestic fronts.152 As the world becomes increasingly internationalised, decisions, policies and operations of NSAs may have significant effects on the lives (and human rights) of individuals and groups in local communities. Some four examples—the IMF, the World Bank, the WTO and TNCs—are briefly reviewed below.

B. The IMF, World Bank and Human Rights

[3.49] Until recently, the IMF and the World Bank have shown very little interest in human rights when dealing with states, claiming that these are ‘political’ issues within a country’s domestic affairs.153 This was first clearly manifested when both the IMF and the World Bank declined the invitation from the UN Commission on Human Rights to participate in the drafting of the ICESCR.154 In its response, the IMF expressed interest in the work of the Commission on Human Rights, but stated that ‘the limits set on our activities by our Articles of Agreement do not appear to cover this field of work’.155 Similarly, the World Bank also declined the invitation to participate in the elaboration of the Covenant by stating that

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151 J Ruggie, above n 62, UN Doc A/HR C/8/5 (7 April 2008), paras 57 and 81.
155 Ibid.
since the activities of the International Bank do not bear directly upon the work of the Commission, the Bank does not plan to send a representative to attend the Commission's forthcoming meeting.156

[3.50] Likewise, in the 1960s the UN General Assembly passed a series of resolutions successively ‘inviting’, ‘urging’ and ‘requesting’ the World Bank to stop lending to South Africa and Portugal because of their respective apartheid and colonial policies, but the Bank insisted on its apolitical character and approved several loans in defiance of the UN resolutions.157 Thus, the Bank provided economic support and moral sanction to oppressive governments. Both institutions—the IMF and the World Bank—may affect the lives and rights of the people through their policies, and in case of the World Bank through the projects it funds directly.158 For example, the IMF and World Bank’s requirements of structural adjustment programmes and the policy of privatisation of hitherto public enterprises (without adequate social safety nets) has, in some respects, had a negative effect on ESC rights, in particular of the disadvantaged and marginalised groups in several states.159 In 1999 the CESCR made the following observation with respect to the implementation of structural adjustment in Cameroon:

The Committee notes that the Government’s economic reform programme for 1998/99, which implemented the structural adjustment programme in Cameroon approved by the International Monetary Fund, the World Bank and the Caisse française de développement, while increasing the real GDP growth rate has impacted negatively on the enjoyment of economic, social and cultural rights by increasing poverty and unemployment, worsening income distribution and causing the collapse of social services.160

[3.51] Despite this, the IMF and the World Bank have argued that they are bound by their Articles of Agreement to be ‘non-political’ in their approach and give due regard to ‘only economic considerations’.161 In paying limited or no attention to human rights, it has been stressed that there is a

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156 Ibid.
161 See eg IBRD Articles of Agreement, Art IV, s 10, Art III, S 5 (b); IDA Articles of Agreement, Art V, s 6, Art. V, s 1(g); IMF Articles of Agreement, Art IV, s 3(b). For the analysis, see I Shihata, The World Bank in a Changing World: Selected Essays and Lectures, vol II (The Hague, Martinus Nijhoff, 1995), 557–76.
need to honour the charter of each organisation and to respect the specialisation of different international organs as reflected in the statutory requirements of their respective charters.  

It is claimed, for example, that drawing the World Bank, which is an international financial institution, directly into politically charged areas, with their typical vagaries and double standards, can only politicise its work and jeopardise its credibility, both in the financial markets from which it borrows and in the member countries to which it lends.

To this end, Shihata has argued:

The role of the Bank is to promote the economic development of its member countries. Its success in this role helps to create an environment for the enjoyment by individuals in these countries of all their human rights... But it demeans the organisation to ignore its charter and act outside its legal powers.

[3.52] Likewise, the IMF argued that human rights are the responsibility solely of individual governments and that ‘rights cannot be realised in the absence of structural adjustment’. The IMF has also argued that human rights protection was not explicitly included within its mandate and that its founding Charter mandates that (as a monetary agency) it pays attention only to issues of an economic nature and requires it to ‘respect the domestic social and political policies of members’. For instance, in 2001 the IMF General Counsel François Gianviti, in an informal opinion, rejected the applicability of the ICESCR to the Fund on the grounds that the obligations imposed by the Covenant applied only to states, not to international organisations such as the IMF. He further stated that the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant.

[3.53] The question that arises here is whether the IMF and the World Bank will be acting outside their charters or legal powers when they respect (or even promote) all human rights in the formulation of their policies and activities. In other words, are human rights issues ‘political’ affairs and thus barred from any consideration by the

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165 UN Doc E/C4/Sub2/1991/63, para 7. It is argued that costs from SAPs are short term and give rise to greater long-term benefits. It is also claimed that further deterioration would occur in the absence of SAPs.
170 Ibid.
two institutions? In fact, except for references to ‘raising conditions of labour’\(^{171}\) and ‘maintenance of high levels of employment and income’,\(^{172}\) there are no direct mentions of human rights in the Articles of Agreement of the two institutions. In addition, the two institutions are not parties to human rights treaties protecting ESC rights,\(^{173}\) and accordingly not bound, \textit{strictu sensu}, by human rights treaties and have not accepted the implementation mechanisms for existing human rights treaties.

\[3.54\] It is essential to note that in the agreements between the UN Economic and Social Council (ECOSOC) and the IMF\(^{174}\) and the World Bank,\(^{175}\) entered into in accordance with Articles 63 and 57 of the UN Charter establishing the latter’s status as UN specialised agencies, greater autonomy and independence from the UN is conferred on the two institutions\(^{176}\) and neither human rights nor even Articles 55 and 56 of the UN Charter are referred to. However, Article 103 of the UN Charter links the two institutions’ Articles to the Charter. This Article reads as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

In the preliminary objections phase of the \textit{South-West Africa} cases, Judge Jessup noted that while Article 103 of the Charter uses the expression ‘international agreement’, there ‘appears to be no reason to interpret this Article as excluding any treaty, convention, accord, or other type of international engagement or undertaking’\(^{177}\). Later in the \textit{Nicaragua} case, the ICJ itself concluded that

\begin{quote}
all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made . . . must be made always subject to the provisions of Article 103.\(^{178}\)
\end{quote}

\[3.55\] This means that Article 103 covers also the Articles of Agreement of both the IMF and the World Bank. Although this provision can be read in many ways,\(^{179}\) it has been taken to suggest that the aims and purposes of the United Nations—maintenance of peace and security, and promotion and protection of human rights—constitute an international public order to which other treaty regimes and the international

\begin{itemize}
\item \(171\) World Bank’s Articles of Agreement, Art I (iii).
\item \(172\) IMF’s Articles of Agreement, Art I (ii).
\item \(173\) Art 26(1) of the ICESCR refers only to states as being capable of becoming parties and it would seem that international organisations cannot directly become parties to the Covenant.
\item \(175\) Agreement between the UN and the IBRD. (The Agreement formalised the relationship between the UN and the IBRD. It was approved by the UN General Assembly on 15 November 1947.) See World Bank Group Archives, at http://go.worldbank.org/GXFDFYZK180.
\item \(176\) For example Art 1(2) of the Agreement between the UN and the IMF states, inter alia, that: ‘The Fund is a specialized agency. . . By reason of the nature of its international responsibilities . . . the Fund is, and is required to function as, an independent international organisation.’ The IBRD/UN Agreement has a similar provision.
\item \(178\) \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Jurisdiction and Admissibility)} [1984] ICJ Rep 392, para 107.
\end{itemize}
organisations giving effect to them must conform. As one member of the ILC stated in 1982, Article 103 of the UN Charter means that ‘the UN Charter . . . [is] hierarchically superior to those of any other treaty, whether earlier or later’. As such, it has a direct influence on the way in which human rights come into play in terms of the policies of the IMF and the World Bank. Therefore, the IMF and the World Bank Articles of Agreement should be interpreted and applied in a manner that respects all human rights. To achieve this, the IMF and the World Bank (through their credit agreements and policies) must refrain from undermining the human rights, including ESC rights, of all persons, especially disadvantaged and marginalised individuals and groups. This calls for the integration of human rights into the formulation of the policies of the two institutions.

[3.56] In fact human rights issues are implicitly part of the development mandate of the World Bank and central to the success of the poverty alleviation programmes of the Bank and the IMF. Respect for civil and political rights promotes participation and more accountability, which leads to better performance of government projects funded by the Bank. Conversely, substantial violations of civil and political rights are related to lower economic growth, which limits the available resources necessary for development and the progressive realisation of ESC rights.

[3.57] As a result of several criticisms of the World Bank policies, the Bank has acknowledged in its Comprehensive Development Framework (CDF) that ‘[w]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible’. It has also noted that ‘creating the conditions for the attainment of human rights is a central and irreducible goal of development’. Thus, the World Bank issued a set of guidelines linking its activities to human rights and acknowledged that ‘ensuring sustainable development requires

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attention not just to economic growth but also to environmental and social issues\textsuperscript{189} including poverty and inequality reduction and prevention of armed conflicts and terrorism.\textsuperscript{190} In the Bank’s view ‘ending global poverty is much more than a moral imperative – it is the cornerstone of a sustainable world’.\textsuperscript{191} To this end the World Bank together with the IMF have since 1995 been active in designing mechanisms to address the issue of debt burden, culminating into what came to be known, in 1996, as the Heavily Indebted Poor Countries (HIPC) initiative\textsuperscript{192} that was later broadened in October 1999 to increase the number of eligible countries under the Enhanced HIPC Initiative. For a debtor country to qualify for this initiative, it must demonstrate, inter alia, that it will implement a full-fledged poverty reduction strategy, which has been prepared with broad participation of civil society, and an agreed set of measures aimed at enhancing economic growth.\textsuperscript{193}

\textbf{[3.58]} It is worthy noting, first, that although the alleviation of poverty and debt relief is essential for enjoyment of ESC rights, the Bank, like the IMF, still lacks a coherent and explicit human rights policy to fully integrate human rights into the poverty reduction strategy papers (PRSPs) and its debt relief measures it offers are not enough to lift HICPs out of poverty. Secondly, the Bank’s approach to human rights is limited as it fails to take into account of all human rights. The Bank has claimed that it is ‘concerned by human rights’ but ‘its mandate does not extend to political human rights’.\textsuperscript{194} What human rights are ‘political’? It is vital to develop a broader approach to human rights which takes into account all human rights. As Roberto Danino, the then General Counsel of the World Bank, argued, the Bank’s objectives and activities are deeply supportive of human rights and that a more explicit approach to human rights is not only consistent with the Bank’s Articles of Agreement, but is essential if the institution is to fulfil its poverty reduction mission of economic growth and social equity in a changing world.\textsuperscript{195} Similarly in 2006 the new World Bank General Counsel, Ana Palacio, expressed support for the incorporation of human rights concepts into the work of the World Bank.\textsuperscript{196}

\textbf{[3.59]} It has to be noted, however, that internationally recognised human rights (whether civil and political or economic, social and cultural) are of international


\textsuperscript{191} \textit{Ibid}, at 184.

\textsuperscript{192} I Shihata, \textit{The World Bank in a Changing World: Selected Essays}, vol III (The Hague, Martinus Nijhoff, 2000), 365–79. There are about 40 HICPs, most of which are located in sub-Saharan Africa.

\textsuperscript{193} IMF and World Bank Support Debt Relief for Uganda, IMF Press Release No 00/34 (2 May 2000).


\textsuperscript{195} See R Danino, Legal Opinion on Human Rights and the Work of the World Bank, Senior Vice-President and General Counsel, World Bank, January 2006.

concern that transcends ‘political affairs’ and autonomous jurisdiction of a state. In this respect, both the IMF and the World Bank, as a subjects of international law, have human rights obligations since ESC rights are a part of general international law that is binding outside the treaty regimes and therefore creates binding obligations for the IMF and the World Bank. As a result, since the projects funded by the World Bank and programmes of the Bank and the IMF impact on the enjoyment of human rights, it is essential to ensure that they do not negatively impact on or violate human rights, even if they are to lead to economic development in the long run. International human rights instruments must not be subordinated to the charters of the international financial institutions or agencies in question when, as a matter of law, the reverse should be the case.

[3.60] In conformity with Articles 22 and 23 of the ICESCR, the IMF and the World Bank should (through their lending policies and credit agreements) co-operate effectively with states to implement ESC rights at the national level, bearing in mind their own mandates. The minimum core obligation incumbent directly upon both the World Bank and the IMF as specialised agencies of the UN system and subjects of international law is a duty of vigilance to ensure that their policies and programmes do not facilitate breaches of their Member States’ human rights treaty obligations. This calls for putting in place a clear and consistent human rights impact assessment policy in project/programme identification, preparation, appraisal, loan negotiation, implementation and evaluation (post-audit) for the World Bank and similar stages in negotiations and release of funds for the IMF.

[3.61] This would ensure, at the very minimum, that the policies and programmes of the two institutions (such as privatisation of social security schemes, healthcare and education) in pursuit of their respective charter obligations do not violate existing human rights standards. With respect to Zambia, for example, the CESCR expressed its concern in June 2005 about the fact that privatized social security schemes in the state party have not been financially sustainable, thereby leaving its beneficiaries without adequate social protection.

It recommended:

Zambia’s obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as the International Monetary Fund

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202 Skogly, above n 182, 163–6.


and the World Bank, so as to ensure that the rights enshrined in the Covenant are duly protected, for all Zambians, and, in particular for the most disadvantaged and marginalized groups of society. The Committee refers the State party to its statement to the Third Ministerial Conference of the World Trade Organization adopted at its twenty-first session in 1999 (E/2000/22-E/C.12/1999/11, annex VII).205

[3.62] Therefore, there is dire need for explicit integration of international human rights into the policies, programmes and projects of the World Bank and the IMF, including these bodies’ poverty-reduction strategies,206 to make them ‘effective, sustainable, inclusive, equitable and meaningful to those living in poverty’.207 As the Bank has recently acknowledged in its recent communication entitled ‘Human Rights: FAQ [Frequently Asked Questions]:’208

The World Bank needs to undertake analytic work to examine how human rights fit within the constitutional framework and what positive contribution they could make to the development process. While the World Bank is not an enforcer of human rights, it may play a facilitative role in helping its members realise their human rights obligations.209

[3.63] However, it is important to note that there are some obstacles within the World Bank and the IMF to the effective integration of human rights into their activities. For instance, the Bank and IMF primarily consist of economists and financial experts who specialise in lending techniques that can be measured quantitatively without adequate attention to human rights.210 In addition, the Bank and the IMF Executive Board members and staff lack human rights training, hence there has been internal resistance to the application of human rights in these institutions.211 Furthermore, although the programmes and policies of the World Bank and the IMF affect the lives (and human rights outcomes) of individuals and groups living in developing states in both positive and negative ways, the decision-making involved in the programmes and policies of these organisations often fails to take into account particular circumstances existing in developing states.212 One possible reason for this is the unequal representation of developing states on the Executive Boards—eg while Sweden has 1.09 per cent of the total voting power on the Executive Board of the IMF, Mozambique has only 0.06 per cent.213 Therefore, it would be useful to provide human rights training to the executive directors and staff of these organisations (to build and develop their

205 Ibid, para 36.
209 Ibid.
211 Uganda, UN Doc A/HRC7/11/Add.2, para 112.
212 Ibid, para 119.
213 Ibid.
capacity in human rights analysis) and to strengthen the voice of developing states in the decision-making processes in these organisations through the development of democratic and transparent structures on the Executive Boards of the World Bank and the IMF which could be achieved by giving equal voice to developing states, in terms of both their voting capacity and their membership on the Board.\footnote{Ibid, para 120.}

\section*{C. The WTO and Human Rights}

\[3.64\] Should the WTO respect (protect or even promote) human rights? In May 1998 the CESCR asserted that:

\begin{quote}
international organisations [such as the WTO], as well as the governments that have created and manage them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.\footnote{CESCR, Globalisation and Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights (11 May 1998), para 5, available at http://www2.ohchr.org/english/bodies/cescr/docs/statements/Globalisation-1998.doc.}
\end{quote}

Based on the above, it can be stated that the WTO, as an international organisation for states, has a responsibility to assist states to respect human rights. Indeed, the realms of trade, finance and investment are in no way exempt from human rights principles and the international organisations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights.\footnote{Ibid.}

The WTO system has a potential to contribute to the development and to the realisation of broader ESC rights, by stimulating economic growth and thereby helping to generate the resources that are needed for the fulfilment of such rights.\footnote{See RD Anderson and H Wager, ‘Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy’ (2006) 9(3) Journal of International Economic Law 707–47.}

there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.  

Thus, although the WTO Agreement does not make explicit reference to human rights, the language of the preamble demonstrates a recognition by the WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development.

However, it is essential to note that although trade liberalisation has wealth-generating potential, such liberalisation does not necessarily create and lead to a favourable environment for the realisation of ESC rights. In this regard, it is important to consider ways in which the primacy of human rights, including ESC rights, may be ensured in the WTO.

[3.66] Sustainable development is broad enough to include respect for human rights. The right to (sustainable) development implies the right to improvement and advancement of economic, social, cultural and political conditions. The essence of the right to development is the principle that the human person is the central subject of development and that the right to life encompasses human dignity with the minimum necessities of life. As stated in the Declaration on the Right to Development:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Sustainable development ensures the well-being of the human person by integrating social development, economic development, and environmental conservation and protection. One aspect of sustainable development implies that the basic needs of the human being (e.g., education, health services, food, housing, employment and social security) are met through the implementation and realisation of human rights. Viewed in this context, the WTO has to take into account all human rights, including ESC rights, in accordance with the objective of sustainable development.

[3.67] The case for linking the protection of human rights apart from workers’ rights to membership of the WTO rests partly on the idea that states that violate or turn a blind eye to human rights infractions should not be allowed to participate in the

220 Ibid.
international trading system. This view, in turn, rests on the premise that such exclusion will cause these states to change their actions or omissions. Thus, the case for linkage between trade and human rights depends on the power of the WTO to decree trade sanctions. As Matsushita has noted, there are numerous problems with the above reasoning:

First, what human rights would the WTO seek to enforce? Arriving at an agreement on this would not be possible now. Second, there exist long established international and regional regimes for the promotion and enforcement of human rights, such as the UN Commission on Human Rights, the UN Committee on Human Rights, and the European Court of Human Rights. Adding the WTO to these regimes would accomplish little and would pose the danger of conflicting interpretations and decisions. Third, although trade sanctions have emotional appeal to punish human rights violations, empirical studies have established that trade sanctions seldom accomplish their objectives and are not effective in accomplishing their objectives. Fourth, if the WTO ever were to try to become a human rights enforcement agency, there is little chance its dispute settlement mechanism would survive; it soon would be engulfed in compliance problems, and the WTO itself would be under threat.

[3.68] Despite the above observations, the WTO has a role to play in the progressive realisation of human rights, including ESC rights. Although the WTO cannot transform into a human rights organisation, it must take steps to acknowledge fully the human rights effects of its work in order to maintain sustainable development and its own credibility. Some WTO Agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the General Agreement on Trade in Services (GATS), can impact on human rights—eg the rights to health and education. The TRIPS Agreement is a comprehensive multilateral agreement that sets detailed minimum standards for the protection and enforcement of intellectual property rights. The forms of intellectual property protection covered by the TRIPS Agreement most relevant to the enjoyment of the right to health include patent protection (over new medical processes and products such as

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226 Ibid, 924.
227 Ibid.
230 Apart from establishing minimum standards for various forms of intellectual property protection, the TRIPS Agreement also allows WTO Member States to adopt measures to protect public health and nutrition, and to protect against the abuse of intellectual property rights in certain cases. The Agreement makes disputes between WTO members concerning respect for the minimum standards subject to the WTO dispute-settlement procedures. See CM Correa, Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options (London, Zed Books, 2000); CM Correa, Trade Related Aspects of Intellectual Property Rights: A commentary on the TRIPS Agreement (Oxford University Press, 2007).
pharmaceuticals), trademarks (covering signs distinguishing medical goods and services as coming from a particular trader), and the protection of undisclosed data (in particular test data). For example, patent protection of a pharmaceutical allows the intellectual property right holder to exclude competitors from certain acts, including making, using, offering for sale, selling or importing the drug (without the owner’s consent) for a minimum period of 20 years. Where the subject matter of a patent is a process, a patent prevents the third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling or importing for these purposes at least the product obtained directly by that process. This period of exclusion theoretically allows the right holder to recoup some of the costs involved in medical research. Since most patents are owned by corporations, the protection offered by TRIPS primarily protects business and corporate interests and investments. In practice, intellectual property protection under the TRIPS can affect medical research and this can bear upon access to medicines.

[3.69] Although it has been stated that the claim that the TRIPS Agreement and the WTO are blocking access to medicines in poor countries is ‘demonstrably false’, intellectual property protection can affect the enjoyment of the right to health, and related human rights, in a number of ways. For example, patent protection can promote medical research by helping the pharmaceutical industry shoulder the costs of testing, developing and approving drugs. However, the commercial motivation of intellectual property rights encourages research, first and foremost, towards ‘profitable’ diseases, while diseases that predominantly affect people in poor countries—eg river blindness—remain under-researched. Further, intellectual property rights may affect the use of traditional medicines such as those of indigenous peoples. While existing intellectual property protection can promote health innovations by indigenous and local communities, the particular nature of this knowledge and the knowledge holders might require significant amendment to be made to intellectual legislation for protection to be comprehensive. Furthermore, some traditional medicines have been appropriated, adapted and patented with little or no compensation to the original knowledge holders and without their prior consent, which raises questions for both the right to health and cultural rights.

[3.70] In addition, the exclusion of competitors as a result of the grant of a patent can also be used by patent holders as a tool to increase the price of pharmaceuticals. High prices exclude some sections of the population, particularly poor people, from accessing medicines. Given that the right to health includes an obligation on states to provide affordable essential medicines according to the WHO essential drugs list, intellectual property protection can adversely affect the right to health. In other words, in some cases intellectual property protection can reduce the economic accessi-

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233 TRIPS Agreement, Arts 33 and 28.
234 Ibid, Art 28(2).
235 Matsushita et al, above n 225, 718.
236 Hunt, above n 232, para 42.
237 Ibid.
238 Ibid, para 43.
bility of essential medicines. This issue was considered by the Central Intellectual Property and International Trade Court in AIDS Access Foundation v Bristol-Myers Squibb. The AIDS Access Foundation, and two patients living with AIDS (acquired immune deficiency syndrome) due to infection with HIV (human immunodeficiency virus), alleged that Bristol-Myers Squibb and the Thai Department of Intellectual Property had ‘conspired to intentionally delete’ the dose restriction in a patent application for didanosine. They argued that this could have the effect of restricting access to this particular HIV/AIDS treatment. In its judgement, the Thai Central Intellectual Property and International Trade Court ruled that, because pharmaceutical patents may lead to high prices that limit access to medicines, patients may challenge their legality. The Court asserted the primacy of human life in trade agreements, as recognised internationally by the Doha Declaration on TRIPS and Public Health. The Court held that the TRIPS agreement must be:

interpreted and implemented so as to promote the rights of members to protect public health, especially the promotion and support of access to medicines.

The Court also held that ‘lack of access to medicines due to high prices prejudices the human rights of patients to proper medical treatment’.

[3.71] It is important to note that Articles 30 and 31 of the TRIPS Agreement include some flexibility in such circumstances by permitting WTO members to authorise third parties to use the subject matter of a patent (ie manufacture and sell pharmaceuticals at a lower price) without the authorisation of the patent holder, subject to certain limitations including payment of a ‘adequate remuneration in the circumstances of each case, taking into account the economic value of the authorisation’. Nonetheless, such flexibilities are, in reality, only available to those WTO members that have a domestic pharmaceutical manufacturing capacity. Article 31(f) of the TRIPS Agreement allows unauthorised working of the patent where sale is ‘predominantly for the supply of the domestic market of the Member authorising such use’. This could limit the ability of countries that cannot make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. Thus, poorer countries without adequate manufacturing capacity might not be able to benefit from this flexibility. Accordingly an amendment to the TRIPS Agreement to allow pharmaceutical products made under compulsory licences to be exported to countries lacking production facilities should be supported. It is interesting to note that the WTO received from Canada, on 4 October 2007, the first notification from any government that it has authorised a company to make a generic version of a patented medicine for export under special WTO provisions agreed in 2003. The triple-combination AIDS therapy drug, TriAvir, can now be made and exported to Rwanda, which is unable to manufacture the medicine itself.

[3.72] As an international organisation for states, the WTO should ensure that its

239 Black Case No Tor Por 34/2544 (1 October 2002), full judgment available at http://www.cptech.org/ip/health/c/thailand/arv-iprdisputes.html.
240 TRIPS Agreement, Art 31(h).
241 See Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641
policies and decisions are in conformity with the human rights obligations of its Member States. As noted by the CESCR since 1998 and by the UN’s Sub-Commission on Promotion and Protection of Human Rights in August 1998, the WTO should consider the human rights impact of trade and investment policies by recognising human rights as the primary objective of trade, investment and financial policy. This is because human rights are fundamental, inalienable and universal entitlements belonging to individuals, and, under certain circumstances, groups of individuals and communities. Intellectual property rights under the TRIPS Agreement are generally of a temporary nature, and may be allocated, limited in time and scope, traded, amended and even forfeited; in contrast, human rights are timeless expressions of fundamental entitlements of the human person. Thus, the WTO should take fully into account existing state obligations under international human rights instruments. The Decision on Implementation of paragraph 6 of the Doha Declaration on TRIPS and Public Health (August 2003) allowing countries producing generic copies of patented drugs under compulsory licence to export drugs to countries with no or little drug-manufacturing capacity is an example of how human rights (eg the right to health) could be taken into account by the WTO.

[3.73] As a satisfactory human rights situation also improves the objectives of the WTO, human rights and the WTO mandate are not necessarily contradictory but mutually support each other. The WTO should, therefore, play a role in promoting human rights in a systematic or deliberate manner. This could be achieved through several ways including the following:

First, through its multilateral treaty framework that promotes principles of non-discrimination, rule of law, economic liberalism, and peaceful dispute settlement, the WTO can be said to promote and protect human freedoms. Second, Article XXI of the General Agreement on Tariffs and Trade (GATT) permits WTO Members to participate in action involving trade sanctions decreed by the United Nations in cases of threats to peace and security. Moreover, WTO Members are permitted to use investment and trade as positive incentives to promote human rights in cases where infringement of WTO norms are not at stake.


CESCR, General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (c), of the ICESCR), UN Doc E/C.12/GC/17 (12 January 2006), para 2.

See Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (November 2001), http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_epdf; Decision of the General Council of 30 August 2003, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1 (September 2003), http://www.worldtradelaw.net/misc/dohapara6.pdf. See also Doha Ministerial Declarations: Doha Declaration, WT/MIN (01)/DEC/1 (November 2001), http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_epdf, para 6 stated: ‘under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements’.

Matsushita et al, above n 225, 924.
While the WTO, like the World Bank, is not an enforcer of human rights, it may play a facilitative role in helping its members (numbering 153 on 23 July 2008) realise their human rights obligations. It is therefore necessary for the WTO Member States to re-engage the WTO in human rights to ensure that these are taken into account.

D. Corporations and Human Rights

[3.74] What, if any, legal responsibilities do corporations have for violations of ESC rights under international law? In 2007 the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, noted:

The traditional view of international human rights instruments is that they impose only indirect responsibilities on corporations, ie responsibilities provided under domestic law in accordance with States’ international obligations. In contrast, some observers hold that these instruments already impose direct legal responsibilities on corporations but merely lack direct accountability mechanisms. For example, the United Nations Sub-Commission on the Promotion and Protection of Human Rights, explaining that its proposed norms reflect and restate existing international law, attributed the entire spectrum of State duties under the treaties—to respect, protect, promote, and fulfil rights—to corporations within their spheres of influence.248

[3.75] Sphere of influence refers to both to (i) impact, where the company’s activities or relationships are causing human rights harm; and (ii) whatever leverage a company may have over actors that are causing harm. Corporations are increasingly recognised as ‘participants’ at the international level, with the capacity to bear some rights and duties under international law. Corporations are capable of both breaching all internationally recognised human rights and contributing to their protection. For example, foreign companies can contribute to the realisation of ESC rights in a state where they operate by paying appropriate taxes that can be invested in the realisation of ESC rights. On the other hand, foreign companies can undermine the realisation of ESC rights by exploiting a state’s natural resources through, for example, paying low taxes and taking most of the profits abroad. In 1999 the CESCR took note of the fact that in the Solomon Islands

the major share of the country’s natural resources is exploited by foreign companies which pay low taxes, if any, to the Government and, by taking most of the profits abroad, leave only few benefits to Solomon Islands.251

250 In 1949, the ICJ stated: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.’ See Advisory Opinion on Reparations for Injuries suffered in the service of the United Nations, (1949) ICJ Rep 174 at 179. See also A Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’ (2008) 6 Journal of International Criminal Justice 899.
In addition policies and practices of some pharmaceutical companies (eg not contributing to research and development for neglected diseases, or lobbying for more demanding protection of intellectual property interests than those required by TRIPS, such as additional limitations on compulsory licensing) may constitute obstacles to the implementation by states of the right to the highest attainable standard of health and, in particular, their endeavours to enhance access to medicines.\(^{252}\)

\[3.76\] However, the question of what precise responsibilities corporations have in relation to human rights, and to ESC rights in particular, has received far less attention.\(^{253}\) Although adverse business impacts on human rights are not limited to the contexts outlined below, the worst cases of corporate-related human rights harm have occurred where governance challenges were greatest: disproportionately in low-income countries; in countries that often had just emerged from or were still in conflict; and in countries where the rule of law was weak and levels of corruption high.\(^{254}\) The armed conflict in the Democratic Republic of the Congo (DRC) in 1997–2004 offers a good example as to how corporations can violate human rights in a state in conflict through direct and indirect involvement (complicity) in human rights abuses in a state where judicial and government institutions are weak and unable to sanction corporate abuses.\(^{255}\) In October 2002 the UN Panel of Experts listed 85 companies, mostly based in the West, which it declared had violated OECD Guidelines for Multinational Enterprises in the Democratic Republic of the Congo.\(^{256}\) The allegation against many of these companies was that they were fuelling the armed conflict in the DRC in order to retain their control over the country’s natural resources in that finance flowed from them to the various armies via trade in natural resources, thus providing an incentive for continued conflict.\(^{257}\) Some of the companies were accused of entering into direct business relationships with various combatants, others with purchasing raw materials along their supply chain from the DRC.\(^{258}\)

\[3.77\] Like other NSAs, corporations, as specialised economic ‘organs of society’, have a responsibility to respect human rights in all situations. This responsibility may be derived, first, from national laws under which corporations operate; and second, from soft law instruments such as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,\(^{259}\) and the OECD Guidelines for Multi-


\(^{254}\) Ibid, para 16.


\(^{257}\) Ibid.

\(^{258}\) Ibid. See also Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146 (16 October 2002).

national Enterprises.\textsuperscript{260} It is not surprising that companies increasingly claim that they respect human rights.\textsuperscript{261} While states have not adopted binding international human rights standards with respect to corporations, they, together with business and civil society, have drawn on some of international human rights instruments in establishing soft law standards and initiatives. These provide a framework for further development of corporate responsibility for human rights in the future in which human rights treaties will play a key role.

V. CONCLUSION

[3.78] What, then, is the conclusion? (1) How should international human rights law ensure that the activities of NSAs are consistent with international human rights standards? (2) How should accountability of NSAs be promoted effectively when violations of international human rights law occur? Although there are no straightforward answers to these questions, from the foregoing, the following conclusions can be drawn.

[3.79] Firstly, international human rights law is historically, and will remain (at least in the near future), essentially state-centred. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that NSAs respect human rights. This means that states have to protect human rights against violations by NSAs: individually, as home as well as host states, and collectively through ‘international co-operation’. As noted above, when violations by NSAs occur, states are obliged to investigate, punish and redress abuses through accessible, transparent and effective judicial as well as non-judicial mechanisms of accountability. Currently, there are limited direct human rights obligations for NSAs. Consequently, international human rights law should continue to hold the state responsible within its jurisdiction to ensure that the activities of NSAs are consistent with international human rights standards. However, as noted above, states in which protection of human rights against violations by NSAs is most needed are often those least able to enforce them against NSAs such as international financial institutions and TNCs—the main driving agents of the global economy, exercising control over global trade, investment and technology transfers—who possess much-desired investment capital or technology.

[3.80] Secondly, given the current limitations of state power with respect to NSAs, it is necessary that NSAs (defined broadly to include international organisations) accept/recognise some moral human rights obligations. However, at present they have no clearly defined legal obligations to respect human rights apart from compliance with the legal regime of the particular state in which they are operating. Nevertheless,

\textsuperscript{260} See OECD, DAFFE/IME/WPG(2000)15/FINAL. The text is available at http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html.

NSAs undoubtedly do have a role to play in the progressive realisation of ESC rights. As this chapter makes clear, the era of NSA respect for ESC rights has arrived. Within their respective ‘spheres of activity and influence’, NSAs have two main obligations: (i) to comply with the national law of the state in which a NSA operates, as well as any relevant legislation of the state where it is domiciled; (ii) to respect human rights by refraining from any conduct that will or may encourage a state to act in a way that is inconsistent with its obligations arising from national and international human rights law. NSAs have the responsibility to use ‘due diligence’ in ensuring that their activities do not contribute directly or indirectly to human rights violations, and that they do not directly or indirectly benefit from human rights violations of which they are aware or ought to have been aware.262 The question is how can this be legally realised; should NSAs be directly liable for their violations of ESC rights under international human rights law or should they continue to be indirectly liable through states and should states have a duty under international human rights law to move against NSAs that violate ESC rights within their respective jurisdictions?

[3.81] Although there is no consensus on the above issue,263 it is clear that in the era of globalisation, it is not enough to look only to the state as the primary actor to respect, protect and fulfil human rights. Various factors have contributed to this development. They include: (i) the privatisation of functions previously performed by states; (ii) the ever-increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalisation; (iii) the expanding impact and responsibilities of multilateral organisations such as the WTO affecting broader society;264 (iv) the enormous growth in the role played by transnational civil society organisations, many of which now have multimillion-dollar budgets, employ very large staffs, and perform public-type functions in a large number of states; (v) a rise in the impact of organised armed groups violating human rights or controlling territory and population and aspiring to gain international legitimacy; and (vi) the growth of international terrorist networks such as Al Qaeda, and international criminal networks, such as drug cartels, which are not confined to any one state and some of whose activities have become global in scope.265 In view of these developments, it is necessary that a considerable number of actors other than states, including multilateral institutions (eg the IMF and the World Bank) and TNCs, should equally be obliged to respect human rights. In short, therefore, human rights should be everyone’s responsibility. Thus, NSAs should support the emerging global framework for human rights responsibilities of NSAs as a means to achieve good governance, encourage participation, strengthen their own anticorruption

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264 See eg Matsushita et al, above n 225, 918–31.
controls, and provide assistance in ways that strengthen the human rights obligations of states.266

[3.82] Consequently, making space in the legal regime to take account of the role of NSAs in the realisation of ESC rights, and their accountability for violations of ESC rights, remains a critical challenge facing international human rights law today. In order to ensure more accountability for human rights violations by NSAs, it is relevant to consider the creation of a global ombudsman function that could receive and handle complaints or to consider the adoption of the Statute of the International Court of Human Rights, to which NSAs (including intergovernmental organisations such as the UN; international financial institutions such as the IMF and the World Bank; the WTO; and TNCs) could also possibly become parties in addition to states.267 In this arrangement, it should be possible to bring claims of human rights violations (including violations of ESC rights) not only against the state but also directly against NSAs. As Nowak has noted:

In principle, any non-State actor might be interested, for various reasons including upholding ethical standards, marketing, corporate identity or a genuine interest in strengthening human rights, to recognise the jurisdiction of the World Court of Human Rights.268

As privatisation, outsourcing and downsizing place ever more public or governmental functions into the hands of NSAs, the human rights regime must adapt to those changes if it is to maintain its relevance.269 It is in this context that there is increasing recognition that

it is essential to ensure human rights obligations fall where power is exercised, whether it is in the local village or at the international meeting rooms of the WTO, the World Bank or the IMF.270

[3.83] It is vital for the effectiveness of international human rights law that NSAs respect and protect human rights in order to ensure that they remain relevant for all members of the international community. There is a need for the IMF, the World Bank and the WTO to adopt human rights policy statements which expressly recognise the importance of human rights generally, and ESC rights in particular, in relation to all their strategies, policies, programmes, projects and activities. This would give greater legitimacy to difficult and contested policy choices, and strengthen policy coherence and co-ordination among these actors. Indeed, it is becoming increasingly

266 World Bank, Global Monitoring Report 2006: Millennium Development Goals: Strengthening Mutual Accountability, Aid, Trade, and Governance (Washington DC, World Bank, 2006), 177, noting that ‘international financial institutions (IFIs) are essential parts of the global governance framework, especially for poor countries. Their efforts include bolstering their own anticorruption controls, improving transparency, encouraging adherence to internationally recognized standards and codes, and working with their clients to encourage domestic accountability.’
268 Ibid, 257.
269 See generally K De Feyter and F Gomez Isa (eds), Privatisation and Human Rights in the Age of Globalisation (Oxford, Intersentia, 2005); Alston, above n 23.
important that all decision making by NSAs—local, national, regional and global—should take human rights issues into account consistently and comprehensively. As a minimum, policies and programmes of NSAs must not facilitate breaches of their states’ human rights treaty and customary obligations. International financial institutions should pay greater attention to the protection of ESC rights in their lending policies, structural adjustment programmes, poverty alleviation programmes and credit agreements. Whether international human rights law will develop to adequately protect against violations of human rights by NSAs, and to hold effectively all NSAs directly accountable for violations of ESC rights, remains to be seen. The challenge that faces human rights activists is to reflect on the most appropriate manner in which to enhance the obligations of NSAs with respect to ESC rights. As a starting point, it is necessary to integrate consistently the human rights principles of non-discrimination, monitoring, democratic participation and accountability at each step of the process of making and applying the policies and decisions of NSAs. In the final analysis, global rules binding on NSAs are necessary because most of these actors have outgrown the ability of many individual states to regulate them effectively.
I. INTRODUCTION

[4.01] For international human rights treaties, including those protecting ESC rights, to be effective at a national level, state obligations must be ‘reflected in the content of the domestic law’.¹ This is mainly because it is often through domestic (sometimes termed ‘national’, ‘municipal’ or ‘internal’ law) law and domestic institutions such as courts, tribunals and human rights commissions that international law is most easily enforced. This is because domestic institutions are relatively more accessible than international institutions; there is also a lack of significant enforcement measures in international law especially with respect to ESC rights.

[4.02] There are two principal theoretical constructs, with a number of variations in the literature, advanced to explain the relationship between international law and domestic law:

The first doctrine is called the dualist (or pluralist) view, and assumes that international law and municipal law are two separate legal systems which exist independently of each other. . . . The second doctrine, called the monist view, has a unitary perception of the ‘law’ and understands both international and municipal law as forming part of one and the same legal order.²

The monistic theory maintains ‘the primacy of international law’ in the event of conflict between international law and domestic law.³ Yet, dualism

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stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have effect on, or overrule, the other.4

Generally, however, irrespective of the system—monism or dualism—through which international law is incorporated in the domestic legal order,5 following ratification of an international instrument that is ‘in force’, it is ‘binding’ upon the parties and must be performed in ‘good faith’ and given full effect in the domestic legal order.6

[4.03] As shown in chapters 1 and 2, the obligations arising under the ICESCR in general, and Article 2 of the Covenant in particular, are binding on every state party as a whole. It follows that states are under a general obligation to act in conformity with the rules of international law and will bear responsibility for breaches of it, whether committed by the legislative, executive or judicial organs,7 and other public or governmental authorities, at whatever level—national, regional or local.8 This follows from a well-established principle of international law that states cannot invoke their domestic legal systems—internal laws and procedures—as justification for not complying with international treaty (human rights) obligations.9 Thus, there is a general obligation for states to modify the domestic legal order to be in conformity with their international treaty obligations.10 But international law leaves the method of achieving this result (described in the literature by varying concepts of ‘incorporation’, ‘adoption’, ‘transformation’ or ‘reception’) to the domestic jurisdiction of states.11 However, as Ian Brownlie points out,

in general a failure to bring about such conformity is not in itself a direct breach of international law, and a breach arises only when the state concerned fails to observe its obligations on a specific occasion.12

It follows that the most appropriate ways and means of implementing the ICESCR at a domestic level will vary from one state to another. As the CESCR has noted with

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7 Shaw, above n 4, 138.
9 In Polish Nationals in Danzig (PCIJ, Series A/B, no 44 (1931), 24 the PCIJ stated: ‘according to generally accepted principles . . . a State cannot adduce against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force’. See also the Free Zones case (PCIJ, Series A/B, no 46, 167) where the Court stated: ‘It is certain that France cannot rely on her own legislation to limit the scope of her international obligations.’
10 Vienna Convention, above n 6, Art 27 states: ‘A party [to a treaty] may not invoke the provisions of its internal law as justification for its failure to perform a treaty’; Art 8 UDHR provides: ‘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.’ See also Exchange of Greek and Turkish Populations (1925) PCIJ No 10, 20.
respect to non-discrimination and the equal right of men and women in the enjoyment of all ESC rights:

Every State party has a margin of discretion in adopting appropriate measures in complying with its primary and immediate obligation to ensure the equal right of men and women to the enjoyment of all their economic, social and cultural rights. Among other things, States parties must, *inter alia*, integrate into national plans of action for human rights, appropriate strategies to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.\(^{13}\)

[4.04] Generally, although there are others methods of protecting human rights at a domestic level, the primary method of protecting human rights at a domestic level is through constitutional provisions, particularly the entrenchment of a chapter on human rights in the constitution.\(^{14}\) While constitutional provisions have been widely used to protect civil and political rights, there is no reason in principle why this should not be extended to ESC rights given that the two sets of rights are mutually reinforcing. This chapter examines the domestic protection of ESC rights. The chapter is divided into four sections. As a starting point, the chapter examines the position of the CESCR on the application of the ICESCR on the national plane (section II). This establishes the basis for a critical consideration of some examples of the application of the ICESCR on the national plane (section III). An examination is then made of the role of independent national human rights institutions in the promotion and protection of ESC rights (section IV). The chapter ends with some concluding observations (section V).

### II. THE ICESCR ON THE NATIONAL PLANE

[4.05] How can the ICESCR be applied effectively at a domestic level? The CESCR addressed this question in its General Comment 9 on the Domestic Application of the Covenant.\(^{15}\) The General Comment emphasised several important aspects considered in this section. First, the Committee affirmed the principle of direct and immediate application of the Covenant. This means that the Covenant as a legally binding international human rights treaty should operate ‘directly and immediately’ within the domestic legal system of each state party. In the words of the Committee:

> 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

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\(^{13}\) CESCR, General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, UN Doc E/C.12/2005/3 (2005).


pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.\textsuperscript{16}

\textbf{[4.06]} Second, the Committee stated that the means used to apply the Covenant should be ‘appropriate’ and subject to ‘review’ as part of the Committee’s examination of the state party’s compliance with its obligations under the Covenant.\textsuperscript{17} It should be noted that the Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. As the CESCR acknowledged,

\begin{quote}
there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law.\textsuperscript{18}
\end{quote}

Thus, the precise method by which Covenant rights are given effect in national law is a matter for each state party to decide. This means that states in practice enjoy a margin of discretion or appreciation in deciding what methods are the most effective in a particular domestic context. In accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee, as an international treaty body, always respects the margin of appreciation of states to take steps and adopt measures most suited to their specific circumstances.\textsuperscript{19} Nonetheless, the Committee noted that the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its [ICESCR] obligations by the State party.\textsuperscript{20}

\textbf{[4.07]} Third, in order for the means chosen to implement the Covenant to be appropriate, they must be ‘adequate’ and ‘effective’.\textsuperscript{21} The Committee noted that an analysis of state practice with respect to the domestic implementation of the Covenant shows that states have used a variety of approaches. The approach of states to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order. 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. Some states have entrenched some ESC rights in national constitutions as justiciable rights.\textsuperscript{22} Other states have protected some ESC rights in bills of rights and the rest in a separate part of the constitution which states ‘Directive Principles of State Policy’.\textsuperscript{23} Yet others have recognised ESC rights as

\textsuperscript{16} Ibid, para 4.
\textsuperscript{17} Ibid, para 5.
\textsuperscript{18} Ibid.
\textsuperscript{20} CESCR, General Comment 9 above n 15, para 5.
\textsuperscript{21} Ibid, para 7.
\textsuperscript{22} See Constitutions of Argentina (1994); Benin (1990); Cape Verde (1990); Colombia (1991); Hungary (adopted 1949, and heavily amended in 1989); Latvia (adopted 1922, a chapter on Fundamental human rights was added only by amendment in 1998); and South Africa (1996).
‘Directive Principles of State Policy’ only.\(^{24}\) Significantly, some states, eg Norway, have adopted or incorporated the ICESCR into domestic law, so that its terms are retained intact and given formal validity in the national legal order.\(^{25}\) 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.\(^{26}\) The Committee, however, noted that 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 \ldots 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.\(^{27}\)

\[4.08\] Fourth, while the Covenant does not formally oblige states to incorporate its provisions in domestic law, the Committee considered that the direct formal adoption or incorporation of the Covenant in national law (such as the constitutional bill of rights) is desirable, suggesting that this is the most appropriate and effective way of applying the Covenant. Indeed, direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a firm basis for the direct invocation of the Covenant rights by individuals in national courts.\(^{28}\)

\[4.09\] Fifth, adequate protection of the Covenant at the domestic level requires monitoring and accountability of states and relevant NSAs. Accountability takes many different mechanisms including human rights commissions, administrative bodies, impact assessments and judicial proceedings. Accountability is important because it provides individuals and groups with an opportunity to understand how those with responsibilities have discharged their duties. It also provides those with responsibilities the opportunity to explain what they have done and why. It can help to identify what works well so that it can be repeated, and what does not, so that it can be reconsidered. Where there has been a failure, accountability requires redress. It is striking to note that ‘rights and obligations demand accountability: unless supported by a system of accountability, they can become no more than window-dressing’.\(^{29}\) Accordingly, the adequate protection of human rights needs accessible, transparent and effective accountability mechanisms to ensure that rights are respected, and where they are

\(^{24}\) See eg the Constitutions of Sierra Leone (1991) and Nigeria (1999).
\(^{25}\) In 1999 Norway adopted the Human Rights Act of 21 May 1999, which incorporated the Covenant into domestic law, stipulating in s 3 that the Covenant takes precedence over any other legislative provisions that conflict with it. The CESCR welcomed this incorporation. See CESCR, Concluding Observations: Norway, UN Doc E/C.12/1/Add.109 (23 June 2005), para 4.
\(^{26}\) CESCR, General Comment 9, above n 15, para 6.
\(^{27}\) Ibid, para 7 (emphasis added).
\(^{28}\) Ibid, para. 8.
not, that victims can find redress. Courts and national human rights institutions, endowed with appropriate powers, can play a key role in ensuring that a state's conduct is consistent with its human rights obligations, including ESC rights.

[4.10] It is not enough to incorporate the ICESCR in domestic law without recognising that ESC rights are justiciable in domestic courts. Thus, in the Concluding Observations of the CESCR on Norway in 2005 the Committee stated:

In the light of the Supreme Court ruling in the ‘KLR case’ (Supreme Court Reports 2001, p 1006), which states that international treaties that have been incorporated into national legislation can only be directly applied when it is possible to derive concrete rights and duties from their provisions, the Committee reaffirms the principle of the interdependence and indivisibility of all human rights and that all economic, social and cultural rights are justiciable, and urges the State party to ensure that all the provisions of the Covenant are given effect by its domestic courts. In this regard, the Committee refers the State party to its general comment No 9 (1998) on domestic application of the Covenant.

The enjoyment of the rights recognised under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of domestic law. Thus, the CESCR has pointed out that:

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.

[4.11] Finally, in order to ensure that individuals and groups whose ESC rights have been violated can seek redress or effective remedies at a domestic level, states parties to the ICESCR and other human rights treaties protecting ESC rights should ensure that domestic courts and administrative bodies are empowered to make reparation. This should include, but not be limited to, restitution, rehabilitation and measures of satisfaction to individuals whose rights have been violated, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant laws and practices, as well as bringing to justice the perpetrators of ESC rights violations. In this respect, the CESCR stated:

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,

31 CESCR, Concluding Observations: Norway, above n 25, para 23.
32 CESCR, General Comment 9, para 14.
33 Pursuant to Art 2, para 2, of the Covenant, states ‘undertake to guarantee’ that the rights therein are exercised ‘without discrimination of any kind’. For a discussion see chapter 2.
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.\footnote{CESCR, General Comment 9, para 9 (emphasis added).}

[4.12] It is essential to note that the right to an effective remedy may in certain circumstances require states parties to provide for and implement preventive, provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations. For example, with respect to forced evictions (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 CESCR noted:

Appropriate procedural protection and due process are essential aspects of all human rights but it is especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognised in both International Human Rights Covenants. 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.\footnote{CESCR, General Comment 7: Forced evictions, and the Right to Adequate Housing, UN Doc E/1998/22, annex IV at 113 (1997), para 16.}

With respect to the right to adequate housing, cases from South Africa demonstrate that courts have a critical role to play in protecting the most vulnerable members of society, eg by enforcing protection from arbitrary eviction,\footnote{See S Wilson, ‘Judicial Enforcement of the Right to Protection from Arbitrary Eviction: Lessons from Mandelaville’ (2006) 22 South African Journal on Human Rights 535–62.} ensuring that the state has devised and implemented within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing,\footnote{See eg the Constitutional Court of South Africa, The Government of the Republic of South Africa and others v Irene Groothoom and others (‘the Groothoom case’), Case CCT 11/00, 2001 (1) SA 46 (CC).} and that in case of evictions the above procedural protections are applied, and in particular engaging meaningfully with those affected both individually and collectively.\footnote{See the Constitutional Court of South Africa, Occupiers of 51 Olivia Rd, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and 3 Others, Case CCT 24/07, (2008) ZACC 1, para 13.}
III. EXAMPLES OF THE APPLICATION OF THE ICESCR ON THE NATIONAL PLANE

[4.13] The following examples of domestic law applications of the ICESCR have been selected as they demonstrate the diversity of mechanisms for implementing the ICESCR and represent a broad geographical range. First, two examples are selected from Europe: the United Kingdom (which represents perhaps the purist form of a dualist approach) and Italy (which represents an example of a monist approach). Second, two examples are selected from Africa: South Africa (because its 1996 Constitution incorporates a wide range of ESC rights in the Bill of Rights and claims of violations of these rights have been tested before courts) and Uganda (because its 1995 Constitution protects some ESC rights in the Bill of Rights and some as ‘directive principles’). Third, one example is considered from Asia: India, because of the important contribution made by the Supreme Court of India to the development of international jurisprudence in favour of the justiciability of ESC rights, through its proactive interpretations of the constitutional guarantees of the fundamental rights in light of the Directive Principles. For example, as shown below, the Indian Supreme Court has interpreted the right to life broadly to include the right to a livelihood and this has been used to protect some ESC rights.

A. United Kingdom

(i) The ICESCR in the United Kingdom

[4.14] The UK signed the ICESCR on 16 September 1968 and ratified it on 20 August 1976 (see Appendix C) with some reservations.39 However, the ICESCR has not been and is not expected to be incorporated into domestic law.40 Only rarely has the Covenant been cited by the courts in the UK or mentioned in Parliament.41 In addition to the ICESCR, the UK has ratified a number of other principal international human rights treaties, protecting some ESC rights, including the ICCPR, although by 2008 the UK was the only Member State of the European Union not to be a party to the First Optional Protocol to the ICCPR; the CERD; the CEDAW; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the CRC; and the Optional Protocol to the CRC on the involvement of children in armed conflict (CRC-AC).42 By 2008 the UK was not yet a party to some

39 The UK made reservations to Arts 6, 7(a.i), 8(b.1), 9, 10(1,2, 13(2a), 14 of the ICESCR; and a declaration on Arts 2(3), and 1 of the Covenant (Appendix H). CESCR, Concluding Observations: UK, UN Doc E/C.12/1/Add.79 (5 June 2002), para 9: ‘The Committee also welcomes the delegation’s statement that the State party is currently in the process of reviewing its reservations to international human rights instruments, with a view to withdrawing those that have been superseded by legislation or practice.’
international human rights treaties—namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, and the International Convention for the Protection of All Persons from Enforced Disappearance—which can enhance the protection of human rights, including ESC rights. At a regional level, the UK is a state party to the European Social Charter (1961), and signed the revised European Social Charter (1996). Both charters protect a number of economic and social rights.

[4.15] However, the UK does not have a single written constitution or a general bill of rights defining the status of ratified international treaties in the domestic law. In the absence of a written constitution, the two main sources of constitutional law are legislation and judicial precedent. One of the fundamental principles of its unwritten constitution is that of legislative ‘parliamentary supremacy’. The legislative supremacy of Parliament means that there are no legal limitations on the legislative competence of Parliament. As Dicey put it, Parliament has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

[4.16a] The classic exposition regarding the status of international treaties in the UK domestic law was given by Diplock LJ in Salomon v Commissioners of Customs and Excise [1967] 2 QB 116, 143–4 as follows:

Where, by a treaty, Her Majesty’s Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty’s Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see Ellerman Lines v Murray; White Star Line and US Mail Steamers Oceanic Steam Navigation Co Ltd v Comerford), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty’s own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for...

46 CETS No 163, entered into force on 1 July 1999. The UK signed the revised charter on 7 November 1997 but is yet to ratify it.
49 Bradley and Ewing, above n 47, 53.
there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.

[4.16b] It is clear from the above case that for international treaties to be given full application the UK, domestic legislation is required. In the absence of such legislation, international treaties would be limited to interpreting ambiguous legislation. As explained by the House of Lords in the Maclaine case, international treaties have to be incorporated, or implemented, by legislation into the UK law before courts will give them full effect:

It is an established principle of English law that the terms of a treaty do not, by virtue of the treaty alone, have the force of law in the United Kingdom. They cannot effect any alteration in English domestic law or diminish existing rights or confer new or additional rights unless and until enacted into domestic law by or under the authority of Parliament. When a treaty is so enacted, the courts give effect to the legislation and not to the terms of the treaty (pp 474–5) . . . as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter aliis acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant (p 500).51

[4.17] The case above makes it clear that the power to conclude treaties in the UK is an exercise of the Royal Prerogative, being part of the monarch’s powers exercised by the Executive. As Parliament is the only national institution of the UK that can make law, the courts have required treaties to be incorporated, or implemented, by legislation into the UK law before courts will give them full effect. In general, most human rights treaties to which the UK is a state party have not been incorporated directly into law although it is recognised that ambiguous legislation will be interpreted in the way which is most consistent with the international obligations of the UK, including unincorporated treaties (see Garland v British Rail Engineering [1983] 2 AC 751 at 771). Where a change in the law is necessary to enable the UK to comply with a treaty or convention, legislation should be introduced to give effect to the relevant obligation; but no such specific incorporation is necessary to require or enable the Government to determine how to give effect to such treaty obligations or, if they may be effectuated by administrative action, to take such action.52

51 Maclaine Watson & Co Ltd v Department of Trade and Industry [1990] 2 AC 418. See also JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry; Tin Council Cases [1990] 2 AC 418; R v Lyons [2002] UKHL 44; Campaign for Nuclear Disarmament v Prime Minister [2002] EWHC 2759.
Although the UK gives effect to its obligations under the ICESCR by means of specific laws, policies and practices which implement the various rights set out in the Covenant, the general position of the UK with respect to the ICESCR has been stated in its third periodic report (of 1996) to the CESCR as follows:

As regards the International Covenant on Economic, Social and Cultural Rights, the greater part of its provisions do not purport to establish norms which lend themselves to translation into legislation or justiciable issues, but are statements of principle and objectives. The United Kingdom has, both before and since the coming into operation of the Covenant, taken measures, including legislation and the adoption of policies and programmes, which advance the same principles and objectives as are set out in the Covenant. Where an instrument such as the Convention imposes a more precise obligation not hitherto reflected in the common law, existing legislation or administrative procedures, it is the practice of the United Kingdom to bring the law or procedure into line with the obligation.

The UK did not provide specific examples to show how the alleged ‘practice’ of bringing UK law or procedure into line with the ICESCR had been implemented to date. The position of the UK that a greater part of the ICESCR reflects statements of ‘principles’ and ‘objectives’, rather than justiciable legal obligations is difficult to justify. As the CESCR concluded in 1997, the above position of the UK that provisions of the Covenant, with certain minor exceptions, constitute principles and programmatic objectives rather than legal obligations, and that consequently the provisions of the Covenant cannot be given direct legislative effect is ‘disturbing’. The Committee suggested that the UK takes ‘appropriate steps’ to introduce into legislation the ICESCR, so that the rights covered by the Covenant may be fully implemented. The Committee noted that the UK had through the Human Rights Act 1998 (HRA) taken such action with respect to the ECHR and expressed the view that it would be appropriate to give similar due regard to the obligations of the Covenant. In the absence of a compelling justification for this difference in the methods used to apply civil and political rights and those used to apply ESC rights, the conclusion of the CESCR is defensible given that the two sets of rights (those protected in the ECHR and the ICCPR on the one hand, and those protected in the European Social Charters and the ICESCR on the other hand) are interdependent. It is also important to emphasise that the HRA provides the potential to provide indirect or collateral benefits to ESC rights or interests through civil and political rights protected in the ECHR in accordance with positive obligations engendered by

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54 See above n 52, para 9. See also A Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’ (1978) 9 Netherlands Year Book of International Law 69 at 103 stating that: ‘What are laid down in provisions such as Articles 6, 11 and 13 of the ICESCR are consequently not rights of individuals, but broadly formulated programmes for government policies in the economic, social and cultural fields.’
56 Ibid, para 21.
57 For an introduction to the HRA, see H Fenwick, Civil Liberties and Human Rights (Abingdon, Routledge-Cavendish, 4th edn, 2007), 157–298.
58 UN Doc E/C.12/1/Add.19, above n 55, para 21.
Articles 3 and 8 ECHR, but this has not been fully explored. This is because the ECHR does not protect economic and social rights, explicitly (with the exception of the right to education [and the right to property]) or impliedly.

[4.20] Notwithstanding the above comments of the CESCR, the UK has not changed its position regarding the domestic implementation of the Covenant. Thus, in terms of their legal status, ESC rights in the UK legal system have been, and currently seem destined to remain, ‘the poor cousins of . . . civil and political rights’. Unsurprisingly, in 2002 the CESCR deeply regretted that, although the UK had adopted a certain number of laws in the area of ESC rights, the Covenant had still not been incorporated in the domestic legal order and that there is no intention by the state party to do so in the near future. The Committee reiterated its concern about the state party’s position that the provisions of the Covenant, with minor exceptions, constituted principles and programmatic objectives rather than legal obligations that are justiciable, and that consequently they cannot be given direct legislative effect. The Committee concluded by stating that:

Affirming the principle of the interdependence and indivisibility of all human rights, and that all economic, social and cultural rights are justiciable, the Committee . . . strongly recommends that the State party re-examine the matter of incorporation of the International Covenant on Economic, Social and Cultural Rights in domestic law. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.

61 C Warbrick, ‘Economic and Social Interests and the European Convention on Human Rights’, in M Baderin and R McCorquodale (eds), Economic, Social and Cultural Rights in Action (Oxford University Press, 2007), 241–56. See also Anna Pancenko v Latvia, App No 40772/98, Admissibility Decision of 28 October 1999. The applicant, complained before the ECtHR about her socioeconomic problems in Latvia, including her indebtedness for communal charges in respect of her flat, unemployment, absence of free medical assistance or financial support from the state to ensure proper subsistence. The Court recalled ‘that the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living’.
62 See the UK Parliament’s Joint Committee on Human Rights, The International Covenant on Economic, Social and Cultural Rights, 21st Report 2003-04, HL Paper 183/HC 1188, para 163, available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/18302.htm, noting that: ‘In a culture of respect for human rights, the economic, social and cultural rights embodied in the International Covenant should not be regarded as the poor cousins of the civil and political rights incorporated into UK law by the Human Rights Act . . . the two sets of rights are not distinct and should not be divided.’
64 Ibid.
65 UN Doc E/C.12/1/Add.79, para 24.
(ii) Why Has the UK not Incorporated ESC Rights Protected in the ICESCR?

[4.21] It is clear from the foregoing that the UK has not incorporated the ICESCR in the UK’s domestic law despite the strong recommendation of the CESCR cited above. The UK Government responded to the Committee’s observations above by stating that it is ‘not convinced’ that it can incorporate the rights contained in the ICESCR in a meaningful way within the British legal system. Why is the UK not convinced? The Government has advanced four main reasons.

[4.22] Firstly, the Government has argued that some of the rights contained in the Covenant are not clearly defined, the main example is the right to an adequate standard of living (Article 11). According to the Government, it is unclear how domestic courts would fairly assess claims brought under this article and similarly ambiguous articles since the standards are likely to vary between individuals. For example, it is not clear how courts could judge whether there has been an absence of general progress in a particular case where an individual claimed that he/she had not fully enjoyed the right to the highest attainable standard of physical and mental health (Article 12). Is the ‘ambiguous’ nature of some articles in the ICESCR a sufficient reason for their non-incorporation in domestic law? Cannot these rights be applied in concrete cases? It is my view that one of the benefits of domestic legal protection (incorporation) of ESC rights is to clarify the content of these rights in a specific national context, while increasing the accountability of states and relevant NSAs. This could consolidate efforts to provide effective remedies for violations of these rights. Indeed, as shown in chapter 8, the right to the highest attainable standard of physical and mental health can be incorporated in national law and enforced at a domestic level. ESC rights as protected in the ICESCR are not more imprecise than civil and political rights protected in international human rights treaties such as the ICCPR and ECHR. A number of civil and political rights, including freedom from torture, and inhuman and degrading treatment, have benefited from domestic legal protection and judicial development at a national level. It is likely that even ESC rights could be developed in a similar way.

[4.23] Secondly, the Government has stated that it is also constrained by limited budgetary resources in progressively realising the rights contained in the Covenant thus a judicial decision that the Government should have made greater progress in one area, for example health, would imply a reduction in the investment into another area, for example education.

In other words, according to the claims brought in court, the Government would have to continue to shift its priorities and investments. This is a restatement of the traditional critique of ESC rights as too institutionally complex to implement.

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67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
judges are said to lack the *legitimacy* and/or the *competence* to deal with the rights in the ICESCR,\(^73\) and thus such decisions, it is argued, should remain the exclusive domain of the executive and legislature. The critique, simply put, is how can courts, without a bureaucracy of policy expertise, create government prerogatives or oversee policies involving complex issues such as social security, adequate housing, education or healthcare?\(^74\) This objection is overstated because the judiciary can still play the role of making the state accountable by, for example, requiring the state to explain whether resources have been spent the way they should have (in accordance with the law) and whether particular groups or individuals have been excluded. In this way the judiciary can legitimately remind the state that it is under a duty to respect, protect or fulfil ESC rights within the available resources in a specific domestic context.

**[4.24]** Thirdly, the Government has stated that the progressive realisation of the rights contained in the Covenant can be achieved in different ways depending on the political views of the Parliamentary majority supporting the Government.\(^75\)

According to the Government, some people may judge that the realisation of these rights requires ‘targeted interventionist policies’, while others may judge that the best chances for improvement come from ‘de-regulating the market and allowing individual economic initiative’ to achieve the standards set out in the ICESCR.\(^76\) The Government argued that, for example, for some people, the right to adequate housing (Article 11) may mean being provided with a shelter when they cannot provide for themselves, while for other people it means the Government providing an economic environment in which they can earn sufficient income to be able to afford accommodation.\(^77\) It, then, concluded that ‘[I]t would be inappropriate for courts to have the last word in what is ultimately governmental economic policy’. It is true that it is not for the courts to determine government economic policy, and indeed the ICESCR, like other human rights treaties, does not require any particular economic policy. Every state has a margin of discretion in deciding the appropriate economic policy. Nonetheless, within the limits of the appropriate exercise of their functions of judicial review, courts should take account of ESC rights, as protected in the ICESCR and other human rights treaties, where this is necessary to ensure that the state’s conduct is consistent with its international human rights obligations.\(^78\)

**[4.25]** Finally, the Government has asserted that individuals in the UK are already empowered under a variety of legislation, regulations and administrative rules to challenge Government policy in the area of ESC rights.\(^79\) For examples, individuals can petition their local Member of Parliament or file a complaint against a public authority for failing in its duties—support and advice is available through the equality bodies (the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission), the Citizens’ Advice Bureau and a range of


\(^74\) Boon, above n 72, 472.

\(^75\) 5th periodic report, above n 66, para 74.

\(^76\) *Ibid*.

\(^77\) *Ibid*.

\(^78\) CESCR, General Comment 9, above n 15, para 14.

\(^79\) 5th periodic report, above n 66, para 74.
NGOs. While some aspects of ESC rights could be enforced under the existing framework, it is not sufficiently comprehensive to cover all rights protected under the Covenant. Even before the incorporation of most of the ECHR into UK law, some rights could be enforced but this did not stop the Government from incorporating most of the ECHR. It is, therefore, still useful to re-examine the matter of incorporation of the ICESCR into domestic law.

[4.26] The effect of the view that unincorporated treaties cannot give rights or obligations in the UK is that claims based on the ICESCR are non-justiciable by the courts, i.e., not subject to legal enforcement unless given effect by legislation. As a result, individuals and groups that are victims of violation of Covenant rights, which are not incorporated into domestic law or indirectly protected by other treaties, are unable to challenge such violations before domestic courts. For example, the UK has failed to incorporate the right to strike as protected by Article 8 of the ICESCR into domestic law. In this respect, the CESCR has expressly stated:

The Committee considers that failure to incorporate the right to strike into domestic law constitutes a breach of article 8 of the Covenant. The Committee considers that the common law approach recognising only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of an employment contract. The Committee is also of the view that the legally accepted practice of allowing employers to differentiate between union and non-union members by giving pay raises to employees who do not join a union is incompatible with article 8 of the Covenant.

[4.27] Since the poor and groups frequently subject to discrimination such as racial minorities and women have often been victims of violations of ESC rights, non-justiciability or non-incorporation of such rights in a state’s domestic law tends to reinforce the marginalisation of vulnerable groups in society, including women. In 2008, for example, the CEDAW Committee noted that

women of different ethnic and minority communities, including traveller communities, continue to suffer from multiple discrimination, particularly in access to education, employment, and health care.

The Committee also noted that ethnic and minority women are underrepresented in all areas of the labour market, particularly in senior or decision-making positions (e.g., despite recent improvements, the proportions of women and ethnic minorities in the judiciary remain at low levels), have higher rates of unemployment and face a greater pay gap in their hourly earnings compared to men. It further noted ‘the lack

80 Ibid.
82 CEDAW Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN Doc CEDAW/C/GBR/CO/6 (18 July 2008), para 45.
84 Ibid.
of positive media portrayals of ethnic and minority women, elderly women and women with disabilities’. With respect to the right to work, the Committee was concerned about the persistence of occupational segregation between women and men in the labour market and the continuing pay gap, one of the highest in Europe, where current figures showed that the average hourly earnings of full-time women employees amount to approximately 83 per cent of men’s earnings. Therefore, this indicates that there are some issues involving ESC rights which require attention. In this respect it is especially important to avoid any a priori assumption that the rights under the ICESCR should be considered to be objectives that cannot be given direct legal effect in domestic law. In fact, many of them are stated in terms that are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed as capable of direct legislative effect.

B. South Africa

(i) The ICESCR in South Africa

[4.28] The Republic of South Africa signed the ICESCR on 3 October 1994 but has not yet ratified it (see Appendix C). It is also a state party to other international human rights treaties (protecting some ESC rights) including the ICCPR, CERD, CEDAW, CAT, CRC and CRC-SC. At a regional level, South Africa is a state party to, inter alia, the ACHPR, which protects some ESC rights. The ratification of the ICESCR and its incorporation into South African domestic law would strengthen the efforts of South Africa to meet its obligations in guaranteeing ESC rights under its jurisdiction. As shown below, the Constitution of the Republic of South Africa (Act 108 of 1996), was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. It has been described by Sunstein as ‘the most admirable constitution in the history of the world’. It recognises the importance of international law in interpreting and applying domestic law, and protects some aspects of ESC rights protected under the ICESCR.

85 Ibid, para 27.
86 Ibid, para 39.
87 See UN Doc HRI/GEN/4/Rev.4 (15 May 2004), above n 42, 163.
89 CRC, Concluding Observations: South Africa, UN Doc CRC/C/15/Add.122, (23 February 2000), para 11 ‘The Committee notes that the State party has not yet ratified the International Covenant on Economic, Social and Cultural Rights. The Committee is of the opinion that the ratification of this international human rights instrument would strengthen the efforts of the State party to meet its obligations in guaranteeing the rights of all children under its jurisdiction. The Committee encourages the State party to reinforce its efforts to finalize the ratification of this instrument.’
90 CR Sunstein, Designing Democracy: What Constitutions Do (New York, Oxford University Press, 2001), 261. One of the main sources of admiration is the inclusion of a range of justiciable social and economic rights together with civil and political rights in the Constitution, thus recognising the indivisibility of human rights.
Article 231(4) of the South African Constitution provides that:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Article 232 states that ‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’ The Constitution further provides in Article 233 that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

In S v Makwanyane and Another in the context of section 35(1) of the interim Constitution, which required courts (when interpreting the Constitution) to have regard to public international law applicable to the protection of rights entrenched in the Constitution, Chaskalson P stated:

public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

The relevance of international law in interpreting a Bill of Rights was explained by the High Court of South Africa, Witwatersrand Local Division, in September 2001 in the Residents of Bon Vista Mansions v Southern Metropolitan Local Council Case No 01/12312 2002 (6) BCLR 625. In this case an urgent application for interim relief was filed by the residents of a block of flats whose water supply was allegedly unlawfully discontinued. Bundler AJ granted an order for interim relief, to restore the water supply, pending the final determination of the application. In furnishing reasons for this order the Judge stated that he relied on international law to interpret the Bill of Rights

where the Constitution uses language similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this. (paragraph 15)

The Court quoted General Comment 12 of the CESCR, on the Right to Food (this

92 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
93 S 35(1) of the interim Constitution provided: ‘In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.’
94 See above n 92, para 35 (footnotes omitted).
case pre-dated the adoption of UN General Comment 15 on the Right to Water), in explaining the duty to respect ‘rights of access’; and the Court commented that ‘General Comments have authoritative status under international law’ (paragraphs 17–8). As already noted, although General Comments are not legally binding under international law, they represent expert interpretation by relevant treaty monitoring bodies. Therefore, it is legitimate to take General Comments into account in interpreting and applying relevant domestic law.

[4.32] In accordance with the above approach, in the Government of the Republic of South Africa and Others v Grootboom and Others95 the South African Constitutional Court cited paragraph 10 of General Comment 3 of the CESCR in an attempt to identify the content of a minimum core obligation of the right to adequate housing. Paragraph 9 of General Comment 3 was also quoted in full to explain the Committee’s analysis of the progressive realisation of the right to housing. Similarly in Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), in an attempt to define the ‘minimum core’ of section 27(1) of the South African Constitution, the Constitutional Court made reference to the concept ‘minimum core’ as developed by the CESCR in General Comment 3. The Court quoted paragraph 10 of General Comment 3 to explain what is meant with the term ‘minimum core’ and to apply this concept to section 27(1) of the Constitution (paragraph 26). This approach is commendable since it gives effect to the view that irrespective of the system through which international law is incorporated in the domestic legal order—monism or dualism—following ratification of an international instrument, the state party is under an obligation to comply with it and to give it full effect in the domestic legal order. Compliance necessarily entails taking into account the views of the relevant treaty monitoring bodies.

[4.33] However, although the Court purported to follow international law by referring to General Comment 3, the approach it adopted differed significantly from that which had been developed in international law. As noted in chapter 2, while the idea of the minimum core obligations in international law requires a state to

\[
\text{demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations}^{96}
\]

to the Court, the real question in terms of the South African Constitution is ‘whether the measures taken by the state to realise the right afforded by section 26


96 CESCR, General Comment 3, para 10.
are reasonable’.

Thus, the Court avoided engaging with the identification of the core content of the right in question (access to adequate housing). In summary, the concept of reasonableness adopted by the Court provides far less clarity about the core content of the right.

(ii) ESC Rights Protected Under the South African Constitution

ESC rights protected under the South African Constitution 1996 include the rights of access to adequate housing (section 26); access to healthcare, food, water and social security (section 27); children’s rights to basic nutrition, shelter, basic healthcare services and social services (section 28); right to education (section 29); rights to take part in cultural life (sections 30–1); rights of prisoners to ‘adequate accommodation, nutrition, reading material and medical treatment’ (section 35); a number of labour rights including the right to form trade unions and the right to strike (section 23); a right to an environment that is not harmful to health or well-being (section 24); and the right to property (section 25). It is useful to note some of these sections below.

**Constitution of the Republic of South Africa**  
**Act 108 of 1996**

**Housing**

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

**Health care, food, water and social security**

27. (1) Everyone has the right to have access to

a. health care services, including reproductive health care;

b. sufficient food and water; and

c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

**Children**

28. (1) Every child has the right

a. . . .

b. to family care or parental care, or to appropriate alternative care when removed from the family environment;

c. to basic nutrition, shelter, basic health care services and social services;

97 Grootboom, above n 95, para 33.

d. to be protected from maltreatment, neglect, abuse or degradation;

e. to be protected from exploitative labour practices;

f. not to be required or permitted to perform work or provide services that
   (i) are inappropriate for a person of that child’s age; or
   (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

(3) In this section “child” means a person under the age of 18 years.

Education

29. (1) Everyone has the right
   a. to a basic education, including adult basic education; and
   b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

   (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
   a. equity;
   b. practicability; and
   c. the need to redress the results of past racially discriminatory laws and practices.

   (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
   a. do not discriminate on the basis of race;
   b. are registered with the state; and
   c. maintain standards that are not inferior to standards at comparable public educational institutions.

   (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
   a. to enjoy their culture, practise their religion and use their language; and
   b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

   (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Arrested, detained and accused persons

35. (2) (e) Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.99

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Section 7(2) of the Constitution requires the state ‘to respect, protect, promote and fulfil the rights in the Bill of Rights’ and the courts are constitutionally bound to ensure that these rights are protected and fulfilled. Importantly, the relevant rights accrue to ‘everyone’ and this has been understood to include non-nationals resident in South Africa. In *Khosa v Minister of Social Development*100 citizens of Mozambique who had permanent resident status in South Africa challenged certain provisions of legislation, the Social Assistance Act 59 of 1992, that limited entitlement to social grants for the aged to South African citizens, and prevented children of non-South African citizens in the same position as the applicants from claiming any of the childcare grants available to South African children (regardless of the citizenship status of the children themselves). The applicants alleged that the exclusions violated the constitutional obligation to provide access to social security, infringed their constitutional rights to life and dignity, limited their right to equality and amounted to unfair discrimination; and infringed the rights of their children. Justice Yvonne Mokgoro, writing for the majority,101 held that the Constitution protected ‘everyone’ with the right to have access to social security and that this included those residing legally in the country. The exclusion of permanent residents from the legislative scheme amounted to unfair discrimination and was unreasonable. The importance of providing access to social assistance to all who live permanently in South Africa, as well as the impact upon life and dignity that a denial of such access would have, far outweighed the financial and immigration considerations on which the state relied.

While Mokgoro J accepted the concern that ‘non-citizens may become a financial burden on the country’ as a legitimate one,102 on the evidence in this case she found that the cost would not place an additional burden on the state and, indeed, would not constitute ‘a huge cost’ but ‘only a small proportion of the total cost [of the social security budget].’103 The Court characterised permanent residents as ‘part of a vulnerable group in society’.104 It concluded that the social security programmes enjoyed by South African citizens had ‘a serious impact on [their] dignity’ and, accordingly, found that the relevant legislation violated both the right to equality and the right to social security of permanent residents.105

Although the majority decision in *Khosa* is to be welcomed, at least in so far as it appeared to be unfettered by the reasonableness standard that had dominated the three earlier cases brought under sections 26 and 27 of the South African Constitution,106 the Court’s reluctance to extend social security to temporary residents does

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100 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).
104 *Ibid*, para 74.
105 *Ibid*, para 76. In a dissenting judgment Ngcobo J with Madala J concurring, found that the relevant legislation (s 3(c) of the Social Assistance Act 59 of 1992) is a reasonable limitation of the right of access to social security. The state has insufficient resources to provide for everyone within its borders and is entitled to prioritise its citizens. The Act has the legitimate purpose of encouraging self-sufficiency in immigrants. Furthermore, it is important that the provision of these benefits does not create an incentive to immigrate to South Africa.
106 The three cases were *Soobramoney*, below n 119; *Grootboom* above n 95; and *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), (hereinafter TAC).
not appear to be consistent with international law, in particular with the ICESCR. As noted in chapter 2, Article 2(2) of the ICESCR prohibits discrimination on several grounds, including nationality. With respect to social security, the CESCR has noted that

where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.107

The reference to ‘migrant workers’ above is not qualified by the duration of their stay in a receiving state and, thus, appears to be wide enough to include both temporary and permanent non-nationals resident in a given state. Mokgoro J noted that both permanent residents and citizens contribute to the welfare system through the payment of taxes, and the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.108 The same reasoning, however, could be applied to temporary residents who have paid taxes to justify their right to social security benefits.

[4.38] It has to be noted that despite the constitutional protection of ESC rights afforded by the South African Constitution, the language used in most sections offers limited protection compared to the standards under the ICESCR. With respect to housing, for example, which has been a central issue before the South African Constitutional Court,109 the following differences can be pointed out: (a) the Covenant provides for a right to adequate housing, while section 26 of the Constitution provides for the right of access to adequate housing; (b) the Covenant obliges states parties to take appropriate steps which must include legislation, while the Constitution obliges the South African state to take reasonable legislative and other measures.110 The same applies to healthcare, food, water and social security under section 27. Significantly, the right of access to is not the same as the right to. ‘Access to’ primarily implies that one can only claim access (without discrimination) to what is already available.111 On the other hand the ‘right to’ (as used, for example, in section 28 above regarding children’s rights) implies an entitlement to the protected right even when it may not be available, i.e. a state would be obliged to make it available (where this is beyond the state’s available resources, a state would need actively to seek international assistance and co-operation). It is, therefore, not surprising that the CRC Committee welcomed section 28 above (‘right to’), noting that the

107 CESCR, General Comment 19, para 36.
108 Khosa, above n 75, para 100, citing Rosberg, ‘The Protection of Aliens from Discriminatory Treatment by the National Government’ (1977) Supreme Court Review 275 at 311.
110 Groothoom, above n 95, para 28.
111 It may be possible to interpret ‘access to’ widely. See eg TAC above n 106, para 125 (discussed in chapter 8) where the Court observed that the ‘increases in the budget . . . will facilitate [the access to Nevirapine for the HIV-positive mothers and their newborn babies]’.
Committee expresses appreciation for the efforts made by the State party in the area of legal reform. In this regard, the Committee welcomes the new Constitution (1996), in particular article [section] 28, which guarantees children a number of specific rights and freedoms also provided for under the Convention. \[112\]

[4.39] Given the constitutional protection of ESC rights in the Bill of Rights, the South African Constitutional Court has noted remarkably that:

The question is therefore not whether socio-economic rights are justiciable under our [South African] Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis. \[113\]

Although the South African Constitutional Court has examined important cases involving ESC rights, the judgments have not yet properly defined the scope and content of children’s ESC rights protected in the Bill of Rights. \[114\] In addition, in some cases, the Constitutional Court has been reluctant to define the scope of ESC rights, and to impose additional policy burdens on the government or exercise supervision over the executive. \[115\] This was clear in the three earlier cases—Soobramoney, Grootboom and TAC. \[116\] Indeed in TAC, in rejecting some form of supervisory jurisdiction, the Court stated that there was no reason to believe that the government could not execute the court order. \[117\] However, more than two years after the court order, there had not been full implementation by any of the relevant government agencies suggesting that in some cases court supervision might be necessary at least to confront administrative inefficiency and inertia. \[118\]

[4.40] The problem with the limited wording in sections 26 and 27 of the Constitution was encountered by the South African Court in Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal. \[119\] The case involved a 41-year-old unemployed diabetic who suffered from chronic renal failure, necessitating regular renal dialysis. \[120\] His condition was irreversible but could be prolonged by means of regular renal dialysis. \[121\] He had exhausted his personal funds and requested treatment at the state hospital in Durban. \[122\] However, the hospital was unable to provide this treatment because of the limited facilities that were available for kidney dialysis in the public sector. \[123\] Under the guidelines developed by the hospital, dialysis machines were limited to patients eligible for kidney transplant, but Mr Soobramoney was ineligible for a transplant.

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115 Davis, above n 98, at 15.
117 See above n 106.
118 Davis, above n 106, para 129.
119 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) [Soobramoney], further considered in chapter 8.
120 Soobramoney, 1997 (12) BCLR 1696.
121 Ibid.
122 Ibid, 1699–70.
123 Ibid, 1699.
because of his complicated medical history. The applicant claimed before the South African Constitutional Court, which is the highest court in South Africa in all constitutional matters, violations of rights to life, health and emergency medical treatment.

[4.41] The Court, inter alia, rejected the claim that the positive right to health under sections 27(1) and (2) required the state to make additional resources available for dialysis treatment, noting that the regional health budget was already overspent, and that a dramatic increase in the health budget would be required to accommodate all similarly situated patients in South Africa, which would imperil other state social obligations. Madala J in his concurring opinion framed the issue before the court as ‘whether everybody has the right of access to kidney dialysis machines even where resources are scarce or limited’. He concluded that no such right existed where the treatment would not cure the patient, but ‘merely’ prolong his life, and suggested that a ‘massive education campaign’ about kidney disease might be warranted. The majority opinion did not suggest that the state should do anything further (including through international assistance and co-operation) to respond to the epidemic of kidney disease. This approach would be necessary to enhance the realisation of ESC rights. For example, the CRC Committee has encouraged South Africa to prioritise budgetary allocations and distributions to ensure implementation of the economic, social and cultural rights of children, to the maximum extent of available resources and, where needed, within the framework of international cooperation.

The case illustrates that healthcare needs must be seen in the light of the population at large and the demands on other services. As long as the relevant guidelines are reasonable, non-discriminatory, made in good faith, and applied fairly and rationally, the Constitutional Court will uphold them.

[4.42] It is important to note that in the early cases the South African Constitutional Court placed emphasis on the availability of resources. Justice Chaskalson observed that

the obligations imposed on the State by ss 26 and 27 are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources.

Similarly, in *Grootboom*, Justice Yacoob stated ‘s 26 does not expect more of the State than is achievable within its available resources’. It should be noted, however, that

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125 South African Constitution, s 11 (‘Everyone has the right to life’).
126 *Ibid*, ss 27(1) and (2).
127 *Ibid*, s 27(3).
128 *Soobramoney*, 1997 (12) BCLR 1704.
133 *Ibid*.
135 *Soobramoney*, above n 119, para 11.
136 *Grootboom*, above n 95, para 46.
the ‘availability of resources’, although an important qualifier to the rights to have access to adequate housing, healthcare services, sufficient food and water and social security under sections 26 and 27, does not alter the immediacy of the obligation to ‘take reasonable legislative and other measures’ to achieve the ‘progressive realisation’ of these rights. Similarly, resource constraints alone should not justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for the state to ensure the widest possible enjoyment of the rights protected in sections 26 and 27 under the prevailing circumstances. Even in times of severe resource constraints, the state must protect the most disadvantaged and marginalised members or groups by adopting relatively low-cost, targeted programmes.

C. Uganda

(i) The ICESCR in Uganda

[4.43] The supreme law of Uganda is the Constitution of the Republic of Uganda 1995 (as revised in 2006) and any other law is considered to be void if inconsistent with the Constitution (Article 2, Ugandan Constitution, 1995). As shown below, the Constitution defines the status of international treaties, including the ICESCR, in domestic law. Uganda ratified the ICESCR in 1987 without any reservation or declaration (Appendices C and H). Uganda’s 1995 Constitution requires Uganda to respect and comply with international law, agreements, treaties and convention obligations. In addition to the ICESCR, Uganda has ratified, without reservations, a number of international human rights treaties including, the ICCPR and its First Optional Protocol, the CEDAW, the CRC, the CAT, and the Convention on the Rights of Migrant Workers and the Members of their Families. At a regional level, Uganda has ratified the ACHPR and its Protocol establishing the African Court on Human and Peoples’ Rights, the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, and the African Charter on the Rights and Welfare of the Child. These instruments provide a framework for legislation and policy at the national level to respect, protect and fulfil ESC rights for those within Uganda’s jurisdiction.

[4.44] Despite such impressive ratifications, there are still several problems in terms of compliance with Uganda’s human rights obligations under the foregoing international instruments. Two problems are noted here. First, there is limited political will to comply with international human rights obligations with respect to ESC rights, including the failure to submit timely reports, and to incorporate international

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137 Uganda Constitution (1995), Art 286, 52(1) (h), and para XXVIII of National Objectives.
139 OAU Doc CAB/LEG/67.1.
human rights treaties on ESC rights into domestic law and policies. It is, therefore, not very surprising that by August 2008, more than 20 years after ratifying the ICESCR, Uganda had not submitted a single report to the CESCR despite having submitted some reports to other UN treaty monitoring bodies, in particular the CAT, CEDAW, CERD and CRC committees. Various excuses have been given for this delay including the limited capacity to draft the report and disagreements as to which government ministry is responsible for drafting the report. Second, Uganda as a highly indebted poor country has had a high debt burden. Over the years the priority accorded to payment of Uganda’s high debt has undermined investment in the progressive realisation of ESC rights. Although Uganda’s external debt has declined over the years, partly as a result of debt relief, it still impacts upon the state’s available resources to invest in ESC rights. It is certainly the case that the ICESCR has had a very low profile within Ugandan law and has generated little domestic discussion.

[4.45] Regarding the status of international treaties into Uganda’s domestic law, the position is as follows:

**The Constitution of the Republic of Uganda, 1995**

**International Agreements, Treaties and Conventions**

Article 286 where—
(a) any treaty, agreement or convention with any country treaties and or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or
(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it.

**Uganda Human Rights Commission**

51 (1) There shall be a Commission called the Uganda Human Rights Commission.

52(1) (h) The Commission shall have the following functions to monitor the Government’s compliance with international treaty and convention obligations on human rights.

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146 International Monetary Fund (IMF) and the International Development Association (IDA), Uganda: Joint IMF/World Bank Debt Sustainability Analysis, 30 November 2007, available at www.imf.org/external/pubs/ft/dsa/pdf/dsacr0804.pdf. Uganda’s external debt was US$1.5 billion (13 per cent of GDP) at end-2006/07, compared with US$4.5 billion (47 per cent of GDP) a year earlier.
148 IMF and IDA, above n 146.
National Objectives and Directive Principles of State Policy

XXVIII Foreign Policy Objectives.

(i) The foreign policy of Uganda shall be based on the principles of—
(a) . . .
(b) respect for international law and treaty obligations; . . .

[4.46] Uganda adopted the so-called ‘dualist’ approach to international treaties. Under the 1995 Constitution, the Ugandan president or a person authorised by the president is empowered to make treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter.

The Constitution further provides that any treaty, agreement or convention with any country or international organisation to which Uganda was a party before the coming into force of the 1995 Constitution (such as the ICESCR) shall continue to be binding on Uganda. However, as Parliament is the only national institution of Uganda that can make domestic law, treaties have to be ratified, or incorporated, through legislation by Parliament before courts can give them full effect. This means that for a ‘ratified instrument to become municipal law, it is debated by Parliament, a bill is passed and a law is then made’. Therefore, the official Ugandan position is that the various human rights instruments [ratified by Uganda including the ICESCR] are not directly enforceable by the courts or other administrative authorities. They first have to be transferred into internal laws or administrative arrangements.

It follows that only treaties negotiated by the Executive and ratified by Parliament become part of Uganda’s domestic laws and stand on a par with other Acts of Parliament.

[4.47] As yet, Parliament has not incorporated any human rights treaty as part of domestic law in Uganda. The consequence is that claims based on unincorporated treaties are considered non-justiciable by the Ugandan courts. In this regard, the Uganda Constitutional Court has explicitly stated in the Ssemwogerere case that:

The International Human Rights Conventions mentioned in the petition [in this case referring to the ICCPR and the African Charter on Human and Peoples’ Rights] are not part of

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149 Under this approach, a treaty signed and ratified by the executive is considered as binding to the state at the international level but the rights and obligations created by the treaty have no effect in municipal law and individuals cannot derive rights and obligations, unless legislation is in force to give effect to treaties. See Lord Oliver in Maclaine Watson v Dept. of Trade, [1989] 3 All ER 523 at 544–5, HL; A Aust, Modern Treaty Law and Practice (Cambridge University Press, 2nd edn, 2007)m 187; JG Starke, Introduction to International Law (London, Butterworths, 1989), ch 4.
150 Ibid, Art 123(1) and (2).
152 Ibid, para 40.
153 Ibid, para 41.
the Constitution of the Republic of Uganda. Therefore, a provision of an Act of Parliament cannot be interpreted against them. This issue [of the domestic applicability of such treaties to Uganda] was therefore, misconceived.156

[4.48] The view expressed above would in principle equally apply to the ICESCR in Uganda. It is regrettable that the Ugandan Constitutional Court has taken such a narrow view in relation to international human rights treaties to which Uganda is a state party. This view suggests that individuals within Uganda’s territory may not generally invoke the rights guaranteed under such human rights treaties before the domestic courts since courts can not give them direct effect. Unlike the Uganda Human Rights Commission (UHRC),157 Ugandan domestic courts have so far not made any explicit reference to the ICESCR in any of their judgments, even as an aid to interpretation. The effect is that the Covenant enjoys a very low profile.

[4.49] Nonetheless, it is desirable that where Parliament has not incorporated into domestic law a human rights treaty to which Uganda is a party, it may still be referred to, and followed at least as an aid to interpretation of domestic law—whether constitutional, statute or common law—if uncertain, ambiguous or incomplete.158 Thus, Courts should construe the chapter on human rights under the Constitution not in a narrow way (that excludes international human rights treaties to which Uganda is a State party) but broadly and purposively so as to give effect to Uganda’s international human rights obligations and the effective protection and promotion of the indivisible and interdependent nature of all human rights. This may be achieved by applying international human rights jurisprudence (including the General Comments of the CESCRL to fill the gaps in domestic law and/or as an interpretative principle to assist in the ascertainment of the meaning of the rights guaranteed in the chapter on human rights under the Constitution.160 It is interesting to note that in January 2009 Uganda’s Supreme Court made reference to the UDHR and the ICCPR when deciding on the constituionality of the death penalty in Uganda (see Attorney General v Susan Kigula & 417 others, Constitutional Appeal No 03 of 2006). It would appear, however, that if applying a ‘dualist’ approach, an international treaty cannot prevail over a clearly worded domestic statute that contradicts it.161 But this was not the position in the case of Ssemwogerere considered above.

157 The UHRC frequently refers to international human rights instruments in its application of human rights in the Constitution. See eg Sam Muvonge v Capt Sulaiti Mwesigye and Others Complaint, No 202/1998 where the Commission applied the definition of ‘torture’ in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984)], entered into force 26 June 1987.
160 M Kirby, ‘Domestic Implementation of International Human Rights Norms’ (1999) 5 Australian Journal of Human Rights 109 at 125; and Matia v Uganda, Appeal to the High Court of Uganda, Criminal Revision Cause No MSK-00-CR-0005 of 1999 (30 June 1999), Commonwealth Human Rights Law Digest (CHRLD) 3 at 66. The High Court considered the decision of the HRC in Lubuto v Zambia, Communication No 390/1990 UN Doc CCPR/C/55/D/390/1990/Rev.1 (1995), in determining which factors should be considered in Uganda to establish whether a delay in a criminal trial is unreasonable (the period between laying of the charge and the completion of proceedings or up to the time when the issue of delay is raised).
161 See R v Secretary of State for the Home Department, Ex p Brind, [1991] 1 AC 696, HL, Lord Bridge
(ii) ESC Rights Protected Under Uganda’s Constitution

[4.50] The Constitution of the Republic of Uganda is grounded in basic human rights principles, including non-discrimination and equality for everyone, with specific provisions to ensure the human rights of vulnerable groups, including women, persons with disabilities, children and minorities. There are two main mechanisms of human rights monitoring and accountability: (i) via the courts (especially the High Court, Court of Appeal/Constitutional Court and the Supreme Court); and (ii) via the Uganda Human Rights Commission.

[4.51] It is important to note that the enactment of Uganda’s 1995 Constitution was preceded by the establishment of a Constitutional Commission in 1988. The Commission reaffirmed the need to ensure that the Bill of Rights section of the Constitution gives effect to the basic needs and rights of the people. However, the Commission considered that not all rights were amenable to enforcement or judicial review in the same way. This gave rise to the idea that some rights should be included in the Constitution as unenforceable and non-binding principles to guide the implementation of the Constitution because, according to the Commission, ‘these rights cannot all be realised and given full effect immediately’. Hence, Uganda’s 1995 Constitution protects human rights in two sections of the Constitution, namely a (justiciable) chapter on ‘human rights and freedoms’—which contains mainly civil and political rights; and a section (perceived as non-justiciable) entitled ‘National Objectives and Directive Principles of State Policy’—where the majority of ESC rights are confined. While Uganda’s 1995 Constitution breaks new ground in several different respects, in so far as the protection and enhancement of ESC rights is concerned, it does not go very far. The only provisions found in the Bill of Rights relating to ESC rights under Uganda’s 1995 Constitution and thus considered enforceable are limited to the protection from forced labour; protection from deprivation of property; a general right to education; a right to a healthy environment; a lukewarm articulation of the right to work; and a broad right to culture. The Constitution makes

and Lord Ackner. In general the UK cases are persuasive in the Ugandan courts because the Ugandan ‘judiciary administers a system of law which in Uganda includes the Constitution, statutes enacted by Parliament, common-law principles derived from English law and customary law’. See UN, Core Document forming part of the Reports of the States Parties: Uganda, UN Doc HRI/CORE/1/Add.69 (7 March 1996), para 23.


168 Ibid, Art 26(1).


170 Ibid, Art 39.

171 Ibid, Art 40.

172 Ibid, Art 37.
special reference to the human rights of vulnerable groups, including minorities,\textsuperscript{173} children,\textsuperscript{174} persons with disabilities\textsuperscript{175} and women.\textsuperscript{176}

[4.52] Some of the relevant Articles protecting ESC rights are set out below to show the scope of the rights protected.

**The Constitution of the Republic of Uganda, 1995**

**Protection from deprivation of property.**

Article 26(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

**Right to education**

Article 30 All persons have a right to education.

**Right to a clean and healthy environment**

Article 39 Every Ugandan has a right to a clean and healthy environment.

**Economic rights**

Article 40(1) Parliament shall enact laws—

(a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) to ensure equal payment for equal work without discrimination; and

(c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

(2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

(3) Every worker has a right—

(a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;

(b) to collective bargaining and representation; and

(c) to withdraw his or her labour according to law.

\textsuperscript{173} *Ibid*, Art 36 reads: ‘Minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes.’


\textsuperscript{175} *Ibid*, Art 35 stating that ‘Persons with disabilities have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure that they realise their full mental and physical potential.’

The employer of every woman worker shall accord her protection during pregnancy and after birth, in accordance with the law.

**Right to culture and similar rights**

Article 37. Every person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

[4.53] Article 20(2) requires that the rights and freedoms of the individual and groups enshrined in the Bill of Rights ‘shall be respected, upheld and promoted by all organs and agencies of Government and by all persons’. It is clear from the list above that the Bill of Rights under Uganda’s 1995 Constitution does not expressly protect many ESC rights protected in the ICESCR, which Uganda ratified on 21 April 1987. The Bill of Rights does not expressly protect the following rights: social security; an adequate standard of living, including adequate food, clothing and housing; and the highest attainable standard of physical and mental health. As noted above, the majority of these rights were confined to a section of the Constitution referred to as the National Objectives and Directive Principles of State Policy that was not subject (at least in the minds of the framers of the Constitution) to legal enforcement.

[4.54] However, the Constitution recognised that

The rights, duties, declarations and guarantees relating to the fundamental and human other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.179

The question here is whether ESC rights that are not expressly protected in the Bill or Rights can be read in this general provision that protects other human rights ‘not specifically mentioned’. Although the scope of this Article has not yet been clearly delineated by Uganda’s Constitutional Court and the Supreme Court, it would appear that the text is wide enough to be interpreted as incorporating into Uganda’s constitutional framework all human rights guaranteed under international human rights treaties to which Uganda is state party, including those guaranteed under the ICESCR. But even if the courts were to take this view, there is still another conceptual question: why should the constitution guarantee expressly civil and political rights and then ‘protect’ most ESC rights implicitly? Undoubtedly, such a position relegates most ESC rights to ‘second-class’ human rights, a position that is incompatible with the principle of the indivisibility and interdependent nature of all human rights.

[4.55] As shown below, it is in the National Objectives that the rights to health, water, natural resources, food security and nutrition are addressed.

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177 See UN, Recent Reporting History, HRI/GEN/4/REV.2 (7 June 2002), 184.
178 See inter alia, paras VI (gender balance); XIII (protection of national resources); XX (medical services); XXI (clean and safe water); and XXII (food security and nutrition) of the National Objectives and Directive Principles of State Policy, 1995 Constitution of the Republic of Uganda.

I. Implementation of Objectives.

(i) The following objectives and principles shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying, or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

XIV. General Social and Economic Objectives.

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that—

(i) all developmental efforts are directed at ensuring the minimum social and cultural well-being of the people; and
(ii) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

The language used in the National Objectives (set out above) does not adequately bind and impose obligations on the state to realise ESC rights. Rather, it is provided that the ‘objectives and principles shall guide (not “bind”) all organs and agencies of the State and that the State obligation is to ‘endeavour to fulfil’ (ie not simply to ‘fulfil’).

[4.56] While such National Objectives and Directive Principles of State Policy may be useful in interpreting the provisions in the chapter on human rights, as noted above, they were regarded generally as being aspirational and not justiciable—not subject to legal adjudication—in the strict sense. In short, the Constitution imposed moral obligations at best, but without provision for an enforcement mechanism. Since it is primarily ESC rights that are in this part of the Constitution, the effect is that courts cannot investigate alleged violations and accordingly courts cannot provide effective remedies in the event of a state’s (or NSA’s) failure to respect, protect and fulfil most ESC rights. As a result, since the enactment of Uganda’s 1995 Constitution, jurisprudence relating to ESC rights in Uganda has been scanty, with the possible exception of the rights protected in the Bill of Rights, notably the right to property, some aspects of the right to education (notably the case of Dimanche Sharon et al v Makerere University discussed in chapter 9), and the right to a healthy environment. Even in these areas, there is no well-developed jurisprudence as to the scope of these rights and no reference to the ICESCR. One way forward is for human rights advocates to bring appropriate cases before the courts (through public interest

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183 Oloka-Onyango, above n 166, 24–30.
litigation) and for the courts to apply the Bill of Rights in the light of the Directive Principles relevant to ESC rights.\textsuperscript{184} Using this approach, advocates for women's rights to equality and non-discrimination have made significant developments against discriminatory laws, some of which affected women's ESC rights.\textsuperscript{185}

\textbf{[4.57]} Following the amendment of Uganda's Constitution in 2006, a new provision, Article 8A, was inserted into the 1995 Constitution. This provision, which refers to the 'National Interest', stipulates as follows:

\begin{quote}
Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.\textsuperscript{186}
\end{quote}

The new provision arguably makes it mandatory (rather than merely obligatory) for the state to take into account all the principles of national interest and common good enshrined in the National Objectives.\textsuperscript{187} Thus, by virtue of Article 8A, it is arguable that

\begin{quote}
the State is now under a legal and mandatory duty to observe, respect, promote and protect all the rights enshrined in the NOPSP [National Objectives and Directive Principles of State Policy] in much the same way as if they had been incorporated in the Bill of Rights of the Constitution.\textsuperscript{188}
\end{quote}

This provides an opportunity to subject the state and NSAs to greater judicial accountability for alleged violations of ESC rights.

\textbf{D. Italy}

\textbf{(i) The ICESCR in Italy}

\textbf{[4.58]} Italy ratified the ICESCR on 15 September 1978 (Appendix C). It has also ratified several principal international human rights treaties notably the ICCPR, CERD, CEDAW, CAT, CRC, CRC-AC and CRC-SC, with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.\textsuperscript{189} At a regional level, Italy is a state party to the European Social Charter (1961),\textsuperscript{190} and the revised European Social Charter (1996).\textsuperscript{191} As noted above,

\begin{quote}
\textsuperscript{185} See Ssenyonjo, above n 176.
\textsuperscript{186} Uganda Constitution (1995, as amended on 15 February 2006), Art 8A. The amendment was introduced by s 4 of Act 11/2005 (emphasis added).
\textsuperscript{188} \textit{Ibid.}
\textsuperscript{189} UN Doc HRI/GEN/4/Rev.4 (15 May 2004), above n 42, 85.
\textsuperscript{190} CETS No 035, entered into force on 26 February 1965. Italy signed the Charter on 18 October 1961, ratified it on 22 October 1965 and the charter entered into force for Italy on 21 November 1965. See Council of Europe, at http://conventions.coe.int/.
\textsuperscript{191} CETS No 163, entered into force on 1 July 1999. Italy signed the revised charter on 5 May 1996; ratified it on 5 July 1999; and the charter entered into force for Italy on 1 September 1999. See Council of Europe, \textit{ibid.}
both charters protect a number of ESC rights. These instruments provide a framework for legislation and policy at the national level to protect vulnerable groups.

[4.59] Generally, international treaties in Italy can be, and in fact have been (eg in the case of the CRC and the ICCPR), applied directly by the Italian courts, and Italy applies the principle of the primacy of international human rights standards over national legislation in case of conflict of law.192 Article 10 of the Constitution of the Italian Republic states: ‘The Italian juridical system conformed itself to the generally recognised norms of the international law.”193 The phrase ‘generally recognised norms of international law’ can be understood to include all aspects of international law, including customary and treaty rules such as the ICESCR.

[4.60] Despite the legal framework in place, the Italian courts have not applied directly most rights under the ICESCR, because they are regarded as being ‘non-justiciable’. Very few court rulings refer explicitly to the Covenant.194 Italy’s position that some ESC rights (such as the right to adequate housing) are not justiciable has been criticised by the CESCR as follows:

13. The Committee is concerned that the State party still considers that some economic, social and cultural rights, including the right to adequate housing, are not justiciable since they entail financial burdens upon the State. In this regard, the Committee notes the scarcity of court decisions in which the Covenant has been invoked.

29. Affirming the principle of the interdependence and indivisibility of all human rights, the Committee encourages the State party to reconsider its position regarding the justiciability of economic, social and cultural rights. Moreover, the Committee considers that the State party remains under an obligation to give full effect to the Covenant in its domestic legal order, providing for judicial and other remedies for violations of all economic, social and cultural rights. In this respect, the Committee draws the attention of the State party to its General Comment No 9 on the domestic application of the Covenant.

30. The Committee recommends that the State party provide appropriate training to the judiciary, prosecutors and other officials responsible for the implementation of the economic, social and cultural rights enshrined in the Covenant to ensure that those rights are consistently enforced in courts of law.195

[4.61] However, some of the judicial decisions of the Supreme Court of Italy have had a positive impact on the progressive enjoyment of ESC rights. For example, in 1996 the Supreme Court of Italy found that corporal punishment as a disciplinary measure in schools can no longer be considered as lawful, noting that:

In any case, . . . the use of violence for educational purposes can no longer be considered lawful. There are two reasons for this: the first is the overriding importance which the legal system attributes to protecting the dignity of the individual. This includes ‘minors’ who now hold rights and are no longer simply objects . . . at the disposal of their parents [or teachers]. The second reason is that, as an educational aim, the harmonious development of a child’s

personality, which ensures that he/she embraces the values of peace, tolerance and co-existence, cannot be achieved by using violent means which contradict these goals.\textsuperscript{196}

Although the Court did not refer to the right to education (as guaranteed under Articles 13 and 14 of the ICESCR), its decision had a positive impact on the right to education. As the UN Committee on the Rights of the child has affirmed, ‘the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline’.\textsuperscript{197} Similarly, the CESCR confirmed that ‘corporal punishment is inconsistent with . . . the dignity of the individual’.\textsuperscript{198} Indeed, the use of corporal punishment as a disciplinary school measure is a violation of the child’s right to freedom from inhuman or degrading treatment or punishment,\textsuperscript{199} as well as the child’s right to education.\textsuperscript{200}

(ii) Discrimination in the Enjoyment of ESC Rights in Italy

\textbf{[4.62]} One key issue affecting the progressive realisation of ESC rights and other human rights in Italy is the discrimination of vulnerable groups, in particular the Roma, foreigners and Italians of foreign origin, and the reluctance on the part of the police and authorities to provide adequate protection to the victims and to effectively investigate claims of discrimination remains an area of concern.\textsuperscript{201} There have been reported instances of hate speech, including statements targeting foreign nationals and Roma, attributed to politicians and disseminated in the mass media.\textsuperscript{202} However, by 2007 Italy had not yet established a national human rights institution for the protection and promotion of human rights,\textsuperscript{203} which could help in addressing alleged cases of discrimination. In 2004 the CESCR noted that

\textsuperscript{196} Cambria, Cass, sez VI, 18 Marzo 1996, [Supreme Court of Cassation, 6th Penal Section, 18 March 1996], Foro It II 1996, 407 (Italy).

\textsuperscript{197} CRC, The Aims of Education, General Comment 1, UN Doc CRC/GC/2001/1 (17 April 2001), para 8. See also CRC, General Comment 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, UN Doc CRC/GC/8 (2 March 2007); CRC, Concluding Observations: Zimbabwe, UN Doc CRC/C/ZW/CO/1 (15/13/Add.55 (7 June 1996), para 18.

\textsuperscript{198} CESCR, General Comment 13: The Right to Education, UN Doc E/C.12/1999/10 (8 December 1999), para 41.


\textsuperscript{200} See chapter 9.


\textsuperscript{202} CERD Committee, Concluding Observations: Italy, UN Doc CERD/C/ITA/CO/15 (16 May 2008), paras 15 and 22; HRC, above n 201, para 12.

\textsuperscript{203} UN Doc CAT/C/ITA/CO/4, above n 201, para 8.
the Roma on the whole live below the poverty line and are discriminated against, especially in the workplace, if and when they find work, and in the housing sector.\textsuperscript{204}

The Committee noted that many Roma lived in camps lacking basic sanitary facilities on the outskirts of major Italian cities; and that life in the camps had a major negative impact on Roma children, many of whom abandoned primary and secondary schooling in order to look after their younger siblings or to go out begging in the streets in order to help increase their family income.\textsuperscript{205} Although the CESCR recommended that Italy step up its efforts to improve the situation of the Roma population, inter alia by replacing camps with low-cost houses; \ldots by providing better education for Roma children; and by strengthening and implementing anti-discrimination legislation, especially in the employment and housing sectors\textsuperscript{206}

by 2008 the Roma still lived in conditions of \textit{de facto} segregation in camps, in which they lacked access to the most basic facilities, and school attendance by Roma children was still low.\textsuperscript{207}

\textbf{[4.63]} As a result the CERD Committee, recalling its General Recommendation 27,\textsuperscript{208} made the following recommendation in 2008:

the State party develop and implement policies and projects aimed at avoiding segregation of Roma communities in housing, to involve Roma communities and associations as partners together with other persons in housing project construction, rehabilitation and maintenance. The Committee further recommends that the State party act firmly against local measures denying residence to Roma and the unlawful expulsion of Roma, and to refrain from placing Roma in camps outside populated areas that are isolated and without access to health care and other basic facilities. The Committee \ldots recommends that the State party strengthen its efforts to support the inclusion in the school system of all children of Roma origin and to address the causes of dropout rates, including any cases of early marriage, in particular of Roma girls, and, for these purposes, to cooperate actively with Roma parents, associations and local communities.\textsuperscript{209}

\textbf{[4.64]} Similarly undocumented migrant workers in Italy from various parts of the world, in particular from Africa, Eastern Europe and Asia, have suffered violations of their human rights, in particular of their ESC rights, including alleged ill-treatment, low wages received with considerable delay, long working hours and situations of bonded labour, whereby a part of wages is withheld by employers as payment for accommodation in overcrowded lodgings without electricity or running water.\textsuperscript{210} In

\begin{itemize}
\item \textsuperscript{204} CESCR, above n 195, para 10.
\item \textsuperscript{205} \textit{Ibid}.
\item \textsuperscript{206} \textit{Ibid}, para 23.
\item \textsuperscript{207} UN Doc CERD/C/ITA/CO/15, above n 202, paras 14 and 20. The HRC in 2006 was concerned by Italy’s ‘policy to consider Roma as “nomads” as well as its camp-based policy towards them’. It expressed concern about widespread reports that the Roma population lived in ‘poor, unhygienic housing conditions on the margins of Italian society’. The HRC was also concerned that that the Roma were ‘not protected as a minority in Italy, on the basis that they do not have a connection with a specific territory’. It recalled that ‘the absence of connection with a specific territory does not bar a community for qualifying as a minority under article 27 of the Covenant [ICCPR]’. See HRC, above n 201, paras 21–2.
\item \textsuperscript{208} Discrimination against Roma (57th Session, 2000), UN Doc A/55/18, annex V, 154.
\item \textsuperscript{209} UN Doc CERD/C/ITA/CO/15, above n 201, paras 14 and 20.
\item \textsuperscript{210} \textit{Ibid}, para 17.
\end{itemize}
order to address discrimination, it is essential to take resolute action to counter any
tendency, especially from politicians, to target, stigmatise, stereotype or profile people
on the basis of race, colour, descent, and national or ethnic origin, or to use racist
propaganda for political purposes.\textsuperscript{211} In addition, measures should be taken to elimi-
nate discrimination against non-citizens in working conditions and work requirements,
including employment rules and practices with discriminatory purposes or effects in
accordance with CERD General Recommendation 30 on non-citizens.\textsuperscript{212}

\textbf{[4.65]} Apart from the Italian Constitution, there are some other national constitu-
tions that apply international treaties directly. For example, the Constitution of
Ecuador, 1998, Article 18 provides:

The rights and guarantees determined in this Constitution and the effective international
instruments, will be direct and immediately applicable by and before any judge, court or
authority.

The Constitution of Ecuador, 1998, incorporates a wide range of human rights,
including a number of ESC rights enshrined in the ICESCR.\textsuperscript{213} In the case of
Norway, the Human Rights Act of 21 May 1999\textsuperscript{214} incorporated the ICESCR into
domestic law, stipulating in section 3 that the Covenant takes precedence over any
other legislative provisions that conflict with it.\textsuperscript{215} Similarly, under Article 16 of the
Constitution of the State Union of Serbia and Montenegro (2003), the ICESCR
takes precedence over the law of Serbia and Montenegro and that of the Republics.\textsuperscript{216}
The direct applicability of the ICESCR should be encouraged as it provides a firm
legal basis for the domestic courts to reinforce the domestic application of ESC rights.

As noted above, appropriate training of the judiciary, prosecutors and other officials
responsible for the implementation of human rights is necessary so as to treat ESC
rights as interdependent in practice with civil and political rights.

\textbf{E. India}

\textit{(i) ESC Rights in India}

\textbf{[4.66]} India ratified the ICESCR in 1979 but it has been slow in complying with its
reporting obligations under the ICESCR.\textsuperscript{217} It has also ratified several international
human rights treaties, notably the ICCPR, CERD and CRC,\textsuperscript{218} as well as the Conven-

\textsuperscript{211} \textit{Ibid}, para 15.
\textsuperscript{212} 64th Session, 2004, UN Doc CERD/C/64/Misc.11/rev.3.
\textsuperscript{214} See Act of 21 May 1999 No 30 (as amended 1 July 2003) Relating to the Strengthening of the Status
of Human Rights in Norwegian Law. This law clearly stipulates that the ECHR, the ICESCR and the
ICCPR (including its two protocols) carry the full effect of domestic law. It further stipulates that should
domestic law come into conflict with any of the above-mentioned treaties and protocols, then the interna-
tional treaties and protocols take precedence.
\textsuperscript{215} CESCR, Concluding Observations: People’s Republic of Norway, UN Doc E/C.12/1/Add.109 (23 June
2005), para 4.
\textsuperscript{216} Art 16 provides: ‘The ratified international treaties and generally accepted rules of international law
shall have precedence over the law of Serbia and Montenegro and the laws of the member states.’
\textsuperscript{217} See UN, Combined Second, Third, Fourth and Fifth Periodic Report of India, UN Doc E/C.12/IND/5
(1 March 2007). India submitted its second to fifth periodic reports to the CESCR after a 15-year delay.
\textsuperscript{218} HRI/GEN/4/Rev.4 (15 May 2004), above n 42, 85.
tion on the Rights of Persons with Disabilities, ratified in 2007; the Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict, ratified in 2005; and the ILO Convention No 105 on Abolition of Forced Labour, ratified in 2000. However, international treaties are considered to be ‘not self-executing in India’ and thus it is necessary to take steps to incorporate fully the provisions of the ratified international treaties into domestic law, so that individuals may invoke them directly before the domestic courts.\textsuperscript{219} It is also vital to reconceptualise ESC rights in India because the realisation of the rights protected in the ICESCR are considered as ‘entirely progressive in nature’ and the Covenant is not given its full effect in India’s legal system due to the absence of relevant domestic legislation.\textsuperscript{220}

\textsuperscript{[4.67]} On a positive note, there are frequent references to the provisions of international human rights instruments by the Indian courts, in particular the Supreme Court.\textsuperscript{221} India has guaranteed in its Constitution human rights that can be enforced by an application to the High Court and the Supreme Court.\textsuperscript{222} The rights have been guaranteed in a chapter on ‘fundamental rights’, which forms Part III of the Constitution, Articles 14–35, protecting rights to equality, life, personal liberty, prohibition of forced labour, freedom of religion, and minority rights. In 2002, the Constitution (86th Amendment) Act, 2002 was adopted. This provided for the right to free and compulsory education for all children aged 6–14 in the following terms:

Article 21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

\textsuperscript{[4.68]} The Constitution of India also contains the ‘Directive Principles of State Policy’, Part IV of the Constitution, Articles 36–51, containing mainly ESC rights such as the rights to work, education, health, and environment.\textsuperscript{223} Some key Directive Principles are stated below:

\textbf{Directive Principles of State Policy, Constitution of India}

Article 39(e): Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing that the health and strength of workers, men

\textsuperscript{219} HRC, Concluding Observations: India, UN Doc CCPR/C/79/Add.81 (4 August 1997), para 13.
\textsuperscript{220} CESCR, Concluding Observations: India, UN Doc E/C.12/IND/CO/5 (May 2008), paras 8–9.
\textsuperscript{222} See Constitution of India (updated up to 94th Amendment Act), Arts 226 and 32, Government of India, Ministry of Law and Justice, at http://indiacode.nic.in/coiweb/welcome.html. It was passed by the Constituent Assembly on 26 November 1949. It has been in effect since 26 January 1950. For a classic study of Indian Constitution see G Austin, \textit{The Indian Constitution: Cornerstone of a Nation} (Delhi, Oxford University Press, 1966).
and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 41: Right to work, to education and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 43: Living wage, etc., for workers: The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Article 48A: Protection and improvement of environment and safeguarding of forests and wild life: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

[4.69] It is expressly stated that the Directive Principles above 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.

However, the Indian Supreme Court’s approach is that:

[D]irective principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed. . . . These principles have to be read into the fundamental rights. Both are supplementary to each other.224

This creative and interpretative exercise has overcome this apparent limitation by emphasising that the fundamental rights and Directive Principles are complementary, ‘neither part being superior to the other’.225

[4.70] As shown below, the approach above has enabled the Court to interpret the limited rights guaranteed in the chapter on ‘fundamental rights’ broadly to include ESC rights. For example, the right to life under Article 21, which provides that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’, has been applied in light of the Directive Principles of State Policy to include the right to livelihood, which includes several ESC rights.

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Significantly, legislative and other measures have been adopted by India to promote the enjoyment of ESC rights.226

(ii) Judicial Protection of ESC Rights in India

[4.71] In several Indian Supreme Court rulings the right to adequate housing (shelter) has been upheld as related to the right to life.227 The Court has also interpreted the right to life as encompassing the workers’ right to health:

the right to health and medical care to protect his [the workman] health and vigour while in service or post-retirement is a fundamental right of a worker under Article 21, read with [the Directive Principles] Articles 39(e), 41, 43, 48-A and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person.228

In Francis Coralie Mullin the court declared that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life, such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, and mixing and comingling with fellow human beings.229 It observed that the magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.230 In Unnikrishnan JP v State of Andhra Pradesh the Court held the ‘right to education to be implicit in the right to life because of its inherent fundamental importance’.231

[4.72] In another case,232 a youth organisation wrote a letter to the court alleging that women in a ‘Care Home’ were compelled to live in subhuman conditions. The Court

226 See in particular the 2006 Prohibition of Child Marriage Act; the 2005 National Rural Employment Guarantee Act, which recognises employment as a matter of right; the 2005 Protection of Women from Domestic Violence Act; the “Sarva Shiksha Abhiyan” (Education or All) programme adopted in 2005; the “National Rural Health Mission”, launched in 2005, aimed at providing accessible, affordable and accountable quality health services; the four-year time-bound plan, “Bharat Nirman” aimed to upgrade rural infrastructure, launched in 2005; the 2005 Right to Information Act, aimed to ensure government accountability; the 2004 amendments to the Indian Divorce Act and the Hindu Succession Act, widening the scope for women to exercise their rights to divorce, ownership and inheritance; the 2003 amendment to the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; the 2002 Constitution (86th Amendment) Act, making education free and compulsory for all children aged 6–14; and the 2000 Juvenile Justice (Care and Protection of Children) Amendment Act. In May 2008 the CESCR noted these measures with satisfaction. See CESCR, Concluding Observations: India, UN Doc E/C.12/IND/CO/5, para 4.


228 Consumer Education and Research Centre (CERC) v Union of India (1995) 3 SCC 42 at 43.

229 See above n 227, 529 B–F.

230 Ibid.

231 (1993) 1 SCC 645 at 738, para 183.

interpreted Article 21 on the right to life in light of several Directive Principles and held that the state is required to protect the weaker sections of society. It thus ordered the state to offer suitable alternative accommodation and to ensure that a doctor visit the ‘Care Home’ daily. In the case of MC Mehta v Union of India, Mehta, an active social worker, filed a writ petition to restrain industries from discharging trade effluents into the river Ganges. In ordering the tanneries to close down unless their effluent was subjected to a pre-treatment process, the Supreme Court referred to the right to life (Article 21) in conjunction with Article 48A of the Directive Principles and noted that the ‘closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.’ Such an approach would be appropriate to reinforce ESC rights in many other states that include ESC rights in national constitutions as ‘Directive Principles’ (or do not protect this category of rights at all) but protect the right to life in a Bill of Rights.

[4.73] A case from Venezuela illustrates the importance of the Indian Court’s approach of interpreting the right to life broadly in order to protect some aspects of ESC rights. In Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social, more than 170 people living with HIV/AIDS alleged that the Ministry of Health had failed to supply prescribed anti-retroviral drugs. They claimed that this violated their rights to life, health, liberty and security of the person, equality and benefits of science and technology. The Supreme Court dismissed the claims based on the rights to liberty, security of the person and equality, but stated that the right to health and the right to life of the petitioners were closely linked to the right to access the benefits from science and technology. The Court made orders directing the Ministry to provide anti-retroviral drugs, medications necessary for treating opportunistic infections and diagnostic testing, free of charge for all Venezuelan citizens and residents. The Ministry was also ordered to develop the policies and programmes necessary for this treatment and assistance, and to reallocate its budget as necessary to carry out the Court’s decision. After a series of such actions, the Court decided that the remedy need not be limited to the specific petitioners, but could be extended to benefit all those in a similar situation.

[4.74] It is clear from the foregoing that the right to life may be interpreted to include the right to livelihood, the rights to adequate housing, healthcare, and access to the underlying determinants of health. At least Article 21 of the Indian Constitution has been interpreted to include within its scope the rights to a clean environment, food, clean working conditions, emergency medical treatment, free legal aid and release from bonded labour. However, victims of violations of ESC rights face several

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233 Art 38, the promotion of welfare; Art 39(f), protection of children; 39A, the promotion of equal justice; and Art 42, just and humane working conditions.

234 1987 (4) SCC 463.


236 See Kothari, above n 225. In addition to the cases cited above, see Subhash Kumar v Bihar (1991) 1 SCC 598 (environment); Peoples Union for Civil Liberties v Union of India and Others WP (Civil) No 196/2001, 23 July 2001 (food); Consumer Education and Research Centre v Union of India (1995) 3 SCC 42 (working conditions); Parmamanad Katara v Union of India (1989) 4 SCC 248 (emergency medical treatment); Khatri v State of Bihar (1981) 1 SCC 623 (free legal aid); and Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161 (release from bonded labour).
obstacles, including the high costs of litigation, long delays in court proceedings and the non-implementation of court decisions by government authorities.\(^{237}\)

**IV. TOWARDS AN EFFECTIVE DOMESTIC APPLICATION OF THE ICESCR: THE ROLE OF INDEPENDENT NATIONAL HUMAN RIGHTS INSTITUTIONS**

\[4.75\] The World Conference on Human Rights, held in 1993, in the Vienna Declaration and Programme of Action reaffirmed ‘the important and constructive role played by national institutions for the promotion and protection of human rights’, and encouraged ‘the establishment and strengthening of national institutions’.\(^{238}\) Independent national human rights institutions (NHRIs) can play a key role in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.\(^{239}\)

\[4.76\] Independent NHRIs are an important mechanism to promote and ensure the indivisibility and interdependence of all human rights. The establishment of such bodies falls within the commitment made by states parties upon ratification of the ICESCR to ensure the progressive realisation of ESC rights. As noted in chapter 2, Article 2(1) of the ICESCR obligates each state party to take steps . . . with a view to achieving progressively the full realisation of the [Covenant] rights . . . by all appropriate means.

One such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights.\(^{240}\) It is therefore essential that full attention be given to ESC rights in all of the relevant activities of these institutions including:

(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;

\(^{237}\) CESCR, above n 219, paras 9 and 13.


\(^{239}\) Ibid.

The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;

Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the State as a whole or in areas or in relation to communities of particular vulnerability;

Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and

Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.241

The majority of existing NHRIIs can be grouped together in two broad categories; human rights commissions, special commissions established to ensure that the laws and regulations concerning the protection of human rights are effectively applied;242 and ombudsmen, a group of persons generally appointed by the parliament acting on constitutional authority or through special legislation to protect the rights of individuals who believe themselves to be the victim of unjust acts on the part of the public administration. Accordingly, the ombudsman will often act as an impartial mediator between an aggrieved individual and the government.243 Another less common, but no less important variety are the ‘specialised’ national institutions which function to protect the rights of a particular vulnerable group such as ethnic and linguistic minorities, indigenous populations, children, refugees or women.244 The institution, whatever its form, should be able, independently and effectively, to monitor, promote and protect ESC rights.

As affirmed in the Vienna Declaration, states should establish NHRIIs (or review their status and effectiveness) having regard to the ‘Principles relating to the status of national institutions’ (the ‘Paris Principles’).245 These minimum standards provide guidance for the establishment, competence, responsibilities and composition, including pluralism, independence, methods of operation and quasi-judicial activities of such NHRIIs. Some key principles are outlined below:

1. A national institution shall be vested with competence to protect and promote human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the government, parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals

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241 Ibid, para 3.
244 Ibid.
245 The Paris Principles were endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.
and reports on any matters concerning the protection and promotion of human rights. The national institution may decide to publicize them. These opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights. In that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. It shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.246

[4.79] The effectiveness of NHRI s in the promotion and protection of ESC rights, including the rights of vulnerable groups such as children, depends on several aspects. The following is an indicative, but not exhaustive, list of such aspects: mandate and powers, establishment process, resources, pluralistic representation, provision of remedies, accessibility and participation. These aspects have been explained by the Committee on the Rights of the Child as follows:

**Mandate and powers**

8. NHRI s should, if possible, be constitutionally entrenched and must at least be legislatively mandated. It is the view of the Committee that their mandate should include as broad a

scope as possible for promoting and protecting human rights, . . . incorporating civil, political, economic, social and cultural rights. . . .

9. NHRIs should be accorded such powers as are necessary to enable them to discharge their mandate effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence. . . .

Establishment process

10. The NHRI establishment process should be consultative, inclusive and transparent, initiated and supported at the highest levels of Government and inclusive of all relevant elements of the State, the legislature and civil society. In order to ensure their independence and effective functioning, NHRIs must have adequate infrastructure, funding . . ., staff, premises, and freedom from forms of financial control that might affect their independence.

Resources

11. While the Committee acknowledges that this is a very sensitive issue and that State parties function with varying levels of economic resources, the Committee believes that it is the duty of States to make reasonable financial provision for the operation of national human rights institutions. . . . The mandate and powers of national institutions may be meaningless, or the exercise of their powers limited, if the national institution does not have the means to operate effectively to discharge its powers.

Pluralistic representation

12. NHRIs should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights. They should seek to involve, among others, the following: human rights, anti-discrimination and children's rights non-governmental organizations (NGOs), including child- and youth-led organizations; trade unions; social and professional organizations (of doctors, lawyers, journalists, scientists, etc.); universities and experts, including children's rights experts. Government departments should be involved in an advisory capacity only. NHRIs should have appropriate and transparent appointment procedures, including an open and competitive selection process.

Providing remedies for breaches of children's rights

13. NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children. In order to be able to effectively carry out such investigations, they must have the powers to compel and question witnesses, access relevant documentary evidence and access places of detention. They also have a duty to seek to ensure that children have effective remedies—independent advice, advocacy and complaints procedures—for any breaches of their rights. Where appropriate, NHRIs should undertake mediation and conciliation of complaints.

14. NHRIs should have the power to support children taking cases to court, including the power (a) to take cases concerning children's issues in the name of the NHRI and (b) to intervene in court cases to inform the court about the human rights issues involved in the case.

Accessibility and participation

15. NHRIs should be geographically and physically accessible to all . . ., in particular the most vulnerable and disadvantaged, such as (but not limited to) children in care or detention, children from minority and indigenous groups, children with disabilities, children living
in poverty, refugee and migrant children, street children and children with special needs in areas such as culture, language, health and education. . . .

18. NHRIIs must have the right to report directly, independently and separately on the state of [human] rights to the public and to parliamentary bodies. In this respect, States parties must ensure that an annual debate is held in Parliament to provide parliamentarians with an opportunity to discuss the work of the NHRI.247

[4.80] Several states have established NHRIIs to promote human rights. The example of the Uganda Human Rights Commission (UHRC) is considered below to give an indication of the potential role of such commissions in the promotion and protection of all human rights, including ESC rights, in developing states. It should be noted, however, that there are several obstacles which can impact negatively on the role of NHRIIs in developing states. The UHRC was established in November 1996 following the recommendation of the Commission of Inquiry into Human Rights Violations in Uganda to establish a permanent and independent Commission.248 This was endorsed by the Uganda Constitutional Commission.249 When Uganda’s Constitution was adopted in 1995, the UHRC was constitutionally entrenched,250 and effectively began operations in 1997. The relevant provisions relating to the establishment, functions, powers, and independence of the Commission are set out below:


Uganda Human Rights Commission

51. (1) There shall be a Commission called the Uganda Human Rights Commission.
(2) The Commission shall be composed of a Chairperson and not less than three other persons appointed by the President with the approval of Parliament.
(3) The Chairperson of the Commission shall be a Judge of the High Court or a person qualified to hold that office.
(4) The Chairperson and members of the commission shall be persons of high moral character and proven integrity and shall serve for a period of six years and be eligible for re-appointment.

Functions of Human Rights Commission

52 (1) The Commission shall have the following functions:
(a) to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right;
(b) to visit jails, prisons, and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and make recommendations;
(c) to establish a continuing programme of research, education and information to enhance respect of human rights;
(d) to recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights, or their families;

249 See Uganda Constitutional Commission, above n 163.
(c) to create and sustain within society the awareness of the provisions of this Constitution as the fundamental law of the people of Uganda;
(f) to educate and encourage the public to defend this Constitution at all times against all forms of abuse and violation.
(g) to formulate, implement and oversee programmes intended to inculcate in the citizens of Uganda awareness of their civic responsibilities and an appreciation of their rights and obligations as free people;
(h) to monitor the Government’s compliance with international treaty and convention obligations on human rights; and
(i) to perform such other functions as may be provided by law.

(2) The Uganda Human Rights Commission shall publish periodical reports on its findings and submit annual reports to Parliament on the state of human rights and freedoms in the country.

(3) In the performance of its functions, the Uganda Human Rights Commission shall—
(a) establish its operational guidelines and rules of procedure;
(b) request the assistance of any department, bureau, office, agency or person in the performance of its functions; and
(c) observe the rules of natural justice.

Powers of the Commission

53(1) In the performance of its functions, the Commission shall have the powers of a court—
(a) to issue summons or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
(b) to question any person in respect of any subject matter under investigation before the commission;
(c) to require any person to disclose any information within his or her knowledge relevant to any investigation by the Commission.
(d) to commit persons for contempt of its orders.

(2) The Commission may, if satisfied that there has been an infringement of a human right or freedom order—
(a) the release of a detained or restricted person;
(b) payment of compensation; or
(c) any other legal remedy or redress.

(3) A person or authority dissatisfied with an order made by the Commission under clause (2) of this article, has a right to appeal to the High Court.

(4) The Commission shall not investigate—
(a) any matter which is pending before a court or judicial tribunal; or
(b) a matter involving the relations or dealings between the Government and the Government of any foreign State or international organisation; or
(c) a matter relating to the exercise of the prerogative of mercy.

Independence of the Commission

54. Subject to this Constitution, the Commission shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or control authority.

55(1) The Commission shall be self-accounting and all the administrative expenses including
salaries, allowances and pensions payable to persons serving with the Commission shall be charged on the Consolidated Fund.

(2) The Chairperson and other members of the Commission shall be paid such salaries and allowances as Parliament may prescribe.

**Removal of Commissioners**

56. The provisions of this Constitution relating to the removal of a Judge of the High Court from office shall, with the necessary modifications, apply to the removal from office of a member of the Commission.

**Staff of Commission**

57. The appointment of the officers and other employees of the Commission shall be made by the Commission in consultation with the Public Service Commission.

**Parliament to make laws regarding functions of Commission**

58. Parliament may make laws to regulate and facilitate the performance of the functions of the Uganda Human Rights Commission.

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[4.81] It is notable from the above that the UHRC has several functions (a wide constitutional mandate), inter alia, to investigate, on its own initiative or following a complaint by any person or group of persons against the violation of any human right (there is no need to prove a direct interest in the matter); and to monitor the Government’s compliance with international treaty and convention obligations on human rights. The independence of the Commission (which is a fundamental aspect of its success in the protection and promotion of human rights) is guaranteed, at least in theory. To ensure independence, the commissioners are guaranteed security of tenure, and expenses of the Commission are charged to the consolidated fund. In addition, the salaries and allowances of the Commissioners are left to Parliament to prescribe and Parliament is required to ensure that adequate resources and facilities are provided to the Commission.

[4.82] However, in practice, the Commission’s independence is capable of being undermined in two essential respects. First, the Chairperson and all the Commissioners are appointed by the President with the approval of Parliament, which is largely controlled by the President. As one scholar has noted, the appointment procedure is...
flawed in that ‘it gives the President too great an influence in the exercise’. This is worsened by the fact that the nomination and selection process is carried out without involvement of the civil society, particularly local human rights organisations. As a result, a number of commissioners were not appointed primarily on the basis of performance or experience in the field of human rights but mainly because of allegiance to the regime in power. Therefore, the system of appointment of members of the Commission needs to be reviewed so that it is ‘consultative, inclusive and transparent’, including an open and competitive selection process.

[4.83] Secondly, the Commission lacks adequate financial and human resources due to budgetary/economic constraints. Uganda very much depends on aid: in 2001 the amount of official development assistance received was US$782 million. The Commission acknowledges that ‘donors have supplied most of the funding of the Commission’s activities, while the government has met most of the administrative costs’. Despite this, the Commission is constantly underfunded. This has affected some of the Commission’s core activities since the Commission cannot open up enough regional offices to make it more accessible. As a result the Commission lacks the basic requirements to function effectively. For example, the Commission ‘can not hire sufficient staff or acquire adequate transport, office equipment and furniture’ necessary to discharge its functions.

[4.84] However, amidst all these difficulties, the UHRC has in some respects acted ‘independently of the government’ based on the fact that the Commission has exposed to the public human rights violations resulting from the Government’s actions or inactions and has further determined crucial decisions against the state and

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264 UHRC, Annual Report 2001–2002, 32, para 1.87 observing that in the financial year 1997–98, the Commission budgeted for Uganda shillings 5 billion but this was reduced (due to limited resources) by the Treasury to Uganda shillings 1.3 billion. See also UHRC, 10th Annual Report (2007), 117 noting that in the financial year 2006–07, the Commission’s budget estimates were Uganda shillings 4.5 billion; the Government released 2.89 billion; reflecting a deficit of 1.62 billion.


266 UHRC, Annual Report (2001–02), para 2.38. The main external donors to the Commission include: the Danish Embassy, the European Union, the Austrian Government, the OHCHR, the UNDP, the Government of Finland, the Australian Government, and the Royal Dutch Government.


governmental officials in regard to human rights abuses.\(^{269}\) To cite one example in *Allen Atukunda v Hon Col Kahinda Otafiire*,\(^{270}\) the Commission Tribunal found a Cabinet Minister who also doubled as the Minister of Water, Lands and the Environment as well as a colonel in the Ugandan national army to have neglected or abandoned his parental responsibility for his two sons, aged six years and two years, contrary to section 6 of Uganda’s Children Act.\(^{271}\) The Minister was ordered to maintain his children by paying a specified sum of money to the mother for the maintenance of the two children; and to pay school fees for the school-age child. While it is not known whether the Minister complied with this decision, the Commission was firm in its findings and orders to protect children’s ESC rights.

[4.85] The Commission is required to publish periodic reports on its findings and submit annual reports to Parliament on the state of human rights and freedoms in the country.\(^{272}\) Since 1997 the Commission has published an annual report in which it makes its recommendations,\(^{273}\) though most of the recommendations do not appear to have been implemented. This raises questions as to the impact of these recommendations in the absence of the necessary political will to implement them. Generally, the reports document human rights concerns and comment on the general human rights situation in the country in a specific period. In this way, the Commission has ‘a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights’\(^{274}\) by acting as a mechanism for the domestic implementation of Uganda’s international human rights obligations and the strengthening of human rights protection by complementing the courts.\(^{275}\) The Commission can also develop appropriate normative content of different human rights through its monitoring, reporting and judicial process.

[4.86] In the performance of its functions, the Commission has the powers of a court and, if satisfied that there has been an infringement of a human right or freedom, it is empowered to order the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress.\(^{276}\) In practice the Commission’s approach to the complaints before it has involved mediation/conciliation, tribunal

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\(^{269}\) See Matshekga, above n 261, 73–4. Most of the Commission awards in the year 2007 were against the Attorney General. See UHRC, *10th Annual Report* (2007), 27. See also *Tugume Mariam Rajab v Attorney General*, Complaint No UHRC 776/1998 in which the Commission found that Sheikh Idris Yusuf Lwazi disappeared and died as a result of ‘negligence on the part of state agents’ and awarded Uganda shillings 36 million (about £12,000) as adequate compensation to Sheikh Lwazi’s family.

\(^{270}\) Complaint No UHRC 228/2003 (decision of 6 February 2004).

\(^{271}\) Ch 59, *Revised Laws of Uganda* 2000. § 5(1) provides that: ‘It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to: (a) education and guidance; (b) immunization; (c) adequate diet; (d) clothing; (e) shelter; and (f) medical attention.’ A parent in this section means a father or a mother of the child.

\(^{272}\) *Uganda Constitution* (1995), Art 51(2).

\(^{273}\) Some of the Commission’s Annual Reports are available at the UHRC website at http://www.uhrc.ug/pub.php.

\(^{274}\) See CESCR, General Comment 10, para 3.


\(^{276}\) *Uganda Constitution* (1995), Art 53(1) and (2); the UHRC Act 1997, ss 18–26.
hearings, advice and referrals to the appropriate authorities.\textsuperscript{277} A party aggrieved with the decision of the Commission has a right of appeal to the High Court of Uganda.\textsuperscript{278}

\textbf{[4.87]} It is useful to note that while several states have established NHRIs, there is a tendency to compromise their independence and to pay very limited attention to ESC rights in contrast to civil and political rights. What has been the approach of the UHRC to ESC rights? A review of the Commission's first report in 1997 indicated that the Commission generally paid 'much less attention to these [ESC] rights', and had mainly focused on the traditional civil and political rights.\textsuperscript{279} Although the Commission later changed its approach, it regarded some ESC rights as unjusticiable. For example, the 2003 Annual Report of the UHRC stated that

\begin{quote}
the state cannot be [held] accountable to lack of good health. It is in this vein that it is said that economic, social, and cultural rights are not justiciable.\textsuperscript{280}
\end{quote}

This position, however, as shown in chapters 2 and 8, is no longer tenable (if it has ever been) since all ESC are justiciable and states can, in appropriate cases, be held accountable for the failure to respect, protect and fulfil ESC rights, including the right to health.

\textbf{[4.88]} Increasingly, the Commission has paid more attention to ESC rights and this has been reflected in a few cases it has handled with respect to this category of rights. One example of the right to education indicates the role of the Commission in promoting education. A number of cases have been brought before the Commission involving actions against parents (in particular fathers) neglecting to pay their children's school fees. On the basis of Article 34 of Uganda’s Constitution, the Commission has ordered fathers to pay for the education of their children.\textsuperscript{281} The Commission has also addressed the issue of corporal punishment in schools in the case of \textit{Emmanuel Mpondi v The Chairman, Board of Governors Nganwa High School}.\textsuperscript{282} In this case the Commission considered whether on the facts there was a violation of the right to education. Mpondi, who was a student in the respondent's school, was severely physically punished by two teachers, apparently prompted by the student's attempt to enter the staffroom at the request by another teacher to fetch something, leading to hospitalisation. Following his treatment and return to school, he was sent home to collect school fees. However, his sponsor refused to pay his school fees until the school administration had either punished the two teachers, or clearly indicated the specific action they would take against them. As a consequence,

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\textsuperscript{277} In 1999, out of 1,221 complaints received, 69 were found to be time-barred, 102 were dismissed for want of jurisdiction, 7 were merely acknowledged because they were directed to other authorities and only copied to the Commission, 44 were successfully resolved through mediation; while 687 were referred to various organs and authorities. See UHRC, \textit{Annual Report} (1999), para 2.11.

\textsuperscript{278} Uganda Constitution (1995), Art 53 (3).


\textsuperscript{280} UHRC, \textit{Sixth Annual Report} (Kampala: UHRC, 2003), para 15.02.

\textsuperscript{281} See FW Juuko and C Kabonesa, \textit{Universal Primary Education (UPE) in Contemporary Uganda: Right or Privilege?} (Kampala, Human Rights & Peace Centre, 2007), 21–2 citing the following cases: Kaifumba Estolia v Bareberaha Ezekiel, Complaint No UHRC/MBA/32/2002; Eva Nanwanye v Itaaga Bosco, Complaint No 187 of 2004; Mirembe Margaret v Dr Mukubwa Tumwine, Complaint No UHRC 373 of 2000; Susan Kaasa v Major Godfrey, Complaint No UHRC/J/LOG-12/2002; and Rose Namande Kaduyu v George Mugisha, Complaint No 197 of 2003.

Mpondi was forced to leave the school. The Commission settled the case by ordering financial compensation for the boy. In dealing with the issue of the claimant’s right to education, the Commission stated:

In our view the evidence shows that Mpondi’s education at Nganwa High School was interfered with. We hold the respondents responsible for the interference. We find on a balance of probabilities that Mpondi’s right to education was violated by the respondents.283

[4.89] Although the Commission did not substantiate its reasoning (eg no reference was made to the specific constitutional provision on which the decision was based (Article 30, Uganda’s Constitution, 1995); no elaboration of the reasons on which the Commission based its findings; and the scope of the right to education was not examined), the Mpondi case is important in three essential respects. Firstly, the Commission conceptualised the punishment a student was subjected to in terms of human rights, rather than as simply a tort or negligent wrong. Secondly, it awarded compensation for the specific violation of the right to education, aside from the award it made relating to inhuman and degrading treatment to which the claimant had been subjected. Thirdly, the case demonstrates that NSAs (in this case teachers and the school) can be held accountable for violations of all human rights, civil and political (eg violation of freedom from subjection to inhuman and degrading treatment) as well as ESC rights (violation of the right to education).

[4.90] But even in the context of civil and political rights, it is acknowledged that the Commission faces the challenge of ensuring that victims of human rights violations are actually paid the amounts awarded by the Tribunal as compensation.284 It is unclear whether this is due to unwillingness or inability to comply with the Commission’s decisions. Given that the Commission has in some cases held the Government to account for its omissions or actions, it is unsurprising that, in September 2003, the Government recommended that the Commission be abolished and proposed the transfer of the Commission’s functions to the Inspectorate of Government.285 In this respect the UN Human Rights Committee observed:

7. While acknowledging the important role of the Uganda Human Rights Commission in the promotion and protection of human rights in Uganda, the Committee is concerned about recent attempts to undermine the independence of the Commission. It is also concerned about the frequent lack of implementation by the State party of the Commission’s decisions concerning both awards of compensation to victims of human rights violations and the prosecution of human rights offenders in the limited number of cases in which the Commission had recommended such prosecution.

The State party should ensure that decisions of the Uganda Human Rights Commission are fully implemented, in particular concerning awards of compensation to victims of human

rights violations and prosecution of human rights offenders. It should ensure the full independence of the Commission.286

V. CONCLUSION

[4.91] The above survey of the domestic protection of ESC rights has considered the application of the ICESCR on the national plane in some selected states: the UK, South Africa, Uganda, Italy and India. Although the focus has been primarily on these states, many of the points made have general application to other states. From the foregoing, two concluding remarks should be emphasised. Firstly, the real protection accorded to the rights recognised under the ICESCR depends on the constitutional framework in a particular state. While some states protect ESC rights as legally binding, a number of states regard ESC rights as non-legally binding ‘principles and objectives’. But the CESCR has insisted that ESC rights should not be downgraded to ‘principles and objectives’.287 The exclusion of many ESC rights from justiciable human rights is highly detrimental to the full realisation of all human rights and may amount to a regressive step that contravenes a state party’s human rights obligations under the ICESCR.288 Given that the justiciability of ESC rights has the potential to improve the quality of the lives of the most vulnerable and marginalised members of society and may contribute to social transformation, it is desirable that these rights should be applied by the relevant accountability mechanisms, including the courts and human rights commissions.289 Justiciability of these rights at a domestic level is one of the means of self-defence for millions of impoverished and marginalised individuals and groups worldwide, particularly in the least-developed states.290 As shown by the Indian example, strategic litigation supported by a strong civil society movement is still an important strategy for the increased recognition and enforcement of ESC rights. This should be combined with several other factors, including training of judicial officers and lawyers on the justiciability and enforceability of ESC rights, social campaigns, research and political will.

[4.92] Secondly, there is no settled state practice relating to the application of the ICESCR in domestic law. 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

286 HRC, Concluding Observations: Uganda, UN Doc CCPR/CO/80/UGA (4 May 2004). For similar observations, see the Committee Against Torture (CAT), Concluding Observations: Uganda, UN Doc CAT/C/CR/34/UGA (21 June 2005), paras 8 and 10(k).
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. It has to be emphasised that:

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, 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.’

[4.93] The central obligation in relation to the ICESCR is for states parties to give effect to the rights recognised therein ‘by all appropriate means’. As shown above, one such means, through which important steps can be taken to achieve progressively the rights recognised in the ICESCR, is the work of independent NHRIs. Therefore, states parties to the ICESCR must ensure that the mandates accorded to all NHRIs include the protection and promotion of all ESC rights. The other appropriate means is to develop the possibilities of judicial remedies. Although the ICESCR contains no direct counterpart to Article 2(3)(b) of the ICCPR, which obligates states parties to, inter alia, ‘develop the possibilities of judicial remedy’, a state party seeking to justify its failure to provide any domestic legal remedies for violations of ESC rights would need to show either that such remedies are not ‘appropriate means’ within the terms of Article 2(1), of the ICESCR or that, in view of the other means used, judicial remedies are unnecessary. As the CESCR has stressed:

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.

291 UNTS, vol 1155, 331.
293 Ibid, para 3.
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State Reservations to the ICESCR

I. INTRODUCTION

[5.01] The capacity of a state to make reservations to international treaties, including human rights treaties, illustrates the principle of state sovereignty, whereby a state may refuse its consent to particular provisions so that these do not become binding upon it.1 However, reservations to human rights treaties are a major problem, since the effects are generally to weaken protection for, or even legally deny, some rights to individuals or groups of individuals within that state. It is, therefore, not surprising that, in recent years, complex questions have arisen with respect to the legality of reservations to human rights treaties, and the legal consequences of invalid reservations.2 Unlike some treaties—such as such as the Rome Statute of the International Criminal Court,3 the Convention against Discrimination in Education,4 the Slavery Convention,5 and the ECHR6—the ICESCR (or ‘the Covenant’),7 like the

2 This matter has been a subject of study by the International Law Commission (ILC) under the direction of Special Rapporteur, Mr Alain Pellet. See eg Report prepared by Mr Alain Pellet, Meeting with Human Rights Bodies, UN Doc ILC(LIX)/RT/CRP.1 (26 July 2007); Twelfth Report on Reservations to Treaties, UN Doc A/64/584 (15 May 2007); Eleventh Report on Reservations to Treaties, UN Doc A/64/574 (10 August 2006); Tenth Report on Reservations to Treaties, UN Doc A/64/558 (1 June 2005); Addendum UN Doc A/64/558/Add.1 (14 June 2005) and UN Doc A/64/558/Add.2 (30 June 2005). See also generally I Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden, Martinus Nijhoff, 2004).
4 429 UNTS 93, entered into force 22 May 1962, Art 9 states: ‘Reservations to this Convention shall not be permitted.’
5 Supplementary Convention on the abolition of slavery, the Slave Trade and Institutions and Practices similar to Slavery, 226 UNTS 3, entered into force 30 April 1957, Art 9 stating that ‘No reservations may be made to this Convention’.
7 993 UNTS 3, entered into force 3 January 1976.
ICCPR, neither prohibits the formulation of reservations and declarations either expressly or impliedly, nor mentions any permitted type of reservation(s). Yet, the General Assembly made an express demand in 1952 that concrete provisions on the permissibility and legal effect of reservations be adopted in the two Covenants, as well as various [UK] initiatives in this direction.\(^9\)

In addition, McNair, in 1961, urged that states should insert into multilateral treaties (such as the ICESCR) express provisions on reservations.\(^10\)

[5.02] In fact, upon the ratification of the ICESCR, some states have limited their legal obligations under the Covenant by formulating some reservations, at times disguised as ‘declarations’, ‘understandings’, ‘explanations’ or ‘observations’, as to some of the Covenant provisions. While a declaration is a unilateral statement that purports to clarify the meaning or scope attributed to the treaty or some of its provisions, a reservation is defined as:

> A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.\(^12\)

Although not as seriously afflicted by reservations as some other human rights treaties, particularly CEDAW\(^13\) and the CRC,\(^14\) the Covenant has nonetheless been subjected to some broad reservations. Only a few states have made objections\(^15\) within

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8 999 UNTS 171, entered into force 23 March 1976.
11 For a list of such reservations, see Appendix H: Declarations and Reservations at http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (hereinafter ‘Declarations’). Objections are also available on this website (hereinafter ‘Objections’).
15 See Objections, above n 11. For the definition of the term ‘objection’ see ILC, Reservations to Treaties, UN Doc A/CN.4/L.665 (11 May 2005), paras 2.6.1 and 2.6.2.
12 months of communication of the reservations, suggesting that most states have silently approved such reservations.16

As of 18 April 2008, 42 of the 158 states parties to the ICESCR had, between them, entered several declarations and reservations of varying significance to their acceptance of the obligations under the Covenant,17 to which only 14 states made objections.18 The scope of these reservations includes the following aspects: (i) the exclusion of the duty to recognise particular rights in the Covenant,19 (ii) ‘the right to postpone’ certain rights in the Covenant;20 and (iii) general reservations couched in broad terms, often directed to ensuring the continued supremacy of certain domestic legal provisions over some or all provisions of the Covenant.21 Yet, unlike most other human rights treaties, the Covenant lacks a specific clause on declarations and reservations. This has given rise to several questions which are examined in this chapter. Firstly, what reservations to the ICESCR are permissible or impermissible in international human rights law? Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible? Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation? And finally, are some of the existing state reservations to the Covenant incompatible with the object and purpose of the Covenant (ie the Covenant’s essential rules, rights and obligations) and thus impermissible? If so, how should reservations incompatible with the object and purpose of the Covenant be treated by the CESCR (‘the Committee’)? The approach and methods used to address these questions is to examine the texts of selected state reservations in the light of the object and purpose of the Covenant while taking into account the general law of treaties as contained in the Vienna Convention on the Law of Treaties (VCLT or ‘the Vienna Convention’),22

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16 Art 20(5) Vienna Convention provides that ‘unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later’. Although this rule may not reflect customary international customary law, it is now accepted practice. See UN Depository Practice, Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, UN Doc ST/LEG/7/Rev. 1 (New York, United Nations, 1999), paras 213–4 and the Twelfth Report on Reservations to Treaties, above n 2, paras 214–7. It is arguable, however, that that no time limit applies to objections against reservations, which are inadmissible under international law.

17 See Declarations, above n 11. States which have formulated reservations to the ICESCR include: Afghanistan, Algeria, Bangladesh, Barbados, Belgium, Bulgaria, China, Denmark, Egypt, France, Guinea, Hungary, India, Indonesia, Iraq, Ireland, Japan, Kenya, Kuwait, Libyan Arab Jamahiriya, Madagascar, Malta, Mexico, Monaco, Mongolia, the Netherlands, New Zealand, Norway, Pakistan, Romania, Russian Federation, Rwanda, Sweden, Syrian Arab Republic, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, Viet Nam, Yemen and Zambia. These constitute about 27 per cent of the states parties to the Covenant.

18 See Objections, above n 11. These are Cyprus, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. These constitute only about 9 per cent of the states parties to the Covenant.

19 See eg Declarations, above n 11, Denmark, Japan and Sweden.

20 Ibid. Barbados, for example, reserved the right to postpone: ‘(a) The application of sub-paragraph (a)(1) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work; (b) The application of Article 10(2) in so far as it relates to the special protection to be accorded mothers during a reasonable period during and after childbirth; and (c) The application of article 13(2)(a) of the Covenant, in so far as it relates to primary education’. The Government of Madagascar reserved ‘the right to postpone the application of article 13, paragraph 2, of the Covenant, more particularly in so far as relates to primary education’. Zambia made a similar reservation.

21 See section III below.

22 Above n 12.
any objections made by states, Concluding Observations of the CESCR, and relevant jurisprudence of other human rights bodies.

[5.04] The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of states parties or make state obligations obscure. It is important for states parties to know exactly what obligations they, and other states parties, have in fact undertaken under the Covenant. Although there have been scholarly analyses of reservations to human rights treaties generally, the focus has been on other human rights treaties (such as the ICCPR and its first Optional Protocol, CEDAW, CRC and some regional human rights instruments) but not on the ICESCR.23 Despite this, up to July 2006, the Committee, comprised of 18 experts with recognised competence in the field of human rights monitoring and the implementation of the Covenant by states parties, had not had a single general discussion on reservations, and is yet to adopt a comprehensive written position on the matter.

[5.05] According to Committee member Philippe Texier, the Committee has not discussed the issue of reservations to the Covenant because

the number of reservations relating to the International Covenant on Economic, Social and Cultural Rights was not large, and mainly concerned articles 6 to 8.24

Are reservations to Articles 6–8 necessarily compatible with the object and purpose of the Covenant? This raises the question of whether it is the number or the nature of reservations that should trigger the Committee’s interest in the matter. How many states should make reservations to the Covenant before the number could be considered as ‘large’? Is it not the case that the (wide) scope and impact of some of the existing reservations, as opposed to the number, would necessitate an examination of reservations to the Covenant?

[5.06] This chapter examines the permissibility of reservations to the ICESCR and discusses some selected reservations to demonstrate that certain reservations to the Covenant have significant effects on state obligations under the ICESCR. It argues


that it is useful to adopt a carefully drafted General Comment or Statement on reservations to the ICESCR to give an indication to present states parties, and to those states that are not yet parties, of what reservations are compatible or incompatible with the object and purpose of the Covenant. A clarification of the law in this area may provide useful guidance to states in the formulation of reservations, however named, to the Covenant. It may also help to develop the law on reservations to the Covenant. Such a development would help all states not to enter reservations incompatible with the object and purpose of the Covenant and enable the better protection of ESC rights.

[5.07] The chapter adopts the following structure. Section II considers what reservations are permissible (or not permissible) under the ICESCR and how invalid reservations to the ICESCR should be treated by the treaty monitoring body. Section III discusses some questionable reservations based on reservations made by Kuwait, Pakistan and the Republic of Turkey upon ratifying or acceding to the ICESCR. The selection made was based on the need to examine some of the existing widest and much more general reservations to the ICESCR (ie reservations which appear to be too ‘sweeping’ to raise the question whether they are compatible with the object and purpose of the Covenant). Although the states considered in this section could be regarded either as Muslim-majority states (or, with the exception of Turkey, to an extent as ‘Islamic’ states as their national constitutions provide for the supremacy of, or protect some aspects of, Islamic law or shari’a), their reservations to the ICESCR were not stated to have been motivated by Islamic law. While these states are not representative of the world at large, their reservations reflect the nature of questionable reservations to the ICESCR and would raise similar issues if made to other human rights treaties. In section IV reservations entered by these selected states are compared with reservations of other states, drawing examples from Africa and Europe where a number of states have also made declarations/reservations to the Covenant. Are the latter different from the ones made by the selected states, and if so, in what way and why? Section V concludes that reservations incompatible with the object and purpose of the Covenant are invalid, and thus of no legal effect. It is pointless to maintain such reservations. It is noted that in the spirit of the Vienna Declaration and Programme of Action, adopted in 1993, states are encouraged ‘to regularly review any reservations with a view to withdrawing them’, particularly those that appear to be incompatible with the object and purpose of the ICESCR. It is observed that the CESCR can play a key role in this crucial and difficult area by examining reservations to the Covenant more systematically in a General Comment or in a comprehensive statement and, when applicable, in its Concluding Observations on state reports.

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II. PERMISSIBLE RESERVATIONS TO THE ICESCR 
AND THE EFFECT OF AN INVALID RESERVATION

[5.08] In this section, two issues are examined. Firstly, what reservations are permissible (or not permissible) under the ICESCR given that the Covenant does not exclude or permit expressly the possibility of reservations? Secondly, who should decide whether a reservation under the ICESCR is invalid? And if a reservation under the Covenant is invalid, what is the legal effect of such an invalid reservation?

A. Permissible Reservations Under the ICESCR: The ‘Object And Purpose’ Test

[5.09] Reservations are generally permissible in international law as a compromise between the objectives of preservation of the integrity of the normative text of the treaty (so that all parties are equally bound) and the maximisation of ratifications to (or universality of participation in) the treaty.27 From one perspective, reservations to human rights treaties detract from the protection of individuals, which is the purpose of international human rights law, and thereby weaken—or in some cases totally undermine—the overall effectiveness of human rights norms.28 Yet another perspective is that reservations are a legitimate, perhaps even desirable, means of accounting for cultural, religious, economic or political diversity across nations.29 However, even if reservations could play an important and legitimate role, the absence of a specific prohibition or limitation, in either form or content, on reservations in the ICESCR does not mean that any reservation is permitted. In accordance with the rules of customary international law that are reflected in Article 19(c) of the Vienna Convention, reservations can therefore be made, provided they are not ‘incompatible with the object and purpose of the treaty’.30

27 As noted by the Human Rights Committee (HRC): ‘Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant.’ See HRC, General Comment 24 (52): General Comment on Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994), para 4.


A reservation is incompatible with the object and purpose of the treaty if it has a serious impact on the essential rules, rights or obligations indispensable to the general architecture of the treaty, thereby depriving it of its raison d’être.\(^{31}\)

This must also include all interpretative declarations whose effect is that of reservations. This is consistent with the practice in other existing international human rights treaties such as the CEDAW,\(^ {32}\) the CRC,\(^ {33}\) and the CERD,\(^ {34}\) all of which protect some ESC rights and expressly prohibit reservations that are incompatible with the object and purpose of the respective treaties.

It is also in line with the conclusions reached by the ICJ in its Advisory Opinion of 28 May 1951 in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (‘the 1951 ICJ Advisory Opinion’ or Reservations to the Genocide Convention Case).\(^ {35}\) It follows that since the ICESCR is silent on the matter of reservations, a reservation to the Covenant has to pass the compatibility (object and purpose) test to be valid. It is, however, debatable whether a state’s reservation to certain provisions in the Covenant is ‘compatible’ or ‘incompatible’ with the object and purpose of the ICESCR since this is not defined in the Covenant.\(^ {36}\) The question, then, remains what is the object and purpose of the Covenant?

It is useful to note that modern human rights treaties in general (including the ICESCR) are not multilateral treaties of a traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of states parties.\(^ {37}\) Their object and purpose is the legal protection of basic rights of individual human beings, and groups of individuals in some contexts, from infringements by the state and

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\(^{32}\) Art 28(2) of the CEDAW, above n 13, states: ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’

\(^{33}\) Art 51(2) of the CRC, above n 14, provides: ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’

\(^{34}\) 660 UNTS 195, entered into force 4 January 1969. Art 20(2) of the CERD provides: ‘A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.’

\(^{35}\) ICJ Rep 1951, 15, at 29. The Advisory Opinion (7–5 vote) sanctioned the entering of reservations to international obligations subject the object and purpose of the treaty. The ICJ noted that: ‘The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.’

\(^{36}\) In general the compatibility of a reservation with the object and purpose of the treaty is subject to different views. See eg ICJ, judgment of 3 February 2006, Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction of the Court and Admissibility of the Application (hereinafter Congo v Rwanda), para 67; and joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, para 21.

\(^{37}\) See eg the IACtHR, The Effect of Reservations on the Entry into Force of the American Convention (Arts 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, IACtHR (Ser A) No 2 (1982), paras 29–30; Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, 8 September 1983, IACtHR (Ser A) No 3 (1983), para 50; European Commission on Human Rights, Austria v Italy, Application No 788/60, 4 European Yearbook of Human Rights 116, at 140 (1961); HRC, General Comment 24 (52), above n 27, para 17.
NSAs given their increasing role and power in the international legal system. Each of these rights carries with it corresponding obligations primarily by the state. In the words of the CESCR, the overall objective, indeed the raison d’être, of the Covenant . . . is to establish clear obligations for States parties in respect of the full realisation of the rights in question.

It follows, then, that at the very minimum, states parties to the Covenant are under an obligation ‘not to raise any obstacle’ (whether by way of reservations or otherwise) to the exercise of the rights recognised in the Covenant.

[5.13] Although in accordance with state practice not all reservations to the substantive provisions of a human rights treaty are inherently incompatible with the object and purpose of a particular treaty, the following reservations would arguably be difficult to reconcile with the object and purpose of the treaty:

1. Reservations worded in vague, general language that do not allow their scope to be determined.

2. Reservations that offend peremptory or higher norms of general international law (jus cogens) or obligations that concern or bind all states (obligations erga omnes), eg freedom from racial discrimination. These are prohibited because they might threaten the integrity of the peremptory norm, the application of which must be uniform, and would inevitably affect the ‘quintessence’ of the treaty. In the context of the ICESCR, a state’s obligation to take steps on a non-discriminatory basis in accordance with Articles 2(1), 2(2) and 3 of the Covenant cannot be subjected to reservations because ‘the philosophy of the Covenant [is] based on the principle of non-discrimination and on the idea of the universality of human rights’.

3. Reservations that offend norms of customary international law. In September 2003 the IACtHR asserted that the principle of equality and non-discrimination ‘forms part of general international law’ because it is applicable to all states, regardless of whether or not they are a party to a specific international treaty.

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38 See chapter 3.
41 Vienna Convention, above n 10, Art 53 defines a ‘peremptory norm’ of general international law (also called jus cogens, Latin for ‘compelling law’) as ‘a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. On jus cogens, see U Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2008) 18(5) European Journal of International Law 853–71; and A Bianchi, ‘Human Rights and the Magic of Jus Cogens’, (2008) 9(3) The European Journal of International Law 491–508.
44 HRC, General Comment 24 (52), above n 27, para 8. This is debatable. See Pellet, UN Doc A/CN.4/558/Add.1 (14 June 2005), above n 2, paras 116–29.
45 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 17 Septem-
4. Any reservation by which a state purports to exclude or modify the application of a treaty provision in order to preserve the integrity of its domestic law incompatible with the object and purpose of the Covenant. For example, a reservation to preserve discrimination against women in accordance with domestic law would be contrary to the object and purpose of the Covenant because the Covenant is predicated on the principles of ‘absolute non-discrimination against women’ and their full enjoyment of all the rights enjoyed by their male counterparts.\footnote{CESCR, Concluding Observations: Libyan Arab Jamahiriya, UN Doc E/C.12/1/Add.15 (20 May 1997), para 13 (emphasis added).} In addition, a reservation to the core obligations arising from the ‘minimum essential levels’ of the rights protected under the Covenant—including rights to food; education; health; water; the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, the right to work; and the right to social security\footnote{CESCR, General Comment Nos 11 (para 17), 13 (para 57), 14 (para 43), 15 (para 37), 17 (para 39), 18 (para 31); 19 (para 59), respectively, all available at http://www2.ohchr.org/english/bodies/cescr/comments.htm.}—would largely deprive the Covenant of its \textit{raison d’être},\footnote{CESCR, General Comment 3: The Nature of States Parties’ Obligations (Fifth Session, 1990), UN Doc E/1991/23, annex III at 86 (1991) para 10 (emphasis added).} and thus unlikely to be compatible with the Covenant’s object and purpose. The Committee confirmed that a state party cannot, under any circumstances whatsoever, justify its non-compliance with these core obligations, which are ‘non-derogable’.\footnote{CESCR, General Comment Nos14 (para 47) and 15 (para 40). See also CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2001/10 (10 May 2001), para 18.} To justify such reservations to non-derogable obligations, a state would have a ‘heavy onus’.\footnote{See also HRC, General Comment 24(52), above n 27, para 10.} One reason for core obligations of ESC rights being considered non-derogable is because their suspension is irrelevant and unnecessary to the legitimate control of the state of national emergency (eg the undertaking to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind and to ensure the equal right of men and women to the enjoyment of all ESC rights in Articles 2 and 3 would deserve greater rather than less importance in times of national emergency so as to protect vulnerable groups against discrimination).

B. Effect of an Invalid Reservation

\[5.14\] Two issues are addressed briefly in this section. First, who should determine the validity of a reservation to the ICESCR? Is it a matter exclusively for a reserving state and those making objections, or should the CESCR pronounce itself on compatibility with the object and purpose, when the need arises? Second, what legal effect should follow the determination of a reservation to the ICESCR as invalid (unacceptable, irregular, impermissible or inadmissible)?
(i) Who Should Determine the Validity of a Reservation to the ICESCR?

[5.15] In recent years there has been a tendency for some states, and certain commentators, to view the 1951 ICJ Advisory Opinion as stipulating a régime of inter-state *laissez-faire* in the matter of reservations, in the sense that while the object and purpose of a convention should be borne in mind both by those making reservations and those objecting to them, everything in the final analysis is left to the states themselves.51 According to this view, nobody beyond the states themselves has anything to say on reservations. It should, however, be noted that the 1951 ICJ Advisory Opinion did not foreclose legal developments in respect of the law on reservations and should not be read in such a restrictive way.52

[5.16] In its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, the ILC stated that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to *comment upon and express recommendations* [not to assess] with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them.53

This was seen as an important concession from the ILC, which had previously considered that only states parties to a treaty could express opinions as to whether a reservation was valid or not.54 Nonetheless, the ILC still considered that it was not for human rights treaty bodies to decide on the consequences of an invalid reservation and that it was the reserving state that has the responsibility to take action.

[5.17] In July 2003, members of the ILC met with members of the Human Rights Committee to discuss General Comment No 24 and the 1997 Preliminary Conclusions. The position of the ILC seems to have evolved since then. Indeed, the Special Rapporteur of the ILC on the topic of ‘Reservations to treaties’, Alain Pellet, has proposed draft guideline 3.2.1, which states that where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State.55

[5.18] The practice of the relevant human rights bodies supports this view. For example, the ECtHR, the IACtHR and the HRC have not followed the *laissez-faire* approach attributed to the 1951 ICJ Advisory Opinion; they have pronounced on the

51 *Congo v Rwanda*, above n 36, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, para 4. In 2003 Professor Malcolm N Shaw stated: ‘At the moment, unless the particular treaty otherwise provides, whether a reservation is impermissible is a determination to be made by states parties to the treaty themselves.’ See MN Shaw, *International Law* (Cambridge University Press, 5th edn, 2003), 828. He maintained the same position in 2008. See Shaw, above n 1, 922.


55 See A/CN.4/558/Add.2, annex. At the time of writing (August 2008) this text had not yet been adopted by the ILC.
compatibility of specific reservations to the ECHR, the American Convention on Human Rights and the ICCPR, respectively.\textsuperscript{56} They have not thought that it was simply a matter of bilateral sets of obligations, left to individual assessment of the states parties to the convention concerned. The practice of such bodies is not to be viewed as ‘making an exception’ to the law as determined in 1951 by the ICJ, but rather as a development of the law to meet contemporary realities or to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently.\textsuperscript{57} In addition, the practice of the ICJ itself reflects this trend. For example, in 2006 in \textit{Congo v Rwanda},\textsuperscript{58} the ICJ considered the impact of Rwanda’s reservation to Article IX of the Genocide Convention. The ICJ made its own assessment of the compatibility of such a reservation\textsuperscript{59} and went beyond, noting that a reservation had been made by one state which did not occasion an objection by the other. The Court found that Rwanda’s reservation ‘does not appear contrary to the object and purpose of the Convention’.\textsuperscript{60} The ICJ’s opinion supports the view that the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. Should the CESCR assess the compatibility of reservations to the ICESCR with the object and purpose of the Covenant?

\[5.19\] As noted in chapter 1, the compliance of states with their obligations under the Covenant is monitored by the CESCR.\textsuperscript{61} This Committee was established in 1985 by a decision of the ECOSOC of the UN\textsuperscript{62} to merely ‘assist’ it in the ‘consideration’ of state reports.\textsuperscript{63} Thus, the Committee is not a body established by treaty, but a subsidiary body of ECOSOC. It has the primary responsibility for ‘monitoring’ the implementation of ESC rights guaranteed under the Covenant.\textsuperscript{64} All states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. The Committee can effectively monitor the measures adopted and the


\textsuperscript{57} See \textit{Congo v Rwanda}, n 36, paras 16 and 22.

\textsuperscript{58} n 36 above.

\textsuperscript{59} \textit{Ibid}, para 67.

\textsuperscript{60} See \textit{Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Provisional Measures, Order of 10 July 2002}, ICJ Reports 2002, 246, para 72. In its later decision on jurisdiction (above n 36, para 67), the majority found that: ‘Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.’


\textsuperscript{62} ECOSOC Decision 1985/17. By Arts 16 and 17 of the ICESCR, states parties to the Covenant are required to submit reports, at intervals defined by ECOSOC, on the ‘measures which they have adopted’ and ‘the progress made’ in achieving the observance of the rights in the Covenant.


progress made if it can determine the extent of each state party’s obligations under the Covenant, and this necessarily involves addressing the issue of the legality of reservations. In particular, whether a reservation is permissible, and whether it is compatible with the object and purpose of the Covenant.

[5.20] With respect to reservations, the approach of the CESCR has so far involved the following ‘quasi-diplomatic’ methods. Firstly, the Committee has made positive remarks welcoming a state party’s adherence to the Covenant without any reservations. It has also welcomed a state party’s statement that it was in the process of reviewing human rights treaty reservations, with a view to withdrawing those superseded by legislation or practice. Where a state withdrew reservations to the Covenant (Articles 1 and 7), the Committee warmly welcomed the withdrawal. All these examples indicate that the Committee considers the ratification of the Covenant without reservations, or the withdrawal of the existing reservations, as the preferred option and a positive aspect in line with the object and purpose of the Covenant. As the Committee has stated:

when a State has ratified the Covenant without making any reservations, it is obliged to comply with all of the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more articles of the Covenant, except in accordance with the provisions of the Covenant and the principles of general international law.

[5.21] Secondly, the Committee has encouraged reserving states parties either to withdraw ‘reservations to the Covenant that have become redundant’ or to withdrawal reservations to substantive rights (such as Articles 6–8 and 13) and to withdraw reservations to other human rights treaties (such as the ICCPR and the Convention on the Rights of the Child) without further explanations and without coming to the conclusion whether the reservations in issue are incompatible with the object and purpose of the Covenant. More recently, in the Concluding Observations of the CESCR on the

69 UK, UN Doc E/C.12/1/Add.79, above n 66, para 43.
70 See CESCR, Concluding Observations: The [Democratic Republic of the] Congo, UN Doc E/C.12/1/Add.45 (23 May 2000) para 29, the Committee recommended ‘that the State Party withdraw its reservation to article 13, paragraphs 3 and 4, of the Covenant’; Hong Kong Special Administrative Region, UN Doc E/2002/22, 2001, para 191, the Committee recommended that the State Party ‘withdraw its reservation to Article 6 of the Covenant and the interpretative declaration replacing its former reservation on article 8’; France, UN Doc E/2002/22, 2001, para 874, the Committee recommended that France withdraws its reservation with regard to Article 27 of the ICCPR; Japan, UN Doc E/2002/22, 2001, para 613, the committee urged Japan ‘to consider the withdrawal of its reservations to articles 7(d), 8, paragraph 2, and article 13, paragraph 2(b) and (c) of the Covenant’; New Zealand, UN Doc E/2004/22, 2003, para 198, the Committee encouraged New Zealand ‘to withdraw its reservation to article 8 of the Covenant’; Netherlands, UN Doc E/1999/22, 1998, para 225, the Committee encouraged the Government ‘to carry out its intention to withdraw its reservation to the Covenant concerning the right to strike’; Sweden, UN Doc E/2002/22, 2001, para 739, the Committee recommended that Sweden ‘withdraw its reservation to Article 7(d) of the Covenant’; Trinidad and Tobago, UN Doc E/2003/22, 2002, para 283, the Committee recommended that Trinidad and Tobago ‘withdraw its reservation to Article 8 of the Covenant’; CESCR, Concluding Observations: France, UN Doc E/C.12/1/Add.72, 23 November 2001, para 25, the Committee recommended that
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Netherlands Antilles, the Committee noted that the right to strike was recognised in the state party, but regretted that the state party had not clarified ‘the reasons for maintaining its reservation to article 8(1)(d) of the Covenant in respect of the Netherlands Antilles’. The Committee recommended that ‘the State party give more serious consideration to withdrawing the reservation to article 8(1)(d) of the Covenant’ but without stating the reason(s) for considering the withdrawal of the reservation and when to consider the withdrawal. The Committee did not also request the state party to provide the reasons for maintaining the reservation as a follow-up measure within a defined period of time. In addition, the Committee did not state that the declaration was invalid. This cautious approach appears to be a result of fear that states will resent any intervention regarding the legality of reservations and possibly respond by denouncing the Covenant or any Optional Protocol that might be adopted in the future.

[5.22] In addition, this approach might discourage some states that have not yet ratified the Covenant from considering ratification in the future subject to some reservations. Although a state may not be able to legally withdraw from the ICESCR since the ICESCR, like the ICCPR, does not provide for denunciation or withdrawal from the Covenant, from a practical perspective it is desirable to take into account the possible reaction of states to severing reservations made to the ICESCR from consent to be bound. As yet, most states have maintained their reservations. Other UN treaty monitoring bodies have also examined relevant reservations, although for some time there has been no agreed common approach among these bodies. It is worth noting that apart from the HRC other committees have not pronounced on the validity of reservations in the context of individual communications. It is interesting to note that some UN treaty monitoring bodies have encouraged states to withdraw France ‘withdraw its reservation with regard to article 27 of the ICCPR’ and CESCR, Concluding Observations: France, UN Doc E/C.12/FRA/CO/3 (9 June 2008), para 49, the Committee recommended that France ‘withdraw its reservation to article 27 of the International Covenant on Civil and Political Rights and to article 30 of the Convention on the Rights of the Child’.

72 Ibid, para 33. In April 2008 the HRC recommended that a state immediately withdraw a reservation it considered to be ‘vague and extremely wide’ and ‘offending peremptory norms of international law’. See HRC, Concluding Observations: Botswana, UN Doc CCPR/C/BWA/CO/1 (24 April 2008), para 14: ‘The State party should immediately withdraw its reservation to article 7 of the Covenant, and should also withdraw its reservation to article 12 of the Covenant.’
73 As noted in chapter 1, on 18 June 2008 the UN HRC adopted without a vote an Optional Protocol to the ICESCR and recommended that the General Assembly adopt and open for signature, ratification and accession the Optional Protocol, at a signing ceremony in Geneva in March 2009. The Optional Protocol was annexed to a resolution A/HRC/8/L.2/Rev.1/Corr.1. The General Assembly adopted the Protocol on 10 December 2008. See Appendix B.
74 See also HRC, General Comment 26 (61): Continuity of Obligations, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 (8 December 1997).
75 When the HRC applied its General Comment 24(52) in the Rawle Kennedy (represented by the London law firm Simons Muirhead & Burton) v Trinidad and Tobago, Communication No 845, UN Doc CCPR/C/67/D/845/1999, 31 December 1999 (Kennedy case), Trinidad and Tobago denounced the Optional Protocol with effect from 27 June 2000 and did not reaccede.
77 See Report on Reservations, UN Doc HRI/MC/2008/5, 29 May 2008. To date, only the HRC had to pronounce itself on the legal effect of reservations in the context of individual communications in the case of Kennedy v Trinidad and Tobago, above n 75. In Stephen Hagan v Australia, Communication No 26/2002,
reservations to the ICESCR. On one occasion, for example, the Committee on the Rights of the Child (CRC Committee) noted with concern that the reservation made by the Government of Kenya to Article 10(2) of the ICESCR ‘limits the family support available to women in employment before and after childbirth’; and recommended that Kenya:

Strengthen[s] the support available to women before and after childbirth by taking appropriate measures including the removal of the reservation to paragraph 2 of article 10 of the International Covenant on Economic, Social and Cultural Rights, of 1966.\(^78\)

This indicates that it may be possible for other UN treaty monitoring bodies (committees) with the competence to examine state reports and individual communications to consider issues related to ESC rights, including reservations, in the context of the relevant treaties.

[5.23] It may be questioned whether the CESCR is under an obligation or simply has the option of entering into a ‘reservations dialogue’ with states? Given the mandate of the Committee, as a body monitoring state obligations under the Covenant, and the fact that a reservation becomes an integral part of the treaty, it is arguable that a ‘reservations dialogue’ with the relevant states is more of an obligation than an option. Moreover, any meaningful interpretation of a treaty calls for an interpretation of any reservation made thereto.\(^79\) Therefore, as a body monitoring the Covenant, the CESCR should consistently determine (i) whether a statement is a reservation or not; and (ii) if so, whether it is a valid reservation; and (iii) to give effect to a conclusion with regard to validity.\(^80\) Thus, reservations to the ICESCR must of necessity be interpreted by the CESCR by reference to relevant principles of general international law within the general context of the Covenant and taking into account its object and purpose.

(ii) The General Effect of an Invalid Reservation

[5.24] What are the effects of an invalid reservation? While a detailed discussion of this question is beyond the scope of this chapter, it is vital to note that the general effect of an invalid reservation to human rights treaties has been a subject of different views since this was not specified in the Vienna Convention. It could be one of the following three options. First, the state remains bound to the treaty except for the provision(s) to which the reservation related.\(^81\) This means that a state should be

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\(^78\) See CRC Committee, Concluding Observations: Kenya, UN Doc CRC/C/KEN/CO/2 (19 June 2007), paras 36(b) and 37(b).

\(^79\) Restrictions to the Death Penalty, Advisory Opinion OC-3/83, IAmCtHR (Ser A) No 3 (1983), paras 62–6.


bound by the obligations of the treaty beyond the limits foreseen in those reservations. Second, the invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement until it makes it clear that it is prepared to be a party without reservation.\(^\text{82}\) Third, an invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision(s) to which the reservation related.\(^\text{83}\) But the Vienna Convention is silent on severance because it only regulates the consequences of permissible reservations and objections to them. It neither rejects nor supports the severability approach. Which of these three options would enhance the object and purpose of the ICESCR while respecting state consent given that ‘in its treaty relations a State cannot be bound without its consent’?\(^\text{84}\)

[5.25] While there is no consensus on this issue, both the 1951 ICJ Advisory Opinion and Article 19 of the Vienna Convention imply that if the reservation is not compatible with the object and purpose of the treaty, it is not capable of being accepted.\(^\text{85}\) In that case, there are only two possibilities depending on whether or not a reservation constituted an ‘essential condition’ of ratification: the state either does not become a party to the treaty at all (clearly an undesirable outcome as this does not enhance the protection of human rights) or it becomes a party without the benefit of the ‘reservation’.

[5.26] Can a prohibited reservation or a reservation incompatible with the object and purpose of a treaty be severed? According to the HRC:

The normal [but presumably not automatic] consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.\(^\text{86}\)

The above position triggered critical comments by certain states, notably the US, the UK and France, mainly based on the principle of state consent, noting that severability is in opposition to state consent.\(^\text{87}\) Although the HRC did not rely on any legal grounds in coming to this view, the above position is defensible where a reservation is not essential in the sense that a state would have ratified the treaty without it.\(^\text{88}\) Where

\(^{82}\) In its Advisory Opinion of 28 May 1951 on Reservations to the Genocide Convention Case, above n 35, 23, the ICJ (by seven votes to five) advised that: ‘a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention’ (emphasis added).


\(^{84}\) Reservations to the Genocide Convention Case, above n 35, 21.

\(^{85}\) Ibid, 23 quoted in n 82.

\(^{86}\) HRC, General Comment 24 (52), above n 27, para 18 (emphasis added). This position has so far been applied by the HRC only in the Kennedy case (above n 75) in which the Committee has set aside a reservation.


a reservation constituted an essential part of a state’s consent to be bound or a sine qua non of ratification, it is arguable that

a State which purports to ratify a human rights treaty subject to a [an essential] reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all—unless it withdraws the reservation.89

Some members of the HRC supported this view in the Rawle Kennedy v Trinidad and Tobago case.90 Similar comments were made by Sir Hersh Lauterpacht in his dissenting opinion in the Interhandel case, in which he stated that if a

reservation is an essential condition of the acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation.91

[5.27] However, if an essential reservation is found to be incompatible with the object and purpose of the Covenant, it is invalid. It follows that such an invalid reservation is to be considered null and void, meaning that a state will not be able to rely on such a reservation and, unless a state’s contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.92 In such a case, a state should be invited to make a careful review of an incompatible reservation with a view to withdrawing it with

the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.93

As yet there have not been any major difficulties with states parties to the ICESCR on the subject of reservations, even where the Committee examined the articles to which reservations were made.94

III. QUESTIONABLE RESERVATIONS MADE TO THE ICESCR

[5.28] The most problematic reservations to human rights treaties, including the ICESCR, are those that subject a treaty, or some of the core provisions of a treaty, to the national constitution (‘constitutional reservation’) or to the domestic law

91 ICJ, Switzerland v United States (Interhandel case), 6 ICJ Rep 95, 117 (1959), emphasis added.
93 See Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2006/5, 4 July 2006, para 16(7). The ECtHR in the case of Belilos v Switzerland (1988)10 ECHR 466 concluded that the willingness of Switzerland to be a party to the ECHR was ‘stronger’ than its willingness to maintain the reservation in question.
generally of a reserving state. Some selected examples of such reservations by Kuwait, Pakistan and Turkey are considered in this section to give an idea of their scope and permissibility. As shown below, Kuwait made a reservation in respect of Articles 2(2), 3 and 8 and an ‘interpretative declaration’ in respect of Article 9. Kuwait subjected Articles 2(2) and 3 to ‘Kuwaiti law’. Pakistan made a very general reservation subjecting the provisions of the Covenant to the provisions of the Constitution of the Islamic Republic of Pakistan. The Republic of Turkey declared that it will implement the provisions of the Covenant only to the states with which it has diplomatic relations; and reserved the right to interpret and apply the provisions of paragraphs (3) and (4) of Article 13 of the Covenant in accordance with the provisions under Articles 3, 14 and 42 of the Constitution of the Republic of Turkey. These important reservations are discussed below. In particular, are these reservations compatible with the object and purpose of the Covenant? If not, what is the effect, if any, of such reservations? Are these reservations different from reservations made by other States?

A. Kuwait’s Reservations

[5.29] Upon accession to the ICESCR on 21 May 1996, Kuwait made an ‘interpretative declaration’ regarding the non-discrimination and equality provisions—Articles 2(2) and 3—to the ICESCR. By Article 2(2) the states parties to the ICESCR

undertake to guarantee that the rights enunciated in the . . . 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.

Under Article 3 the states parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all ESC rights set forth in the Covenant. Non-discrimination and the equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognised under international law and enshrined in the main international human rights instruments.95 The ICJ stated in the Namibia case that

...to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . [constitutes] a denial of fundamental human rights.96

In September 2003 the IACtHR noted that:

At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens

because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.97

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95 With respect to ESC rights, see generally CESCR, General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, UN Doc E/C.12/2005/4 (11 August 2005).
97 Juridical Condition and Rights of the Undocumented Migrants, above n 45, para 101.
These two principles are at the core of the Covenant and apply to all substantive rights recognised in the Covenant. As the CESCR has pointed out:

The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States Parties.98

As a ‘mandatory’ obligation, it is clearly not subject to reservations. Article 3 sets a non-derogable standard for compliance with the obligations of states parties as set out in Articles 6–15 of the ICESCR.99 Notwithstanding the fundamental nature of these provisions, Kuwait made the following ‘interpretative declaration’:

Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.

One question arising from the above declaration is whether such a declaration described as ‘interpretative’ must be regarded as a ‘reservation’? Another question is: can a state formulate such a ‘declaration’ in order to safeguard the application of its domestic law if it is incompatible with the object and purpose of the Covenant? In addressing these questions, as a starting point, in such cases, ‘it is necessary to ascertain the original intention of those who drafted the declaration’100 and to ‘look behind the title given to it and seek to determine the substantive content’.101 Clearly the intention of Kuwait’s declaration was to subordinate Kuwait’s obligations under the Covenant to its national law without specifying the ‘limits set by Kuwaiti law’. The declaration, in the absence of further clarification, could be seen as having been intended to ensure that Kuwait accepted what was already the (less-demanding) law of Kuwait.102 Accordingly, Kuwait’s ‘interpretative declaration’ amounts to ‘a unilateral statement’, made by a state, when acceding to the ICESCR, whereby it purports to ‘exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’ (Vienna Convention, Article 2(1)(d)). As such, it must be regarded as a ‘reservation’.

The reservation does not indicate in precise terms the domestic legislation or practices referred to and thus offends the principle that reservations must be specific and transparent. Specificity requires that reservations are not couched in terms that are too vague or broad for it to be impossible to determine their exact meaning and scope. Transparency enables the committee which monitors state party compliance with their obligations under the ICESCR (the CESCR), those under the jurisdic-

98 Ibid, para 16 citing CESCR, General Comment 3, above n 39, emphasis added.
99 Ibid, para 17.
101 Ibid, para 49.
102 See eg CRC Committee, Concluding Observations: Kuwait, UN Doc CRC/C/15/Add.96 (26 October 1998), para 17: The Committee was ‘concerned that neither the Constitution nor legislation fully conforms to article 2 of the Convention [on the Rights of the Child], and does not specifically prohibit discrimination on the basis of race, colour, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’. The Committee was also ‘concerned at the existence of some laws, regulations or practices which are discriminatory towards non-Kuwaitis and girls, especially with regard to the right to education and inheritance’.
tion of the reserving state and other states parties to know what obligations of human rights compliance have or have not been undertaken. What are the ‘limits set by Kuwaiti law’ to which the Covenant is subjected to? Does Kuwaiti law, for example, protect non-discrimination against women, and the equal rights of men and women, in the enjoyment of all ESC rights? In 2004 the CEDAW Committee noted that while the general principles of equality and non-discrimination are guaranteed in Articles 7 and 29 of Kuwait’s Constitution and contained in domestic legislation, there is a lack of specific definitions of discrimination against women, in national law, in accordance with Article 1 of the CEDAW. Furthermore the Committee noted with concern that restrictions on women’s employment, as well as protective employment legislation, policies and benefits for women, perpetuate traditional stereotypes regarding women’s roles and responsibilities in public life and in the family.

[5.33] In addition, given that ‘the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality’, a reservation to Articles 2(2) and 3 may be considered as offending peremptory norms and accordingly such a reservation would not be compatible with the object and purpose of the Covenant. This is especially so because the elimination of de jure as well as de facto, discrimination, whether direct or indirect, is required for the equal enjoyment of ESC rights, as well as the civil and political rights of women. Thus, Kuwait’s reservation casts doubt on Kuwait’s commitment to the object and purpose of the Covenant. Commenting on similar ‘interpretative declarations’ of Kuwait regarding non-discriminatory and equality guarantees in the ICCPR (Articles 2(1), 3 and 23 of the ICCPR, as well as the ‘reservations’ concerning Article 25(b) of the ICCPR protecting the right to vote and to be elected at genuine periodic elections), the HRC noted that these raised ‘the serious issue of their compatibility with the object and purpose of the Covenant’. In particular, the HRC noted that Articles 2 and 3 of the ICCPR constitute core rights and overarching principles of international law that cannot be subject to ‘limits set by Kuwaiti law’. Such broad and general limitations would undermine the object and purpose of the entire Covenant.

In principle this equally applies to reservations to Articles 2(2) and 3 of the ICESCR, protecting essential obligations under the Covenant.

104 HRC, General Comment 24 (52), above n 27, para 19.
105 CEDAW Committee, Concluding Observations: Kuwait, UN Doc A/59/38 (18 March 2004), para 64.
106 Ibid, para 72.
107 CESCR, General Comment 16, paras 3 and 41.
108 See Vienna Convention, above n 12, Art 53; see also CESCR, Concluding Observations: Monaco, UN Doc E/C.12/MCO/CO/1 (13 June 2006), paras 8 and 16.
109 CESCR, General Comment 16, para 41 stating that ‘Failure to adopt, implement and monitor effects of laws, policies and programmes to eliminate de jure and de facto discrimination with respect to each of the rights enumerated in articles 6 to 15 of the Covenant constitutes a violation of those rights.’
112 Ibid. The Committee concluded in para 6 that: ‘the interpretative declaration regarding Articles 2 and 3 contravenes the State Party’s essential obligations under the Covenant and is therefore without legal effect and does not affect the powers of the Committee. The State party is urged to withdraw formally both the interpretative declarations and the reservations.’
[5.34] Given the general nature of Kuwait’s ‘declaration’ regarding essential obligations in Articles 2(2) and 3 of the ICESCR, it has been a subject of objections by a number of states including Finland, Italy and Norway. One would have expected more objections from other states parties to the Covenant since such objections may lead to withdrawal or modification of some reservations. However, for the great majority, political considerations seem to prevail. Reservations may be seen (albeit incorrectly) as intervening in the affairs of another state, and thus perceived as an unfriendly act in international relations. The co-operative interplay among states and the fact that there is no incentive to object to any reservations in a human rights treaty such as the ICESCR explains why states do not object against incompatible reservations regardless of how antithetical they may be to the rights protected by the Covenant. Some states may not have objected because of their belief that they need not object to invalid reservations. Nonetheless the objections of some states parties are useful in illustrating the problem of Kuwait’s reservation. For example, in its objection, the Government of Finland stated:

according to the interpretative declaration regarding article 2, paragraph 2, and article 3 the application of these articles of the Covenant is in a general way subjected to national law. The Government of Finland considers this interpretative declaration as a reservation of a general kind. The Government of Finland is of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted.113

[5.35] Similarly with regards to the declarations and the reservation made by Kuwait, the Government of Italy considered ‘these reservations to be contrary to the object and the purpose of this International Covenant’, noting that the said reservations include ‘a reservation of a general kind in respect of the provisions on the internal law’.114 It is useful to note that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other states parties the extent to which the reserving state commits itself to the Covenant and therefore may raise doubts as to the commitment of the reserving state to fulfil its obligations under the Covenant. The application of such a reservation is also subject to the general principle of treaty interpretation according to which ‘[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.115 In other words, states should modify their domestic legal orders as necessary in order to give effect to their treaty obligations.116 However, all the governments of the objecting states (Finland, Italy and Norway) stated that their objections do not preclude the entry into force in its entirety of the Covenant between the State of Kuwait and each of the objecting states (Finland, Italy, and Norway). This left ambiguous the

113 Objections, above n 11, Finland, 25 July 1997.
114 Ibid, Italy, 25 July 1997. Norway in its objection of 22 July 1997, observed: ‘In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities by invoking general principles of internal law may create doubts about the commitment of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations.’
115 Vienna Convention, above n 12, Art 27.
effect of the reservation on Kuwait’s obligations under the Covenant. Such a statement is regularly found in objections to human rights treaties and illustrates the political dilemma faced by the objecting states. Kuwait did not withdraw its reservation and did not reply and so its position remains unknown as to whether it agreed that the entire Covenant came into force for it, despite its reservation.

[5.36] In addition to the above, Kuwait also made an ‘interpretative declaration’ regarding Article 9, stating that

The Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis.

This ‘declaration’ is broad. It is not restricted to a particular category of non-Kuwaitis such as undocumented (illegal) immigrants but extends to all categories of non-Kuwaitis including long-term residents or permanent residents, temporary residents legally staying in Kuwait, refugees and asylum seekers. This ‘declaration’ (a reservation in substance for the reasons stated above) is thus problematic because it purports to exclude or to modify the legal effect of Article 9, one of the core articles in the ICESCR, in its application to Kuwait.

[5.37] Article 9 of the ICESCR provides that: ‘The States Parties to the . . . Covenant recognise the right of everyone to social security, including social insurance.’ This Article, which protects the right to social security, is of ‘central importance’ in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their ESC rights. These circumstances might arise, inter alia, from (i) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (ii) unaffordable access to healthcare; (iii) insufficient family support, particularly for children and adult dependents. The right to social security encompasses ‘the right to access and maintain benefits, whether in cash or in kind, without discrimination’ in order to secure protection from such circumstances. Thus, the right to social security is vital for ensuring that everyone is able to live a life with dignity without the fear of losing income or other support that is essential for maintaining an adequate standard of living, accessing healthcare, and caring for children and other dependents.

[5.38] Since the right to social security in Article 9 extends to ‘everyone’ within a state’s jurisdiction, core obligations of the right to social security require, inter alia, that all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged or marginalised sections of the population (including non-nationals), in law and in fact, without discrimination on any of the prohibited grounds. Non-nationals, including permanent residents, are ‘part of a vulnerable group in society’ and their exclusion from social security schemes violates

119 Ibid, para 2.
120 Ibid.
121 Ibid, paras 2, 23 and 59(b).
both the core rights to equality and non-discrimination on the basis of nationality.\textsuperscript{122}

In the context of Kuwait this is essential in view of the fact that the number of non-Kuwaiti nationals exceeds the number of Kuwaiti citizens in Kuwait.\textsuperscript{123} Article 2(2) of the Covenant proscribes discrimination, inter alia, on grounds of nationality, and the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers (such as non-Kuwaiti workers in Kuwait), have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.\textsuperscript{124} In any case ‘the migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights’, including the right to social security.\textsuperscript{125} As noted by Germany and Sweden in their respective objections to Kuwait’s ‘declaration’:

> the declaration regarding Article 9, as a result of which the many foreigners working on Kuwaiti territory would, in principle, be totally excluded from social security protection, cannot be based on article 2(3) of the Covenant.\textsuperscript{126}

\[5.39\] The final reservation made by Kuwait concerned Article 8, paragraph 1(d) which stated: ‘The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1(d).’ Do states have a right ‘not to apply Article 8(1)(d)’ of the Covenant? To answer this question, it would be useful to recall that by Article 8(1)(d) the states parties to the ICESCR ‘undertake to ensure: The right to strike, provided that it is exercised in conformity with the laws of the particular country’. From the text, it is notable that while a state can subject the right to strike to its national laws, in the absence of necessity in a democratic society, a state has no general ‘right’ to postpone the right to strike as this would deprive individuals and groups of this right so as to render it meaningless. A general right to postpone the right to strike would be difficult to reconcile with the object and purpose of the Covenant. A state can only regulate the exercise of the right to strike in accordance with its domestic law. However, the relevant domestic law must be in conformity with the Covenant, which requires in its Article 4 that limitations have to be compatible with the nature of these rights [protected in the Covenant] and solely for the purpose of promoting the general welfare in a democratic society.

In effect, laws regulating the right to strike must conform to the principle of proportionality. It is difficult to see how not applying a right to (a peaceful) strike can promote the ‘general welfare’ in a democratic society so as to be compatible with the Covenant.

\textsuperscript{122} See also Khosa v Minister of Social Development 4 March 2004, (2004) (6) SA 505 (CC); 2004 (6) BCLR 569 (South African Constitutional Court), Justice Yvonne Mokgoro, writing for the majority, paras 74 and 76.

\textsuperscript{123} CEDAW, Concluding Observations: Kuwait, UN Doc A/59/38 (18 March 2004), para 76.

\textsuperscript{124} See CESCR, General Comment 19, above n 118, para 36. In para 37, the CESCR stated: ‘Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.’

\textsuperscript{125} Juridical Condition and Rights of the Undocumented Migrants, above n 45, para 134.

\textsuperscript{126} Objections, above n 11, Germany (10 July 1997); Sweden (23 July 1997). By Art 2(3) ‘[D]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the . . . Covenant to non-nationals’. 
The wide scope of Kuwait’s reservations attracted some concern on the part of the CESCR. In 2004, for example, the CESCR noted with concern the reservations and declarations Kuwait had made in respect of the provisions of Articles 2(2), 3, 8(1)(d) and 9 of the Covenant.\footnote{CESCR, Concluding Observations: Kuwait, UN Doc E/C.12/1/Add.98 (7 June 2004) para 9.} The Committee expressed its concern, like other human rights treaty bodies, about the lack of clarity regarding the primacy of the Covenant over conflicting or contradictory national laws, and its direct applicability and justiciability in national courts.\footnote{Ibid, para 8.} In this regard, the Committee noted that there was no case law in Kuwait on the application of the Covenant.\footnote{Ibid.} However, instead of considering Kuwait’s declarations and reservations as invalid and of no legal effect, the Committee took a cautious attitude, encouraging Kuwait
to consider withdrawing reservations and declarations entered upon the ratification of the Covenant in the light of the fact that they negate the core purposes and objectives of the Covenant.\footnote{Ibid, para 28.}

While the Committee made this useful finding, it did not state categorically that any particular reservation or declaration was invalid. This left open to speculation the question whether a reservation or declaration which negates the core purposes and objectives of the Covenant is an invalid one and without legal effect. Can a reservation which negates the ‘core purposes and objectives of the Covenant’ be valid? Although the Committee avoided addressing this question explicitly, it is implicit in its recommendation (urging Kuwait to consider withdrawing its reservations) that such a reservation offend Article 19(c) of the Vienna Convention, and is thus invalid.

It is arguable that reservations incompatible with the core purposes and objectives of the Covenant should not have been made in the first place (Article 19(c) Vienna Convention) and accordingly no other state party is capable of accepting them since they are invalid or inadmissible. The approach applied by the CESCR follows the view of the ILC, in its Preliminary Conclusions of 15 July 1997, that in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or foregoing becoming a party to the treaty.\footnote{See Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, in the Report of the International Law Commission on the work of its Forty-ninth Session, 12 May–18 July 1997, Official Records of the General Assembly, 52nd Session, Supplement No 10, UN Doc A/52/10 (1997), para 157(10).}

However, as yet, Kuwait has neither modified/withdrawn its ‘declarations/reservations nor forgone becoming a party to the Covenant. It is preferable, however, to withdraw such reservations so as to comply with the object and purpose of the Covenant. While the cautious approach applied by the CESCR is a useful starting point, it is submitted that where a state consistently ignores considering withdrawal or reformulation of a clearly incompatible reservation, for which a withdrawal is necessary, the Committee should move towards a stronger position to declare the incompatible ‘declaration/reservation invalid, and without legal effect. In such a case...
it is likely that a state party committed to the object and purpose of the Covenant would find it pointless to maintain such declarations/reservations. Although such a state might be unhappy at the result, and arguably has the option of withdrawing from the Covenant, it is unlikely to do so in practice for good political reasons such as avoiding criticism regarding its lack of commitment to minimum international human rights standards. In addition, as noted above, a state may not be able to legally withdraw from the Covenant since the ICESCR, like the ICCPR, does not provide for denunciation or withdrawal from the Covenant.  

B. Pakistan Reservations

[5.42] Pakistan signed the ICESCR on 3 November 2004. Upon signature, Pakistan made the following ‘declaration’ to the ICESCR subjecting the application of the provisions of the Covenant to the provisions of national law, namely the Constitution of the Islamic Republic of Pakistan:

While the Government of [the] Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the Constitution of the Islamic Republic of Pakistan.

[5.43] Although Pakistan’s statement was stated to be a declaration, it is a reservation in substance since it is in fact a unilateral act aimed at precluding or modifying the legal effect of the provisions of the ICESCR. This reservation is problematic in two respects. First, the Government of the Islamic Republic of Pakistan declared that it ‘will implement the [ICESCR] Provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country’. This formulation is extremely broad. What specific provisions of the Covenant would be implemented in a ‘progressive manner’ and how progressive is the manner? Is it the entire Covenant, including minimum core obligations? What is meant by ‘progressive’ in this context? It may be argued that the term ‘progressive’ was derived from Article 2 of the ICESCR, and used in a similar manner. The term ‘progressive’ realisation as used in Article 2 of the ICESCR has been understood to impose ‘an obligation to move as expeditiously and effectively as possible’ towards the full realisation of the rights protected in the Covenant. It is not clear whether Pakistan’s reservation would be understood in a similar way. Since some fundamental obligations resulting from the ICESCR, including in particular the principle of non-discrimination found in Article 2(2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed with immediate effect, the ‘declaration’ represents a significant qualification of Pakistan’s commitment to guarantee the human rights recognised in the Covenant. There is no doubt that the elimination of discrimination immediately is fundamental to the enjoyment of ESC rights on the basis of equality. This obligation frequently requires the adoption and implementation of appropriate legislation and

132 See also HRC, General Comment 26 (61), above n 74, paras 1–5.
133 Declarations, above n 11, Pakistan.
134 CESCR, General Comment 3, para 9.
135 Objections, above n 11, Germany (8 November 2004) and Norway (17 November 2005).
does not necessarily require significant resource allocations. Although Article 2(1) of the Covenant allows for a progressive realisation of the provisions, this may not be invoked as a basis for discrimination.

[5.44] Second, the Government of the Islamic Republic of Pakistan also declared that the provisions of the Covenant shall, however, be subject to the provisions of its Constitution. What specific provisions? As noted above, the object of reservations is to exclude or modify ‘the legal effect of certain provisions of the treaty in their application’ to reserving states.136 This is intended to avoid vagueness and generality of the reservations, which make it impossible for other states parties to take a position on them. As such, general reservations must be deemed incompatible with the object and purpose of the Covenant. It is noteworthy that Pakistan made a similar ‘declaration’ to the CEDAW stating that:

The accession by [the] Government of the Islamic Republic of Pakistan to the [CEDAW] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan. 137

In effect international human rights treaties are subordinate to Pakistan’s Constitution. Unless this is intended to bring domestic law into conformity with the Covenant, this may constitute a total negation of ratification. Apparently what Pakistan did was to indicate that it was unwilling to assume any commitment other than the one already provided by its Constitution.

[5.45] As noted above, principles of equality and non-discrimination are central to the ICESCR. Does Pakistan accept the principles of non-discrimination and equality between men and women in the enjoyment of all ESC rights? While Pakistan’s Constitution, in its Articles 25(2) and 27, stipulates equality before the law, including on the basis of sex, neither the Constitution nor any other appropriate legislation contain a definition of discrimination which encompasses both direct and indirect discrimination in accordance with international human rights law (such as Article 1 of the CEDAW), nor provisions on the equality of women with men in line with Article 3 of the Covenant.

[5.46] Regarding the right to work, for example, Article 18 of Pakistan’s Constitution states:

Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

While this provision guarantees the right to work (of citizens) to both men and women, it is subject to qualifications ‘prescribed by law’. Some laws in Pakistan do not allow women to work in certain kinds of jobs ostensibly for ‘health and safety reasons’ and during certain hours at night.138 Such laws could result in the potential

136 Vienna Convention, above n 12, Art 2(1)(d), emphasis added.
138 The Mines Act, 1923, s 23-CC states that: ‘No woman shall be employed in any part of a mine, which is below the ground. No woman shall be allowed to work in a mine, above ground between the hours of 7 p.m. to 6 a.m.’ The Factories Act, 1934 states in s 45 that: ‘No woman shall be allowed to work in a factory except between 6 a.m. and 7 p.m. Except with the permission of the Government, no woman or young person shall be employed in any establishment otherwise than between the hours of 9.00 a.m. and 7.00 p.m.’
discriminatory impact on women’s employment which is not specifically prohibited in both public and private sectors.\textsuperscript{139} What possible protection, then, can the Covenant provide to individuals and groups—especially to the most vulnerable ones such as women, non-nationals and ethnic, religious and racial minorities—in Pakistan if it is hierarchically inferior to Pakistan’s Constitution?

[5.47] Pakistan’s Constitution requires all existing laws to be ‘brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah’, and that ‘no law shall be enacted which is repugnant to such Injunctions’.\textsuperscript{140} This means that the effect of Pakistan’s declaration is to subject every provision of the Covenant to the general injunctions of Islam, without specifying them. Such a general reservation does not appear to be consistent with the object and purpose of the Covenant.\textsuperscript{141} Although when ratifying the Covenant Egypt declared that

\begin{quote}
[T]aking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument [ICESCR], we accept, support and ratify it\textsuperscript{142}
\end{quote}

subjecting the Covenant to the general injunctions of Islam is not free from problems. This is especially so because such injunctions are highly vulnerable to different interpretations over time and in different societies that it is not easy (given the nebulous, general, unlimited and undefined scope of the reservation) to establish clearly the obligations assumed by Pakistan under the Covenant. In 2003, for example, the Grand Chamber of the ECtHR concurred with the Chamber’s view that:

\begin{quote}
It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, . . . particularly with regard to its . . . rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.\textsuperscript{143}
\end{quote}

However, the Court did not analyse the legal status of women in sharia, and the different interpretations of sharia, before making this broad (and debatable) conclusion.

\textsuperscript{139} See Pakistan: Combined Initial, Second and Third Periodic Reports of States, UN Doc CEDAW/C/PAK/1-3 (3 August 2005), 21–3.
\textsuperscript{141} See also CEDAW Committee, Concluding Observations: Saudi Arabia, UN Doc CEDAW/C/SAU/CO/2 (8 April 2008) paras 4, 9 and 10. ‘The Committee notes that a general reservation has been made by the State party to the Convention whereby in case of a conflict between the provisions of Islamic law and those of the Convention, the State party gives precedence to Islamic law. . . . The Committee is concerned about the general reservation made upon ratification of the Convention by the State party, which is drawn so widely that it is contrary to the object and purpose of the Convention. The Committee urges the State party to consider the withdrawal of its general reservation to the Convention, particularly in light of the fact that the delegation assured that there is no contradiction in substance between the Convention and Islamic Sharia.’
\textsuperscript{142} Declarations, above n 11, Egypt.
Does Pakistan interpret the injunctions of Islam as providing for equality between men and women in the enjoyment of all human rights, including ESC rights? Some human rights scholars believe that if the primary source of Islam, the Quran, is interpreted in its ‘proper’ and ‘social’ context, it ‘never discriminates on the basis of gender’, and they criticise ‘out of context interpretation’ that reflects the masculine and patriarchal prejudices of the interpreters or ‘narrow interpretations of Islamic texts by authorities’. This view has been supported by the Committee on the Rights of the Child (CRC Committee) noting that ‘the universal values of equality and tolerance [are] inherent in Islam’. However, some interpretations of sharia are against the enjoyment by women of equality with men. Indeed, a renowned Islamic scholar, Sheikh Muhammed Salih Al-Munajjid, has asserted that:

Those who say that Islam is the religion of equality are lying against Islam. . . . Rather Islam is the religion of justice which means treating equally those who are equal and differentiating between those who are different. No one who knows the religion of Islam would say that it is the religion of equality. . . . Not one single letter in the Qur’an enjoins equality, rather it enjoins justice.

Although it is arguable that justice is genderless, and thus entails the principle of equality, in justifying the above view Al-Munajjid observes, inter alia, that with regard to testimony or bearing witness, the Quran states that the testimony of one man is equivalent to the testimony of two women. While this might be regarded as an overgeneralisation since the Quranic text referred to specifically addressed business transactions at a time when women were not generally heavily involved and experienced in business transactions, this interpretation could have influenced the Qanun-e-Shahadat (Law of Evidence) 1984 in Pakistan, under which a woman cannot be an

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146 Ibid. Representatives of Islamic states such as the Saudi Arabian delegation before CEDAW Committee have also recently assured that ‘there is no contradiction in substance between the Convention [on the Elimination of Discrimination against Women] and Islamic Sharia’. See CEDAW Committee, Concluding Observations: Saudi Arabia, UN Doc CEDAW/C/SAU/CO/2 (1 February 2008), para 10.

147 See CESCR, Concluding Observations: Libyan Arab Jamahiriya, UN Doc E/C.12/1/Add.15 (20 May 1997), para 13. The Committee noted that ‘the State party has advanced certain arguments against the enjoyment by women of certain family and civil rights on the basis of Sharia law’.


149 Ibid. His view is based on the interpretation of the Qur’anic verse known as ‘verse of indebtedness’, Al-Baqarah 2: 282, which prescribes writing financial/debt contracts as a precautionary measure and having such contracts witnessed in these terms: ‘When you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. . . . And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.’ See A Yusuf Ali, The Meaning of the Holy Quran (Birmingham, Islamic Dawah Centre International, 2007); and M Taqi-ud-Din Al-Hilali and M Muhsin Khan, Interpretation of the Meanings of the Noble Quran in the English Language (Riyadh, Darussalam, 1996).
attesting witness to a legal contract. This *de jure* discrimination in the form of the lack of capacity and the value attached to a woman's evidence may affect women, particularly those in business and legal careers. It also perpetuates patriarchal attitudes and deep-rooted traditional and cultural stereotypes regarding the roles and responsibilities of women and men in the family, in the workplace and in society, which negatively affects women's enjoyment of human rights.

[5.50] From the foregoing, it is clear that there are different interpretations of some aspects of the application of Islamic injunctions. Pakistan's 'declaration' was couched in terms that were too broad and imprecise for it to be possible to determine its exact meaning and scope. It is not clear whether it would adopt an attitude consistent with the object and purpose of the Covenant in that regard by reconciling rights protected in the Covenant (including equality between men and women) with its interpretation of Islamic texts.

[5.51] As Denmark and Finland noted in their objections, the general subordination of the Covenant to Pakistan's Constitution, without specifying which provisions or contents, makes it unclear (for other states parties) to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of the Islamic Republic to the object and purpose of the Covenant. Shelton observed:

> These general subordination reservations are the most questionable because they deny the very reason for adoption of human rights treaties: the establishment of minimum standards with which domestic laws should be brought into conformity.

In objecting to this 'declaration', France noted, for example, that 'such a declaration is general in scope and unclear and could render the provisions of the Covenant null and void'. The Government of the Federal Republic of Germany was of the opinion that this declaration left it 'unclear to which extent the Islamic Republic of Pakistan considers itself bound by the obligations resulting from the Covenant'. Indeed, as pointed out by the Netherlands,

> [A] reservation as formulated by the Islamic Republic of Pakistan is thus likely to contribute to undermining the basis of international treaty law.

Unsurprisingly, an unusually high number of Western states parties to the ICESCR,

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150 See Pakistan: Combined Initial, Second and Third Periodic Reports of States, UN Doc CEDAW/C/PAK/1-3 (3 August 2005), 116, para 474.
151 See CEDAW Committee, Concluding Observations: Pakistan, UN Doc CEDAW/C/PAK/CO/3 (11 June 2007), paras 28–9.
155 *Ibid* Germany, 8 November 2004. See also Objection of the United Kingdom of Great Britian and Northern Ireland, 17 August 2005 stating that: ‘The Government of the United Kingdom note that a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to this reservation made by the Government of Pakistan.’
namely Denmark, Finland, Latvia, Netherlands, Norway and Sweden, objected to the above-mentioned declarations and considered them to be reservations incompatible with the object and purpose of the Covenant.

[5.52] More importantly, these states noted that their objections did not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and each of them, some adding ‘without Pakistan benefiting from its declaration/reservation’. This approach went further and ignored the plain fact that the reserving state had made it clear that it was willing to be bound subject to a condition. The question raised here is: should reservations to human rights treaties which subject the Covenant to domestic law incompatible with the object and purpose of the relevant treaty be disregarded or should this be left to the reserving state? What would happen in cases where the reserving state did not determine the appropriate action to be taken as no mechanism exists to oblige the state to take action? Is Pakistan bound by the Covenant despite its reservation?

[5.53] If one or more contracting states have objected to the reservation as incompatible with the object and purpose of the Covenant, the reserving state should decide whether or not it is prepared to be a party without the reservation. However, Pakistan, following the pattern of most reserving states, did not reply to the above objections, and consequently it is not known whether it agrees that the Covenant comes into force, despite the incompatibility of its reservation. As noted above, a state is not entitled to make a reservation incompatible with the object and purpose of the Covenant and no other state is capable of accepting it even if no formal objection is made.

[5.54] Therefore, it is necessary to make a careful review of Pakistan’s general reservation with a view to withdrawing it without delay with the presumption, which may be refuted, that Pakistan would prefer to remain a party to the Covenant without the benefit of the reservation, rather than being excluded. This involves undertaking a comprehensive and systematic review and revision of all domestic legislation (which necessitated the reservation), in order to achieve full compliance with all the provisions of the Covenant. Pakistan might wish to follow its earlier practice with respect to withdrawal of general reservations, in particular its withdrawal on 23 July 1997 of the general reservation it had entered to the CRC by withdrawing its reservation to the ICESCR. Regarding a similar reservation to the CEDAW to the effect that accession to the Convention was subject to the provisions of the Constitution of the Islamic Republic of Pakistan, the CEDAW Committee has urged Pakistan ‘to withdraw its declaration to the Convention without delay’.

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157 See eg Objections, above n 11, Latvia, 10 November 2005.
158 Pakistan’s reservation to the CRC (objected to by the Governments of Denmark and Netherlands) stated: ‘Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values’. See United Nations Treaty Collection, Declarations and Reservations, above n 11.
159 CEDAW Committee, Concluding Observations: Pakistan, UN Doc CEDAW/C/PAK/CO/3 (11 June 2007), para 13 (emphasis added).
C. Turkey Reservations

[5.55] Turkey signed the ICESCR on 15 August 2000 and ratified it on 23 September 2003. Upon ratification, Turkey made the ‘declarations’ and ‘reservation’ below:

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations.

The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance [with] the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey.160

[5.56] Several issues arise out of these ‘declarations’ and the ‘reservation’. Firstly, are Turkey’s ‘declarations’ used as, or intended to be, reservations? Put in other words, are these ‘declarations’ in fact an attempt (as in the definition of reservation) ‘to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’? Secondly, do these ‘declarations’ and ‘reservations’ raise doubt as to the commitment of Turkey to the object and purpose of the ICESCR?

[5.57] While caution should be exercised before pronouncing a ‘declaration’ to be a ‘reservation’, an examination of Turkey’s ‘declarations’ in fact reveals that they are reservations in effect. Clearly, the ‘declarations’ modify the legal effect of certain provisions of the Covenant in their application to Turkey in two essential respects. First, the declarations limit the implementation of the provisions of the Covenant only to those states with which the Republic of Turkey has diplomatic relations. This modifies the scope of the Covenant by excluding states parties that do not have diplomatic relations with Turkey. As noted by the Government of Greece, ‘this declaration in fact amounts to a reservation’, and more importantly, this reservation is incompatible with the principle that inter-state reciprocity has no place in the context of human rights treaties, which concern the endowment of individuals with rights.161

[5.58] Indeed, human rights treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals and, under certain circumstances, groups of individuals and communities with rights or fundamental, inalienable and universal entitlements. In general, therefore, as noted above, the principle of inter-state reciprocity has no place under human rights treaties.162 In this respect the HRC observed that although treaties that are mere exchanges of obligations between states allow them to reserve *inter se* application of rules of general international law, this is not the case with human rights treaties, which are for the benefit of persons within their jurisdiction.163 Accordingly, Turkey’s reservation purporting to apply the principle of inter-state reciprocity to the ICESCR, in

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160 Declarations, above n 11, Turkey.
162 See also HRC, General Comment 24 (52), above n 27, para 17.
163 Ibid, para 8.
the absence of further clarification, raises a serious doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

[5.59] Secondly, the ‘declaration’ limits the Covenant ‘exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied’. This territorial limitation means that Turkey intended to exclude the application of the Covenant from its, or its agents’, acts and omissions which produce effects or are undertaken beyond national territory (e.g. not to apply the Covenant to those individuals and groups who are not within the Turkey’s territory but who are subject to Turkey’s jurisdiction). By implication it does not apply in a part of Turkey’s territory where the Constitution is not applied. This is a clear modification of the legal effect of the Covenant which, as shown in chapter 1, is not territorially limited but intended to apply to ‘all individuals within its [a state’s] territory or under its jurisdiction’,164 ie in the entire jurisdiction of a state party. It is useful to note that the ICESCR contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights that are essentially territorial.165 However, as noted by the ICJ,

it is not to be excluded that it [the ICESCR] applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.166

A states party’s obligations under the ICESCR ‘apply to all territories and populations under its effective control’.167 It does not matter whether or not the Constitution is applied in a territory. By way of example, in General Comments 14 and 15 the CESC noted that health facilities, goods, services and water have to be accessible to everyone ‘without discrimination, within the jurisdiction of the State party’.168 Turkey’s ‘declaration’ is, therefore, incompatible with the object and purpose of the Covenant.

[5.60] It is therefore not surprising that some states objected to Turkey’s declarations and considered them as amounting to reservations. For example, in its objection of 26 November 2003, Cyprus stated:

These reservations create uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Covenant, and raise doubt as to the commitment of Turkey to the object and purpose of the said Covenant.169

[5.61] Regarding Turkey’s reservation, it is useful to note that the Republic of Turkey reserved the right to ‘interpret’ and ‘apply’ the provisions of the paragraphs 3 and 4 of Article 13 of the Covenant in accordance with the provisions under Articles 3, 14 and 42 of the Constitution of the Republic of Turkey.170 Before examining the effect of Turkey’s reservation, it is relevant to consider the scope of Article 13(3) and (4) of

164 CESCR, General Comment 1, above n 103, para 3 (emphasis added).
166 Ibid.
167 CESCR, Concluding Observations: Israel, UN Doc E/C.12/2/Add.90 (23 May 2003), paras 15 and 31.
169 Declarations, above n 11, Cyprus.
170 The Constitution of the Republic of Turkey is available at http://www.hri.org/docs/turkey/.
the Covenant. Article 13(3) has two elements, the first 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. As noted by the CESCR, 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.\textsuperscript{171} Public education that includes instruction in a particular religion or belief is inconsistent with Article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.\textsuperscript{172}

\textbf{[5.62]} 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.\textsuperscript{173} These minimum standards, which must be consistent with the educational objectives set out in Article 13(1), may relate to issues such as admission, curricula and the recognition of certificates.\textsuperscript{174} Article 13(4) has been interpreted by the CESCR to permit:

everyone, including non-nationals,... the liberty to establish and direct educational institutions. The liberty also extends to ‘bodies’, ie 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.\textsuperscript{175}

\textbf{[5.63]} The effect of Turkey’s reservation is to subject the provisions of paragraphs 3 and 4 of Article 13 of the Covenant to Turkey’s national law, in particular the provisions under Articles 3, 14 and 42 of the Constitution of the Republic of Turkey. Two questions do arise here. First, is this reservation compatible with the object and purpose of the Covenant given that it subjects an international treaty (the ICESCR) to Turkey’s domestic law (without specifying the content of the domestic law)? In other words, is the subjection of the Covenant to domestic law compatible with the object and purpose of the Covenant or the broader view of international law?

\textsuperscript{172} Ibid.
\textsuperscript{173} The educational objectives set out in Art 13(1) ICESCR are as follows: ‘They [States Parties to the ICESCR] 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.’ See also CRC, Art 29; Committee on the Rights of the Child, General Comment No 1: The Aims of Education, UN Doc CRC/GC/2001/1 (17 April 2001).
\textsuperscript{174} CESCR, General Comment 13, above n 171, para 29.
\textsuperscript{175} Ibid, para 30.
Secondly, are the provisions of Articles 3, 14 and 42 of the Constitution of the Republic of Turkey consistent with paragraphs 3 and 4 of Article 13 of the ICESCR?

[5.64] Regarding the first question, as noted above, it is fairly well established that questions relating to the domestic application of the Covenant must be considered in the light of Article 27 of the Vienna Convention on the Law of Treaties, which states that ‘[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ Thus, states should modify the domestic legal order as necessary in order to give effect to their treaty obligations.176 Although Article 27 of the Vienna Convention is in a part entitled ‘Observance, Application and Interpretation of Treaties’ and not in a section dealing with ‘reservations’, once the question of the validity of the reservation has been resolved, Article 27 can be invoked to limit the applicability of Turkey’s reservation. Viewed from this perspective, Turkey’s reservation could be regarded as having no legal effect in as far as it purports to subject the interpretation and application of paragraphs 3 and 4 of Article 13 of the ICESCR to Turkey’s Constitution.

[5.65] As regards the second question, it is questionable whether Articles 3, 14 and 42 of the Constitution of the Republic of Turkey are consistent with paragraphs 3 and 4 of Article 13 of the ICESCR. Article 3 provides that: ‘The Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish.’ Article 14 states that: None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

While Article 42 provides that ‘[N]o one shall be deprived of the right of learning and education’, it also states that the scope of the right to education shall be defined and ‘regulated by law’ and that the provisions of international treaties are reserved. More specifically Article 42 provides:

No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law.

[5.66] As a result of this provision women and girls whose mother tongue is not Turkish may face multiple forms of discrimination in access to and achievement in education.177 Since the Articles considered above subject the right to education to Turkish domestic law, which is not specified, the reference to certain provisions of the Constitution of the Republic of Turkey is of a general nature and does not clearly specify the content of the reservation.178 Unless this reservation is understood, as noted by the Government of the Federal Republic of Germany, to mean that the relevant Articles and domestic law will be interpreted and applied in such a way that protects

176 CESCR, General Comment 9, para 3.
178 See Objections, above n 11, Finland, 13 October 2004 noting that: ‘The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Turkey will ensure the implementation of the rights recognised in the Covenant and will do its utmost to bring its national legislation into compliance with the obligations under the Covenant with a view to withdrawing the reservation.’
the essence of the freedoms guaranteed in Article 13 paragraphs 3 and 4 of the ICESCR, it creates serious doubts as to the commitment of the reserving state to the object and purpose of the Covenant. In view of this reservation, is Turkey willing to change the relevant domestic laws to be compatible with the Covenant? The rights contained in the Covenant should be respected, protected and fulfilled in a state party’s jurisdiction. Even though such a widely formulated reservation lends itself to a number of different interpretations, its common denominator is that it essentially renders ineffective the relevant Covenant rights which would require any change in national law to ensure compliance with the Covenant obligations. In this respect, no real international rights or obligations under Articles 13(3) and (4) have thus been accepted until the withdrawal of the reservation.

[5.67] It is instructive to consider briefly the nature of reservations and declarations made by other states in other parts of the world to establish whether these are different from those made by Pakistan, Kuwait and Turkey. A few examples are considered below.

### IV. RESERVATION BY OTHER STATES: EXAMPLES FROM AFRICA AND EUROPE

[5.68] This section compares the reservations considered above by Kuwait, Pakistan and Turkey with the reservations and declarations made by other states. Selected examples are drawn from African and European states because some of these states have made several reservations or declarations to the Covenant. Are reservations and/or declarations of these states different from the ones made by the three states considered in section III above, and if so, in what way and why?

**A. Reservations by African States**

[5.69] By April 2008 eight African states—Algeria, Egypt, Guinea, Kenya, Libyan Arab Jamahiriya (Libya), Madagascar, Rwanda and Zambia—had entered reservations or made declarations to some provisions of the ICESCR. Apart from the interpretative declarations of Algeria and Libya, most of these reservations and declarations have not attracted objections from other states parties. This is partly because, unlike the reservations/declarations considered in section III above, reservations by African states have been more specific, often quite precise in their formulation, and apparently not generally incompatible with the object and purpose of the Covenant.

[5.70] A few examples are mentioned here for purposes of illustration only. The Government of Madagascar stated that it reserves the right to postpone the application of Article 13, paragraph 2, of the Covenant, more particularly in so far as relates

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181 See Declarations, above n 11.
to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.\(^\text{182}\) Zambia made a similar reservation.\(^\text{183}\) While it is difficult to claim that postponing free and compulsory primary education is compatible with the object and purpose of the Covenant, in particular with the minimum core obligations of the right to education,\(^\text{184}\) the reservations of Madagascar and Zambia are, unlike those of Kuwait, Pakistan and Turkey, limited only to the application of Article 13(2), particularly in so far as it relates to primary education. Rwanda also made a reservation in respect of the right to education. The reservation states that: ‘The Rwandese Republic [is] bound, however, in respect of education, only by the provisions of its Constitution.’\(^\text{185}\) This reservation, like that of Pakistan, subjects the right to education to the Constitution of Rwanda without specifying the relevant constitutional provisions. While this is problematic based on the reasons stated above with respect to general constitutional reservations, this reservation does not extend to other provisions in the Covenant covering rights other than the right to education. Thus, it is not as broad in formulation as the reservations of Kuwait, Pakistan and Turkey.

\[5.71\] In short, the scope of reservations by African states to the ICESCR is generally limited to some specific provisions in the Covenant either with respect to the right to self-determination or some substantive rights mainly perceived to be resource intensive such as the right to education. This indicates that African states parties to the Covenant did not consider that there were problems in complying with their obligations under the Covenant. Moreover, most rights recognised in the Covenant are also protected in the African Charter on Human and Peoples’ Rights\(^\text{186}\) to which all 53 African states are parties,\(^\text{187}\) and are further protected in other human rights treaties in Africa, in particular the African Charter on the Rights and Welfare of the Child\(^\text{188}\) and the Protocol to the African Charter on the Rights of Women in Africa.\(^\text{189}\) Under the African Charter on Human and Peoples’ Rights, ESC rights are unequivocally justiciable as any of the other rights (eg civil and political rights).\(^\text{190}\) Reservations to rights already protected by regional human rights instruments would be unnecessary.

\(^{182}\) Ibid, Madagascar.
\(^{183}\) Ibid, Zambia.
\(^{184}\) See CESCR, Concluding Observations: Kenya, UN Doc E/C.12/1993/6 (3 June 1993), para 18 stating that ‘the obligation of States parties to the Covenant to ensure that “primary education shall be compulsory and available free to all” applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school’.
\(^{185}\) Ibid, Rwanda. Art 40 of the Constitution of the Republic of Rwanda 2003, available at www.cjer.gov.rw/eng/constitution_eng.doc, states that: ‘Every person has the right to education’ and that ‘Primary education is compulsory. It is free in public schools.’ It is silent on secondary and higher education. On 15 December 2008 Rwanda withdrew its reservation.
\(^{190}\) F Viljoen, \textit{International Human Rights Law in Africa} (Oxford University Press, 2007), 236–42.
B. Reservations by European States

[5.72] Some European states, including Belgium, Bulgaria, Denmark, France, Hungary, Ireland, Malta, Netherlands, Norway, Romania, Sweden and the United Kingdom, have made reservations and declarations to certain provisions in the ICESCR. The natures of the reservations entered by these states are generally different from those of Kuwait, Pakistan and Turkey because they are limited to some specific provisions of the Covenant, and are generally not too wide in scope so as to negate the core purpose of the Covenant. Thus, these reservations, like those of African states considered above, have not attracted objections from other states parties. For purposes of illustration of the scope of key reservations by European states to the ICESCR, a summarised overview is presented below.

[5.73] Belgium made an interpretative declaration with respect to Article 2(2) and 2(3) only. Belgium’s declaration states that with respect to Article 2(2) the Belgian Government interprets

non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals.191

According to Belgium, the term should be understood to refer to

the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.192

The declaration does not appear to be contrary to the Covenant because discrimination under the Covenant has been understood to exclude differences based on reasonable and objective criteria.193 With respect to Article 2(3) the Belgian Government declared that it ‘understands that this provision cannot infringe the principle of fair compensation in the event of expropriation or nationalisation’.194 No objection has been made to this declaration and the CESCR has not made any comment.195

[5.74] Bulgaria made a declaration to Article 26(1) and (3) of the ICESCR and noted that these provisions are of a ‘discriminatory nature’ because they deprived a number of states of the opportunity to become parties to the Covenant. Hungary, Romania and Ukraine made similar declarations and these have not given rise to any objection.

[5.75] Denmark restricted its reservation to Article 7(d), noting that:

The Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of Article 7(d) on remuneration for public holidays.

191 See Declarations, above n 11, Belgium.
192 Ibid.
193 Non-discrimination ‘prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status’. See CESCR, General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, UN Doc E/C.12/2005/4 (11 August 2005), para 10.
194 Ibid.
195 See eg CESCR, Concluding Observations: Belgium, UN Doc E/C.12/BEL/CO/3 (4 January 2008), and UN Doc E/C.12/1/Add.54 (1 December 2000).
Sweden entered a similar reservation in connection with Article 7(d) of the Covenant in the matter of the right to remuneration for public holidays. Although this is a very specific reservation, it is undesirable to maintain it. Thus, in 2001 the CESCR noted that Sweden has maintained its reservation with regard to Article 7(d) of the Covenant concerning the right to remuneration for public holidays. It recommended that ‘the State party withdraw its reservation to article 7(d) of the Covenant’.  

[5.76] France’s declaration extended to five Articles in the in the Covenant. First, the Government of the Republic declared that

> Articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits.

Second, it declared that it will implement the provisions of Article 8 in respect of the right to strike in conformity with Article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter. This declaration has not been controversial and thus the CESCR has not commented on it.

[5.77] Reservations of Ireland were restricted to Articles 2(2) and 13(2)(a). The first reservation to Article 2(2) stated that:

> In the context of Government policy to foster, promote and encourage the use of the Irish language by all appropriate means, Ireland reserves the right to require, or give favourable consideration to, a knowledge of the Irish language for certain occupations.

The second reservation to Article 13(2)(a) provided that:

> Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State’s obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their own way provided that these minimum standards are observed.

Given the specific nature of these reservations and the fact that they do not negate the core purposes of the Covenant, the CESCR has not made any critical comments.

[5.78] Malta made a declaration to Article 13 stating that the Government of Malta is in favour of upholding the principle affirmed in the words ‘and to ensure the religious and moral education of their children in conformity with their own convictions’. However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult given the limited financial and human resources to provide such education in accordance with a particular religious or moral belief in cases of ‘small groups’, cases of which are exceptional in Malta. Although Malta’s declaration is limited to Article 13, it has the potential to lead to a lack of respect for religious minorities in schools. It is thus understandable that the CESCR has not made any critical comments.

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197 Ibid, para 32.
199 See eg CESCR, Concluding Observations: Ireland, UN Doc E/C.12/1/Add.77 (5 June 2002).
encouraged Malta ‘to withdraw its declaration made upon ratification under article 13 of the Covenant’.200

[5.79] The Kingdom of the Netherlands made a reservation with respect to Article 8(1)(d) in the case of the Netherlands Antilles ‘to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned’. Clearly this is a very specific reservation limited only to the right to strike in the Netherlands Antilles. The CESCR has noted that the right to strike is recognised in the Netherlands, but regretted that the state party has ‘not clarified the reasons for maintaining its reservation to article 8(1)(d) of the Covenant in respect of the Netherlands Antilles’.201 It recommended that the state party give ‘more serious consideration’ to withdrawing the reservation to Article 8(1)(d) of the Covenant.202

[5.80] Norway made reservations to Article 8(1)(d) to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway.

This declaration does not affect the substance of the right to strike and has not been a principal subject of concern.203

[5.81] Finally, upon ratification of the Covenant the Government of the United Kingdom of Great Britain and Northern Ireland (UK) made specific reservations to several provisions in the Covenant including Articles 1(3), 2(3), 6, 7(a)(i), 8(1)(b), 9, 10(1) and (2), 13(2)(a) and 14.204 Most of these reservations are now redundant and have not been a cause for particular concern.205 The UK reserved the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory.

It also reserved the right to postpone the application of sub-paragraph (i) of paragraph (a) of Article 7, in so far as it concerns the provision of equal pay to men and women for equal work in the private sector in Jersey, Guernsey, the Isle of Man, Bermuda, Hong Kong and the Solomon Islands.206


202 Ibid, para 33.

203 No reference is made to Norway’s declaration in the Concluding Observations of the CESCR. See eg CESCR, Concluding Observations: Norway, UN Doc E/C.12/1/Add.109 (23 June 2005).

204 See the United Kingdom of Great Britain and Northern Ireland, Fifth Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, UN Doc E/C.12/GBR/5 (31 January 2008), para 54.


206 The reservation on Art 7(a)(i) is maintained (but is void for Hong Kong and the Solomon Islands as the UK is no longer responsible for these territories). See UN Doc E/C.12/GBR/5, above n 204, para 53.
In addition, it reserved the right not to apply sub-paragraph 1(b) of Article 8 in Hong Kong. Furthermore, while the UK recognised the right of everyone to social security in accordance with Article 9, it reserved the right to postpone implementation of the right [to social security] in the Cayman Islands and the Falkland Islands because of shortage of resources in these territories.

No state has objected to any of these reservations. Unlike reservations of Kuwait, Pakistan and Turkey, UK’s reservations to the Covenant were limited to specific provisions in the Covenant and to specific territories. Most of these have been superseded by legislation or practice. In this respect the CESCR welcomed the UK delegation’s statement in 2002 that the UK was in the process of reviewing its reservations to international human rights instruments, with a view to withdrawing those that have been superseded by legislation or practice. The Committee encouraged the UK ‘to withdraw its reservations to the Covenant that have become redundant’. However, apart from declarations and reservations placed in respect of territories for which the UK is no longer responsible (eg the Gilbert Islands, Hong Kong, the Solomon Islands, Southern Rhodesia and Tuvalu), all other declarations and reservations have been maintained.

V. CONCLUSION

[5.82] This chapter has considered four main questions. Firstly, what reservations to the ICESCR are permissible or impermissible? Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible? Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation? And finally, are some of the existing state reservations to the Covenant incompatible with the object and purpose of the Covenant and thus impermissible? If so, how should reservations incompatible with the object and purpose of the Covenant be treated by the CESCR?

[5.83] Regarding the first question, it is clear from the foregoing that only reservations compatible with the object and purpose of the Covenant, ie the Covenant’s essential rules, rights and obligations, are permissible. Accordingly reservations incompatible with the object and purpose of the Covenant—which is to establish clear obligations for states parties in respect of the full realisation of ESC rights—are impermissible.

[5.84] The question whether a reservation is compatible (and thus permissible) or incompatible (and thus impermissible) with the object and purpose of the Covenant is subject to interpretation by the CESCR. This could arise mainly in two situations: the consideration of periodic reports submitted by states and the examination of

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207 Ibid. The reservation on Art 8(1)(b) is void as the UK is no longer responsible for Hong Kong.
209 Ibid, para 43.
210 See UN Doc E/C.12/GBR/5, above n 204, para 53.
individual or group petitions or communications. However, until the Optional Protocol to the ICESCR providing for the competence of the Committee to receive and consider communications comes into force, the latter option is not yet available to the CESCR.\textsuperscript{211} The ratification of an Optional Protocol to the ICESCR by states is necessary because once it enters into force it would, inter alia, confer upon the Committee a quasi-judicial function and create an additional mechanism to allow the Committee to examine relevant reservations in specific cases.

\textbf{[5.85]} At present the Committee has one main option to consider reservations during its consideration of periodic reports by states parties. Although this is a limitation compared to other treaty-monitoring bodies, the Committee has some flexibility necessary to interpret the Covenant as a living instrument. A well thought-out and carefully drafted General Comment or Statement on reservations to the ICESCR could clarify the Committee’s general approach to reservations. Concluding Observations could then refer to this General Comment or Statement.

\textbf{[5.86]} To assess the compatibility of a reservation with the object and purpose of the Covenant, account should be taken of the following:\textsuperscript{212} (i) the indivisibility and inter-dependence of the rights set out in the Covenant; (ii) the importance that the right (or rights) which is (or are) the subject of the reservation has (or have) within the general architecture of the Covenant; and (iii) the seriousness of the impact the reservation has (or is intended to have) upon a particular right, relevant rights or the Covenant as whole. As the above survey demonstrates, impermissible reservations include general and broad reservations subjecting the Covenant to domestic law incompatible with the Covenant or those extending to minimum core obligations which are non-derogable and thereby depriving the Covenant of its \textit{raison d’être}.

\textbf{[5.87]} With respect to the third question, as argued above, reservations incompatible with the object and purpose of the Covenant should be treated as invalid, and therefore of no legal effect. Unless a state chooses to withdraw from the Covenant, which may not be legally possible, such reservations should generally be severable, meaning that the Covenant will be operative for the reserving state without benefit of the reservation, however phrased or named. However, as yet the Committee has not applied this approach, although it has encouraged states to review and withdraw relevant reservations.\textsuperscript{213} The Committee seems to have taken into consideration the realities of the situation by engaging states in a dialogue. The CESCR can advance this by requiring reserving states through their reports to explain: (i) the nature and scope of reservations or interpretative declarations; (ii) the reason(s) why such reservations were considered to be necessary and have been maintained; (iii) the precise effect of each reservation in terms of national law and policy; and (iv) any plans to limit or modify the effect of reservations and ultimately withdraw them within a specific time frame.\textsuperscript{214} Where applicable, the Committee could highlight the lack of consistency among reservations formulated to certain provisions protected in more than one

\textsuperscript{211} See above n 73.

\textsuperscript{212} See Tenth Report on Reservations to Treaties, UN Doc A/CN.4/558/Add.1, above n 1, para 7.

\textsuperscript{213} See eg CESCR, Concluding Observations: Monaco, UN Doc E/C.12/MCO/CO/1 (13 June 2006), paras 8 and 16.

\textsuperscript{214} See Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2007/5 (9 February 2007), para 16 (9); HRC, General Comment 24(52), above n 27, para 20.
treaty and encourage the withdrawal, whether total or partial, of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.215

[5.88] On the final question, some of the existing reservations to the ICESCR, as shown in section III above, do not appear to be compatible with the object and purpose of the Covenant. While it cannot be generally stated that states that have entered no or limited reservations (such as those considered in section IV), or that have removed existing ones, are necessarily doing any better with regard to the respect, protection and fulfilment ESC rights than those that have entered broad reservations (such as those states discussed in section III), reservations to any human rights treaty ‘clearly indicate the degree of commitment of the reserving State to full compliance with a particular treaty’.216

[5.89] Although there is no legal obligation under the ICESCR, and no express provision for the withdrawal of reservations, it would be in accordance with the Covenant’s object and purpose, and the spirit of the Vienna Declaration and Programme of Action, adopted in 1993,217 to envisage that laws and practices which necessitated reservations in some states would be examined carefully, progressively amended or repealed to ensure that the states parties complied, without reservation, with all the Covenant’s provisions. This has certainly happened on some occasions,218 and some of the reservations withdrawn appear clearly to have been incompatible with the object and purpose of the Covenant.219 Indeed, it is pointless to maintain reservations which are incompatible with the object and purpose of the Covenant since these are invalid in law. However, the formal removal of such reservations is still useful as an indicator of a state’s commitment to its international human rights obligations.

215 Ibid.
217 Vienna Declaration, above n 26, para 5.
218 The states which have withdrawn some reservations to the ICESCR (on the dates shown in the brackets) include: Belarus (30 September 1992); Denmark (14 January 1976); Democratic Republic of Congo (21 March 2001); Malta (upon ratification 13 September 1990); New Zealand (5 September 2003); Rwanda (15 December 2008).
219 For example, on 21 March 2001, the Government of the Democratic Republic of the Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows: ‘Reservation: The Government of the People’s Republic of the Congo declares that it does not consider itself bound by the provisions of Article 13, paragraphs 3 and 4. . . . In our country, such provisions are inconsistent with the principle of nationalisation of education and with the monopoly granted to the State in that area.’
Women’s Economic, Social and Cultural Rights

I. INTRODUCTION

[6.01] Women’s ESC rights, which are interrelated with women’s civil and political rights, include, but are not limited to, the following rights: (i) an adequate standard of living including food and freedom from hunger; water; clothing; housing and freedom from forced eviction; continuous improvement of living conditions; (ii) the highest attainable standard of mental and physical health throughout a woman’s lifecycle, including reproductive and sexual health and freedom; (iii) equal inheritance and ownership of land and property; (iv) social security, social protection, social insurance and social services, including special assistance before, during and after childbirth; (v) training and education; (vi) freely chosen work as well as just and favourable conditions of work including fair wages, equal remuneration and protection from sexual harassment and sex discrimination at work; (vii) form and join trade unions; (viii) protection from economic exploitation; (ix) protection from coerced and uninformed marriage; (x) a clean and healthy environment; (xi) participation in cultural life; (xii) claim and enjoy the benefits of patents and intellectual property; (xiii) nationality; and to bestow nationality on children; (xiv) freedom from trafficking and exploitation; and the recognition of the human rights of trafficked persons (Appendix G, paragraph 1).

ESC rights have a particular significance for women because, as a group, women are disproportionately affected by poverty, and by social and cultural marginalisation. The inequality in the lives of women that is deeply embedded in history, tradition and culture affects women’s enjoyment of ESC rights. Most women have


2 Ibid. See also CESC, Concluding Observations: [Democratic] Republic of the Congo, UN Doc E/C.12/1/Add.45 (23 May 2000), para 17 stating that: ‘The Committee is equally concerned about discrimination against women. Marriage and family laws overtly discriminate against women (for instance, adultery is illegal for women but, in certain circumstances, not for men; while the Legal Code provides that 30 per cent of the deceased husband’s estate goes to the wife, in practice the wife often loses all rights of inheritance). Domestic violence, including rape and beatings, is widespread but rarely reported, and there are no
been denied the equal enjoyment of their human rights with men, in particular by virtue of the lesser status ascribed to them by tradition and custom (broadly culture), or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

[6.02] Thus, some women are more vulnerable than others and vulnerability will vary according to context but vulnerable women generally include the following: ethnic, religious and racial minorities; indigenous women; internally displaced women; refugee women; women combatants; the girl child; non-nationals; women living in rural areas; elderly women; women with disabilities, sick or wounded; migrant women and trafficked women. Underlying each of these vulnerable groups is the fact that individuals and groups suffering the most from human rights violations—the poor in general and poor women in particular—often lack the political voice needed to claim or assert their human rights. Consequently, the effective protection and realisation of women's ESC rights is an important element of international human rights.

[6.03] This chapter examines the relationship between culture and the realisation of women's ESC rights, with particular reference to Africa where culture remains a key obstacle to the realisation of women's human rights generally, and to ESC rights in particular. Due to the limitations of space, the intention here is not to address all cultural issues but to consider some cultural obstacles and threats that have caused major difficulties. Although African states have ratified several human rights instruments protecting women's human rights, generally the severe political, economic and social difficulties facing African states have had a negative impact on efforts to respect, protect and fulfil women's ESC rights. The prevalence of prejudicial traditional practices and customs that legitimise women's inequality, particularly prevalent in rural areas of most African states, hamper the effective implementation of human rights generally, and of vulnerable groups of women in particular. Although obstacles affect both the realisation of women's civil and political rights, as well as ESC rights, traditional practices and customs disproportionately affect ESC rights since traditionally this category of rights has been often marginalised rather than prioritised. In turn this marginalisation disproportionately affects women since women's lives are lived out largely in the private sphere and women experience disproportionate levels of poverty and resource inequality. The chapter adopts the following structure: section II provides a brief background to women's ESC rights; section III provides an overview of human rights of women drawing examples from Africa. Section IV

legal provisions for punishing the offenders. Furthermore, despite the provision in Congolese legislation that endorses the principle of equal pay for equal work, women in the formal sector are under-represented and encounter discriminatory promotion patterns. Women in rural areas are especially disadvantaged in terms of education and employment conditions, including wages.


examines prejudicial cultural practices as an obstacle to the realisation of women’s ESC rights. Section V concludes that the promotion of women’s human rights advances society as a whole and that cultural obstacles must be addressed to realise women’s ESC rights.

II. BACKGROUND AND CONTEXT

[6.04] In 1995, the UN reported that ‘in no society today do women enjoy the same opportunities as men’.5 Over ten years later, discrimination against women persists not only in developing states,6 but also in more developed states including Germany7 and Luxembourg.8 Several practices deny women the equal enjoyment of ESC rights with men. A few examples are cited below for purposes of illustration. In a 2002 Joint Declaration of Special Rapporteurs on Women’s Rights, it was noted that:

Violence against women and girls is perpetrated in every country in the world. This occurs in situations of peace and conflict. However, the State agents and private actors responsible are not held to account. This climate of impunity encourages the persistence of such violations.9

[6.05] As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially abolished more than 150 years ago, ‘domestic slavery’ persists in Europe and concerns thousands of people, the majority of whom are women.10 This is also true in other jurisdictions. In Africa, for example, the consequences of slavery still persist in some states such as Mauritania and the Republic of


7 In 2001, for example, the CESCR observed: ‘Like the ILO, the Committee is concerned about the persisting impediments to women in German society, in terms of promotion in employment and equal wages for work of equal value, both in the private and public sectors, and especially in federal bodies and academic institutions, despite the efforts of the State party to give a new impetus to the equal participation of women in the labour market.’ CESCR, Concluding Observations: Germany, UN Doc E/C.12/1/Add.68 (24 September 2001), para 19. See also Human Rights Committee (HRC), Concluding Observations: Germany, UN Doc CCPR/CO/80/DEU (4 May 2004) para 13 noting that the ‘number of women in senior positions is still very low’ and that there are ‘wide disparities, in the private sector, of remuneration between men and women’.

8 CESCR, Concluding Observations: Luxembourg, UN Doc E/C.12/1/Add.86 (23 May 2003), para 22 stating that: ‘The Committee notes with concern that women are still underrepresented in the work force. While taking note that the disparities between wages of men and women have been reduced, the Committee also notes with concern that the current level of wage difference (women receiving 15 per cent lower wages than men) remains a matter of concern.’


Niger to the detriment of women. In every state for which data is available, for example, notwithstanding favourable legislation, women’s average wages are less than those of men regardless of education, and women experience the onus of the ‘double duty’. It is, therefore, less surprising that, worldwide, over 60 per cent of those working in family enterprises without pay are women. In several developing states, every day millions of women and young girls are forced to spend hours collecting and carrying water for their families (restricting their opportunities and their choices), a ritual that reinforces gender inequalities in employment and education. Women are often subjected to discriminatory employment practices such as the requirement to present a non-pregnancy certificate to gain employment or to avoid dismissal from employment.

[6.06] Thus, notwithstanding comprehensive international and domestic laws proscribing sex discrimination and promoting equality (see section III below), the human rights of women are ‘systematically denied’ and ‘women [are] poorer than men across class, race, national, economic and ethnic lines’. It is, therefore, not surprising that women are generally ‘over-represented in low-paid employment’ and in part-time jobs. The 2008 Concluding Observation of the UN HRC on France below offers some useful illustration:

The Committee remains concerned that, despite legislative and policy measures adopted by the State party to promote gender equality, women are underrepresented in high-level and managerial positions in the State, territorial, and hospital civil service as well as in the private sector. The wage gap between men and women, the overrepresentation of women in part-time jobs, and high unemployment rate among women belonging to racial, ethnic or national minorities also continue to be significant.

13 AM Cotter, Gender Injustice: An International Comparative Analysis of Equality in Employment (Aldershot, Ashgate, 2004), 93–215. ‘Double duty’ refers to the reality that women worldwide who join the paid labour force nevertheless continue to shoulder more than their fair share of household and family responsibilities.
16 CESCR, Concluding Observations: Mexico, Future UN Doc E/C.12/MEX/4 (17 May 2006), para 15 stating that: ‘The Committee reiterates its concern about the practice of employers in the maquiladora (textile) industry to require women to present non-pregnancy certificates in order to be hired or to avoid being dismissed.’
18 Cotter, above n 13, 273 (footnote omitted).
Despite significant achievements in the quest for women’s equality, in particular since the entry into force of CEDAW,\textsuperscript{21} accepted by 185 states by October 2006—over 90 per cent of the members of the UN—ensuring gender equality in all states remains an enormous challenge.\textsuperscript{22} To look at Africa in particular, the following statement by the African Union Chairperson in 2007 merits citation:

Violence against women and girls has assumed unprecedented levels across Africa. . . . Harmful traditional practices against women and girls such as female genital mutilation, virginity tests, early and forced marriages and widow inheritance continue to bedevil continental efforts towards gender equality and women’s empowerment. The situation of women in conflict situations in Africa is deplorable. Gross human rights violations are perpetrated against civilians in general but against women and girls in particular.\textsuperscript{23}

\textbf{[6.07]} Most violations of women’s ESC rights (eg the right to education, which plays ‘a vital role in empowering women’ to participate fully in their communities)\textsuperscript{24} often continue unchallenged since they are regarded as not justiciable and thus ‘not-quite-rights’.\textsuperscript{25} The overwhelming majority of children deprived of basic education, and adults unable to read, are female.\textsuperscript{26} In Togo, for example, there is an extremely high rate of illiteracy among women, which in 1998 stood at 60.5 per cent in rural areas and 27.6 per cent in urban areas.\textsuperscript{27} The denial of women’s ESC rights in turn undermines women’s ability to enjoy their civil and political rights, which then limits women’s capacity to influence decision- and policy-making in public life.\textsuperscript{28}

\section*{III. HUMAN RIGHTS OF WOMEN TO EQUALITY AND NON-DISCRIMINATION: AFRICAN EXPERIENCES}

\textbf{[6.08]} As noted in chapter 2, all human beings are born ‘free and equal in dignity and rights’.\textsuperscript{29} As a result the principles of non-discrimination and equality represent the

\begin{itemize}
\item \textsuperscript{21} GA res 34/180, 34 UN GAOR Supp (No 46), 193, UN Doc A/34/4, entered into force 3 September 1981.
\item \textsuperscript{23} Statement by the African Union Chairperson, Professor Alpha Oumar Konare, in Celebration of the International Women’s Day of 8 March 2007 (on file with the author).
\item \textsuperscript{24} CESCR, General Comment 13: The Right to Education, UN Doc E/C.12/1999/10 (8 December 1999), para 1.
\item \textsuperscript{25} K Tomasevki, ‘Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004’ (2005) 5(2) Human Rights Law Review 205–37 at 216 noting that: ‘As the Cold War has not ended as yet within the [UN Commission on Human Rights], economic, social and cultural rights are still a casualty.’
\item \textsuperscript{26} K Watkins, The Oxfam Education Report (Oxford, Oxfam, 2000), 3 noted: ‘Two-thirds of the children not in school—and a similar proportion of adults who are illiterate—are female.’
\item \textsuperscript{27} CEDAW, Concluding Observations: Togo, UN Doc CEDAW/C/TGO/CO/3 (3 February 2006), paras 24–5. Togo’s Ministry of Education Circular No 8478/MEN-RS prohibits pregnant schoolgirls or students from attending school. This partly accounts for the high dropout rate of girls owing to pregnancy and early and forced marriage and their low enrolment rates in higher education.
\item \textsuperscript{28} See above n 1.
\item \textsuperscript{29} UDHR, GA res. 217A (III), UN Doc A/810 at 71 (1948), Art 1.
\end{itemize}
core principles upon which human rights law is established as reflected in various international and regional human rights instruments.\textsuperscript{30} The main women's human rights instruments in Africa—most notably the ACHPR (‘the Charter’),\textsuperscript{31} and the Protocol to the ACHPR in Africa (‘African Women’s Rights Protocol’ or ‘the Protocol’)\textsuperscript{32}—prohibit discrimination and protect the equal enjoyment of the rights of men and women.\textsuperscript{33} It is accordingly widely recognised that international norms of non-discrimination and equality, which demand that particular attention be given to vulnerable groups (such as women) and individuals from such groups, are integral elements of the international human rights normative framework sometimes categorised as norms of \textit{jus cogens}.\textsuperscript{34} In the Barcelona Traction case the ICJ referred to the category of \textit{erga omnes} obligations as including specifically ‘the basic human rights of the human person, including protection from slavery and racial discrimination’.\textsuperscript{35} As the ICJ stated in the Namibia case,

to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . [constitutes] a denial of fundamental human rights.\textsuperscript{36}

Although discrimination on the ground of sex was not included specifically in the category of \textit{jus cogens} above,\textsuperscript{37} it would also be difficult for a state or a non-state actor to justify a difference in treatment in the enjoyment of human rights, whether civil and political or economic, social and cultural, based on the sole ground of sex (even if this is based on traditional, religious or cultural practice, or domestic laws and policies).\textsuperscript{38}

A. The ACHPR and the Rights of Women in Africa

\[6.09]\] The ACHPR contains four main provisions protecting women against discrimination. First is the general non-discrimination clause contained in Article 2 of the Charter, which states:

\textsuperscript{30} See chapter 2, section III dealing with non-discrimination and equality.


\textsuperscript{33} ACHPR, Arts 2, 3, 18(3).


\textsuperscript{35} ICJ Reports 1970, 3, 32.


\textsuperscript{38} A similar approach has been applied by the ECtHR. The Court requires ‘very weighty reasons’ before a difference of treatment on sole ground of sex could be regarded as compatible with the ECHR. See eg Burghartz v Switzerland, Application No 16213/1990, judgment of 22 February 1994, [1994] ECHR 2, para 27; Schuler-Zgraggen v Switzerland, Application No 14518/89, judgment of 24 June 1993, (1993) 16 EHRR 405, para 67.
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as ... sex.

Secondly, this is reinforced by Article 3 of the Charter which deals with equal protection of 'every individual' in the following terms: ‘1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law’. Thirdly, for the avoidance of doubt, Article 18(3) of the Charter, which generally deals with the protection of the family, provides:

The State shall ensure the elimination of every [emphasis added] discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

Finally, Article 60 of the Charter states that the ACmHPR ('the African Commission') will draw inspiration from international human rights instruments (such as CEDAW). In view of the above provisions, which clearly prohibit discrimination against women on the basis of sex, why was it considered necessary to adopt an additional protocol to the African Charter on the Rights of Women?

[6.10] The answer lies in the fact that the above provisions were considered as not being adequate to address the human rights of women in Africa. For example, while Article 18 prohibits discrimination against women, it does so only in the context of the family. In addition, explicit provisions guaranteeing the right of consent to marriage and equality of spouses during and after marriage are absent. These omissions are compounded by the fact that the Charter places emphasis on traditional African values and traditions without addressing concerns that many customary practices, such as female genital mutilation, forced marriage and wife inheritance, can be harmful or life threatening to women. By Article 18(2) of the Charter:

The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

Under Article 29(7) of the Charter the individual has a duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

What are the 'positive African cultural values'? Can this be interpreted as protecting discriminatory cultural practices against women?

[6.11] The scope of ‘positive African cultural values’ is subject to interpretation. Given that gender inequality in Africa is entrenched in all societal structures, positive African cultural values could possibly reinforce masculinist and patriarchal prejudices that are discriminatory against women. However, if this is interpreted in light of the overall object and purpose of the African Charter, Article 29(7) cannot be properly interpreted as trumping the non-discrimination provisions in the Charter.39 Thus, taken in its totality as a human rights treaty, it is arguable that the ‘positive African values’ described in the Charter are those that are consonant with the principles of

equality and non-discrimination. In this respect, a progressive and liberal construction of the Charter as a ‘living instrument’ would clearly leave no room for the discriminatory treatment of women.40 The adoption by the African Commission, in *Legal Resources Foundation v Zambia*, of the definition of discrimination drawn by the UN HRC in General Comment 18, which itself is based on CEDAW Article 1 and CERD Article 1, suggests that there can be no derogation of the equality principle, not even for culture.41 Finally, the African Commission guidelines to states on reporting, which are based on CEDAW reporting guidelines, encompass both public and private sphere violations.42 Interpreting the Charter in light of the present-day conditions would thus entail holding a state responsible for human rights violations by NSAs (including individuals, groups, corporations and other entities as well as agents acting under their authority) where a state fails to prevent NSAs from interfering in any way with the enjoyment of human rights of women,43 or in some contexts holding NSAs directly responsible for violations of women’s human rights.

[6.12] By and large, however, by ignoring making explicit provisions to critical issues affecting women such as custom and marriage, it was argued that the Charter inadequately protects women’s human rights.44 It is against this background that during its 23rd Session, held in April 1998, the African Commission endorsed the appointment of the first Special Rapporteur on the Rights of Women in Africa (SRRWA) with a mandate that included working towards the adoption and ratification of the Protocol to the African Charter on the Rights of Women in Africa and making recommendations geared towards improving the situation of women in Africa.45

What are the prospects of Africa’s Protocol on Women’s Rights?

B. Protocol to the African Charter on the Rights of Women in Africa

[6.13] The Protocol was adopted on 11 July 2003 during the Second Ordinary Heads of States and Governments Summit held in Maputo, Mozambique. It was a long-awaited realisation, as it had taken eight years for the draft text of this critical new human rights instrument to be adopted. On 25 November 2005, the Protocol came into force having received the required 15 ratifications. By 26 May 2007, nearly four years after the adoption of the Protocol, only 21 (out of 53) African states had

ratified the Protocol. The reluctance to ratify the Protocol is itself indicative of the approach of African states to the protection of women’s human rights. However, human rights instruments in Africa have historically taken a long time to ratify and come into force due to the lack of political will. For example, the African Charter, adopted in 1981, only came into force five years later in 1986; the Protocol establishing the African Court on Human and Peoples’ Rights came into force in 2004, six years after its adoption in 1998; and the African Charter on the Rights and Welfare of the Child, which was adopted in 1990, took nine years to come into force.

[6.14] The Protocol protects the civil and political rights of women, their ESC rights and also their collective rights. Apart from re-emphasising and extending UN instruments on human rights of women, the Protocol enshrines human rights and gender equality into the mainstream of African affairs, an objective and principle of the African Union (AU). The specific rights protected under the Protocol are, broadly, the rights to: non-discrimination (Article 2); dignity (Article 3); life, integrity and security of the person (Article 4); equal marriage rights regarding separation, divorce or annulment (Articles 6 and 7); access to justice and equal protection before the law (Article 8); participation in the political and decision-making process (Article 9); peace (Article 10); protection of women in armed conflicts (Article 11); education and training (Article 12); economic and social welfare rights (Article 13); health and reproductive rights including a woman’s right to have ‘medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus’ (Article 14); food security (Article 15); adequate housing (Article 16); live in a ‘positive cultural context’ (Article 17); healthy and sustainable environment (Article 18); sustainable development (Article 19); widows’ rights (Article 20); and inheritance (Article 21). The protocol contains special provisions protecting elderly women (Article 22), women with disabilities (Article 23) and women in distress (Article 24). Some human rights, such as the rights of women to vote, property and to participate in the cultural life of the community itself, are not specifically mentioned. However, there is no evidence to suggest that this was deliberate.

[6.15] Article 26 of the Protocol states the obligations of the state parties in the following terms:

46 These were Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, the Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Seychelles, Rwanda, South Africa, Senegal, Tanzania, Togo and Zambia. See African Commission website at http://www.achpr.org/english/ratifications/ratification_women%20protocol.pdf.
1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.

2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

[6.16] The above text makes it clear that states are obliged to ‘ensure’ the implementation of the Protocol, including ESC rights of women at a national level, without a qualifying ‘progressive realisation’ clause. In particular, states parties are obliged by Article 5 of the Protocol to take all ‘necessary legislative’ and ‘other measures’ to eliminate harmful practices which adversely affect the human rights of women and which are contrary to recognised international standards, including:

a. creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

b. prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

c. provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

d. protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

[6.17] Unlike some human rights treaties, the Protocol neither prohibits the formulation of reservations (either expressly or impliedly) nor mentions any permitted type of reservation(s). During the drafting of the Protocol, it was suggested by the Southern African Development Community Member States that reservations should be expressly prohibited, but this suggestion was not taken up. While this position was adopted to secure wider ratification of the Protocol by African states which consider that they have difficulties in guaranteeing all the rights in the Protocol but can nonetheless accept the generality of obligations in that instrument, it left some questions unaddressed. First, what reservations are permissible (or not permissible) under the Protocol given that it does not exclude or permit the possibility of reservations? Secondly, who should decide whether a reservation under the Protocol is invalid? Is it a matter exclusively for a reserving state and those states making objections, or should

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52 See eg Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 November 1950, 213 UNTS 222, entered into force 3 September 1953 (European Convention for the Protection of Human Rights and Fundamental Freedoms–ECHR). Art 57 ECHR provides: ‘1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article. 2. Any reservation made under this article shall contain a brief statement of the law concerned.’ See also the Convention against Discrimination in Education 429 UNTS 93, entered into force 22 May 1962, Art 9 states: ‘Reservations to this Convention shall not be permitted.’ See also Supplementary Convention on the abolition of slavery, the slave trade and institutions and practices similar to slavery 226 UNTS 3, entered into force 30 April 1957, Art 9 stating that ‘No reservations may be made to this Convention.’

the African Court itself pronounce on the compatibility with the object and purpose, when the need arises? And what legal effect should follow the determination of a reservation to the Protocol as invalid (unacceptable, irregular, impermissible or inadmissible)?

[6.18] As noted in chapter 5, in accordance with the rules of customary international law that are reflected in Article 19 of the Vienna Convention on the Law of Treaties,54 reservations can be made to the Protocol, provided they are compatible with the object and purpose of the Protocol. A reservation would be incompatible with the object and purpose of the Protocol if it has a ‘serious impact’ on the essential rules, rights or obligations indispensable to the general architecture of the Protocol, thereby depriving it of its raison d’être.55 This must also include all interpretative declarations whose effect is that of reservations. Possible reservations that might be contrary to the object and purpose of the Protocol include reservations that offend peremptory or higher norms (jus cogens)56 or obligations that concern or bind all states (obligations erga omnes) and norms of customary international law.57 For example, a reservation to the obligation to combat all forms of discrimination against women (Article 2) in the enjoyment of all human rights, including ESC rights, would not be acceptable. Similarly a state may not reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights protected in the Protocol (Article 26). Reservations to CEDAW made by Egypt, Libyan Arab Jamahiriya, Mauritania and Morocco specifically referred to the traditional male-centred interpretations of Islamic law (sharia).58 In particular, Egypt’s reservation to Article 16 of CEDAW, concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, states:

The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband.59

[6.19] The CEDAW Committee has urged states to expedite the steps necessary for the

54 1155 UNTS 331, 8 ILM 679, Art 19.
56 Vienna Convention, Art 53 defines a ‘peremptory norm’ of general international law (also called jus cogens, Latin for ‘compelling law’) as ‘a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. On the effect of jus cogens, see U Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2008) 18(5) EJIL 853–71.
59 Ibid.
withdrawal of such reservations incompatible with the object and purpose of the Convention.\textsuperscript{60} In particular, the Committee’s view is that Articles 2 and 16 of CEDAW are central to the object and purpose of the Convention and that, in accordance with Article 28, paragraph 2, they should be withdrawn.\textsuperscript{61} However, states have continued to observe these reservations in practice and thus violate the human rights of women.

\textbf{[6.20]} As noted in chapter 5, the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. Accordingly the African Commission, in the course of monitoring the legislative and other measures undertaken by states for the full realisation of the rights recognised in the Protocol (Article 26), and the African Court of Justice and Human Rights (in the course of the interpretation of matters arising from the application or implementation of this Protocol under Article 27), should assess the compatibility of reservations to the Protocol on Women’s Rights in Africa with the object and purpose of the Protocol. In doing so, account should be taken of the following:\textsuperscript{62} (i) the indivisibility and interdependence of the rights set out in the Protocol; (ii) the importance that the right(s) which is the subject of the reservation has within the general architecture of the Protocol, and (iii) the seriousness of the impact the reservation has (or is intended to have) upon a particular right, relevant rights or the Protocol as whole. Impermissible reservations under the Protocol are likely to include any general and broad reservations subjecting the Protocol to domestic law incompatible with the Protocol or those extending to minimum core obligations which are non-derogable and thereby deprive the Protocol of its \textit{raison d'être}.

\textbf{[6.21]} The Commission can advance the protection of women’s rights in Africa by requiring reserving states through their reports to explain: (i) the nature and scope of reservations or interpretative declarations; (ii) the reason(s) why such reservations was considered to be necessary and have been maintained; (iii) the precise effect of each reservation in terms of national law and policy; (iv) any plans to limit or modify the effect of reservations and ultimately withdraw them within a specific time frame.\textsuperscript{63} Where applicable, the Commission in its recommendations to states could highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal, whether total or partial, of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions. On its part, the Court should treat reservations incompatible with the object and purpose of the Protocol as invalid, and therefore of no legal effect. Unless a state chooses to withdraw from the Protocol, such reservations should generally be severable, meaning that the Protocol will be operative for the reserving state without benefit of the reservation, however phrased or named.

\textsuperscript{60} See the CEDAW Committee’s statement on reservations in the report on the 19th Session, Official Records of the General Assembly, 53rd Session, Supplement No 38, UN Doc A/53/38/Rev. 1, part two, ch I.
\textsuperscript{63} See also Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2007/5, para 16 (9); HRC, General Comment 24(52), above n 57, para 20.
C. The State of Women’s Rights in Africa in Practice

[6.22] Every state in Africa is party to at least one international treaty prohibiting discrimination on the basis of sex in the enjoyment of human rights or party to an international treaty providing for the equal rights of men and women to the enjoyment of all human rights. Despite this, it is essential to note that:

Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

[6.23] For example, persons with mental disabilities are often subjected to human rights abuses including rape and sexual abuse by other users or staff; forced sterilisation; confinement; violence and torture; the administration of treatment without informed consent; grossly inadequate sanitation; and a lack of food. However, women with mental disabilities are especially vulnerable to forced sterilisation and sexual violence, a violation of their sexual and reproductive health rights. Moreover, women with disabilities who belong to ethnic and racial minorities often experience compounded disadvantages due to the intersection of sex with ethnicity and race, though this has been historically neglected. This is because

Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers.

[6.24] In Libya, for example, there are ‘numerous reports about the existence of racial prejudices against Black Africans, which on some occasions has led to acts of violence against them’. Women have been the worst victims since the human rights of women are often subordinated to rigid social norms reportedly condoned and reinforced by the Libyan government. Consequently, there are circumstances in which discrimination (on grounds of disability or race) only or primarily affects women, or affects

67 CESC, General Comment 5: Persons with Disabilities (11th Session, 1994), UN Doc E/1995/22, 19 (1995), para 19 stating: ‘Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected.’
women in a different way, or to a different degree than men. For example, women often have less access to education and healthcare than men, and this compromises their opportunities for employment and advancement.\(^{71}\) For instance, in Botswana women ‘refugees have access neither to the Anti Retroviral (ARV) Therapy Programme nor the Prevention of Mother-to-Child Transmission of HIV Programme’.\(^{72}\) Therefore, despite the ratification of human rights instruments by the majority of African states, women in Africa still continue to be ‘victims of discrimination and harmful practices’ which violate their human rights.\(^{73}\) The key obstacles to the realisation of women’s human rights in Africa have deep cultural roots. The next section examines some selected prejudicial cultural practices affecting women’s realisation of ESC rights.

IV. PREJUDICIAL CULTURAL PRACTICES AND CUSTOMS AS AN OBSTACLE TO THE REALISATION OF WOMEN’S ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA

A. African Culture in General

[6.25] The term ‘culture’ is broad and vague: the concept of culture can refer to many things, varying from cultural products, such as arts and literature, to the cultural process or culture as a way of life.\(^{74}\) Anthropologists commonly use the term ‘culture’ to refer to society or group in which many or all people live and think in the same ways.\(^{75}\) Culture includes ‘inherited ideas, beliefs, values, and knowledge, which constitute the shared bases of social action’.\(^{76}\) During the General Discussion on the Right to take part in cultural life, held by CESCR at its seventh session in 1992, it was stated that culture meant a ‘way of life’.\(^{77}\) The UNESCO Declaration on Cultural Diversity defines culture as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, encompassing, in addition to art and literature, lifestyles, ‘ways of living together, value systems’, traditions and beliefs.\(^{78}\) Such a wide understanding is also reflected in Human Rights Committee’s General Comment 23 on the rights of minorities, according to which culture manifests itself in many forms, including a particular ‘way of life associated with the use of land resources’, especially in the case of indigenous peoples.\(^{79}\)

\(^{72}\) CERD, Concluding Observations: Botswana, UN Doc CERD/C/BWA/CO/16 (4 April 2006), para 19.
\(^{73}\) African Women’s Rights Protocol, preamble, para 12.
\(^{74}\) See Y Donders, Cultural Life in the Context of Human Rights, UN Doc E/C.12/40/13 (9 May 2008).
\(^{76}\) See Collins English Dictionary (HarperCollins, 1999), 385.
\(^{77}\) UN Doc E/C.12/1992/2, para 213.
\(^{79}\) UN Doc CCPR/C/21/Rev.1/Add.5, 8 April 1994.
In this respect, culture is a macroconcept, which subsumes religion as an aspect of culture.80

[6.26] Although a number of African states have ratified treaties which guarantee the equality of men and women and have incorporated the principles of equality and non-discrimination into national constitutions, the persistence of deep-rooted adverse patriarchal attitudes and firmly entrenched stereotypical behaviour with respect to the role of women and men in the family and society limit the full implementation of the human rights of women.81 The widespread and continuing existence of harmful traditional practices in African states affects the equal right of men and women to the full enjoyment of all human rights.82 While it is acknowledged that culture (as reflected in customary law in Africa) in some cases can protect some human rights of women, the prevalence in Africa of certain harmful traditions, customs and cultural practices (often enforced as customary law which is largely patriarchal and systematically oppressive toward women) leads to substantial discrimination against women, thereby preventing them from fully exercising their human rights.83 Although ‘everyone’ has a right to cultural participation,84 including cultural rights of specific groups,85 African cultures and traditions as they presently exist are mainly made for and by men.86 Some of these cultures are now reflected in state practice. In Eritrea, for example, while participation in National Service creates eligibility for access to land and other economic resources, women are exempt from National Service on grounds of marriage, thus losing eligibility for access to land and other resources.87 This serves to perpetuate women’s subordination in the family and society and constitutes serious obstacles to women’s enjoyment of their human rights, including ESC rights.

[6.27] Some of these cultures are enforced through discriminatory laws. For example in Nigeria, section 26(2) of the Constitution does not allow a Nigerian woman to

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80 Raday, above n 75, 665.
82 See eg CESCR, Concluding Observations: Zambia, UN Doc E/C.12/1/Add.106 (23 June 2005), para 10 noting that ‘the persistence of customs and traditions harmful to women’ is one of the factors impeding the implementation of the ICESCR.
83 Ibíd, paras 14, 23, 32. In para 23, the CESCR was ‘concerned about the harsh living conditions of widows and girl orphans due to, among other things, harmful traditional practices such as “widow-cleansing”, early marriages and denial of inheritance’. Similarly, in para 32 the CESCR noted that in Zambia ‘traditional attitudes [against girl education] continue and that discrimination against girl children is prevalent in the State party’. See also Raday, above n 75, 663–715.
84 See ICESCR, Art 5(a); UDHR, Art 27(1) stating: ‘Everyone has the right freely to participate in the cultural life of the community’; CERD, Art 5(e)(vi); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘the Protocol of San Salvador’), Art 14; and ACHPR, Art 17(2).
transmit her nationality to her foreign spouse on the same basis as a Nigerian man; section 55 of Chapter 198 of the 1990 Labour Act of Nigeria prohibits women from working at night in certain sectors of employment; section 360 of the Criminal Code classifies sexual assault against female victims as a misdemeanour; and section 55 of the Penal Code of Northern Nigeria allows wife battery as chastisement as long as ‘grievous harm’ is not inflicted. Thus, husbands are permitted to use physical means to chastise their wives as long as it does not result in ‘grievous harm’, which is defined as loss of sight, hearing, power of speech, facial disfigurement or life-threatening injuries. In more traditional areas of Nigeria, the courts and police have been reluctant to intervene to protect women who formally accused their husbands of abuse if the level of alleged abuse did not exceed customary norms in the areas. This has denied women in Africa ‘the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies’ affecting their lives. The right of everyone to cultural participation seeks to encourage the active contribution of all members of society to the progress of society as a whole. As such, it is intrinsically linked to, and is dependent on the enjoyment of, other human rights such as the right to own property alone as well as in association with others, the freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, the right to the full development of the human personality, and freedom of movement.

[6.28] Women are often denied travel documents just because they are female—they are subjected to legal or de facto requirements which prevent them from travelling (to access employment or education), such as the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. One case from Libya demonstrates the effect of violations of women’s freedom of movement on women’s enjoyment of other human rights. In Loubna El Ghar v Libyan Arab Jamahiriya, the author, of Libyan nationality, had lived all her life in Morocco with her divorced mother and held a residence permit for that country. As a student of French law at the Hassan II University Casablanca, she wished to continue her studies in France and to specialise in international law. To that end, she applied to the Libyan Consulate in Morocco for a passport beginning in 1998. In 2002, the Libyan consul indicated to the author that it was not possible to issue her a passport but that she could be given a laissez-passer (travel document) for Libya, by virtue of a ‘regulation’ that was explained neither orally nor on the laissez-passer itself. The passport

89 US Department of State, Country Reports on Human Rights Practices—2005, Nigeria. Released by the Bureau of Democracy, Human Rights, and Labor, 8 March 2006, available at http://www.state.gov/g/drl/rls/hrrpt/2005/61586.htm (18 March 2006). According to the 2003 Nigeria Demographic and Health Survey (NDHS), 64.5 per cent of women and 61.3 per cent of men agreed that a husband was justified in hitting or beating his wife for at least one of six specified reasons, including ‘burning food and not cooking on time’.
90 US Department of State, ibid.
91 African Women’s Rights Protocol, Art 17(1).
92 See UDHR, Art 17; ICERD, Art 5(d)(v); Protocol No 1 to the ECHR, Art 1; the American Convention on Human Rights, Art 21; and ACHPR, Art 4.
93 See UDHR, Art 19; ICCPR, Art 19(2); ECHR, Art 5; the American Convention on Human Rights, Art 13 and ACHPR, Art 9.
94 See UDHR, Art 26(2); ICESCR, Art 13(1).
95 ICCPR, Art 12(2) provides: ‘Everyone shall be free to leave any country, including his own.’
application submitted to the Libyan Consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author ‘is a native of Morocco and has not obtained a passport, this travel document [laissez-passer] is issued to enable her to return to national territory’. The UN Human Rights Committee (HRC) considered that ‘this laissez-passer cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad’. The Committee concluded that

the facts before it disclose a violation of article 12, paragraph 2, of the Covenant (ICCPR) insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

The Committee urged ‘the State party to issue the author with a passport without further delay’ and to ‘take effective measures to ensure that similar violations do not recur in future’. It is clear that the refusal to issue a passport to a female student on the basis of an ‘unwritten regulation’ (ie apparently because the applicant was female and she had no consent from a third party, namely her father) in this case not only violated her freedom of movement (a civil and political right) but also prevented her from travelling abroad for further studies (a violation of the right to education—an ESC right).

[6.29] It is, therefore, not surprising that many features of customary law in Africa effectively operate ‘against the dignity, welfare or interests of women [and] undermine their status’. Generally, it has been noted that:

Traditional cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.

In the African context, the main harmful traditional practices include ‘the practice of female genital mutilation, as well as scarification and ritual killing of children’,

97 Ibid, para 7.2.
98 Ibid, para 8.
101 Oloka-Onyango, above n 86, 1268 citing the Constitution of the Republic of Uganda (1995), Arts 33(6), 32(1); and cultural objective No xxiv in the Preamble, which encourages the incorporation into aspects of Ugandan life all cultures and customary values consistent with fundamental rights and freedoms and human dignity.
103 K Bowman, ‘Comment: Bridging the Gap in the Hopes of Ending Female Genital Cutting’ (2005) Santa Clara Journal of International Law 132; N Mendelsohn, ‘At the Crossroads: The Case For and Against a Cultural Defense to Female Genital Mutilation’ (2004) 56 Rutgers Law Review 1011–038; CESCR, Concluding Observations: Egypt, UN Doc E/C.12/1/Add.44 (23 May 2000), para 16: ‘The Committee further notes with concern that the percentage of women who are victims of FGM remains alarmingly high:
corporal punishment (in the family, schools and other institutions),\(^{105}\) the high level of acceptance of domestic violence towards women,\(^{106}\) forced and/or early marriages\(^{107}\) polygamy (more specifically polygyny—a man having more than one wife), and the denial of inheritance rights to women.\(^{108}\) Many customary laws discriminate against women mainly in the areas of inheritance, marriage and divorce.\(^{109}\) These areas are, therefore, key to a deeper understanding of why women in Africa do not enjoy their human rights. Yet some states have made only limited efforts to address directly such discriminatory cultural practices and stereotypes, and maintain that ‘women themselves are primarily responsible for changing their position of disadvantage’.\(^{110}\) How can women change such entrenched discriminatory position without the necessary political will to confront holistically discriminatory laws and entrenched cultural practices? Since ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’,\(^{111}\) inequality affects the enjoyment of all human rights of women. For example, inequality in civil and political rights undermines the exercise and enjoyment of women’s ESC rights and vice versa. The next section discusses a selection of cases of violations of women’s human rights in Africa, focusing especially on some traditional customs in the areas of inheritance, polygyny and divorce.

Who statistics for 1995 showed an estimated 97 per cent prevalence of FGM (“Female Genital Mutilation: An Overview”, WHO, Geneva, 1998, p 13); CEDAW, Concluding Observations: Eritrea, UN Doc CEDAW/C/ERI/CO/3 (3 February 2006), para 18 stating that ‘the Committee is concerned at the high incidence of female genital mutilation in the country and the State party’s reluctance to expedite the adoption of legislation aimed at eradicating this practice’.

\(^{104}\) CRC Committee, Concluding Observations: Nigeria, UN Doc CRC/C/15/Add.257 (13 April 2005), para 56. In respect of Uganda, the CRC Committee expressed its concern in 2005 that ‘FGM is not specifically prohibited by law and is still widely practised in the State party’: Concluding Observations: Uganda, UN Doc CRC/C/UGA/CO/2 (23 November 2005), para 55.

\(^{105}\) In Nigeria, for example, the sharia legal code prescribes ‘penalties and corporal punishment such as flogging, whipping, stoning and amputation, which are sometimes applied to children’. CRC Committee, above n 104, para 38(d). See also CRC, Concluding Observations: Uganda, UN Doc CRC/C/UGA/CO/2 (23 November 2005), para 39 noting that ‘While taking note that corporal punishment has been prohibited in schools by a circular of the Ministry of Education, and in the penal system under the Children’s Act, the Committee remains concerned that corporal punishment is still traditionally accepted and widely practised in the family and in other settings’; G Muhwezi, ‘Teacher’s Canes Paralyse Student’, Sunday Monitor 30 July 2006; and Lawfulness of Corporal Punishment: Uganda at http://www.endcorporalpunishment.org/pages/progress/reports/uganda.html (May 2006).


\(^{107}\) See eg The Centre on Housing Rights and Evictions (COHRE), Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women—A Survey of Law and Practice in Sub-Saharan Africa (Geneva, COHRE, 2004); CESCR, Concluding Observations: Senegal, UN Doc E/C.12/1/Add.62 (24 September 2001), para 15 noting that discriminatory practices against women and girls in Senegal include ‘polygamy, restricted access to land, property, housing and credit facilities, and the inability to inherit land’.


B. Right to Inheritance

[6.30] Equal inheritance and ownership of land and property is an ESC right. Article 21 of the Protocol to the African Charter on the Rights of Women in Africa protects this right in these terms:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.

[6.31] However, in many African states, women cannot inherit under the relevant customary law which applies the rule of male primogeniture. In Zambia, for example, customary land, which represents over 80 per cent of all land, is traditionally inherited by the man’s family in accordance with rules of male primogeniture, ‘to the detriment of widows and, especially, girl children’. It is a widely held view that ‘a [married] woman is property because she’s been bought, so how can property own property?’ Disappointingly, discriminatory provisions were entrenched in Zambia’s 1996 Constitution. As noted by the CEDAW Committee, Zambia’s 1996 Constitution contains:

contradictory provisions . . . whereby article 11 guarantees the equal status of women and article 23(4) permits discriminatory laws to exist in the area of personal law, namely: . . . devolution of property on death, or other matters of personal law and customary law with respect to any matter.

Undoubtedly, this provision is a serious flaw in the legal protection of women’s human rights, and it fosters patriarchy and discrimination. It is, therefore, necessary to repeal Article 23(4) of the Constitution, which permits discrimination in the area of law that affects women most. Two cases are considered below to illustrate the point.

(i) The Magaya Case

[6.32] Suprisingly, in some cases, where customary law contravenes international human rights or the statutory law, the customary law continues to be upheld and applied. Perhaps the best case to illustrate this point is the decision of the Supreme

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112 Appendix G, para 1.
113 CESCRC, Concluding Observations: Zambia, UN Doc E/C.12/1/Add.106 (23 June 2005), para 27.
114 COHRE, above n 108, at 143.
115 CEDAW, Zambia: Concluding Observations, UN Doc A/57/38 (21 June 2002), para 230. Art 11 of Zambia’s Constitution (1996), on fundamental rights and freedoms, protects various civil and political rights for all Zambians, regardless of, inter alia, sex. This provision also prohibits the taking of property without appropriate compensation. Disappointingly, however, Art 23(4) of the Constitution specifically excludes from the application of the non-discrimination clause to all law: ‘(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons’.
116 Ibid.
Court of Zimbabwe in Venia Magaya v Nakayi Shonhiwa Magaya.\textsuperscript{118} The main issue in this case was whether a woman (a 58 year old named Venia Magaya) could inherit her father’s estate if he died without a will. At the community court (which was presided over by a female officer), Venia was indeed appointed as heir to the estate of her father. However, Venia’s half-brother from her father’s second wife and other male relatives then contested this appointment. They argued before the magistrate’s court that customary law does not permit a daughter to inherit from her father’s estate. The magistrate agreed with this argument and substituted one of the half-brothers as heir. Venia then appealed to the Supreme Court, which dismissed the appeal. Denying that a woman could indeed inherit on account of the custom of the community from which she came, the learned judge in the case upheld discrimination against women and observed that the ‘nature of African society’ dictates that women are not equal to men, especially in family relationships. The judge noted that ‘the woman’s status is therefore basically the same as that of any junior male in the family’.\textsuperscript{119} The 5–0 male ruling awarded the father’s estate to her half-brother, making reference to African cultural norms, which say that the head of the family is a patriarch, or a senior man, who exercises control over the property and lives of women and juniors.\textsuperscript{120} The Court noted that the woman could not inherit:

because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family (through marriage).\textsuperscript{121}

\textbf{[6.33]} The Supreme Court found further that, although the practice of preferring males is discriminatory, it did not contravene the Zimbabwean Constitution, as it does not forbid discrimination based on sex in the distribution of a deceased person’s estate under customary law. Indeed section 23 of the Zimbabwean Constitution\textsuperscript{122} allows blatant discrimination in several areas, including ‘the application of African customary law’.\textsuperscript{123} Essentially, the Supreme Court elevated discriminatory customary law above human rights obligations. Given the fact that human rights are ‘fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities’ and ‘human rights are timeless expressions of fundamental entitlements of the human person’,\textsuperscript{124} it is important not to elevate customary norms over human rights of women. In this respect, the

\begin{itemize}
  \item \textsuperscript{119} Ibid, 10.
  \item \textsuperscript{120} COHRE, supra, above n 108, 169 observed: ‘The Magaya case should be seen as a warning to all women—that all the laws in the world will amount to nothing if they continue to be interpreted by discriminatory men.’
  \item \textsuperscript{121} Magaya v Magaya [1999] (1) ZLR 100.
  \item \textsuperscript{122} At the time of writing, the Constitution was last reformed in the year 2000. Shortly after the decision, Venia Magaya died in 2000 homeless and destitute. See generally WLSA, Venia Magaya’s Sacrifice: A Case of Custom Gone Awry (Harare, WLSA, 2001).
  \item \textsuperscript{123} S 23(3) states that: ‘Nothing contained in any law shall be held to be in contravention of subsection (1)(a) [which provides that ‘no law shall make any provision that is discriminatory either of itself or in its effect’) to the extent that the law in question relates to any of the following matters: (a) adoption, marriage, divorce and inheritance . . . (b) the application of African customary law’.
  \item \textsuperscript{124} CESCR, General Comment 17, UN Doc E/C.12/GC/17 (12 January 2006), paras 1 and 2.
\end{itemize}
Magaya decision has been described as ‘outrageous’ and ‘one of the world’s most egregious cases of court-condoned discrimination’.\(^{125}\)

\[6.34\] Unfortunately, the Magaya decision is not an isolated one since numerous jurisdictions around Africa regularly give more weight to cultural practices that support patriarchy and discrimination than they do to the rights of women.\(^{126}\) This limits women’s access to land (the most valuable economic resource and main source of income in developing African states) and thereby subordinates women’s economic dependence and survival on men, a fact that perpetuates women’s vulnerability, insecurity and the attendant human rights violations. Undoubtedly, the continued existence of, and adherence to, customary laws perpetuates discrimination against women, particularly in the context of the family. Such prevailing traditional and sociocultural attitudes towards women contribute to the perpetuation of negative images of women, which limits women’s participation at the decision-making level and impedes their emancipation.\(^{127}\) As the UN HRC observed:

> Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. . . . States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant [ICCPR] rights.\(^{128}\)

\[6.35\] One way of ensuring that the implementation of customary laws does not violate women’s right to equality is to interpret customary laws in the light of present-day conditions and international human rights obligations of states. Under this approach, customary laws must be interpreted in a way that promotes the equal enjoyment of all human rights—civil, political, economic, social and cultural rights—by men and women. It follows that the courts would be able to strike down, for example, the rule of male primogeniture in the African customary law of succession. This would ensure that the meaning and application of customary law can vary so as to adapt to new and enhanced ideals of human rights protection. An example from South Africa below adequately illustrates this point.

(ii) The Bhe Case

\[6.36\] In the Bhe case in South Africa there was a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession.\(^{129}\) In this case the deceased’s partner (Ms Nontupheko Bhe) had two minor children, both extramarital daughters, by the deceased (Mgolombane), who died intestate. The daughters had failed to qualify as heirs in the intestate estate of their deceased father. The court appointed the deceased’s father as sole heir of the deceased estate, in

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\(^{125}\) COHRE, above n 108, 162 and 169.

\(^{126}\) Oloka-Onyango, above n 86.

\(^{127}\) CEDAW, Concluding Observations: Zimbabwe UN Doc A/53/38 (14 May 1998), para 139.


\(^{129}\) Constitutional Court of South Africa, Nonkululeko Letta Bhe and Others v The Magistrate, Khayelitsha and Others Case CCT 49/03, 2004 (2) SA 544 (C) (2004 (1) BCLR 27), [Bhe case]; Shibi v Sithole and Others Case CCT 69/03 [Shibi case]; South African Human Rights Commission and Another v President of the Republic of South Africa and Another Case CCT 50/03 (15 October 2004).
accordance with the relevant domestic law.\textsuperscript{130} The general rule (custom) was that only a male related to the deceased qualified as heir in the case of intestacy. Women did not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head was his heir. If the deceased was not survived by any male descendants, his father succeeded him. If his father also did not survive him, an heir was sought among the father’s male descendants related to him through the male line.\textsuperscript{131}

[6.37] The application in the \textit{Bhe} case was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. It was contended that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. In the \textit{Shibi} case similar reasons prevented Ms Shibi was from inheriting the estate of her deceased brother. The South African Human Rights Commission and the Women’s Legal Trust were permitted direct access to the Constitution Court in the third case which was brought in the public interest, and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

[6.38] The South African Constitution Court held that the exclusion of women from heirship, and consequently from being able to inherit property, was in keeping with a patriarchal system which reserved for women a position of subservience and subordination in which they were regarded as perpetual minors under the tutelage of fathers, husbands or heads of the extended family. Basing its decision on sections 9 (equal protection) and 10 (right to dignity) of the South African Constitution,\textsuperscript{132} the Constitutional Court found, rightly, that excluding women from inheriting on the ground of gender is,

\begin{itemize}
  \item a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order,\textsuperscript{133}
\end{itemize}

The Court noted that customary laws ‘have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas’.\textsuperscript{134} Langa DCJ, writing for the majority of the Court, held, inter alia, that:

\begin{itemize}
  \item \textsuperscript{130} The Black Administration Act of 1927, s 23, read with the regulations published thereunder, as well as s 1(4)(b) of the Intestate Succession Act 81 of 1987, purported to give effect to customary law. Extramarital children were not entitled to succeed to their father’s estate in customary law.
  \item \textsuperscript{131} \textit{Bhe and Others v The Magistrate, Khayelitsha and Others} Case CCT 49/03, para 77.
  \item \textsuperscript{132} The Constitution of the Republic of South Africa Act 108 of 1996. S 9 provides:
    \begin{enumerate}
      \item Everyone is equal before the law and has the right to equal protection and benefit of the law.
      \item Equality includes the full and equal enjoyment of all rights and freedoms. . . .
      \item The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. . . .
    \end{enumerate}
  \item \textsuperscript{133} \textit{Bhe and Others v The Magistrate, Khayelitsha and Others} Case CCT 49/03 at para 91.
  \item \textsuperscript{134} \textit{Ibid}, para. 82.
\end{itemize}
The principle of primogeniture also violates the right of women to human dignity as guaranteed in s 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property. . . . In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of s 9(3) of the Constitution.  

[6.39] It was concluded that:

the primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary-law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.  

[6.40] The above decision shows that courts can play a positive role in developing women’s human rights jurisprudence. Judicial oversight is crucial in ensuring that women are protected against discriminatory laws. However, the impact of progressive judicial decisions is limited if court decisions are not enforced adequately. It can be noted that the Constitutional Court in South Africa took a progressive view of culture—by taking into account human rights principles of equality and non-discrimination, while the court in Zimbabwe placed emphasis on the domestic constitutional provisions and avoided interpreting these in light of the well-established human rights principles of equality and non-discrimination. The cases considered above also lead to some interesting questions: for example, why did the South African Constitutional Court give such a progressive view of customary laws compared to the Supreme Court in Zimbabwe? Is it because of the differences in the sociopolitical dynamics at play in these two jurisdictions?  

[6.41] Undoubtedly, however, African governments need to take a more proactive role at a national level by introducing concrete measures to abolish all discriminatory customs and practices including extending gender-sensitive training to the judiciary. In the context of inheritance, it is essential to note that Article 21 of the Protocol to the ACHPR on the Rights of Women in Africa, which protects the right to inheritance, can be used as a minimum standard to which all the customary laws on inheritance in Africa must be subjected. In addition, the codification of family and customary laws, incorporating only those customary laws and practices that promote

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136 Ibid, at para 95.
gender equality and the empowerment of women, has the potential to enhance the realisation of women’s human rights in Africa.

C. Right to Equality and Polygamous Marriages

[6.42] Some traditional practices in Africa are so firmly established that while from an international human rights perspective they are considered as contrary to women’s equality with men, they are recognised even in the African Women’s Rights Protocol. One of the clearest examples is polygamy,138 which according to the UN HRC discriminates against women and violates their dignity. In the words of the HRC:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.139

A similar position has been applied by the CESCR. For example, in 2006 in its Concluding Observations on Morocco, the CESCR noted ‘with regret’ that polygamy, despite the restrictions placed on it by Morocco’s new Family Code, continues to be practised in Morocco. The Committee recalled that ‘polygamy is a violation of a woman’s dignity and constitutes discrimination against women’.140 The Committee recommended that Morocco ‘abolish polygamy once and for all’.141 On another occasion the Committee stated that ‘polygamy, a practice which is very often incompatible with the economic, social and cultural rights of women, is widespread in Nigeria’.142 If polygamy violates the dignity of women and is very often incompatible with the ESC rights of women, why is it recognised in the Protocol to the ACHPR on the Rights of Women in Africa?

[6.43] It is vital to note that although the African Women’s Rights Protocol prohibits discrimination against women and guarantees women’s right to dignity,143 it recognises polygamy. Article 2(1) of the Protocol recognises that: ‘States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures’, and under Article 2(2):

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

138 The term polygamy in social anthropology can be defined as any form of marriage in which a person has more than one spouse. It covers both polygyny (one man having more than one wife simultaneously), or polyandry (one woman having more than one husband simultaneously), or, less commonly as ‘polygamy’ (one person having many wives and many husbands at the same time). In this chapter, polygamy has been used to mean polygyny. For a discussion of polygamy, see S Chapman, Polygamy, Bigamy and Human Rights Law (Philadelphia, Xlibris Corporation, 2001).
141 Ibid, para 38.
143 African Women’s Rights Protocol, Art 3(1): ‘Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights’
More specifically, under Article 5:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.

One would have expected such prohibited harmful cultural and traditional practices which are contrary to international human rights standards to include polygamy. Nevertheless, with respect to polygamy, the Protocol simply states in Article 6(c):

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.

The above provision might be interpreted as recognising polygamy. This might be seen as being consistent with the ACHPR which makes it a ‘duty’ of the state and the individual to promote and protect the morals and ‘traditional/cultural values’ recognised by the community.144 Clearly then, African states parties to the Protocol are only obliged to ‘encourage’ monogamy. This is a weaker obligation since, in its ordinary and natural meaning, the obligation to ‘encourage’ only extends to ‘inspire with the courage or confidence’.145 The obligation is not to eliminate polygamy immediately. During the drafting of the African Women’s Rights Protocol, there was a vigorous debate on whether polygyny should be abolished. While non-governmental organisations demanded its abolition, government experts actively resisted its abolition because ‘Shari’a and many customary personal law systems recognised the rights of men to marry more than one wife’ and that its abolition would result in ‘hardship being suffered by women already in polygynous unions’.146 It is recognised under the Protocol that it is possible to ‘promote’ and ‘respect’ women’s rights in polygamous marital relationships, although it is less clear as to how this can be achieved in practice. By implication, therefore, polygamy under the Protocol is not seen as one of those practices which violate the dignity of women or constitute inadmissible discrimination against women (at least in the short term).

Given the fact that polygyny in Africa is deeply entrenched, it is considered to be very difficult to ban it outright, and if it was banned it might cause harm to many women living in these relationships, whose only protection at the moment might be provisions under the impugned customary law. Therefore, the approach taken was seen as offering necessary flexibility, reflecting the realities of the situation in Africa and the difficulties involved in agreeing to a regional human rights treaty on women’s human rights on a continent where most states have plural legal systems covering

144 ACHPR, Art 17(2): ‘The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.’ Art 29(7): ‘The individual shall also have the duty: to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.’


different cultural, ethnic and religious groupings. This is especially the case given the fact that certain states in Africa (eg Egypt and Sudan) apply aspects of Islamic law (sharia) that are interpreted by some scholars as not providing for equality between men and women, and permit a man to marry up to four women. Such interpretation of the Quran has been contested on the basis that the Quran never discriminates on the basis of gender. It is the interpretation of the Quran, reflecting masculine and patriarchal prejudices of the interpreters, that is discriminatory.

Indeed, depending on the way Islamic injunctions in the Quran are interpreted and applied, they may contribute towards the realisation of women’s human rights. This view has been supported by the CRC Committee, which noted that ‘the universal values of equality and tolerance [are] inherent in Islam’. It is also interesting to note that representatives of Islamic states such as the Saudi Arabian delegation before the CEDAW Committee have also emphasised that ‘there is no contradiction in substance between the Convention [on the Elimination of Discrimination against Women] and Islamic Sharia’.

[6.47] It has to be noted, however, that the recognition of polygyny is difficult to reconcile with the above view of the HRC and the view of the CEDAW Committee: Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.

147 Banda, Women, Law and Human Rights, above n 146, 71.
148 For example, a renowned Islamic scholar Sheikh Muhammed Salih Al-Munajjid, asserted that: ‘Those who say that Islam is the religion of equality are lying against Islam. . . . Rather Islam is the religion of justice which means treating equally those who are equal and differentiating between those who are different. No one who knows the religion of Islam would say that it is the religion of equality. . . . Not one single letter in the Qur’an enjoins equality, rather it enjoins justice.’ See Islam Question and Answer, ‘Does Islam Regard Men and Women as Equal?’ at http://www.islam-qa.com/index.php?ref=1105&ln=eng&txt=equality . For the interpretation of the Quranic provisions regarding women, see generally M Bin Abdul-Aziz Al-Musnad, Islamic Fatawa Regarding Women (Riyadh, Darussalam, 1996).
151 See CRC Committee, Concluding Observations, Egypt, UN Doc CRC/C/15/Add.145 (21 February 2001), para 6; Qatar, UN Doc CRC/C/15/Add.163 (6 November 2001), para 9; Saudi Arabia, UN Doc CRC/C/15/Add.148 (22 February 2001), para 6.
Article 5(a) of the CEDAW, which has been ratified by several African states and is substantially similar to Article 2(2) of the African Women’s Rights Protocol, provides:

States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Since polygamy is considered by UN treaty-monitoring bodies as violating women’s rights to equality with men contrary to CEDAW Article 5(a), would the African Court of Justice and Human Rights (‘the Court’), which under Article 27 of the African Women’s Rights Protocol is ‘seized with matters of interpretation arising from the application or implementation of this [Women’s Rights] Protocol’, similarly interpret polygamy under the Protocol as violating Article 2(2) of the Protocol? While the Court’s interpretation remains to be seen, a similar interpretation would be consistent with the view that the ‘Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned’ without prejudice to ‘more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions’. Under Article 60 of the African Charter, the ACmHPR (‘the African Commission’) and arguably the Court, since it complements the protective mandate of the African Commission, are required to ‘draw inspiration from international law on human and peoples’ rights, . . . the Universal Declaration of Human Rights, other instruments adopted by the United Nations . . . of which the parties to the present Charter are members’. Such instruments undoubtedly include CEDAW.

It is possible that if the Protocol were to be interpreted in line with CEDAW, the obligation to ‘encourage’ would be read in the light of the overall objective, indeed the raison d’être, of the Protocol which is to establish clear human rights obligations for states parties in respect of the full realisation of the human rights of women. The increasingly high standard being required in the area of the protection of human rights correspondingly and inevitably requires greater firmness in assessing breaches

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154 The first Judges of the African Court on Human and Peoples’ Rights (which in 2008 merged with the Court of Justice of the African Union to form the African Court of Justice and Human Rights) were elected on 22 January 2006 at the Eighth Ordinary Session of the Executive Council of the African Union, held in Khartoum, Sudan. These were: Dr Fatsah Ouquerouz (Algeria), Jean Emile Somda (Burkina Faso) replaced in 2008 by Professor Githu Muigai (Kenya), Dr Gerard Niyungeko (Burundi), Sophia AB Akuffo (Ghana), Kellelo Justina Masafo-Guni (Lesotho), Hamdi Fanoush (Libya), Modibo Tounty Guindo (Mali), Jean Mutsinzi (Rwanda), El Hadji Guissé (Senegal), Bernard Ngoepe (South Africa) and George W Kanyeihamba (Uganda) replaced in 2008 by Joseph Nyamihana Mulenga (Uganda). For a discussion of the Court, see AP van Der Mei, ‘The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?’ (2005) 18 Leiden Journal of International Law 113–29. On 1 July 2008 a statute was adopted providing for the merger of the institutions of the African Court on Human and Peoples’ Rights and the African Court of Justice to become the African Court of Justice and Human Rights. See Statute of the African Court of Justice and Human Rights, Assembly/AU/13(XI).


of equality and non-discrimination as the fundamental values of democratic societies. Therefore, the Court should have regard to the fact that the Protocol is a ‘living instrument which must be interpreted in the light of present-day conditions’. As stated in the preamble to the Protocol, this is to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.

Three specific obligations arise here: protect, promote and realise.

[6.50] The obligation to protect requires states parties to take steps aimed directly towards the elimination of prejudices, custom and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women. The obligation of states parties to protect under the Protocol includes, inter alia, the respect and adoption of constitutional and legislative provisions on the equal right of men and women to enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination and to prevent third parties or private actors (individuals, groups, corporations and other entities as well as agents acting under their authority) from interfering directly or indirectly with the enjoyment of women’s human rights, including ESC rights; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.

[6.51] States parties have an obligation to monitor and regulate the conduct of NSAs to ensure that they do not violate the equal right of men and women to enjoy civil, political, economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatised, or where rebel armed movements—such as the notorious Lord’s Resistance Army in Uganda—violate human rights including subjecting women to torture (eg rape) or sexual slavery, or where armed groups execute women based on allegations of adultery.

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159 African Women’s Right Protocol, preamble, para 14 (emphasis added).

160 CESCR, General Comment 16, para 19.

161 See The Social and Economic Rights Action Center and the Center for Economic and Social Rights, Nigeria, Communication 155/96 (2001) AHRLR 60 (15th Annual Activity Report), para 44: Commission Nationale des Droits de l’Homme et des Libertes v Chad Communication 74/92 (2000) AHRLR 66 (9th Annual Activity Report), (ACmHPR); X and Y v Netherlands 91 ECHR (1985) (Ser A), 32 (ECHR); Velasquez Rodriguez v Honduras judgment of July 29, 1988, Series C, No 4 (IACtHR) holding that a state has a positive duty to prevent human rights violations occurring in the territory subject to its effective control, even if such violations are carried out by third parties.

162 CESCR, General Comment 16, para 19; African Women’s Rights Protocol, Art 2.

163 CESCR, General Comment 16, para 20; above ch 3.

164 Ibid. See also generally K. de Feyter and F Gomez (eds), Privatisation and Human Rights in the Age of Globalisation (Antwerp: Intersentia, 2005).


The obligation equally applies where NSAs formulate policies that discriminate against women. A 1992 case from Zambia illustrates this point. This case involved challenging a NSA, the Intercontinental Hotel, which had a policy of refusing women entry unless they were accompanied by a male escort. The hotel justified the policy as a necessary measure against prostitution. A security guard stopped a woman (Longwe) when she tried to retrieve her children from a party at the hotel. On another occasion, the same hotel refused Longwe admittance when she had arranged to meet a group of women’s activists in the hotel’s bar. Longwe made a claim at the Zambian High Court, arguing that the hotel’s actions violated her right to freedom from discrimination under both Zambia’s Constitution and under Articles 1, 2 and 3 of CEDAW. The High Court of Zambia noted that Zambia, being a party to international treaties such as the ACHPR and CEDAW, must respect and conform to the notion of gender equality. Reading international instruments and the Zambian Constitution in conjunction, the Court held that discriminating acts on the basis of gender carried out by NSAs violated the plaintiff’s fundamental equality rights and women’s rights. This case is notable because it applied human rights obligations to NSAs. The implication is that states must put an end to discriminatory actions affecting women’s equal enjoyment of human rights with men ‘both in the public and the private sector’. In particular, states should implement laws and policies to ensure that ‘pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment’.

The obligation to promote and realise (fulfil) requires states parties to take steps to ensure that, in practice, men and women enjoy their civil, political, economic, social and cultural rights on a basis of equality. Such steps should include, but not be limited to, the following:

First, the availability and accessibility of appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes, prevention programmes, revised policies, benchmarks and implementation programmes. Domestic courts must not shy away from confronting discriminatory customary practices against women. A decision of the Nigerian Court of Appeal, affirmed by the Supreme Court, shows how domestic courts can enforce human rights of women. This case involved a challenge of a local custom in Nigeria known as nrachi or idegbé. This custom

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168 HRC, General Comment 28, para 4.


170 CESCR, General Comment 16, para 21.


173 This situation usually arises when a deceased man leaves an estate, but no surviving male issue to inherit it. The idea underlying this practice is to save the lineage ‘from extinction’. The daughter, now considered an idegbé or nrachi, is entitled to inherit both movable and immovable property from her deceased father’s estate. The legal interest vests in her until she gives birth to her own children. However, if she bears sons and daughters, the sons rather than the daughters succeed her in accordance with the rule of primogeniture.
involves the performance of a ceremony whereby a man could keep one of his daughters perpetually in his home unmarried in order to care for the children, especially males, to succeed him (and thereby perform the ‘women’s traditional role’). Relying upon CEDAW, Article 2, the Nigerian Court of Appeal found the custom to be discriminatory on the basis of sex and in violation of the right to marry and women’s equality rights. The Court stressed the importance of eliminating discriminatory customary practices in order to give international human rights practical effect. In holding that a female child can inherit from her deceased father’s estate without the nrachi ceremony being performed, the Court observed:

In view of the fact that Nigeria is a party to the Convention [CEDAW], courts of law should give or provide teeth to its provisions. That is one major way of ameliorating the unfortunate situation Virginia found herself in, a situation where she was forced to rely on an uncouth custom not only against the laws of Nigeria but also against nature.174

Secondly, the establishment and maintenance by states parties of appropriate effective venues for redress against human rights violations, including violations against ESC rights. Such venues include independent courts and tribunals, administrative mechanisms, and national human rights and women’s commissions that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalised women.

Thirdly, the design and implementation of policies and programmes to give long-term effect to the civil, political, economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women’s equal enjoyment of their rights, gender audits and gender-specific allocation of resources.175

Finally, the promotion of equal representation of men and women in public office and decision-making bodies, and the promotion of participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realisation of all human rights.

[6.54] As noted above, the custom of polygyny is considered in international human rights law to be discriminatory against women. How does polygyny discriminate against women? One common response is that it gives men rights to treat women as ‘property’. Thus, Wing and Smith have stated:

This custom can place women at a severe disadvantage by treating wives as commodities to be bought and sold. Even in cases where women’s rights to inheritance and child support are recognised, polygamy leaves less to split among the wives. Polygamy is also one of the major reasons African men have difficulty supporting their families placing heavier burdens on women to produce and support their children. . . . A major problem exists since women bear a risk of getting infected [with HIV] by men who have multiple partners/wives.176

174 Muojekwu v Ejikeme, above n 172, 410.
Viewed in this context, Article 6(c) of the African Women’s Rights Protocol may be interpreted as imposing an obligation on the African states parties to move as expeditiously and effectively as possible towards that goal of monogamy (and thus an implied obligation to progressively eliminate polygamy). If the Protocol was to be read in such a way as not to establish such an obligation to move towards monogamy, it would be largely deprived of its raison d’être since polygyny, as shown above, has been held as amounting to discrimination against women. However, attempts to outlaw polygyny in Africa on the above basis are likely to be opposed by those who argue that polygyny protects women177 and is recognised in shari’a.178 Indeed recent attempts to restrict polygyny in Uganda through the Domestic Relations Bill 2005 were largely resisted by Muslims on the above grounds.179

D. Right to Equality and Divorce

Traditional divorce law in many states in Africa either discriminates against women or contains provisions that may place women at a disadvantage. For example, in Egypt, shari’a is the primary source of legislation, and practices that conflict with the government’s interpretation of shari’a are prohibited.180 Women seeking divorce through unilateral repudiation by virtue of Act No 1 of 2000 (khul) must in all cases forego their rights to financial support and, in particular, to their dowries.181 This leads to financial discrimination against women and may bar women from seeking divorce through unilateral repudiation.

In some states, women have to meet stricter evidentiary standards than men to prove grounds for divorce. In Uganda, for example, before 15 October 2004, husbands were able to divorce their wives solely on the grounds of adultery, whereas for a wife to petition for divorce, she had to prove adultery plus an additional ground.182 Uganda’s Constitutional Court, on 11 March 2004, held that these provisions were inconsistent with Articles 21 (equal protection), 31 (equal rights in marriage) and 33 (right to dignity) of the 1995 Ugandan Constitution.183 In a leading judgment, Twinomujuni JA stated that:

Islamic Information and Education, n.d.), available at http://www.unh.edu/msa/iiie13.htm (last accessed 12 January 2008), who argues that: ‘The truth of the matter is that monogamy protects men, allowing them to “play around” without responsibility. . . Men are the ones protected by monogamy while women continue to be victims of men’s desires. Polygamy is very much opposed by the male dominated society because it would force men to face up to responsibility and fidelity. It would force them to take responsibility for their polygamous inclinations and would protect and provide for women and children.’

177 See eg Ali, above n 176.
178 See eg M. Salih Al-Munajjid, The Ruling on Plural Marriage and the Wisdom Behind It, available on the website of Islam Question and Answer, at
182 These included: incest, bigamy, polygamy, rape, sodomy, bestiality, cruelty or desertion. See the Divorce Act (cap 249), Laws of Uganda 1964, s 4(2)(b).
183 Constitutional Court of Uganda at Kampala, Uganda Association of Women Lawyers v The Attorney General, Constitutional Petition No 2 of 2003 (10 March 2004). Art 21 states: ‘All persons are equal before
It is, in my view, glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution.\textsuperscript{184}

\textbf{[6.58]} This was a landmark case in the history of the rights of women to equality and non-discrimination in Uganda for three reasons. First, the Court was unanimous in declaring the impugned provisions of the Divorce Act null and void. The state did not appeal against this judgment to the Supreme Court, Uganda’s highest appellate court, implying that it was in total agreement with the Constitutional Court’s judgment. Secondly, the effect of declaring the impugned provisions of the Divorce Act was understood in later cases to mean that

the grounds of divorce stated in section 4(1) and (2) [of Uganda’s Divorce Act] are now available to both sexes and therefore, provide for equal justice.\textsuperscript{185}

As one High Court Judge noted,

after constitutional petition No 2 of 2003, each of the grounds for divorce specified in Section 4 of the Divorce Act, Cap 249, is available equally to both the husband and the wife.\textsuperscript{186}

Understood in this context, the decision of the Constitutional Court is in accordance with Uganda’s international human rights obligations under the ICCPR and CEDAW. The HRC interpreted the ICCPR as requiring that the ‘grounds for divorce and annulment should be the same for men and women’.\textsuperscript{187} Thirdly, the Constitutional Court signalled that it would in the future declare similar discriminatory laws null and void if legal challenges were mounted. Indeed the Court appears to have directly invited future petitions challenging discriminatory laws.\textsuperscript{188} In her judgment, Lady Justice Mpagi-Bahigeine stated:

There is urgent need for Parliament to enact the operational laws and scrape all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantive equality based on the reality of a woman’s life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises.\textsuperscript{189}

\textbf{[6.59]} This is a welcome development consistent with the right for ‘women and men [to] enjoy the same rights in case of separation, divorce or annulment of marriage’.\textsuperscript{190} Unequal power relations between women and men in all spheres of life, including marriage and divorce, must be acknowledged and changed, and the entrenched

\begin{thebibliography}{9}
\bibitem{184} Ibid. Judgment of Twinomujuni JA.
\bibitem{186} Dr Speciosa Wandira Naigaga Kazibwe v Eng Charles Nsubuga Kazibwe, High Court Divorce Cause No 3 of 2003, judgment of VF Musoke-Kibuuka of 9 October 2004.
\bibitem{187} HRC, General Comment 28, para 26.
\bibitem{188} Uganda Association of Women Lawyers v The Attorney General, above n 183.
\bibitem{189} Ibid, judgment of Mpagi-Bahigeine.
\bibitem{190} African Women’s Rights Protocol, Art 7.
\end{thebibliography}
disadvantage caused by this power imbalance must be addressed if women are to achieve the equal exercise and equal enjoyment of their ESC rights.  

V. CONCLUSION: THE DUTY TO UPROOT CULTURAL OBSTACLES TO ENHANCE WOMEN’S ENJOYMENT OF ESC RIGHTS

[6.60] This chapter has focused on only a handful of the many cultural issues that arise in the debate over the protection and promotion of women’s human rights, including ESC rights. It cannot be disputed that ‘human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights’.  

[6.61] The key question here is: what are the underlying dynamics that make culture as an obstacle to women’s human rights in Africa so entrenched and difficult to change? The simple answer is that cultural obstacles in Africa have been deeply entrenched for centuries and most states have not adopted immediate and effective measures, particularly in the fields of teaching, education, culture and information to combat discrimination against women. As required by both CEDAW (Article 5(a)) and the Protocol to the ACHPR on the Rights of Women in Africa (Articles 2 and 12), it is now time for states to take ‘appropriate measures’, both legislative and non-legislative,

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191 Appendix G, para 5.
to modify ‘social and cultural patterns of conduct’ to eliminate prejudices and practices based on the idea of the inferiority of women or on stereotyped roles of either sex. It is, therefore, necessary for African states to give urgent attention to the general duty of states to modify the social and cultural patterns of conduct of women and men through public education.194

[6.62] However high the barriers, change is possible. What is so deeply rooted may be uprooted or transformed especially through public education to challenge stereotypical gender roles through textbooks, academic instruction and patterns of participation in the education process. Continuous education including education on ESC rights will help to enhance the participation of women, overcome entrenched forms of resistance and transform certain cultural practices. Education is vital for the establishment of a culture where human rights are understood, respected and promoted. With respect to some cultural practices, such as polygyny, internal dialogue with the community between proponents and opponents of the practice may open a path to change that is more likely to be effective than any state attempt to criminalise the practice.195

[6.63] It must be realised that in the era of globalisation, it is no longer enough to focus just on the state as the only bearer of human rights obligations. As shown in chapter 3, a wide range of NSAs, including individuals, groups, corporations and other entities, should equally be obliged to respect and protect (where appropriate) the human rights of women. Some human rights treaties make this duty specific. For example, Articles 2(e), 2(f), and 11 of CEDAW oblige states to take ‘appropriate measures’ to eliminate discrimination against women by ‘any person, organisation or enterprise’. Under Article 25(a) of the Protocol to the ACHPR on the Rights of Women in Africa, states parties undertake to ‘provide for appropriate remedies to any woman whose rights or freedoms . . . have been violated’. These remedies may be against the state or NSAs (such as a discriminatory private employer in hiring, remuneration and promotion).

[6.64] There is, consequently, a need to interpret the African Women’s Rights Protocol as a living instrument. This requires the African Court of Justice and Human Rights to develop a framework within which the accountability for violations of human rights of women should not only be that of the state but also that of other actors. In this context, it would be possible to bring claims of human rights violations of women’s rights not only against the state but to do so directly against NSAs. This would help to address discrimination in the ‘private’ sphere of the workplace, school and home. In the case of Africa, it would therefore be very beneficial if the African Court were to seek to develop the Protocol in an objective and dynamic manner, by taking into account the increasingly higher standards for the protection of human rights. In this respect, it is useful to view culture as a dynamic aspect of every state’s social fabric and life and therefore subject to change. As Steiner writes,

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194 Protocol to the ACHPR on the Rights of Women in Africa, Article 2(2). See also CEDAW, Art 10(c); CERD, Art 7; CRC, Art 12(1).
Culture is plastic, made and remade through the course of history, not unshakable and essentialist in character but in many respects contingent, open to evolution and to more radical change through purposeful human agency informed by human rights ideals.\textsuperscript{196}

\textbf{[6.65]} Viewed in this context, cultural practices discriminatory against women must be grasped not as static objects, but as historical processes. Non-discriminatory customary law and human rights, rather than being mutually exclusive, can and should complement each other. The cases of \textit{Bhe} in South Africa and \textit{Mojekwu} in Nigeria provide some good examples of this. As noted above, courts in both countries applied human rights standards of equality and non-discrimination, without discarding culture. While it is necessary to uphold cultural life and diversity, it is equally essential to uphold human dignity of all women, and of all men, on the basis of equality. Whether the African Court will live up to this expectation remains to be seen. Of course, it is unlikely that the Court will meet this aim if the African Union does not provide it with adequate material, financial and moral support to allow it to function independently. Where domestic remedies have been exhausted, NGOs should be active in bringing cases before the Court in order to develop women’s human rights jurisprudence in Africa.

\textbf{[6.66]} Finally, it must be recognised that passing, and even enforcing, laws or treaties protecting human rights of women, while useful, does not guarantee equality. As shown above, despite the existence of several international instruments prohibiting discrimination against women and mandating equality, discrimination and inequality persist in practice. Indeed, the great irony is that women have been charged with, and have often found security in, maintaining discriminatory customs and tradition, thus institutionalising the discrimination against themselves through the education and socialisation of children.\textsuperscript{197} Therefore, while it is necessary to pay more attention to further implementation of the existing human rights instruments, educating the wider public about the need to eliminate customary practices which discriminate against women at the global, regional, national and local levels would enhance the struggle to realise women’s human rights in Africa. To appreciate this point, one needs to ask a few simple questions: How many African women have heard about the existence, let alone the content, of the Protocol to the ACHPR on the Rights of Women in Africa? Why do the majority of the African women ‘support’ the very practices that discriminate against them? Do these questions need further research?

\textbf{[6.67]} It has been noted that during the drafting process of the Protocol on the Rights of Women in Africa,

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there was a lack of wide consultation among relevant organisations, with the document being largely in the domain of the working group at the Commission. Consequently, the Protocol is little known among NGOs, governments or the population in Africa.\textsuperscript{198}
\end{quote}
Even after the ratification of the Protocol by some states, not much has been done to ensure that it is known widely within the jurisdiction of ratifying states. In the Solemn Declaration on Gender Equality in Africa of 2004, heads of states and government in Africa committed themselves to initiate and launch within two years sustained public campaigns against gender-based violence and to reinforce legal mechanisms to protect women at the national level and end impunity to crimes committed against women. Beyond this Declaration, there does not appear to have been, so far, a practical commitment to human rights of women. Why are most African states not translating women’s rights into real rights which might be enjoyed in practice?

Whatever the answers, it is suggested that African states and other actors should increase efforts, individually and through international co-operation, to design and implement comprehensive education and awareness-raising programmes targeting women and men at all levels of society, with a view to creating an enabling and supportive environment within which to transform and change discriminatory laws, customs and stereotypes and allowing women to exercise their human rights, including ESC rights. The promotion of gender equality must be made an explicit component of all national development strategies, policies and programmes, in particular those aimed at poverty alleviation and sustainable development, including poverty reduction strategies. Special attention must be made to the needs of rural women—who often lack access to adequate health services, access to education, clean water and sanitation services, access to justice and access to credit facilities—and women heads of household. States should realise that cultural practices which deny women the right to equality and freedom from discrimination, as well as the opportunity to access economic resources and assets necessary for their economic, political and social empowerment, violate their human rights, including the rights to development and self-determination. These violations and denials of women’s human rights continue to bolster the marginalisation of women, feminisation of poverty, HIV/AIDS and insecurity in Africa—none of which is in the best interest of any single African state. It is not too late to recognise that promoting and defending women’s equal enjoyment of human rights with men advances society as a whole and contributes to the realisation of ESC rights.

199 Third Ordinary Session, 6–8 July 2004, Addis Ababa, Ethiopia, Assembly/AU/Decl.12 (III) Rev.1
200 R Nakayi et al, ‘The Women’s Movement in Africa: Creative Initiatives and Lessons Learnt’ (2005) 11(2) East African Journal of Peace & Human Rights 265–303 at 299 and 302 noting that: ‘Elitism has blurred the goals of the Women’s Movement [in Africa]. Often the elite women seem to be out of touch with the issues that affect rural poor women. . . . There is a need to find ways and means of making rural and other disadvantaged women more visible in the movement.’
Part II

Substantive Economic, Social and Cultural Rights: Selected Examples
Article 6 ICESCR

1. The States Parties to the present Covenant recognise 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 realisation 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 ICESCR

The States Parties to the present Covenant recognise 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.
I. INTRODUCTION

[7.01] The right to work is an important human right recognised in several international human rights instruments. Work is the most common source of individuals’ income and thus a means to an end—human survival. In addition, several regional legal instruments recognise the right to work in its general dimension, and affirm the principle that respect for the right to work imposes on states parties an obligation to take measures aimed at the realisation of full employment. Similarly the right to work has been proclaimed by the UN General Assembly in the Declaration on Social Progress and Development, which provides: ‘Social development requires the assurance to everyone of the right to work and the free choice of employment.’ The ICESCR, as laid down in Article 6 above, deals more comprehensively than any other instrument with this right. The ICESCR proclaims the right to work in a general sense in its Article 6, and explicitly develops the individual dimension of the right to work through the recognition in Article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions. The collective dimension of the right to work is addressed in Article 8, which enunciates the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely.

[7.02] Although the right to work has been described as ‘the right to be economically exploited’, only a right to wage-earning labour, and ‘a duty to work’, ie a duty imposed on individuals to disassociate themselves from state support, the importance of the right to work has been aptly summarised by the CESCR as follows:

The right to work is essential for realising other human rights [including the rights to life, education, health, housing, and adequate food] and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.

This chapter deals with two aspects of the right to work based on existing international human rights standards. It focuses mainly on two aspects of the right to
work, namely (i) non-discrimination with particular reference to non-nationals and equal pay for men and women; and (ii) freedom from slavery, forced and compulsory labour, and exploitative child labour. Space limitations and the need to examine comprehensively the selected areas are the basis for the choices made here. As globalisation stimulates international migration more than ever, clarifying the application of the right to work in the context of non-nationals and freedom from forced labour has important implications for protecting the human rights of immigrants and victims of forced labour.

[7.03] The structure of this chapter is as follows. Section II examines the application of non-discrimination and equal protection of employment with particular reference to non-nationals and equal pay for men and women. It has been held that freedom of movement, protected in international human rights treaties, does not grant an individual the right to enter an alien state without that state's consent. If a state is entitled to control the entry of aliens to its territory, does this mean that the state can determine whether or not non-nationals can work in its territory? To what extent can non-nationals claim, and enjoy, the right to work in a host state? Section III deals with freedom from slavery, forced and compulsory labour, and exploitative child labour. Section IV provides concluding remarks.

II. NON-DISCRIMINATION AND EQUAL PROTECTION OF EMPLOYMENT

[7.04] The right to work comprises many aspects, which have been developed in particular through the ILO Conventions. The essence, however, is non-discrimination in guaranteeing the opportunity to have fulfilling and dignified work under safe and healthy conditions and with fair wages (‘equal pay for equal work’) affording a decent living for oneself and one’s family. As summarised in General Comment 18 of the CESCR, the core obligations of the right to work in the context of Article 6 ICESCR encompasses the obligation to ensure non-discrimination and equal protection of employment. In this General Comment on the right to work, the CESCR noted that the core obligations of the right to work include at least the following requirements:

(a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
(b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
(c) To adopt and implement a national employment strategy and plan of action based on

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8 See eg HRC, General Comment 15: The Position of Aliens under the Covenant, 11 April 1986, UN Doc HRI/GEN/1/Rev.1 at 18 (1994), para 5 stating that: ‘The Covenant does not recognise the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.’

and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers’ and workers’ organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.¹⁰

However, in practice, discrimination in employment remains an issue of concern. For example, persons belonging to ethnic, national or religious minorities in France, most notably those with North African or Arabic names, still face ‘serious discriminatory practices’ in the field of employment that prevent or limit their equal access to employment.¹¹

[7.05] In addition to the right of access to employment and non-discrimination in employment, other core obligations of the right to work include freedom of association and collective bargaining, the elimination of exploitative forms of child labour, and the prohibition of slavery, and of forced or compulsory labour.¹² These core obligations are derived from core rights which are also set out in the ILO Declaration on Fundamental Principles and Rights at Work.¹³ Article 2 of this Declaration requires all ILO members ‘to respect, to promote and to realise’ the following rights: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

[7.06] Like other human rights recognised in the ICESCR, the right to work applies to ‘everyone’ within the jurisdiction of a state party, including nationals and non-nationals. Thus, states are obliged to respect the right to work by, inter alia, avoiding measures (eg arbitrary detention leading to loss of employment) which may prevent individuals from working. In the Mazou case, the ACmHPR asserted that such measures constitute a violation of the right to work under Article 15 of the ACHPR (‘the African Charter’).¹⁴ Mr Mazou, a Cameroonian national, was a magistrate in Cameroon. He was imprisoned in 1984 by a military tribunal without trial, and was sentenced to five years’ imprisonment for hiding his brother who was later sentenced to death in connection with an attempted coup d’état. Even after he had served his sentence in April 1989, Mazou continued to be held in prison and was only freed by the intervention of Amnesty International on 23 May 1990. However, he continued to be under detention at his residence until an amnesty was passed in 23 April 1991. Mr Mazou was later freed, but he was not reinstated in his position as a magistrate even after, inter alia, petitioning the President of the Republic for a

¹⁰ CESCR, General Comment 18, above n 4, para 31.
¹⁴ See Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon, Communication No 39/90, (1997); 10th Annual Activity Report, (2000) AHRLR 57. Art 15 of the African Charter reads: ‘Every individual shall have the right to work under equitable and satisfactory conditions . . .’
reinstatement. In these circumstances the ACmHPR found that by not reinstating Mr Mazou to his former position after the amnesty, the government had violated Article 15 of the African Charter, because it has prevented Mr Mazou from working in his capacity of a magistrate even though others who had been condemned under similar conditions had been reinstated.

[7.07] Therefore, the right to work has been described as a ‘right to social inclusion’. Thus, discrimination in employment must be eliminated. The ILO Discrimination (Employment and Occupation) Convention No 111 (1958) defines discrimination to include any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The ICESCR—in Article 2(2), and in Article 3 read together with Article 6—prohibits any discrimination in access to and maintenance of employment 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, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality. Nationality is clearly a prohibited ground of discrimination in the enjoyment of all ESC rights, including the right to work and employment-related benefits.

[7.08] The prohibition of discrimination on the basis of nationality has been stressed by human rights bodies. A decision of the ECtHR in the case of Gaygusuz v Austria illustrates this point. In this case Gaygusuz, the applicant, was a Turkish national who had worked in Austria, where he had paid contributions under the Austrian social security scheme. He had experienced periods of unemployment and periods when he was unfit for work. He applied for an advance on his retirement pension as a form of emergency assistance, but was refused because he was not an Austrian national. He complained that there had been a violation of Article 14 of the ECHR (non-discrimination) in combination with Article 1 of Protocol 1 (right to property). The court noted that a difference of treatment is discriminatory, for the purposes of Article 14, if it ‘has no objective and reasonable justification’, ie if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’. It found a breach of Article 14 of the ECHR taken in conjunction with Article 1 of Protocol No 1, noting that the difference in treatment between Austrians and non-Austrians as regards entitlement to

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16 ILO Convention No 111, Art 1.1.
17 CESCR, General Comment 18, above n 4, para 12(b)(i).
18 See also the Migrant Workers’ Convention, above n 1, Arts 1(1) and 7.
20 Ibid, para 42. The Court stated that ‘very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention’.
emergency assistance, of which Mr Gaygusuz was a victim, was not based on any ‘objective and reasonable justification’.\footnote{Ibid, para 50.}

[7.09] As noted in chapter 2, the principle of non-discrimination is immediately applicable and is neither subject to progressive implementation nor dependent on available resources. According to Article 2 of ILO Convention No 111, states parties should declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

While in principle discrimination on the basis of nationality is prohibited, in practice, non-nationals are subjected to restrictions with respect to their right to work according to their legal status in the host state. When ratifying the ICESCR, France and the United Kingdom entered an ‘interpretative declaration’ and a reservation respectively, to allow the imposition of restrictions on the access of ‘aliens’ to employment.\footnote{See the text in Appendix H.} In most cases these restrictions depend on whether non-nationals are long-term residents, temporary residents, refugees and asylum seekers, undocumented (illegal) immigrants, and migrant workers.\footnote{For a discussion, see H Lu, ‘The Personal Application of the Right to Work in the Age of Migration’ (2008) 26(1) Netherlands Quarterly of Human Rights 43–77.} Do restrictions on the right to work of non-nationals constitute prohibited discrimination or reasonable/justifiable differential treatment?

A. Non-nationals

[7.10] The ICESCR does not specifically indicate whether or not the Covenant rights apply to non-nationals (at least in developed states). However, the text of the Covenant protects the rights of ‘everyone’\footnote{See eg ICESCR, Arts 6, 7(a), 8(1)(a), 9, 11, 12, 13(1), 15(1)(a) and (b).} and prohibits discrimination on the basis of one’s national origin in Article 2(2). Thus, the CESCR has interpreted the Covenant rights as extending to ‘everyone’ within the jurisdiction of the state party,\footnote{See eg CESCR, General Comment 1, para 3; General Comment 8, para 10; General Comment 12, para 14; General Comment 13, para 52; General Comment 14, para 12(b); General Comment 15, para 16.} presumably including both nationals and non-nationals (‘foreigners’) in general.\footnote{See CESCR, Concluding Observations: Liechtenstein, UN Doc E/C.12/CO/LIE/1 (19 May 2006), paras 11 and 25.} With respect to the right to work, the Committee has clarified that ‘the labour market must be open to everyone under the jurisdiction of States parties’.\footnote{CESCR, General Comment 18, para 12(b) (emphasis added).} The protection of ‘everyone’ is very broad and is likely to include full equal treatment and positive protection of the right to work of vulnerable groups such as refugees, asylum seekers and women migrant workers.\footnote{See Lu, above n 23, 57–63; CEDAW Committee, General Recommendation No 26 on Women Migrant Workers, UN Doc CEDAW/C/2009/ WP.1/R (5 December 2008).}

[7.11] Nevertheless, the CESCR has not explicitly stated whether ‘everyone’ when applied to the category of non-nationals is limited only to those holding a long-term or permanent residence permit or whether it extends to temporary residents lawfully
residing in a state (eg foreign students) or even to undocumented or illegal immigrants. In some Concluding Observations, the CESCR has urged states to take all necessary measures to ensure that illegal immigrants in a state party ‘enjoy their economic, social and cultural rights fully and without discrimination’. Presumably this includes the right to work of illegal immigrants given that the principle of non-discrimination applies to everyone including illegal immigrants. However, in practice states are reluctant to protect illegal immigrants’ right to work, and illegal immigrants are often subject to exploitation by employers due to the fear of losing their job or deportation. Due to this reality, the CESCR has welcomed the regularisation of migrant workers, and recommended that ‘the regularisation of the situation of these illegal residents, through the delivery of residence permits or naturalisation, is necessary.’ The CERD Committee has supported this view. Thus, in its Concluding Observations on the Dominican Republic in 2008, the CERD Committee noted that the

State party should reconsider the status of people who have been in its territory for a long period with a view to regularising their stay.

One question arising from these observations is whether there is a human right to regularise illegal residency, at least for long-term undocumented (illegal) immigrant workers?

At the current stage, international law does not protect a human right to regularisation of illegal residency in a given state. This is reflected in Article 35 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (‘the Migrant Workers’ Convention’), which provides:

Nothing in the present part of the Convention [Part III protecting human rights of all migrant workers and members of their families] shall be interpreted as implying the regularisation of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularisation of their situation.

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29 See eg CESCR, Concluding Observations: Dominican Republic, UN Doc E/C.12/1/Add.16 (12 December 1997) para 34.
30 Ibid, para 17: ‘the Committee is still preoccupied by the situation of Haitian illegal workers and by the situation of their children. It notes that approximately 500,000–600,000 Haitian illegal workers reside in the Dominican Republic, some of them for one or two generations, without any legal status and any protection of their economic, social and cultural rights.’ In Abdul Aziz, Cabales and Bakandali v the UK, judgment of 28 May 1985, Application Nos 9214/80, 9473/81 and 9474/81, (1985) 7 EHRR 471, para 78 the ECtHR held that immigration control in order to protect the domestic labour market was ‘without doubt legitimate’.
31 Migrant Workers’ Convention, above n 1, preamble, notes that ‘workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition’.
32 CESCR, Concluding Observations: Italy, UN Doc E/C.12/1/Add.103 (26 November 2004), para 8 stating that: ‘The Committee welcomes the regularisation of the status of 700,000 migrant workers in the State party’.
33 CESCR, Concluding Observations: Dominican Republic, above n 29, para 34. See also CESCR, Concluding Observations: Spain, UN Doc E/C.12/1/Add.99 (7 June 2004), para 24, the Committee ‘encourages the State party to promote the legalisation of undocumented immigrants so as to enable them to enjoy fully their economic, social and cultural rights’.
34 CERD, Concluding Observations: Dominican Republic, UN Doc CERD/C/DOM/CO/12 (March 2008), para 14.
Accordingly, while human rights bodies have recommended regularisation in light of the fact that other methods such as forced removal, mass expulsions and voluntary return have been both expensive and ineffective, and indeed at times have involved violations of other human rights, it is still up to a state to consider whether or not to regularise illegal residency.

[7.13] In light of the foregoing, it is reasonable to propose that states parties to the ICESCR are under an obligation to respect the right to work by, inter alia, refraining from ‘denying or limiting equal access to decent work for all persons’, especially disadvantaged persons including migrant workers. The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national. Migrant workers and members of their families frequently find themselves in a situation of vulnerability owing, among other things, to ‘their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment’. Most of the above-mentioned categories of non-nationals (long-term residents, asylum seekers and illegal immigrants) may actually or potentially be migrant workers. Thus, migrant workers require protection as a vulnerable group.

[7.14] Although there are other legal instruments protecting the rights of migrant workers, the Migrant Workers’ Convention so far offers the widest protection. For example, unlike the (revised) European Social Charter which protects only migrant workers and members of their families who are nationals of other parties ‘lawfully resident or working regularly within the territory of the Part concerned’, the Migrant Workers’ Convention protects all migrant workers and members of their families within a territory or subject to the jurisdiction of a state party. However by 18 March 2009, the Convention had only 15 signatories and 41
Significantly, all states parties to the Migrant Workers’ Convention were from developing countries without any industrialised state party. This suggests that industrialised countries, the main recipients of migrant workers, are still reluctant to accept the standards of the Convention.

[7.15] It is important to note that the IACtHR held that

the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature and that

the State has the obligation to respect and guarantee the labour human rights of all workers, irrespective of their status as nationals or aliens.

This entails equal treatment of foreign and domestic workers. Accordingly, maintaining different rates of payment of pensions for foreign and domestic workers is discriminatory. Similarly the arbitrary expulsion of foreign workers is a violation of the right to work. With respect to Libya, the CESCR stated as follows:

The Committee also expresses its concern at reports that during the second half of 1995 thousands of foreign workers were arbitrarily expelled from the State party and were not given adequate compensation. It further regrets that there was no possibility for a legal or judicial remedy against those expulsions. The Committee is alarmed that the justification given by the delegation for this action was that foreign workers were the cause of many of the State party’s social problems, such as violent crime, immoral activities, black market transactions, drug trafficking, trafficking in women and the spread of communicable diseases. Such a rationale is unacceptable to the Committee and a clear violation of the Covenant.

[7.16] The ACHPR specifically prohibits the arbitrary expulsions of non-nationals. In addition, the ACHPR stipulates that

the mass expulsion of non nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Thus, the ACmHPR did not find mass expulsions of non-nationals consistent with the African Charter in its decision on a communication alleging violations of the Charter by Angola on the occasion of the expulsion of certain nationals of West African states in 1996. The Commission observed that:

African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical
measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights.52

[7.17] Although the Commission did not conclude in this case that there had been a violation of the right to work under Article 15 of the African Charter, the Commission held that

this type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as . . . the right to work (article 15).53

Nonetheless, in cases where the effect of arbitrary expulsion based on nationality is to lead to loss of employment of those expelled, there is no reason in principle for not finding a clear violation of the right to work.

[7.18] In some of its General Comments, the CESCR has gone further to specify that non-nationals as a vulnerable group should be given special attention. For example, in its General Comment 19 on the right to social security, the Committee stated:

Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular . . . refugees, asylum-seekers, . . . non-nationals.54

In principle, this special treatment of non-nationals may apply even to other rights, including the right to work.

[7.19] The above approach is generally consistent with the principle of non-discrimination and equality as protected in most human rights treaties. One exception would have been the ICERD.55 This Convention protects the right to work in Article 5(e)(i) in the following terms:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration

However, Article 2 provides that:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

Does this mean that states parties to CERD may treat non-nationals differently from nationals with respect to the right to work without reasonable and objective criteria?

52 Ibid, para 16.
53 Ibid, para 17.
55 660 UNTS 195.
According to earlier jurisprudence of the CERD Committee, the exclusion of non-nationals from access to certain occupations, if allowed by national law, was considered legitimate and thus not racial discrimination. This was expressed in the views of the CERD Committee in *GAC Enkelaar v France*. This communication was submitted on behalf of Demba Talibe Diop. Mr Diop, a Senegalese lawyer, was denied access to the Bar Association in Nice, France. He met all the statutory requirements for the exercise of his profession as a lawyer except one: French nationality as required by French law for practising lawyers in France. The lawyer claimed to be the victim of a violation by France of Article 5 of the ICERD, alleging that he was denied the right to work on the ground of national origin.

As to the alleged violation of Article 5(e) of the Convention, the Committee noted that the rights protected by Article 5(e) are of ‘programmatic character, subject to progressive implementation’. The Committee considered that it was not within the its mandate to see to it that these rights were established; rather, it was its task to monitor the implementation of these rights, once they had been granted on equal terms. Insofar as the author’s complaint was based on Article 5(e) of the Convention, the Committee considered it to be ill-founded. The Committee noted that the refusal to admit Mr Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1. The author’s allegation related to a situation in which the right to practice law exists only for French nationals, not to a situation in which this right has been granted in principle and may be generally invoked; accordingly, the Committee concludes that article 1, paragraph 1, has not been violated.

This conclusion was reached without applying objective and reasonable criteria requirements such as having legitimate aims and being proportionate to such aims. This approach legitimises discrimination against non-nationals in employment and is difficult to reconcile with the ICESCR prohibition of discrimination in Article 2(2) and its protection of everyone’s right to work in Article 6. Certainly, this wide interpretation of the exception undermines the principle of non-discrimination and equality.

It is interesting to note that since 2004 CERD appears to have adopted a more restrictive approach to the exception in Article 1(2). This is clear from its General Recommendation 30, which states that Article 1(2) must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in particular in the UDHR, the ICESCR and the ICCPR. The Recommendation further noted that

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57 Art 11, para 1, of the French Act No. 71.1130 of 31 December 1971 stipulated that no one may accede to the legal profession if he was not French, except as provided for in international conventions.


human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law.  

It affirmed the standard criteria for justifying differentiation based on citizenship or immigration status: a legitimate aim and the principle of proportionality. The Committee recommended that states should adopt a wide range of measures to curb racial discrimination including:

- Removing obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.

While recognising that ‘States parties may refuse to offer jobs to non-citizens without a work permit’, it emphasised that ‘all individuals’ are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.

[7.23] In summary, the right to work, like other ESC rights, should equally apply to non-nationals (whether documented or undocumented, regular or irregular), especially long-term or permanent residents, but may be subject to reasonable and objective limitations pursuing legitimate aims and being proportionate to the aims sought. The ILO Convention No 111 provides three ‘objective reasons’ which may justify differential treatment: (i) treatment based on the inherent requirements of the job (Article 1(2)); (ii) any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State (Article 4); and (iii) special measures of protection or assistance provided to vulnerable or disadvantaged individuals or groups (Article 5).

B. Equal Remuneration of Men and Women

[7.24] The right to work entails the right to equal remuneration for work of equal value. This is emphasised in several human rights treaties. Article 23(3) of the UDHR declares that: ‘Everyone who works has the right to just and favourable remuneration.’ The ICESCR recognises the right of all workers to ‘fair wages and equal remuneration for work of equal value’. Article 7(a) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights obliges state parties to guarantee in their internal legislation remuneration that guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and ‘fair and equal wages for equal work,'
without distinction’. The African Charter provides that every individual ‘shall receive equal pay for equal work’ (Article 15) and its Protocol on Women’s Rights calls for ‘equal remuneration for jobs of equal value for women and men’ (Article 13(b)). It can be concluded from these instruments that remuneration is an essential aspect of the right to work. Not surprisingly, the African Commission in *Malawi African Association and Others v Mauritania* held that ‘unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being’. Indeed, unremunerated work against one’s will may amount to forced labour. Remuneration must not be discriminatory on the basis of sex.

[7.25] To eliminate discrimination against women, states should adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. The lists of measures listed in the following human rights instruments provide a useful starting point.

**Convention on the Elimination of All Forms of Discrimination against Women**

*Article 11*

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

   (a) The right to work as an inalienable right of all human beings;

   (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

   (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

   (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

   (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

   (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

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71 UN Doc A/34/46, entered into force 3 September 1981.
Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

Article 13: Economic and Social Welfare Rights

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

(a) promote equality of access to employment;
(b) promote the right to equal remuneration for jobs of equal value for women and men;
(c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
(d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
(e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
(f) establish a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it;
(g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
(h) take the necessary measures to recognise the economic value of the work of women in the home;
(i) guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors;
(j) ensure the equal application of taxation laws to women and men;
(k) recognize and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
(l) recognize that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
(m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

[7.26] The denial of access to work to particular individuals or groups on the basis of any of the prohibited grounds discussed in chapter 2, without reasonable and objective criteria, would amount to discrimination. Cases of discrimination might arise in several contexts such as unequal pay for men and women for work of equal value, recruitment, training, promotion, termination, social security, and patriarchal constraints on women’s opportunities and working conditions. It should be noted that not every distinction, exclusion or preference in respect of a particular job is discriminatory. Thus ILO Convention No 111 states:

72 Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, entered into force 25 November 2005.
Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.\textsuperscript{74}

For example, it may not be discriminatory on the basis of religion to exclude female teachers who wear a face-veil (\textit{niqab}) as a religious practice while teaching from teaching jobs because facial expressions are essential to effective teaching. Thus, in \textit{Aishah Azmi v Kirklees Metropolitan Borough Council\textsuperscript{75}} the Employment Appeal Tribunal in London upheld the findings of the Employment Tribunal that a decision to suspend a teaching assistant for refusing an instruction not to wear her veil when in class with pupils assisting a male teacher was not direct discrimination on the grounds of religion or belief. Although it was indirectly discriminatory on that ground, the suspension was lawful, being proportionate in support of a legitimate aim.\textsuperscript{76}

A particularly serious violation of the right to free choice of work is slavery, and forced labour considered in the next section.

### III. FREEDOM FROM SLAVERY, FORCED AND COMPULSORY LABOUR

#### A. General Overview

\textbf{[7.27]} The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she ‘freely chooses or accepts’.\textsuperscript{77} Thus, the absence of forced labour and the existence of ‘freely chosen employment’ is an essential aspect of the right to work.\textsuperscript{78} States are under the obligation to \textit{respect} the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalised individuals and groups, including prisoners or detainees.\textsuperscript{79} It is in this context that international human rights instruments protect everyone from slavery or servitude, and forced or compulsory labour. For example, Article 8 of the ICCPR\textsuperscript{80} provides:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

\textsuperscript{74} ILO Convention No 111, Art 1.2.


\textsuperscript{76} \textit{Ibid.} The Tribunal accepted that the face-veil obscured a person's face and mouth, which would be a barrier to effective learning by children.

\textsuperscript{77} ICESCR, Art 6(1).

\textsuperscript{78} Employment Policy Convention, 1964 (ILO No 122), 569 UNTS 65, entered into force 15 July 1965. See also the Abolition of Forced Labour Convention (ILO No 105), 320 UNTS 291, entered into force 17 January 1959.

\textsuperscript{79} CESCR, General Comment 18, above n 4, para 23.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour.

[7.28] Freedoms from slavery and servitude under the ICCPR are non-derogable rights. A proposal to add the qualification ‘involuntary’ to servitude was rejected by the drafters of the Supplementary Convention on Slavery 1956 and of the ICCPR on the ground that: ‘It should not be possible for any person to contract himself into bondage.’ It follows that consent cannot make slavery or servitude lawful since ‘[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon’. The HRC has noted that states must provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised _inter alia_ as domestic or other kinds of personal service.

Therefore, there is a positive obligation on states to ‘take measures that prevent third parties from interfering with the enjoyment of the right to work’, and to ‘enforce laws prohibiting forced labour, child labour and child prostitution and to implement programmes to prevent and combat such human abuses’.

[7.29] Regional human rights instruments equally prohibit slavery, servitude, and forced or compulsory labour. For example, Article 5 of the ACHPR prohibits ‘all forms of exploitation and degradation of man particularly slavery, slave trade’. States are also obliged to adopt and enforce legislative and other measures to ‘guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers’. In addition, states are obliged to ‘punish all forms of exploitation of children, especially the girl-child’. This requires states to adopt domestic regulations or policies to prevent and combat child labour, and to protect children from economic exploitation and involvement in work that is hazardous and negatively impacts on their rights to health, education and development. This should be done in full compliance with ILO Convention No 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and ILO Convention No 15 138 (1973) concerning Minimum Age for Admission to Employment.

[7.30] Article 4 of the ECHR states: ‘1. No one shall be held in slavery or servitude.

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81 ICCPR, Art 4(2).
82 UN Doc A/2929, 33.
85 CESCR, General Comment 18, above n 4, para 22.
89 _Ibid_, Art 13(g).
2. No one shall be required to perform forced or compulsory labour.92 Like Article 8 of the ICCPR, Article 4 of the ECHR makes no provision for exceptions and no derogation from the prohibitions of slavery and servitude is permissible even in times of a public emergency threatening the life of a nation.93 Similarly, under Article 6 of the American Convention on Human Rights94 it is provided:

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labour.

[7.31] It is notable that none of the above instruments define the terms ‘slavery’, ‘servitude’ or ‘forced labour’. However, ‘slavery’ is widely understood to refer to ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.95 ‘Servitude’ means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of slavery’.96

Thus, it is a state or condition of a slave; bondage or the state or condition of being subjected to or dominated by a person97 involving ‘a particularly serious form of denial of freedom’.98 The term ‘forced or compulsory labour’ has been understood to mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.99

For a person to show he or she has been subjected to forced labour, it should be shown that a state or a private party ordered a person to perform personal work or service involuntarily (it must be performed against the person’s will), and that punishment or a comparable sanction was threatened if this order was not obeyed.100 The ECtHR further requires that, to amount to forced labour, the obligation to perform work should be unjustifiable or oppressive in its nature, or its performance must constitute an avoidable hardship.101

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96 Siliadin v France, above n 93, para 123.
100 Nowak, above n 80, 201.
However, ‘forced or compulsory labour’ does not include the following:

(i) Any work or service . . . normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
(ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;
(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.102

The above activities (prison labour, military service, emergencies and civic obligations) are grounded on the governing ideas of the general interest, social solidarity and what is normal in the ordinary course of affairs—examples of what might loosely be called community service.105 Relevant human rights treaties do not mention how the conditions for and limits on the imposition and performance of forced labour are to be defined in the exceptional cases above. However, such rules can be found in relevant ILO Conventions, eg ILO Convention No 105 concerning the abolition of forced labour106 and Convention No 29 concerning forced or compulsory labour.107 For example, Article 1 of ILO Convention No 105 prohibits the use of any form of forced or compulsory labour:

(a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
(b) As a method of mobilising and using labour for purposes of economic development;
(c) As a means of labour discipline;
(d) As a punishment for having participated in strikes;
(e) As a means of racial, social, national or religious discrimination.

The prohibition of forced labour, slavery and servitude underlines the fact that respect for the individual and his/her dignity is expressed through the freedom of the individual regarding the choice to work, while emphasising the importance of work for personal development as well as for social and economic inclusion.108 Freedom from slavery is recognised as part of customary international law.109

B. Protection against Exploitative Child Labour

It is an undeniable reality that millions of children around the world continue to be the victims of poverty, armed conflict, lack of educational opportunities, and

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102 ICCPR, Art 8(3)(c). See also ECHR, Art 4(3); AmCHR, Art 6(3).
104 W, X, Y, and Z v United Kingdom (1968) 11 Yearbook 562.
105 Schmidt v Germany (1994) 18 EHRR 513, para 22.
107 39 UNTS 55, entered into force 1 May 1932.
108 CESCR, General Comment 18, above n 4, para 4.
109 See American Law Institute, Restatement (Third) of Foreign Law (St Paul, MN, West, 1989), para 702; UDHR, Art 4. See also Barcelona Traction, Judgment, ICJ Reports 1970, paras 33–4; Mme Hadijatou Mani Koroua v The Republic of Niger, 27 October 2008, ECW/CCJ/JUD/06/08 (Community Court of Justice of the Economic Community of West African States), para 81.
health pandemics such as HIV/AIDS. The most vulnerable members of society, they too often work in situations that are illegal, hazardous, exploitative or forced—as miners, prostitutes, soldiers, drug smugglers or bonded labourers. In 2004 there were 218 million children trapped in child labour, of whom 126 million were in hazardous work. Poverty is one of the prime causes of child labour exploitation. It is, thus, not a coincidence that sub-Saharan Africa, Asia and the Pacific have the highest percentages of economically active children between the ages of 5 and 14, and also the highest percentage of people living on less than US$1 a day.

[7.35] It is universally accepted that children, by virtue of their physical and mental immaturity, need special protection from economic exploitation. At the international level, the need to protect children from exploitative practices was formally acknowledged early in the twentieth century. The League of Nations included the protection of children within the ambit of its work on eliminating slavery and the slave trade. In addition, the League of Nations, in the Geneva Declaration of the Rights of the Child of 1924, stated that children must be protected against every form of exploitation. Both the ICCPR and the ICESCR protect children against exploitation. Thus, Article 24(1) of the ICCPR provides that every child has the ‘right to such measures of protection as are required by his status as a minor’. Article 10(3) of the ICESCR echoes the requirement of numerous ILO conventions (considered below) that states should specify a minimum age below which ‘the paid employment of children should be prohibited and punishable by law’.

[7.36] The ILO Minimum Age Convention, 1973 (No 138) and its accompanying Minimum Age Recommendation No 146 are the principal international instruments dedicated to eradicating child labour in general. They require ratifying states to implement national policies progressively to raise the minimum age for admission to

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111 Ibid.
112 See International Programme on the Elimination of Child Labour (IPEC) and Statistical Information and Monitoring Programme on Child Labour (SIMPOC), Every Child Counts: New Global Estimates on Child Labour (Geneva, ILO, April 2002), 6; available at http://www.ilo.org/ipeclnfo/product/viewProduct.do?productId=742. In the year 2000 out of 48 million children in sub-Saharan Africa, 29 per cent were working; in Asia and the Pacific out of 127.3 million children, 19 per cent were working.
113 See World Bank, World Development Indicators 2006 (Washington DC, World Bank, 2006), 73, available at http://go.worldbank.org/RVW6YTLQH0. Sub-Saharan Africa and South Asia had the highest percentage of people living on less than US$1 a day: 44 and 31.1 per cent, respectively.
115 The Slavery Convention did not specifically refer to child slavery as a particular category in its definitions of slavery and the slave trade but the Supplementary Convention made a specific reference to the exploitation of young persons in addition to an explicit prohibition of debt bondage regarding both adults and children. The Supplementary Convention also contains an implicit prohibition of the exploitation of the labour of young girls through early marriage.
116 See World Bank, World Development Indicators 2006 (Washington DC, World Bank, 2006), 73, available at http://go.worldbank.org/RVW6YTLQH0. Sub-Saharan Africa and South Asia had the highest percentage of people living on less than US$1 a day: 44 and 31.1 per cent, respectively.
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the workforce to ensure the fullest physical and mental development of young persons. The Minimum Age Convention applies to all sectors of economic activity and covers children whether or not they are employed for wages. The Minimum Age Convention was introduced to prevent the exploitation of child labour by setting the minimum age for work at not less than the age of completion of compulsory schooling but not less than 15 years (14 years for countries in which the ‘economy and educational facilities are insufficiently developed’). The Convention allows children to do ‘light work’ between the ages of 13 and 15 (12 years in developing countries). The minimum age for ‘hazardous work’ likely to jeopardise the health, safety or morals of a child is set at 18 years.

[7.37] In view of the huge numbers of children employed in contravention of the Minimum Age Convention and in an apparent effort to give a clear signal about which forms of exploitation states should give priority to eliminating, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the Worst Forms of Child Labour Convention, 1999) (No 182) was adopted by the International Labour Conference in June 1999, together with Recommendation No 190 on the same subject. In Article 3 the Convention defines ‘the worst forms of child labour’ as comprising:

(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.

[7.38] It can be noted from the foregoing that due to the vulnerable state of children, states are obliged to protect them from economic exploitation and harmful work, as well as from ‘the worst forms of child labour’. States are also obliged to protect children from ‘all forms of sexual exploitation and sexual abuse by implementing relevant national, bilateral and multilateral measures’; protection for children from the risk of abduction, sale or trafficking; and protection ‘against all other forms of exploitation prejudicial to any aspects of the child’s welfare’. Regional human

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120 ILO Minimum Age Convention, 1973 (No 138), Art 2(3) and (4).
121 Ibid, Art 7(1) and (4).
122 Ibid, Art 3(1).
125 For example, the International Convention on the Rights of the Child, Art 32 recognises the child’s right to be protected from economic exploitation and from ‘performing any work that is likely to be hazardous or to interfere with the child’s education or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’. See also ICESCR, Art 10; Protocol of San Salvador, Art 7(f).
126 ILO No 182, above n 123, Art 3.
127 International Convention on the Rights of the Child, Art 34.
128 Ibid, Art 35.
129 Ibid, Art 36.
rights instruments reiterate the need to protect child. To mention one example, Article 15 of the African Charter on the Rights and Welfare of the Child specifically provides that:

Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.

This often arises out of all forms of slavery or practices similar to slavery. It is in this context that states are obliged to abolish:

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

[7.39] Despite the long-established prohibition of child labour in international law, the Commission on Human Rights in its resolution 1993/79 noted that the exploitation of child labour has remained a widespread phenomenon of a ‘serious nature’ in various parts of the world. Conscious of the harm that the practice of child labour causes to children all over the world, the Commission adopted the Programme of Action for the Elimination of the Exploitation of Child Labour. The Commission recommended that all states should adopt, as a matter of priority, the necessary legislative and administrative measures ‘with a view to the absolute prohibition of employment of children’ in the following seven sectors:

(a) Employment before the normal age of completion of primary schooling in the country concerned;
(b) Under-age maid service;
(c) Night work;
(d) Work in dangerous or unhealthy conditions;
(e) Activities linked with prostitution, pornography and other forms of sexual trade and exploitation;
(f) Work concerned with trafficking in and production of illicit drugs;
(g) Work involving degrading or cruel treatment.

[7.40] Nevertheless, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect, especially in private households with respect to child labour and trafficking. The ILO has estimated that 250 million children between the ages of 5 and 14 work in

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131 See also ICESCR, Art 10; Protocol of San Salvador, Art 7; Worst Forms of Child Labour Convention, 1999 (No 182), above n 123, Art 3(d).
132 See Worst Forms of Child Labour Convention, 1999 (No. 182), ibid, Art 3(a).
133 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, adopted on 30 April 1956, entered into force 30 April 1957, Art 1(d).
135 CESCR, General Comment 18, above n 4, para 4.
developing countries—at least 120 million on a full-time basis.137 61 per cent of these are in Asia, 32 per cent in Africa, and 7 per cent in Latin America.138 In 2004 the Committee on the Rights of the Child (CRC) made the following observation with respect to Angola:

While welcoming the State party’s ratification of ILO Conventions Nos 138 and 182 in 2001, the Committee is concerned that many children below the legal age for employment work in the State party, mostly in family farms and in the informal sector, and that the work of these children is not monitored, although it is known that children are vulnerable to exploitation in employment.139

The Committee made the following recommendations for Angola to address the problem of child labour:

(a) Strengthen its efforts to prevent children under the legal age for employment from working;
(b) Seek innovative strategies whereby children who have completed their primary education who choose to work can combine working with continued education;
(c) Establish an inspection system in order to ensure that work performed by children is light work and not exploitative;
(d) Develop targeted programmes to protect the rights of children separated from their parents and working in the streets;
(e) Seek technical assistance from ILO/IPEC.140

While these recommendations were specific to Angola, they are generally relevant to other developing states facing similar problems.

[7.41] Thousands of ‘hidden slaves’ are still held and forced to work in several parts of the world including in the United States141 and in Europe. As noted by the Parliamentary Assembly of the Council of Europe:

slavery continues to exist in Europe in the twenty-first century. Although, officially, slavery was abolished over 150 years ago, thousands of people are still held as slaves in Europe, treated as objects, humiliated and abused. Modern slaves, like their counterparts of old, are forced to work (through mental or physical threat) with no or little financial reward. They are physically constrained or have other limits placed on their freedom of movement and are treated in a degrading and inhumane manner. Today’s slaves are predominantly female and usually work in private households, starting out as migrant domestic workers.142

[7.42] Regrettably, by 2001 none of the Council of Europe Member States expressly made domestic slavery an offence in their criminal codes.143 Across West Africa, millions of (poorly educated) girls—and less often boys—are effectively sold into slavery

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138 Ibid. Most working children in rural areas are found in agriculture; many children work as domestics; urban children work in trade and services, with fewer in manufacturing and construction.
139 CRC Committee, Concluding Observations: Angola, UN Doc CRC/C/15/Add.246 (3 November 2004), para 64.
140 Ibid.
as ‘domestic workers’ to work in the household of non-family members.\textsuperscript{144} In states such as Togo, there is ‘continuing discrimination against women and girls with respect to access to education, employment, inheritance and political representation’.\textsuperscript{145} This gives rise to many violations of women’s rights including freedom from forced labour, slavery or servitude. Some girls or women, for example, are trafficked to work as prostitutes or domestic workers in Europe.\textsuperscript{146} In 2005, for example, the CRC welcomed the legislative and other efforts aimed at providing protection of children from economic exploitation in France.\textsuperscript{147} However, it observed that in France ‘illegal networks of forced labour continue to operate and that foreign children fall victims of networks which are not countered vigorously enough’.\textsuperscript{148} A recent example arose before the ECtHR in the case of \textit{Siliadin v France}\textsuperscript{149} under Article 4 of the ECHR. This case is discussed below in some detail because of its relevance to the issues of forced labour, servitude and slavery.

\textit{i) Siliadin v France: The Facts}\textsuperscript{150}

[7.43] The applicant, Ms Siwa-Akofa Siliadin, was born in 1978 and lived in Togo until the events that ultimately brought her case before the Court. On 26 January 1994, aged 15 years and 7 months, she was brought to France by Mrs D, a French national of Togolese origin. The applicant entered France on a Togolese passport with a three-month tourist visa. The agreement reached between Mrs D and the applicant’s family was that she would work at Mrs D’s home until the cost of her air ticket had been reimbursed and that Mrs D would attend to her immigration status and find her a place at school. In reality, the applicant became an unpaid housemaid for Mr and Mrs D and her passport was taken from her. During the period that she lived with Mrs D, from January to October 1994, she had been employed by the latter, firstly, to do housework, cook and look after her child, and, secondly, without remuneration, in the latter’s clothing business, where she also did the cleaning and returned to the rails clothes that customers had tried on.

[7.44] In the second half of 1994 Mrs D ‘lent’ the applicant to Mr and Mrs B, who had two small children, so that she could assist the pregnant Mrs B with household work. Mrs B also had another daughter from a first marriage who stayed with her during the holidays and at weekends. The applicant lived at Mr and Mrs B’s home, her father having given his consent. This arrangement became permanent after Mrs B gave birth to her fourth child and told the applicant that she had decided to keep her. The applicant subsequently became a general housemaid for Mr and Mrs B. She worked seven days a week, without a day off, without pay (except for a few gifts from Mr B’s mother who gave her one or two 500 franc notes) from 7.30 am to 10.30 pm, 7.30 am to 10.30 pm,
and was occasionally and exceptionally authorised to go out on Sundays to attend Mass. Her working day began at 7.30 am, when she had to get up and prepare breakfast, dress the children, take them to nursery school or their recreational activities, look after the baby, do the housework, and wash and iron clothes. In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10.30 pm. In addition, she had to clean a studio flat, in the same building, which Mr B had made into an office. The applicant slept on a mattress on the floor in the baby’s room; she had to look after him if he woke up.

[7.45] In December 1995, the applicant escaped from the B family. She then lived and worked for a different family for five or six months. She was given appropriate accommodation and food, and received a salary of 2,500 francs per month. Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B, she returned to the B family upon the request of her paternal uncle. She was promised that her immigration status would be regularised, but this did not occur. In fact, as the French courts later found, Mr and Mrs B had used her fear of arrest and deportation as a way of controlling her. The applicant’s situation remained unchanged: the applicant continued to carry out household tasks and look after the couple’s children. She slept on a mattress on the floor of the children’s bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularised, she was not paid and did not attend school.

[7.46] Later, having recovered her passport, the applicant again escaped, with the assistance of a neighbour and the Committee against Modern Slavery, which in turn filed a complaint with the prosecutor’s office about the applicant’s case and also assisted with her application to the Court. In 1998, Mr and Mrs B were prosecuted under Articles 225-13 and 225-14 of the French Criminal Code. Article 225-13 prohibits obtaining services without payment or for payment which is manifestly disproportionate to the work carried out, by taking advantage of the person’s vulnerability or state of dependence. Article 225-14 prohibits subjecting someone to working and living conditions that are incompatible with human dignity by taking advantage of vulnerability or a state of dependence. They were also charged with employing an alien without a work permit, but this last charge is irrelevant to the Article 4 issues.

[7.47] In 1999, the French court of first instance convicted Mr and Mrs B under Article 225-13 but not 225-14. They found that the applicant was in a state of vulnerability and dependence in her relationship with the B family, particularly because of the fact that the applicant was unlawfully resident in France, was aware of that fact and feared arrest, and that Mr and Mrs B nurtured that fear while promising to secure her leave to remain—a claim that was confirmed by her uncle and her father—and by the fact that she had no resources, no friends and almost no family to help her. It was established that she had not been paid adequately. However, that court was of the view that the offence under Article 225-14 had not been made out because the working conditions, while harsh, were not incompatible with human dignity. The court concluded that, while it seemed established that employment regulations had not been observed in respect of working hours and rest time, this did not suffice to consider
that the working conditions were incompatible with human dignity, which would have implied, for example, an infernal rhythm, frequent insults and harassment, the need for particular physical strength that was disproportionate to the employee’s constitution and having to work in unhealthy premises, which had not been the case in this instance. It appears that the court did not take into account the fact that the applicant was a child. Article 225-13 set a maximum penalty of two years imprisonment plus a fine, but the court ordered 12 months imprisonment, of which seven were suspended, plus a fine and an order for compensation to be paid to the applicant. Mr and Mrs B appealed against this decision.

[7.48] In 2000, the Paris Court of Appeal quashed the judgment at first instance, thus reversing the convictions under Article 225-13. The Court of Appeal found that it had not been established that the applicant was in a state of vulnerability or dependence since, by taking advantage of her ability to come and go at will, contacting her family at any time, leaving Mr and Mrs B’s home for a considerable period and returning without coercion, the girl had, in spite of her youth, shown an undeniable form of independence, and vulnerability could not be established merely on the basis that she was an alien. Accordingly, the Court of Appeal acquitted the defendants of all the charges against them. The applicant appealed to the Court of Cassation, but the Public Prosecutor did not, which meant that the acquittals stood and the only issue before the Court of Cassation was the award of compensation. The Court of Cassation agreed that the Court of Appeal had erred in its application of Article 225-13, and the case was remitted to the Versailles Court of Appeal. In 2003, the Versailles Court of Appeal found that the offence had been made out and therefore ordered compensation: the acquittals remained unaffected.

[7.49] After the Paris Court of Appeal decision, and the refusal of the Public Prosecutor to seek review of the acquittals, the applicant initiated her application to the ECtHR on 17 April 2001. Relying on Article 4 of the ECHR, the applicant alleged that the criminal law provisions applicable in France did not afford her sufficient and effective protection against the ‘servitude’ in which she had been held, or at the very least against the ‘forced and compulsory’ labour which she had been required to perform. In other words, her claim was that the defendant state had failed in its positive obligation to have adequate criminal offences in place to protect her rights under Article 4 of the ECHR. The application was declared admissible on 1 February 2005, and the judgment was issued less than six months later. The Court had to consider whether France had afforded sufficient protection to the applicant, and whether the applicant was held in slavery or servitude, and subjected to forced labour.

(ii) Siliadin v France: The Decision

State Obligation to Protect

[7.50] First, the Court accepted that the obligation to protect the right to be free from

152 On 3 October 2003 the Paris industrial tribunal delivered judgment following an application submitted by the applicant. It awarded her €31,238 in respect of arrears of salary, €1,647 in respect of the notice period and €164 in respect of holiday leave.
slavery, servitude, forced or compulsory labour includes the responsibility of states to prohibit forced or compulsory labour by NSAs.\textsuperscript{153} The Court stated:

limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that Governments have positive obligations, . . . for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice.\textsuperscript{154}

[7.51] The Court went on to state that in accordance with contemporary norms and trends in this field, the Member States’ positive obligations under Article 4 of the Convention must be seen as requiring ‘the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation’.\textsuperscript{155} The court considered that the criminal law legislation in force in France at the material time (Articles 225-13 and 225-14 of the Criminal Code) did not afford the applicant, a minor, ‘practical and effective protection’ against the actions of which she was a victim since slavery and servitude were not as such classified as offences under French criminal law.\textsuperscript{156} The Court therefore found that there had been a violation of France’s positive obligations under Article 4 of the ECHR.\textsuperscript{157} It is submitted that a state’s obligation with respect to trafficked children should not only be limited to having criminal laws but should extend to the regularisation of their immigration status, housing and education.

Slavery

[7.52] On the basis of the Slavery Convention of 1926, the Court found that the applicant’s situation did not amount to slavery as Mr and Mrs B did not exercise a right of ownership over her. The Court noted:

Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B exercised a genuine right of legal ownership over her, thus reducing her to the status of an ‘object’.\textsuperscript{158}

Although following the Slavery Convention of 1926 the Court identified the key element of slavery as ‘ownership’, this strict requirement has not always been applied strictly, in the sense of legal ownership. The International Criminal Tribunal for the Former Yugoslavia, in \textit{Kunarac},\textsuperscript{159} asserted that ownership was an essential element of slavery, but found that slavery had been established in circumstances which could just as easily be described as ‘control’ rather than ownership. The Strasbourg Court’s strict application of the definition of slavery could in some cases be inadequate to protect victims of modern slavery. However, in this case, the applicant’s situation did fall within forced labour and servitude.

\textsuperscript{153} See also CESCR, General Comment 17, para 25.
\textsuperscript{154} \textit{Siliadin} v \textit{France}, above n 149, para 89.
\textsuperscript{155} \textit{Ibid}, para 112.
\textsuperscript{156} \textit{Ibid}, paras 141–8.
\textsuperscript{157} \textit{Ibid}, para 149.
\textsuperscript{158} \textit{Siliadin} v \textit{France}, above n 149, para 122.
\textsuperscript{159} \textit{Kunarac and others}, judgment, ICTY Trial Chamber III, IT-96-23-T and IT-96-23/1-T (2001). See also the recent decision of the High Court of Australia (HCA) in \textit{The Queen v Tang} [2008] HCA 39.
Forced Labour

[7.53] As to forced labour, the Court had regard to the ILO Forced Labour Convention 1930, which uses similar language to Article 4(3), defining, as noted above, forced labour as involuntary work which is ‘exacted . . . under the menace of any penalty’ and also performed against the will of the person concerned, that is work for which he ‘has not offered himself voluntarily’.\(^{160}\) The court found that although the applicant was not threatened by a ‘penalty’, the fact remains that she was in an ‘equivalent situation in terms of the perceived seriousness of the threat’.\(^{161}\) Accordingly, she was covered by this definition because, taking into account her age and immigration status, she was menaced by the fear of arrest by the police because of her irregular status.\(^{162}\) Likewise, in her situation, she was effectively ‘not given any choice’ as to whether or not she worked for Mrs D or the B family, and therefore met the non-voluntariness criterion.\(^{163}\)

Servitude

[7.54] The Court further agreed that the applicant, a minor at the relevant time, had been held in servitude, as she was deprived of her autonomy and was subject to coercion.\(^{164}\) In this regard, the Court adopted the distinction between forced labour and servitude drawn by the Commission in *Van Droogenbroeck v Belgium*, by which servitude includes

\[
\text{in addition to the obligation to provide certain services to another . . . the obligation on the}
\]
\[
\text{‘serf’ to live on the other’s property and the impossibility of changing his status.}^{165}
\]

The court concluded that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention because:

126. In addition to the fact that the applicant was required to perform forced labour, the Court notes that that this labour lasted almost fifteen hours a day, seven days per week. Brought to France by a relative of her father’s, she had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B, where she shared the children’s bedroom as no other accommodation had been provided. She was entirely at Mr and Mrs B’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

127. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time.

128. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

\(^{160}\) *Siliadin v France*, above n 149, para 117.
\(^{161}\) *Ibid*, para 118.
\(^{162}\) *Ibid*.
\(^{165}\) B 44 (1980), Commission Report, para 79.
[7.55] The case of *Siliadin* indicates that violations of the right to work may be a result of not only acts or omissions of the state but also includes acts or omissions of NSAs. A state’s failure to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties or to regulate effectively the activities of NSAs, including individuals, groups or corporations, so as to prevent them from violating the right to work of others (such as not to hold individuals in slavery or servitude or not to subject individuals to forced labour) amounts to a violation of the right to work.166

IV. CONCLUSION

[7.56] The right to work forms an essential part of international human rights law. Although the right to work has been considered as an ESC right, it is also, in many ways, essential to the realisation not only of other ESC rights (such as the rights to adequate housing, food, health and education) but also to the full and effective realisation of civil and political rights as well. For example, the right to work is essential for realising the human right to life since work provides the major source of income in the world. Indeed, as shown above, some aspects of the right to work such as freedom from slavery, servitude and forced labour are protected by human rights treaties protecting essentially civil and political rights. In this respect, the right to work epitomises the indivisibility and interdependence of all human rights.

[7.57] As noted above Article 6(1) of the ICESCR defines the right to work as the right of everyone to the opportunity to gain his or her living by work which he or she ‘freely chooses or accepts’. This has three implications. First, it implies a right not to be forced in any way whatsoever to exercise or engage in employment. This guarantees freedom from forced or compulsory labour, slavery or servitude. The unanimous decision of the Second Section of the ECtHR in *Siliadin v France* shows clearly that Article 4 of the ECHR, concerning slavery, servitude and forced labour, imposes positive obligations on states. Secondly, the right to work implies the right of access to a system of protection guaranteeing each worker access to employment. This guarantees freedom from discrimination. Thirdly, the right to work implies the right not to be unfairly deprived of employment. Thus ILO Convention No 158 concerning Termination of Employment at the Initiative of the Employer (1982) states:

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.

In Article 16(2) ICESCR, states parties recognise that ‘to achieve the full realisation of this right’ the steps to be taken

shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive

166 CESCR, General Comment 17, para 35.
employment, under conditions safeguarding fundamental political and economic freedoms to the individual.

As highlighted in Article 7 of the ICESCR, the work that is protected should respect the rights of the human person as well as the rights of workers in terms of conditions of work safety; remuneration to afford all workers a decent living for themselves and their families; as well as rest, leisure and reasonable limitation of working hours and periodic holidays with pay.
The Right to Health: Article 12

International Covenant on Economic, Social and Cultural Rights, Article 12

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of 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.

I. INTRODUCTION

[8.01] Article 12 of the ICESCR arguably contains ‘the fullest and most definitive conception of the right to health’.¹ It protects the right to the highest attainable state of physical and mental health (hereinafter the ‘right to health’), which is recognised as a human right in several international and regional human rights instruments.² As shown in chapter 1, reflecting universal values, every state in the world is now party to at least one human rights treaty which contain key provisions protecting the right to health.³ Although the right to health is generally regarded to be part of ESC rights, it

² See eg UDHR, Art 25; ICESCR, Art 12; CERD, Art 5; CEDAW, Art 12; CRC, Art 24; ESC, Art 11; Protocol of San Salvador, Art 10; ACHPR, Art 16. The term ‘right to health’ is used to express numerous human rights obligations relating to health.
is, in many respects, related to the exercise of several civil and political rights.\textsuperscript{4} There has also been growing recognition that health is not only a human rights issue but also a fundamental building block of sustainable development, poverty reduction and economic prosperity.\textsuperscript{5} International human rights law has laid down two distinct sets of norms relating to health: first, the right to health creates entitlements and freedoms for individuals and groups with corresponding state obligations in the field of health;\textsuperscript{6} second, the protection of public health constitutes a legitimate ground for limiting individual human rights.\textsuperscript{7} To this end, states as parties to human rights treaties applicable to the right to health are obliged to respect, protect and fulfil the right to health. This commitment to ensuring the realisation of the right to health in practice has been reaffirmed by states in several international conferences.\textsuperscript{8}

\[8.02\] However, as the former Director General of the WHO stated in 2001: ‘One third of the world’s population still lacks access to the medicines needed for good health.’\textsuperscript{9} These are basically the poor, especially in rural areas, who cannot afford access to basic health facilities,\textsuperscript{10} with a majority living in developing states in the South, mainly in Africa, Asia, Latin America, and the Caribbean.\textsuperscript{11} In 2002, for example, while life expectancy at birth reached 78 years for women in developed states, it fell back to less than 46 years for men in sub-Saharan Africa, largely because of the HIV/AIDS pandemic.\textsuperscript{12} Thus, children have dramatically different life chances depending on where they were born. In Japan or Sweden they can expect to live more than 80 years; in Brazil, 72 years; India, 63 years; and in one of several African countries, fewer than 50 years.\textsuperscript{13} As the CESCR acknowledged, for such millions of people,

\textsuperscript{4} For example, in interpreting ‘inherent right to life’ under the ICCPR, the HRC considered that ‘that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy’. See HRC, General Comment 6, Article 6 (Sixteenth session, 1982), UN Doc HRI.1 at 6 (1994), para 5.


\textsuperscript{7} For example several rights under the ICCPR may be limited for the protection of, inter alia, ‘public health’: right to freedom of thought, conscience and religion (Art 18); freedom of expression (Art 19), see HRC, General Comment 10: Freedom of Expression (29 June 1983), UN Doc HRI/GEN/1/Rev.1 at 11 (1994); right of peaceful assembly (Art 21); freedom of association (Art 22).

\textsuperscript{8} See eg the Earth Summit in Rio, Agenda 21, Ch 6, paras 1 and 12; the International Conference on Population and Development in Cairo, Programme of Action, 5–13 September 1994, Principle 8 and para 8.6; the World Summit for Social Development in Copenhagen, Copenhagen Declaration, Commitment 6; Beijing Declaration, paras 17 and 30; Beijing Platform for Action, paras 89 and 106; the Habitaint II conference in Istanbul, Habitatant Agenda, paras 36 and 128, available at http://www.pdhre.org/rights/health.html.


\textsuperscript{13} Commission on the Social Determinants of Health, Closing the Gap in a Generation: Health Equity
'the full enjoyment of the right to health remains a distant goal' and moreover such a goal is 'increasingly remote' for those living in poverty with severe effects on children, as each year some 11 million children (mainly in developing states) die from preventable diseases. The WHO has acknowledged that 'the persistence of deep inequities in health status is a problem from which no country in the world is exempt'. This is a challenge to the universal enjoyment of the human right to health that is indispensable for the exercise of other human rights, and essential to all aspects of every one’s life, well-being and to living a life in dignity. Indeed without physical and mental health, it is difficult to enjoy other human rights. Improved health, for example, contributes to economic growth and an increase in available resources to invest in all human rights. This is achieved in four ways: it reduces production losses caused by worker illness; it permits the use of natural resources previously inaccessible because of disease; it increases enrolment of children in schools and makes them better able to learn; and it frees for alternative uses resources that would otherwise have to be spent on medical care or treating illness.

[8.03] Despite its importance, the human right to health, like many other ESC rights, has for long received relatively scant attention and intellectual development, especially when contrasted with the attention devoted to many other human rights. This has led to a lack of conceptual clarity as to the definition and scope of health as a human right and a lack of significant domestic and international jurisprudence on the enforcement of the right to health. It is in this context that the right to health was, at one time, considered as being ‘too vague to provide the basis for a monitorable and enforceable right’. Fidler referred to the human right to health as ‘an amorphous concept [that] [n]o one is really sure what it means’ while Toebes considered it to be ‘a broad right that is difficult to pinpoint’. It is only recently that health as an international human right has attracted serious attention.


18 CESCR, General Comment 14, para 1.


21 Fidler, above n 11, 191.


23 So far, the most comprehensive authoritative interpretation of the right to health at the UN level is the CESCR, General Comment 14. Thus, in several respects, this chapter relies on this General Comment and draws on the reports of the former UN Special Rapporteur (Paul Hunt) on the right to health (August 2002–July 2008), UN Docs A/63/263, A/HRC/7/11, A/HRC/7/11/Add.2, A/HRC/7/11/Add.1, A/HRC/7/11/Add.3, A/HRC/7/11/Add.4, A/62/214, A/HRC/4/28, A/HRC/4/28/Add.2, A/HRC/4/28/Add.1,
Even so, a number of aspects concerning the right to health have yet to be clarified and developed. This chapter makes such an attempt. As a starting point, it examines the relevant provisions of international and regional human rights instruments that protect the right to health (section II) and establishes the scope and content of the right to health (section III). It then analyses state obligations regarding the right to health (section IV) and discusses the different levels of state obligations (section V). A review of the major issues related to the right to health is then made, focusing on the minimum core obligations of the right to health (section VI), followed by a discussion of the justiciability of the right to health (section VII). It concludes by calling for increased attention on the realisation of the right to health and putting in place health impact assessments before implementing any policies and decisions that may undermine the right to health (section VIII).

II. THE INTERNATIONAL PROTECTION OF THE RIGHT TO HEALTH

Since the early years of recorded human history, several measures have been implemented to improve human health. However, healthcare over the centuries remained the responsibility of families, private charities and religious organisations rather than the state. The concept of health based on medical intervention by the state is largely a nineteenth-century development with its origins in Europe's public health movement. This reflects a broadened sense of governmental responsibility for the welfare of its citizens.

At an international level, health as a human right has been guaranteed in several international instruments since the end of World War II and the founding of the United Nations. The relevant instruments provide a legal basis of the right to health in international law, including the principles of universality, non-discrimination, progressive realisation, the fields in which actions are to be taken, and the obligation to allocate sufficient resources to health. This section provides an overview of the international and regional instruments protecting the right to health, taking into account the practice of the relevant treaty-monitoring bodies.

International instruments which defined the nature and scope of the right to


Chapman, above n 25, 38.
health can be traced from the UN Charter, which commits the UN to the realisation and protection of human rights as one of the purposes of the UN and with obligations imposed upon the UN and Member States to, inter alia, promote human rights and solutions to ‘international . . . health . . . problems’. This explicit reference to the promotion of solutions to international health problems was made in recognition of the fact that ‘medicine is one of the pillars of peace’.

[8.08] Thus in 1946 the WHO, an international organisation for states, was established as a specialised agency of the UN on the premise that health is essential to international peace and security. According to the WHO Constitution, which is binding upon all states parties as a multilateral treaty, the ‘right to health’ is a ‘fundamental right’. Thus, the preamble to the WHO Constitution states:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.

It is in this context that Article 1 of the WHO Constitution provides the sole objective of the WHO as the ‘attainment by all peoples of the highest possible level of health’. Thus ‘Health-for-All’ has become the main focus of the WHO. The WHO Constitution defines health broadly as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’. This definition has been criticised for being all encompassing and too broad to be useful, as it is impossible for any state to guarantee complete physical, mental and social well-being for its population. In particular the precise meaning, scope and content of ‘well-being’ or ‘social well-being’ still remains uncertain and was neither preserved in the travaux préparatoires nor has it been subsequently clarified in the practice of the WHO.

29 UN Charter, Art 55(b) (emphasis added).
31 In 2008 the WHO had 193 Member States and two associate members. For current membership, see the WHO website at http://www.who.int/countries/en/.
36 See Preamble to the Constitution of the WHO. This definition was proposed by a subcommittee of the Technical Preparatory Committee that met in 1946 in preparation of the conference to establish a WHO, and it was not subsequently discussed by the Committee or the Conference which established WHO. WHO Official Records, No 1, 1947, 16.
Although the WHO was set up as ‘the directing and co-ordinating authority on international health work’ with explicit constitutional mandate ‘to propose conventions . . . with respect to international health matters’, it has not promoted law-making in the area of health. It has instead largely elaborated health standards that are ‘non-binding and most often also non-legal, relying on medical ethics rather than law’. It has given ‘little attention to human rights issues, apparently regarding them as unduly political and not within the technical mandate of the organisation’.

**[8.09]** It is submitted that ‘well-being’ in the context of the right to health under the WHO Constitution cannot be understood meaningfully as a ‘right to be healthy’ of everyone within a state’s jurisdiction. Put another way, no state can guarantee or provide complete physical, mental or social well-being for everyone within its jurisdiction. This is because a number of factors that affect and influence individual health (such as genetic factors and individual susceptibility to ill health) are beyond the control of the state. Therefore, as shown below, later formulations of the right to health in international and regional human rights instruments protect the right to ‘highest attainable standard of physical and mental health’ rather than the WHO’s ‘complete physical, mental and social well-being’.

**[8.10]** In the context of the UDHR, the right to health was not guaranteed as a distinct right but was linked to and combined with the right to an adequate standard of living for health and well-being of everyone. Thus Article 25(1) of the UDHR declares that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care.

It has, therefore, been stated that

> Article 25(1) of the Universal Declaration recognises the right of everyone to health and well being, though its stress is on the right to a standard of living adequate for health and well being.

The right to an adequate standard of living was clearly conceived as a composite right, whose enjoyment is dependent on the simultaneous realisation of each of its elements: food, clothing, housing, medical or healthcare, the necessary social services and the right to social security.

**[8.11]** Thus, Article 25 of the UDHR is an ‘integrating human rights provision, one that amalgamates rather than splits, requiring holism where there could be a danger
of fragmentation’. Its significance as regards the right to health lies in the fact that the UDHR recognised that health was wider than medical care and included preconditions for health that are central to achieve an adequate standard of living. This has led some commentators to assert that health was referred to ‘in the amorphous context of heterogeneous rights’ by combining it with a vague phrase ‘standard of living’. The question that arises here is what is ‘adequate’ for one’s health? How should this be ensured? Such questions can be answered if Article 25 of the UDHR is considered in light of numerous other human rights treaties (such as the ICESCR) that subsequently contained relatively detailed and more specific provisions clarifying the content of the right to health.

[8.12] As noted above, the ICESCR arguably contains ‘the fullest and most definitive conception of the right to health’. Article 12(1) of the ICESCR provides: ‘The States Parties . . . recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ A similar formulation is contained in the CRC, the ACHPR, the African Charter on the Rights and Welfare of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘the Protocol of San Salvador’), which states: ‘Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.’

[8.13] It is only the European Social Charter (revised 1996) that adopts a different

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48 For a discussion of the right to an adequate standard of living, see Eide and Eide, above n 45.
49 Chapman, above n 1, 397.
50 UN Doc A/Res/44/25 (1989). Art 24(1) of the CRC provides: ‘States parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.’ For discussion, see generally G Van Bueren, The International Law on the Rights of the Child (Dordrecht, Martinus Nijhoff, 1995), 297.
51 The ACHPR (ratified by all 53 African states), Art 16 states: ‘(1) Every individual shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.’ The standard to be achieved under the African Charter is the ‘best’ rather than the ‘highest’. It is notable that this is a lower standard since what is ‘best’ is likely to be evaluated in the context of the economic difficulties prevalent in many African States.
formulation by providing for the ‘right to protection of health’ placing emphasis in three distinct but related areas: removal of causes of ill-health, health education, and prevention of diseases and accidents. Although both ESCs also prohibit discrimination in the implementation of the rights set forth, including the ‘right to protection of health’, the scope in terms of the persons protected (ratione personae) is limited due to the fact that the substantive guarantees under both Charters are limited only to the nationals of states parties. This means that the ‘right to protection of health’ under the ESCs does not accrue to ‘everyone’ in a state’s jurisdiction, a standard that is lower than that under international instruments (like the UDHR, and the ICESCR) and other comparable regional human rights instruments—such as the African Charter, which guarantees the right to health to ‘every individual’, and the Protocol of San Salvador, which guarantees the right to health to ‘everyone’.

[8.14] The ICESCR (like the CRC) neither defines what is meant by ‘recognise’ nor does it define what is meant by the ‘the highest attainable standard of highest attainable standard of physical and mental health’. As a result, several questions are left unanswered. Does the use of the term ‘recognise’ (as opposed, for example, to ‘guarantee’) allow a state a margin of discretion in interpreting the ‘highest attainable standard’? Is the ‘highest attainable standard’ an individual, group, national or a basic international minimum to the entire population? Who (international community or states) determines the content and scope of the ‘highest attainable standard of health’? How is such a level to be evaluated and measured? If it is dependent on available resources, how should such resources be determined? Is there a minimum level of investment in the health sector required of all states parties? To what extent, if at all, are the more affluent/developed states obliged to make innovation in medical technologies and treatments widely available and accessible? For this reason, some commentators have argued that Article 12 of the ICESCR is imprecise and vague, while others have suggested that ‘[i]t is difficult to pinpoint exactly what the right to health contains’.

[8.15] Nonetheless, it is important to note that the key terms in this Article relate to the obligation to ‘recognise’ the right of ‘everyone’ to ‘the highest attainable standard of physical and mental health’. The use of the broad term ‘everyone’ reinforces the non-discriminatory nature of the right to health and the need to protect vulnerable

56 SD Jamar, ‘The International Human Right to Health’ (1994) 22(1) Southern University Law Review 1–68 at 32 notes that this formulation as opposed to the ‘right to health’ suggests a cautious approach to the right to health.
57 Revised ESC (1996) Art 11 provides: ‘With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly, or in co-operation with public or private organisations, to take appropriate measures designed, **inter alia**: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases as well as accidents.’ See also ESC (1961), Arts 3 and 11.
58 See Appendix to ESC 1961 and to the Revised ESC 1996.
60 See Tomasevski, above n 6, 859–906.
groups, including racial minorities, women, children and refugees. For example, Article 5 of the ICERD\textsuperscript{62} obliges states parties
to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national and ethnic origin, to equality before the law, notably in the enjoyment of the . . . the right to public health, medical care, social security and social services.\textsuperscript{63}

Similarly, CEDAW\textsuperscript{64} provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality with men and women, access to health care services, including those related to family planning.\textsuperscript{65}

\[8.16\] It is vital to note that: ‘Women’s health is inextricably linked to their status in society. It benefits from equality, and suffers from discrimination.’\textsuperscript{66} It is, therefore, essential that in protecting everyone’s right to health, states undertake measures geared towards elimination of \textit{de jure} discrimination and preventing and eliminating \textit{de facto} discrimination against women in the field of health, taking into account rights of women belonging to vulnerable and disadvantaged groups.\textsuperscript{67} These generally includes ‘migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities’, including those in rural areas.\textsuperscript{68}

\[8.17\] It has been suggested that the term ‘recognise’ as opposed to, for example, ‘guarantee’, allows a state a broader discretion in interpreting the right being considered.\textsuperscript{69} However, as argued in chapter 2, the Covenant as a human rights treaty (including for present purposes the term ‘recognise’) must be interpreted in light of the overall objective of the Covenant, which is to create specific binding human rights obligations for states parties. In this respect recognising the right to health is an acknowledgement of the fundamental nature of health, which links Article 12 of the ICESCR to Article 2.\textsuperscript{70} This creates, first, obligations on states parties to respect, protect and fulfill the right to health of everyone within a state’s jurisdiction. For example, in respect of women, Article 12(2) of CEDAW, provides:

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

\begin{itemize}
\item \textsuperscript{62} 660 UNTS 195. Adopted by UNGA on 21 December 1965 and came into force on 4 January 1969.
\item \textsuperscript{63} CERD, Art 5(e)(iv); CERD, General Recommendation 20: Non-discriminatory Implementation of Rights and Freedoms, UN Doc A/51/18 (15 March 1996), para 1.
\item \textsuperscript{64} Annex to GA Res 34/180 of 18 December 1979, UN Doc A/34/46, 193. Entered into force on 3 September 1981.
\item \textsuperscript{67} CEDAW, General Recommendation No 24, para 6.
\item \textsuperscript{68} \textit{Ibid.} See also CEDAW, General Recommendation No 26 On Women Migrant Workers, UN Doc CEDAW/C/2009/WP.1/R (5 December 2008), para 17.
\item \textsuperscript{69} S Jamar, ‘The International Human Right to Health’ (1994) 22 (1) \textit{Southern University Law Review} 1–68 at 23.
\item \textsuperscript{70} A/2929, 320, para 35. For a discussion of Art 2, see chapter 2.
\end{itemize}
Second, states are obliged to refrain from actions that interfere directly or indirectly, with the enjoyment of the highest attainable standard of physical and mental health in other states.

[8.18] It is recognised, however, that the notion of ‘the highest attainable standard of health’ takes into account both ‘the individual’s biological and socio-economic preconditions and a State’s available resources’. In this sense, the highest attainable standard of health varies in time and place. However, as argued in chapter 2, there is a minimum standard below which no state should fall. In order to comply with a state’s obligation in respect of the right to health, a state must ‘take steps’ immediately towards the progressive achievement of the full realisation of the right. The ICESCR spells out a non-exhaustive list of the steps that states are obliged to take. To this end, Article 12(2) of the ICESCR enumerates ‘illustrative’, but ‘non-exhaustive’ examples of ‘steps to be taken by the States Parties . . . to achieve the full realisation’ of the right to health. The steps envisaged under Article 12(2) which illustrate the content of the right to health 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.

[8.19] It follows that states parties have immediate obligations to take deliberate, concrete and targeted steps in the fields enumerated above (ie maternal, child and reproductive health; healthy, natural workplace environments; prevention, treatment and control of diseases; and provision of health facilities, goods and services) towards the full realisation of the right to health. While these steps provide a useful starting point for understanding state obligations in respect of health, ‘their generality makes it difficult to determine specific obligations involved’.

71 CESCR, General Comment 14, para 9.
72 See also CRC, Art 24 (2) stating that ‘States Parties shall pursue full implementation of this right [to the enjoyment of the highest attainable standard of health] and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care . . . ; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services.’ Similar measures are included under Art 14(2) of the African Charter on the Rights and Welfare of the Child, and Art 10(2) of the Protocol of San Salvador.
73 CESCR, General Comment 14, paras 7 and 13.
74 According to WHO, the stillbirth rate is no longer commonly used, instead infant and under-five mortality rates are measured. The infant mortality rate is the number of children who die before reaching the age of one year per thousand live births in a given year. The child mortality rate is the number of children who die aged one to four years per thousand in that age group in a year. See J Ovsiovitch, ‘Reporting Infant and Child Mortality under the United Nations Human Rights Conventions’ (1998) 46 Buffalo Law Review 543–87.
75 CESCR, General Comment 14, para 30; CESCR, General Comment 13, para 43.
In monitoring states’ compliance with obligations in respect of the right to health, states are required to indicate whether a state ‘has a national health policy’ and whether a national health system with ‘universal access to primary health care is in place’. Furthermore states are required to indicate what measures have been taken to ensure, inter alia, preventive, curative and rehabilitive health facilities, goods and services. In addition, under the previous reporting guidelines states were required to provide, ‘where available’, indicators as defined by the WHO, relating to the following issues:

(a) Infant mortality rate (by national value, sex, urban/rural division, socio-economic or ethnic group and geographical area);
(b) Population access to safe water (urban/rural);
(c) Population access to adequate excreta disposal facilities (urban/rural);
(d) Infants immunised against diphtheria, pertussis, tetanus, measles, poliomyelitis and tuberculosis (urban/rural and by sex);
(e) Life expectancy (urban/rural, by socio-economic group and by sex);
(f) Proportion of the population having access to trained personnel for the treatment of common diseases and injuries, with regular supply of 20 essential drugs, within one hour’s walk or travel;
(g) Proportion of pregnant women having access to trained personnel during pregnancy and proportion attended by such personnel for delivery, with figures on the maternity mortality rate, both before and after childbirth;
(h) Proportion of infants having access to trained personnel for care. (break-downs by urban/rural and socio-economic groups for indicators (f) to (h).)

States were then required to indicate whether it could be discerned from the break-downs of the indicators employed above, or by other means, that there were any groups in a state whose health situation is significantly worse than that of the majority of the population. The guidelines demanded that states define these groups as precisely as possible and give details, including an indication of which geographical areas in a state, if any, are worse off with regard to the health of the population, and the measures that are considered necessary or undertaken to improve the physical and mental health situation of such vulnerable and disadvantaged groups or in such worse-off areas. While this may be useful in monitoring the right to health, most health data, including that for assessing maternal mortality rates in many (developing) states where it is a serious problem, are either unavailable, or incomplete and inaccurate. The new reporting guidelines adopted in 2008 do not require these details (see Appendix I).

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77 See Appendix I, para 55.
78 Ibid, para 56.
79 The phrase suggests that providing this data is not mandatory, and as a result few states provide data on a disaggregated basis, and the Committee has rarely criticised states for failure to provide this data. See A Chapman, ‘Monitoring Women’s Right to Health under the International Covenant on Economic, Social and Cultural Rights’ (1995) 44 American University Law Review 1157–175 at 1168.
80 See Compilation of Guidelines on the form and content of reports to be submitted by States Parties, UN Doc HR/GEN/2/Rev.1 (9 May 2001), para 50.
81 Ibid, para 51.
82 Ibid.
By examining state reports in respect of the right to health using the above indicators, the essence of the right to health can be generally ascertained at a particular time in a given state. However, as noted in chapter 2, the current lack of an individual and group petition system under the ICESCR prevents individuals from presenting specific claims of violations of the right to health at the UN level. Yet indicators, though useful, are inadequate to give a complete view of everyone's enjoyment of the right to health. Thus, states are not made effectively accountable. The Optional Protocol providing for such communications adopted in December 2008 by the UN General Assembly should be helpful with respect to this issue.

III. SCOPE AND CONTENT OF THE RIGHT TO HEALTH

The scope of the right to health was articulated by the CESCR in its General Comment 14 as encompassing both healthcare and access to the underlying determinants of health. The Committee stated:

Para 4. . . . 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-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.

Para 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.

From the above paragraphs and section II above, the scope of the right to health extends to two essential aspects: first, it is a right to access timely and appropriate ‘healthcare’; and secondly, the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the ‘underlying determinants of health’. These two aspects of the right to health are examined below.

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A. The Right to Healthcare

[8.24] The first element of the right to health relates to individual entitlement of access to ‘healthcare’ including preventive and curative healthcare. The right to healthcare guarantees an individual’s right to have access throughout his or her lifecycle to the necessary facilities and services for the diagnosis, treatment, care and prevention of diseases. This entitles individuals and groups to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health. States are also, thus, obliged under Article 12(2)(d) to take steps necessary for ‘[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness’. In particular, states are obliged to ‘ensure appropriate pre-natal and post-natal health care for mothers’. The concept of pre- and postnatal healthcare includes the prevention and management of risk factors for low birth weight and premature birth; the ensuring of a clean environment for birth; the maintenance of thermal control and respiratory support; and the initiation of breast feeding immediately after birth.

[8.25] This provision entails a clear obligation of conduct (‘to take steps’) towards the result of assuring healthcare for all in the event of sickness. In the view of the Committee, this requires the state to: ensure 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. This obliges the state to ensure that there are functioning public healthcare facilities (including 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.

[8.26] The prevention, treatment and control of diseases and injury is fundamental to achieving the right to health. In recognition of this, Article 12(2)(c) of the ICESCR obliges states to take measures necessary for ‘[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases’. This requires the establishment of prevention and education programmes for behaviour-related health concerns. These include 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 including compulsory sex education in schools, and economic development and gender equity. Thus, states are required to indicate what measures have been taken ‘to provide education concerning prevailing health problems and the measures of preventing and controlling them’. This should extend to strengthening legislative and non-legislative measures including awareness-raising campaigns to combat traditional practices prejudicial to the health of children, particularly those affecting girls, including teenage pregnancy, ‘early [and forced] marriage, female genital mutilation [FGM], preferential feeding and care of male children’.

[8.27] 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 immunisation programmes and other strategies of infectious disease control. In the reporting guidelines, states are required to ‘describe the measures taken . . . to prevent, treat and control epidemic, endemic, occupational and other diseases’.

[8.28] Similarly, Article 11(1) of the ESC (revised 1996) has been interpreted by the European Committee of Social Rights, formerly the Committee of Independent Experts, as specifically requiring states to make public health arrangements generally available to ensure proper medical care for the whole population; and special measures to protect health of mothers, children and old people. Article 11(2) of the ESC (revised 1996) has been understood to require the provision of an adequate ‘system of health education’, while Article 11(3) requires an adequate vaccination

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92 This is the term commonly used for the human immunodeficiency virus (HIV) leading to acquired immune (or immuno-) deficiency syndrome (AIDS). Transmission of this virus, the progression of the disease and the dire consequences are set out in lay language from para 11 onwards in the judgment of Ngcobo J in Hoffmann v South African Airways 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC). See also CRC, General Comment 3: HIV/AIDS and the Rights of the Child (2003).

93 See Kjeldsen, Busk Madsen and Pedersen v Denmark Series, judgment of 7 December 1976, Series A No 23; (1979–80) 1 EHRR 711.

94 CESCR, General Comment 14, para 16.

95 HRI/GEN/2/Rev.1, above n 80, para 54.

96 See CRC, Art 24(3); CRC Committee, Concluding Observations: Malawi, UN Doc CRC/C/15/Add.174 (1 February 2002), para 50; Kenya, UN Doc CRC/C/15/Add.160 (7 November 2001), para 48; Tanzania, UN Doc CRC/C/15/Add.156 (9 July 2001), para 51; Ghana, UN Doc CRC/C/GHA/CO/2 (17 March 2006), paras 55–6.


99 CESCR, General Comment 14, para 16.

100 Ibid.

101 Ibid.

102 Ibid.

103 Conclusions I onwards of the Committee of Independent Experts (C I) 59 cited in ibid, 150.

104 Ibid.
programme to prevent ‘epidemic, endemic and other diseases.’ In the revised Charter, there is an addition of preventing ‘accidents’. This creates an obligation on states parties to ‘follow a policy of accident prevention, but each State will be able to decide on its own measures to that end’. Generally, the obligation on states under Article 11 implies the implementation in various fields of a very considerable number of measures, constituting a health policy in the fullest sense and geared to prevention as well as treatment.

This includes the prevention of AIDS, air pollution caused by cars, the protection of the public from exposure of asbestos, and nuclear safety.

[8.29] The African Commission has held that the ACHPR requires state parties to ensure that health facilities are available and accessible, and that therefore states parties must take ‘necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick’. Thus, the Commission has called on states to ensure protection against discrimination for those living with HIV/AIDS and to develop educational programmes, and has called on the pharmaceutical companies to ensure affordable healthcare to African governments. As regards vulnerable groups, eg prisoners, the Commission has stated that the ACHPR obliges states to provide detainees with access to medical care and that denying a detainee access to doctors leading to a deterioration of health violates the right to health. Similarly, the starvation of prisoners and depriving them of healthcare, leading to deterioration in health, have been found to be in violation of the right to health under Article 16 of the ACHPR, in addition to violating the prohibition against torture and other cruel, inhuman and degrading treatment in Article 5.

B. Underlying Determinants of Health

[8.30] The second aspect of the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and

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106 C VIII 12.
107 Harris and Darcy, above n 102, 149.
extends to the underlying determinants of health, such as adequate supply of safe food, nutrition and housing, access to safe and potable water and adequate sanitation,\textsuperscript{113} safe and healthy occupational or working conditions and a healthy environment,\textsuperscript{114} and access to health-related education and information, including on sexual and reproductive health.\textsuperscript{115} Some of these elements form an integral relationship with already established human rights. 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 realisation of the highest attainable standard of health.\textsuperscript{116}

\textbf{[8.31]} The African Commission has held that the right to health guaranteed under Article 16 of the ACHPR places a duty on states ‘to provide basic services such as safe drinking water and electricity’, besides the more obvious requirement to supply adequate medicine.\textsuperscript{117} Accordingly, a state’s failure to provide basic services necessary for minimum standards of health, such as safe drinking water, and shortages of medicine as a result of proven mismanagement of a state’s resources, have been held to constitute a violation of the right to health.\textsuperscript{118}

\textbf{[8.32]} Regarding water, one of the key underlying determinants of health, the CESCR has stated in its General Comment 15 as follows:

\textbf{Para 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.\textsuperscript{119} 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 . . .

\textsuperscript{113} E Guisse, Relationship between the Enjoyment of ESC Rights and the Promotion of the Realisation of the Right to Drinking Water Supply and Sanitation, UN Doc E/CN.4/Sub.2/2002/10 (25 June 2002), para 43 notes: ‘The quality of water and . . . sanitation is crucial for health. . . . water-related diseases continue to be one of the major health problems of the world’s population, particularly in developing countries, where it is estimated that some 80 per cent of illnesses and more than one third of death are caused by drinking contaminated water.’ See also CESCR, General Comment 15: The Right to Water, UN Doc E/C.12/2002/11 (20 January 2003).


\textsuperscript{115} CESCR, General Comment 14, paras 4 and 11.

\textsuperscript{116} Ibid, para 9.

\textsuperscript{117} Fre legal Assistance Group and Others v Zaire, above n 108, para 47.

\textsuperscript{118} Ibid.

\textsuperscript{119} According to the WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, 2.5 billion people still remain without improved sanitation facilities and around 900 million people still rely on unimproved drinking-water supplies. See \textit{UN Global Annual Assessment of Sanitation and Drinking-Water (GLAAS)} (Geneva, WHO, 2008). In 2000, the WHO estimated that 1.1 billion people 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 people were estimated to be without sanitation. See WHO, \textit{The Global Water Supply and Sanitation Assessment 2000} (Geneva, WHO and UNICEF, 2000), 1, available at http://www. who.int/water_sanitation_health/monitoring/globalassess/en/. Further, 2.3 billion people each year suffer from diseases linked to water: see UN Commission on Sustainable Development, \textit{Comprehensive Assessment of the Freshwater Resources of the World} (New York, United Nations, 1997), 39.
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.120

[8.33] In addition, the problem of pollution and environmental degradation has also been considered in the context of the right to health. In this regard, the African Commission found, inter alia, a violation of the Article 16 guarantee of the right to health by Nigeria through its oil production operations that caused environmental degradation and resultant health problems among the Ogoni people.121 In López Ostra v Spain, the ECtHR found that environmental harm to human health may amount to a violation of the right to a home and family and private life.122 The European Committee of Social Rights has clarified that in order for the national medical and health systems to comply with the ‘right to health protection’ under the ESC, it must make general measures to prevent air and water pollution, protection from radioactive substances, noise abatement, food control and environmental hygiene.123

In its General Comment 15, the CESCR has similarly observed:

Para 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.124 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.125

[8.34] The right to health also requires states to take measures to ensure effective exercise of the right to safe and healthy working conditions126 and to ‘formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment’.127 ‘This has been understood widely to apply to both ‘employed and self-employed workers’128 and to both private (including family businesses and home workers) and public sector workers, including civil servants.129

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123 C I 59 cited in Harris and Darcy, above n 102, 150.
124 See also CESCR, General Comment 14, para 15.
125 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.
126 ESC (1961), Art 3; Revised ESC (1966), Art 3.
127 Revised ESC, Art 3(1).
128 C XIII-4 342; C III 17.
129 Harris and Darcy, above n 102, 70.
Similarly, Article 12(2)(b) of the ICESCR obliges states to effect ‘improvement of all aspects of environmental and industrial hygiene’. This comprises several measures including 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.

It also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food, and proper nutrition. Furthermore, the improvement of industrial hygiene obliges states to minimise, so far as is reasonably practicable, the causes of health hazards inherent in the working environment. It is noteworthy that the poor and marginalised suffer disproportionately from environmental harm. Accordingly states must avoid ‘environmental racism’—the dumping of environmental waste, or ignoring pollution in areas inhabited by vulnerable groups, ie the poor, racial and ethnic minorities, persons with disabilities, and the mentally and physically handicapped.

In this respect the right to health overlaps with, is closely interrelated with, and dependent upon the realisation of other human rights, including rights to food, housing, work and education. Indeed, improved nutrition, good sanitation, better education and a clean environment enhance the realisation of the right to health.

A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels. In order to participate effectively, individuals should be ‘empowered to promote, preserve, and ultimately define their own health status’. Thus, the reporting guidelines ask states to indicate ‘what measures have been taken . . . to maximise community participation in the planning, organisation, operation and control of primary health care’. In this respect, education has an important role in empowering individuals and groups to realise the right to health.

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132 CESCR, General Comment 14, para 15.

133 Ibid.

134 Shelton, above n 114, 257.

135 Leary, above n 76, 90.

136 CESCR, General Comment 14, para 3.


138 CESCR, General Comment 14, para 11.


140 HRI/GEN/2/Rev.1, above n 80, para 53.
IV. STATE OBLIGATIONS REGARDING THE RIGHT TO HEALTH

[8.38] States are obliged to make healthcare and access to the underlying determinants of health available, accessible, acceptable and of good quality. These elements of the right to health are examined below.

A. Availability

[8.39] Availability embodies two different government obligations. First, it requires a state to ensure that ‘[f]unctioning public health and health-care facilities, goods and services, as well as programmes’ are available in sufficient quantity within the state for the entire population. Secondly, it demands that a state ensure that the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, are available in sufficient quantity. Therefore, availability demands that there be adequate public funding for health in view of the fact that public health facilities are the only type of health facility to which the poor can ever have access. In the case of *Mariela Viceconte v Ministry of Health and Social Welfare*, Mariela Viceconte, and the National Ombudsman, asked the court to order the Government of Argentina to take protective measures against haemorrhagic fever, which threatened 3.5 million people. More specifically, they asked the court to order the Government to produce a WHO-certified vaccine (Candid-1) for Argentine haemorrhagic fever. According to the court, it was the Government’s responsibility to make healthcare available in a situation where the existing healthcare system, including the private sector, was not protecting individuals’ health. In light of the Constitution’s incorporation of international treaties that recognise the right to health, the court found that the Government had not ‘fulfilled its obligations to make available the Candid-1 vaccine’. Because the private sector saw the production of the vaccine as unprofitable, the court ordered the state to produce Candid-1.

B. Accessibility

[8.40] Accessibility in relation to health facilities, goods and services has four overlapping dimensions. The facilities, goods and services must be: (i) accessible without discrimination; (ii) physically accessible; (iii) economically accessible (ie affordable); and (iv) health information must be accessible subject to confidentiality of personal health data.

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142 CESCR, General Comment 14, para 12.
(i) Equality and Non-discrimination

The twin fundamental human rights principles of equality and non-discrimination (see chapter 2) in the context of health mean that outreach and other programmes must be in place to ensure that disadvantaged individuals and groups enjoy, in law and in practice, the same access as those who are more advantaged. The UN Commission on Human Rights reaffirmed that non-discrimination in the field of health should apply to all people and in all circumstances.\textsuperscript{144} States are obliged to eliminate \textit{de jure} and \textit{de facto} discrimination in access to healthcare and to underlying determinants of health, as well as to means and entitlements for their procurement, on any of the internationally prohibited grounds.\textsuperscript{145} This is meant to ensure access to all individuals, including marginalised groups such as women,\textsuperscript{146} persons with disabilities,\textsuperscript{147} older persons,\textsuperscript{148} prisoners,\textsuperscript{149} racial and ethnic minorities,\textsuperscript{150} asylum seekers and illegal immigrants,\textsuperscript{151} and persons living with HIV/AIDS.\textsuperscript{152} States must respect and embrace human rights in the National Health Strategy ‘in line with the principles of non-discrimination and equal access to health facilities and services’.\textsuperscript{153}

(ii) Physical Accessibility

This requires health services and underlying determinants of health to be within safe physical reach for all sections of the population, including in rural areas.\textsuperscript{154} This must be the case especially for those vulnerable or marginalised groups outlined in the previous paragraph.\textsuperscript{155} Physical accessibility also includes adequate access to buildings for persons with disabilities.\textsuperscript{156}

\textsuperscript{144} Resolution 1989/11, Non-discrimination in the Field of Health, 2 March 1989.
\textsuperscript{145} See Ch 2; CESCR, General Comment 14, para 18; CESCR, Concluding Observations: Trinidad and Tobago, UN Doc E/C.12/1/Add.80 (17 May 2002), para 14; United Kingdom, UN Doc E/C.12/1/Add.79 (5 June 2002), para 14; Ireland, UN Doc E/C.12/1/Add.77 (17 May 2002), paras 15, 22 and 35.
\textsuperscript{151} CESCR, General Comment 14, para 34.
\textsuperscript{152} Fighting HIV-related Intolerance: Exposing the Links Between Racism, Stigma and Discrimination, paper prepared by WHO and UNAIDS in consultation with OHCHR, August 2001.
\textsuperscript{153} CESCR, Concluding Observations: Ireland, UN Doc E/C.12/1/Add.77 (17 May 2002), para 35; CESCR, General Comment 14, para 54.
\textsuperscript{154} HRI/GEN/2/Rev.1, above n 80, para 50.
\textsuperscript{155} CESCR, General Comment 14, para 12(b)(ii).
(iii) Economic Accessibility

Economic accessibility (affordability) requires that payment for healthcare 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 practically affordable for all.\textsuperscript{157} Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.\textsuperscript{158} In the \textit{Minister of Health v Treatment Action Campaign}, the South African Constitutional Court considered, inter alia, whether or not Nevirapine was accessible.\textsuperscript{159} The Government provided Nevirapine, an anti-retroviral drug used to treat HIV, at only two research and training sites per province. The drug could also be obtained from private medical providers. As a result, mothers and their babies who did not have access to the research and training sites, and who could not afford access to private healthcare, were unable to gain access to Nevirapine. The Government argued that until the best programme has been formulated and the necessary funds and infrastructure provided . . . the drug must be withheld from mothers and children who do not have access to the research and training sites.

However, the Court held that the state’s limited provision of Nevirapine was unreasonable. It ordered that the Government act without delay to provide the drug in public hospitals and clinics when medically indicated.

(iv) Informational Accessibility

In its very first session in 1946, the UN General Assembly adopted Resolution 59(1) which stated: ‘Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the UN is consecrated.’ This includes the right to seek, receive and impart information and ideas\textsuperscript{160} concerning, inter alia, health issues.\textsuperscript{161} In a 1985 Advisory Opinion, the Inter-American Court of Human Rights recognised that freedom of information is a fundamental human right, which is as important to a free society as freedom of expression.\textsuperscript{162} In three key cases, the ECtHR has held that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, guaranteeing freedom of expression, ‘basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him’.\textsuperscript{163} In the most recent case,

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\textsuperscript{157} CESCR, General Comment 14, para 12(b)(iii).
\textsuperscript{158} Ibid, para 12(b)(iii).
\textsuperscript{161} CESCR, General Comment 14, para 12(b)(ii).
\textsuperscript{162} Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 (13 November 1985) paras 30, 32 and 70.
\textsuperscript{163} Leander v Sweden, judgment of 26 March 1987, 9 EHRR 433, para 74. See also Gaskin v United Kingdom, judgment of 7 July 1989, 12 EHRR 36 and Guerra and Ors v Italy, judgment of 19 February 1998, (1998) 26 EHRR 357.
\end{flushright}
Guerra, the Court held that the Government of Italy was under an obligation to provide certain environmental information to residents in an ‘at-risk’ area, even though it had not yet collected that information.\textsuperscript{164} States should enhance access to health information to everyone, including persons with disabilities. In the Canadian case of \textit{Eldridge v British Columbia (Attorney General)}, a group of deaf applicants challenged the absence of sign-language interpreters in the publicly funded healthcare system.\textsuperscript{165} The Supreme Court held that provincial governments had a positive obligation under the Canadian Charter of Rights and Freedoms to address the needs of disadvantaged groups, such as persons with disabilities. The Court decided that the applicants had a right to publicly funded sign-language interpretation in the provision of healthcare and that the failure of the authorities to ensure that the applicants benefited equally from the provincial medical care scheme amounted to discrimination. However, accessibility of information (like all other health services) must be consistent with other human rights, including the rights to privacy, confidentiality relating to personal health data, informed consent and choice.\textsuperscript{166}

C. Acceptability and Quality

\textbf{[8.41]} Acceptability requires a guaranteed quality of healthcare and underlying determinants of health. Thus, health facilities must be ‘scientifically and medically appropriate and of good quality’.\textsuperscript{167} Medicines rejected in the North because they are beyond their expiry date and unsafe must not be recycled to the South.\textsuperscript{168} Acceptability also requires minimum standards of health and safety, or professional requirements for health personnel which have to be set, monitored and enforced by the government, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.\textsuperscript{169} In this respect, states are obliged to

issue safety and health regulations; to provide for the enforcement of such regulations by measures of supervision; \[and\] to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.\textsuperscript{170}

Acceptability equally requires that all

health facilities, goods and services must be respectful of medical ethics and culturally appropriate, ie 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.\textsuperscript{171}

\textbf{[8.42]} As regards women’s right to health, acceptable health services must ensure that ‘a woman gives her fully informed consent, respects her dignity, guarantees her

\begin{itemize}
  \item \textsuperscript{164} \textit{Guerra and Ors v Italy}, ibid.
  \item \textsuperscript{166} CEDAW, General Recommendation 24, para 31(e). CESCR, General Comment 14, para 12(b)(iv).
  \item \textsuperscript{167} CESCR, General Comment 14, para 12(d). See also \textit{Dr Mohiuddin Farooque v Bangladesh} 48 DLR (1996) HCD 438 (The Supreme Court of Bangladesh).
  \item \textsuperscript{168} P Hunt, UN Doc A/HRC/7/11 (31 January 2008), para 54.
  \item \textsuperscript{169} CESCR, General Comment 14, para 12(d).
  \item \textsuperscript{170} Revised ESC Art 3 (2-4).
  \item \textsuperscript{171} CESCR, General Comment 14, 12(c).
\end{itemize}
confidentiality and is sensitive to her needs and perspectives'. In *Andrea Szijjarto v Hungary*, a Hungarian woman of Roma origin alleged that she had been coercively sterilised. She went into labour and was taken to hospital. Upon examination, it was found that the foetus had died and a Caesarean section was urgently needed. On the operating table, she was asked to sign a form consenting to the Caesarean section, as well as a ‘barely legible note’ handwritten by the doctor giving permission for sterilisation. The reference to sterilisation was in a language that she did not understand. In her application to the CEDAW Committee, she alleged that this conduct constituted a violation of her right to appropriate healthcare services, as well as her right to decide freely and responsibly on the number and spacing of her children. The Committee decided that Hungary had failed to provide Szijjarto with appropriate information and advice on family planning and ensure that she had given her fully informed consent to the operation, and it recommended that the Government provide the applicant with appropriate compensation.

V. LEVELS OF OBLIGATIONS

[8.43] As observed in chapter 1, all human rights, including the right to health, impose three types or levels of obligations on states: the obligations to ‘respect’, ‘protect’ and ‘fulfil’. In turn, the obligation to fulfil contains obligations to ‘facilitate’, ‘provide’ and ‘promote’. A state’s failure/unwillingness, whether of commission or omission, to comply with the obligations to respect, protect or fulfil, amounts to a violation.

172 CEDAW, General Recommendation 24, para 22.


174 Ibid. The Committee stated in para 11.3 that: ‘The Committee also takes note of the unchallenged fact that the author enquired of the doctor when it would be safe to conceive again, clearly indicating that she was unaware of the consequences of sterilization. According to article 12 of the Convention, States parties shall “ensure to women appropriate services in connexion with pregnancy, confinement, and the post-natal period”. The Committee explained in its general recommendation No 24 on women and health that “[A]cceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity . . .” The Committee further stated that “States parties should not permit forms of coercion, such as non-consensual sterilization . . . that violate women’s rights to informed consent and dignity”. The Committee considers in the present case that the State party has not ensured that the author gave her fully informed consent to be sterilized and that consequently the rights of the author under article 12 were violated.’

175 See chapter 1; CESCR, General Comment 14, paras 33–7; B Toebes, *The Right to Health as a Human Right in International Law* (Antwerp, Intersentia, 1999), 311–42.

176 The CESCR has applied this typology in its General Comments. In General Comments 12 (adequate food) and 13 (education), the obligation to *fulfil* was interpreted to incorporate obligations to *facilitate* and to *provide*. In General Comment 14, the obligation to *fulfil* was understood to incorporate an additional obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

Each of these levels of obligations extends to healthcare and the underlying determinants of health as examined below.

A. OBLIGATION TO RESPECT THE RIGHT TO HEALTH

[8.44] The obligation to respect the right to health requires states to refrain from all acts that negatively impact, directly or indirectly, upon the right to health. States are obliged to respect equal access to available health facilities and not to impede individuals or groups from their access to the existing health facilities. In particular, states are under an obligation to respect the right to health by, inter alia, refraining from a number of practices that negatively impact on the right to health. For example, states must refrain from denying or limiting equal access for all individuals and groups to preventive, curative and palliative health services on prohibited grounds.\(^{178}\) As shown in chapter 6, states are obliged in particular to refrain from generally discriminating against women and girls,\(^{179}\) and are obliged to abstain from imposing discriminatory practices relating to women's health status and needs\(^ {180}\) such as limiting access to contraceptives, sterilising a woman without her informed consent,\(^ {181}\) and other means of maintaining sexual and reproductive health for women, censoring, withholding or intentionally misrepresenting health-related information for women, including sexual education and information, as well as from preventing women's participation in health-related matters.\(^ {182}\)

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\(^{178}\) See chapter 2, section on equality and non-discrimination.

\(^{179}\) CESCR, Concluding Observations, Algeria, UN Doc E/C.12/1/Add.71 (30 November 2001), paras 14 and 37; Cameroon, UN Doc E/C.12/1/Add.40 (8 December 1999), paras 13-14 and 31-34; Congo, UN Doc E/C.12/1/Add.45 (23 May 2002), paras 17, 25 and 26; Croatia, UN Doc E/C.12/1/Add.73 (30 November 2001), paras 9, 13, 20 and 24; Egypt, UN Doc E/C.12/1/Add.44 (23 May 2000), paras 13, 16, 17, 20 and 27; Jamaica, UN Doc E/C.12/1/Add.75 (30 November 2001), para 8 in which the Committee was ‘concerned about the existence of laws which are discriminatory on the basis of sex (mostly against women . . .)’; Mauritius, UN Doc E/C.12/1995/18 (7 October 1996), paras 237 and 242; Iraq, UN Doc E/C.12/1/Add.17 (12 December 1997), paras 14, 29 and 30; Hong Kong, UN Doc E/C.12/1/Add.10 (6 December 1996), paras 15 and 36; Iran, UN Doc E/C.12/1993/7 (9 June 1993), para 6 in which the Committee found that the situations in Iran: ‘in which women are not permitted to study engineering, agriculture, mining or metallurgy or to become magistrates; in which they are excluded from a very large number of specific subjects at university level; and in which they need their husbands’ permission to work or travel abroad; to be incompatible with the obligations undertaken by the State party under the Covenant’; Morocco, UN Doc E/C.12/1/Add.55 (1 December 2000), para 16 the Committee expressed concern about ‘persistence patterns of discrimination against women in nation [sic] legislation’; Nigeria, UN Doc E/C.12/1/Add.23 (13 May 1998), paras 14, 21 and 39 in which the Committee expressed ‘its concern that women suffer discrimination’, condemned ‘the continuing existence of legal provisions which permit the beating (“chastisement”) of women by their husbands’ and called on the Government ‘to cease . . . discrimination against women’; Senegal, UN Doc E/C.12/1/Add.62 (24 September 2001), paras 15 and 35; Syrian Arab Republic, UN Doc E/C.12/1/Add.63 (24 September 2001), paras 14 and 31; Togo, UN Doc E/C.12/1/Add.61 (21 May 2001), paras 12, 15 and 20; Sudan, UN Doc E/C.12/1/Add.48 (1 September 2000), paras 20, 24 and 34 in which the Committee stated it was ‘gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent dress or for being out in the street after dusk, on the basis of the Public Order Act of 1996’; Zimbabwe, UN Doc E/C.12/1/Add.12 (20 May 1997), paras 10, 16 and 17.

\(^{180}\) See eg CEDAW, General Recommendation 24; Hayden, n 146.


\(^{182}\) CESCR, General Comment 14, para 34.
States must also refrain from the following acts: prohibiting or impeding traditional preventive healthcare and medicines, marketing unsafe drugs, applying coercive medical treatments, and limiting access to means of maintaining sexual and reproductive health such as access to contraceptives. In addition, states are obliged to refrain from censoring or withholding health-related information, preventing people’s participation in health-related matters, and limiting access to health services as a punitive measure. States should also refrain from carrying out, or giving support to, acts that negatively impact upon human health, such as activities unlawfully polluting air, water and soil—eg through inappropriate disposal of industrial waste from state-owned facilities, or from using or testing nuclear, biological or chemical weapons, if such testing results in the release of substances harmful to human health.

Furthermore, to respect the right to health, states should also refrain from deporting individuals living with HIV/AIDS to states where they may not be able to receive treatment if their illness has reached an advanced or terminal stage. The case of D v United Kingdom concerned the proposed deportation by the British authorities of a man dying from AIDS to St Kitts, his country of origin. D had been diagnosed with HIV while in a British prison. He applied for permission to remain in the United Kingdom after the end of his prison sentence on compassionate grounds. His deportation to St Kitts would entail a loss of the medical treatment he was receiving. The European Court of Human Rights noted that the applicant was in the advanced stages of AIDS, and found that the abrupt withdrawal of medical treatment caused by the deportation of D to St Kitts would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.

The Court observed that an abrupt withdrawal of the care facilities provided in the respondent state together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant’s death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant’s fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St Kitts would amount

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183 CESCR, Concluding Observations: Ireland, UN Doc E/C.12/1/Add.77 (5 June 2002), paras 15 and 22. Coercive medical treatment is only justified on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases, subject to applicable international standards such as the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. See General Assembly Resolution 46/119 (1991).
184 CESCR, General Comment 14, para 34.
185 Ibid, para 34.
188 See eg ECtHR, Arcila Henao v The Netherlands, Application No 13669/03 (24 June 2003), available at http://cmiskp.echr.coe.int/.
189 24 EHRR 423.
190 Ibid, para 53.
to inhuman treatment by the respondent state. The Court ordered that D should not be deported.

[8.47] However, in later cases the Court/Commission has been reluctant to find a violation of Article 3 even where the facts could justify finding a violation. While the reason is not always explicitly stated, it appears to be based on the allegation that finding a breach of Article 3 in cases involving claims to healthcare in other states would open up the floodgates to medical immigration and make Europe vulnerable to becoming the ‘sick-bay’ of the world. The Case of N v The United Kingdom provides a good example. The applicant, a female Ugandan national, then aged 23, who was HIV positive, arrived on a flight from Entebbe, Uganda to the United Kingdom on 28 March 1998 under an assumed name. On the following day, seriously ill, she was admitted to hospital where she was diagnosed HIV positive with severe damage to the immune system (she had a CD4 count of ten; that of a healthy person is over 500) and disseminated TB. Following a long initial stay in hospital she developed a second AIDS defining illness, Kaposi's sarcoma, a particularly aggressive form of cancer. She was readmitted to hospital and started a prolonged course of chemotherapy. By 2002, after some years of treatment with anti-retroviral drugs and many setbacks, her CD count had risen to 414 and she was well. In October 2002, the date of the latest medical evidence in the case, she was described by Dr Meadway as ‘stable and free of any significant illness’ and, were she to remain in the UK, ‘likely to remain well for decades’. Were she to be returned to Uganda, however, her prospects would deteriorate dramatically. In this event it was Dr Meadway’s view that:

the formulation of anti-retroviral drugs Ms N is currently taking are not available in Uganda. Ms N’s HIV virus already has some resistance and in the future she will require a change of anti-retrovirals which is likely to include other drugs not available in Uganda. If she returns to Uganda although anti-retrovirals are available in parts of the country she would not have the full treatment required and would suffer ill-health, pain, discomfort and an early death as a result.

By an ‘early death’ it appears that Dr Meadway was suggesting death within a year or at most two. Dr Larbalestier, a consultant physician, also reporting in October 2002, said:

I have no doubt at all that if she is forced to return to Uganda her life span will be dramatically shortened from potentially decades of high quality life to almost certainly less than 2 years.

In these circumstances, the applicant alleged that if she were returned to Uganda she would not have access to the medical treatment she required and that this would give rise to violations of Articles 3 and 8 of the ECHR.

[8.48] Even on such facts, the Court held (by 14–3) that there would be no violation of Article 3 of the Convention in the event of the applicant being removed to Uganda.
because the applicant’s case did not disclose very exceptional circumstances, such as in *D v The United Kingdom*. The Court accepted that the quality of the applicant’s life, and her life expectancy, would be affected if she were returned to Uganda. The applicant was not, however, at the relevant time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide (para 50). In a joint dissenting opinion, Judges Tulkens, Bonello and Spielmann found that there were substantial grounds to believe that the applicant faced a real risk of prohibited treatment (under Article 3 of the ECHR) in the country of proposed removal given that

in the event of removal to Uganda the applicant will face an early death after a period of acute physical and mental suffering. (para 23)

**B. Obligation to Protect the Right to Health**

[8.49] The obligation to **protect** the right to health requires states to take measures that prevent third parties from interfering with the right to health. In order to **protect** the right to health effectively, states are obliged to adopt legislation or other measures (discussed in chapters 1 and 4) to ensure equal access to healthcare and health-related services provided by third parties; to ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; 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.

[8.50] States are also obliged to take legislative and other measures to protect individuals and groups from health infringements by third parties. To comply with this obligation, states have to take measures to protect individuals and groups from harmful social or traditional practices that interfere with the right to health. By way of example, states must take measures to prevent third parties from coercing women/girl children to undergo traditional practices, such as female genital mutilation, and other harmful traditional practices including early marriage and dowry, early pregnancy, adolescent child-bearing, taboos and practices preventing women from controlling their own fertility, nutritional taboos and differential feeding patterns, traditional birth practices, female infanticide, and the preference for male children. Similarly the obligation to protect obliges states to discourage the

193 Above n 189.
194 CESCR, General Comment 14, para 35.
production, marketing and consumption of tobacco, alcohol and harmful drugs. In addition states are required to take measures to protect all vulnerable or marginalised groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also protect people’s access to health-related information and services from interference or limitation by third parties. In addition, states are obliged to adopt legislation or other measures to protect against third-party interference with the underlying determinants of health. This requires states, for example, to control the environmental impact of the activities of transnational corporations. In *Ratlam Municipality Council v Vardi Chand*, the Supreme Court of India held that municipalities had a duty to protect the environment in the interests of public health. The Court found that ‘pollutants being discharged by big factories . . . [are] a challenge to the social justice component of the rule of law’; and that the preservation of public health, premised on the decency and dignity of individuals, was a non-negotiable facet of human rights requiring state action.

C. Obligation to Fulfil the Right to Health

The obligation to *fulfil* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to facilitate (eg through the appropriate training of doctors and other medical personnel, and the provision of a sufficient number of hospitals, clinics and other health-related facilities), promote (eg medical research and health education, as well as information campaigns), or provide (in case of inability for reasons beyond control of individuals or groups to realise the right to health by the means at their disposal) healthcare and access to the underlying determinants of health. Thus, the CESCR has stressed that:

> while there is no reason that the private sector should not be fully involved in the provision of health services, the Committee emphasises that such an approach does not in any way relieve the Government of its Covenant-based obligations to use all available means to promote access to health care services, particularly for the poorer segments of the population.

In this respect, governmental obligation to promote the right to health is vital because by its entrepreneurial nature, private actors/NSAs in the field of health may prove...

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197 World Bank, *World Development Report 1993*, above n 19, 3 observed that some one million people worldwide die each year from tobacco-related heart disease and cancers.
198 CRC, General Comment 4, para 18.
199 CESCR, General Comment 14, para 35.
203 CESCR, General Comment 14, paras 36–7; CRC, General Comment 4: Adolescent Health, paras 19–26, 32.
205 Such as individual practitioners, groups of practitioners or facilities such as clinics, pharmaceutical companies, hospitals or other private institutions.
difficult to control in practice, since their concern may be more with profits than human rights impact of their activities.\textsuperscript{206}

[8.52] In \textit{Purohit and Moore v The Gambia}, mental health advocates witnessed the inhuman treatment of patients in the psychiatric unit of the Royal Victoria Hospital in the Gambia.\textsuperscript{207} They submitted a complaint to the ACmHPR on behalf of the patients detained in the unit. The principal legislation governing mental health in the Gambia was the Lunatics Detention Act, enacted in 1917, and the last amendment to this Act was effected in 1964. The complaint pointed out that, from the human rights perspective, this colonial legislation was seriously deficient in numerous respects; among other things, there were no provisions and requirements establishing safeguards during the diagnosis, certification and detention of the patient. The Commission held that the legislation was ‘lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities’ (para 83). It then concluded that

> Persons with mental illnesses should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society. (para 85)

The Commission strongly urged the Government of the Gambia: (i) to repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in the Gambia compatible with the ACHPR and international standards and norms for the protection of mentally ill or disabled persons as soon as possible; (ii) pending (i), to create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release; (iii) to provide adequate medical and material care for persons suffering from mental health problems in the territory of the Gambia.

**VI. MINIMUM CORE OBBLIGATIONS OF THE RIGHT TO HEALTH**

[10.53] In chapter 2, it was noted that states have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the ICESCR, including essential primary healthcare and the underlying determinants of health, in order to comply with the Covenant obligations. In the context of health, Chapman has referred to the minimum core obligation as a ‘floor’ below which health conditions and services should not be permitted to fall.\textsuperscript{208} ‘This applies at all times, irrespective of the availability of resources or any other factors and


difficulties. As regards the minimum core content of the right to health, the Health For All and Primary Health Care strategies of the WHO provide that ‘there is a health baseline [core health obligations] below which no individuals in any country should find themselves’. What, more precisely, are these core obligations? In the view of the CESCR, these core obligations in respect of health include at least the following obligations (of conduct):

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised 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 marginalised groups.210

[8.54] The emphasis on the core obligations of the right to health is on the one hand focused on access to, and equitable distribution of, health facilities on a non-discriminatory basis, provision of essential drugs and implementing a national public health strategy and plan of action. On the other hand, it centres on access to minimum essential food, safe and potable water, and housing. It thus combines both healthcare and the underlying determinants of health. The CESCR also confirmed that the following are obligations of ‘comparable priority’, meaning that after achieving the minimum core obligations (above), states are obliged to comply with these obligations:

(a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
(b) To provide immunisation 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.211

[8.55] The foregoing list of elements constituting core and ‘comparable’ obligations in respect of health is broad but notably omits the inclusion of freedom from serious environmental health threats such as pollution. It is submitted that this should be an additional aspect of the core content of the right to health. The language used by the

210 CESCR, General Comment 14, para 43.
211 Ibid, para 44.
CESCR in respect of core obligations of the right to health is to ‘ensure’ or to ‘provide’. This calls for more positive obligations. In view of the limited available resources and high debt burdens, together with inadequate infrastructure and a lack of skilled health personnel, it is doubtful, however, whether this core can be fully implemented or fulfilled immediately in developing states (particularly the least-developed) without considerable targeted international assistance and co-operation. As noted in chapter 2, it is essential to stress that other states and other actors in position to assist can play a key role in assisting developing states to fulfil core obligations of the right to health. Such international assistance should be carefully targeted to minimum core obligations to enhance the realisation of the right to health.

[8.56] It is essential to stress that after realisation of the core of the right to health, there remains an obligation to take effective steps towards progressive realisation of the remainder of the right. Similarly, deliberately ‘retrogressive measures taken in relation to the right to health are not permissible’, unless after the most careful consideration of all alternatives 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 maximum available resources’.

VII. JUSTICIABILITY OF THE RIGHT TO HEALTH

A. General Overview

[8.57] The term ‘justiciability’, as used here, refers to the possibility of aggrieved individuals or groups raising claims involving alleged violations of the right to health for determination/review before domestic judicial or quasi-judicial organs. The term also refers to the right to bring cases concerning violations before international judicial or quasi-judicial organs. It has long been contended that ESC rights, as a category, are inherently ‘non-justiciable’, meaning in this context that they are not suitable for or open to judicial enforcement or handling by courts or similar institutions for two main reasons.

[8.58] First, it is claimed that such rights are resource-intensive and ‘costly’ in nature (thereby raising issues of public finance and policy) and therefore likely to impose uncontrollable financial burdens upon states. It is argued that to the extent such cases will involve public spending priorities on scarce resources, such decisions should

213 CESCR, General Comment 14, para 45. The Commission on Human Rights Resolution 2002/31, para 2 ‘Calls upon the international community to continue to assist the developing countries in promoting the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including through financial and technical support as well as training of personnel.’
214 CESCR, General Comment 14, para 32.
215 CESCR, General Comments 3 and 14, paras 9 and 32, respectively.
remain the exclusive domain of the executive and legislature. As noted in chapter 2, ESC rights are traditionally perceived as ‘positive’ (or ‘abstract’) rights in that states are required to take action to provide them and therefore seen as costly, progressive and non-justiciable. This view is in contrast with civil and political rights traditionally conceptualised as ‘negative’ (or ‘concrete/real’) rights demanding freedom from the arbitrary interference of the state. This classical conception led to the conclusion that civil and political rights (as opposed to ESC rights) are cost-free in that it does not cost the state to refrain from non-interference, and thus, the argument goes, civil and political rights can be realised immediately, which in turn renders them justiciable.

Secondly, it has been asserted that ESC rights (like health) are not suitable for justiciability due to general and vague formulation and lack of precise definition or specificity. In this respect, it is argued that ESC rights cannot be justiciable since they are only ‘ideals’, ‘endeavours’ or ‘programmatic guidelines for government policies/political goals’ as opposed to being legally binding human rights. It is partly for this reason that the United States has at present not ratified or acceded to the ICESCR, despite ratification of the ICCPR in 1993. As noted in chapter 4, the CESCR found the position of United Kingdom that the ‘provisions of the Covenant . . . constitute principles and programmatic objectives rather than legal obligations’ to be ‘disturbing’. The effect of such views is that (quasi) judicial

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217 Sunstein, above n 216.
218 See C Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ (1989) 27 Osgoode Hall Law Journal 769 at 833. Scott notes that ESC rights have been characterised as ‘progressive’, ‘non-justiciable’ and ‘aspirations or goals’, as distinct from civil and political rights which are characterised as ‘immediate’, ‘justiciable’ and ‘real or legal rights’.
220 K Arambulo, Strengthening the Supervision of the ICESCR: Theoretical and Procedural Aspects (Antwerp, Intersentia, 1999), 55 observes that: ‘The alleged non-justiciability in the ICESCR is generally based on two main features: the vagueness of formulation of economic, social and cultural rights contained in the Covenant; and as a result, their opaque normative contents’ (emphasis in original). See also P Alston, ‘No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant’, in A Eide and J Helgesen (eds), The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address. Essays in Honour of Torkel Opsahl (Oslo, Norwegian University Press, 1991), 79–100 at 86 notes that: ‘It is generally agreed that the major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the Covenant [except Arts 6–9] and the resulting lack in the clarity as to their normative implications.’
bodies cannot investigate alleged violations and accordingly cannot provide remedies in event of violation of ESC rights.

[8.60] However, there is nothing inherent in the nature of ESC rights such as health that makes them unenforceable by (quasi) judicial process. The reasons advanced above are overstated for a variety of reasons. First, all human rights, as noted in chapter 1, have a negative action component requiring little to no resources (the obligation to respect), a regulatory action component requiring some resources (the obligation to protect), and a positive action component requiring, to varying degrees, significant resources (the obligation to fulfil), leading to budgetary implications. Indeed, in all societies, ‘negative rights’ are also protected through the apparatus of state regulation by means of legislation, police forces and related controls and therefore cannot be said to be entirely cost-free. Accordingly the realisation of all human rights requires the allocation of resources.

[8.61] The UN HRC has confirmed that all ICCPR rights impose negative duties of forbearance and positive duties of performance on states parties. Thus, for example, the Article 10(1) guarantee of humane treatment in detention necessitates the construction of a sufficient number of detention centres to prevent overcrowding. Similarly the Article 14(1) right to a fair trial necessitates provision of independent organs and system for the administration of justice, while the Article 25(b) right to vote involves the provision of apparatus to ensure fair elections. Moreover, even the effective implementation of the right to non-discrimination often requires extensive positive state actions to realise the underlying value of equality, and this equally applies to procedural rights such as due process. Thus, the realisation of many aspects of civil and political rights requires resources, but this does not render such rights unjusticiable.


226 Holmes and Sustein, ibid, 37–48.

227 J Donnelly, International Human Rights (Boulder, CO, Westview Press, 2nd edn, 1998), 25 noted that: ‘All human rights, however, require both positive action and restraint by the state if they are to be effectively implemented. Some rights, of course, are relatively positive. Others are relatively negative. But this distinction does not correspond to the division between civil and political rights and economic and social rights.’ P Alston and G Quinn, ‘The Nature and Scope of States Parties’ Obligations under the ICESCR’ (1987) 8 Human Rights Quarterly 156 at 172 note that ‘the full realisation of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures’.

228 M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl, NP Engel, 1993), xviii.


231 Joseph et al, above n 229, 34.

It is, accordingly, submitted that rights falling in the category of ESC rights (such as health) can be justiciable.\textsuperscript{233} As shown in chapter 4, there have been cases concerning the right to health before courts or tribunals at the national level. Some cases have also been examined before regional human rights bodies, which indicate that these rights are indeed justiciable in practice.\textsuperscript{234} Accordingly, justiciability as a review mechanism for ensuring compliance with human rights is essential to the attainment of all human rights.\textsuperscript{235} Unless supported by some form of accessible, transparent and effective accountability, human rights run a risk of becoming mere window dressing.

In relation to the vagueness of the obligations arising from ESC rights, including health, it should be recalled that during the Cold War, such rights were neglected by international organisations and Western states in favour of civil and political rights.\textsuperscript{236} As a result, while the scope of civil and political rights was clarified and developed, ESC rights lacked this advantage. It has to be noted, however, that ESC rights, like civil and political rights, can be given relatively specific content, so that (quasi)judicial organs are able to assess the extent to which the state and other actors respect, protect and fulfil human rights obligations.\textsuperscript{237} As shown above, the right to health (like other ESC rights) has content that can form the basis for judicial enforcement.\textsuperscript{238} Besides, vagueness is not only confined to the rights falling in the category of ESC rights but extends to civil and political rights. Even then, vagueness is "not a rigid and static given but can be diminished by means of interpretation".\textsuperscript{239} This process of clarification of the content of human rights is an ongoing and dynamic one.\textsuperscript{240} Indeed, the CESCR has affirmed the view that:

there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. \ldots 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.\textsuperscript{241}

In affirming the principle of interdependence and indivisibility of all human rights, the CESCR has stated clearly that "all economic, social and cultural rights are

\textsuperscript{233} See eg Limburg Principles, para 8 and Maastricht Guidelines, para 28.
\textsuperscript{234} See eg The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication 155/96, Fifteenth Annual Activity Report of ACHPR, 2001–02, Annex V.
\textsuperscript{237} C Fabre, Social Rights under the Constitution: Government and the Decent Life (Oxford University Press, 2000), ch 5.
\textsuperscript{238} See also generally Brand and Russell (eds), above n 25.
\textsuperscript{239} Arambulo, above n 220, 97.
\textsuperscript{240} Hulston, above n 235, 42.
\textsuperscript{241} CESCR, General Comment 9, para 10.
Indeed in many respects, ESC rights such as health are described with sufficient precision and clarity (even within the ICESCR) as to be justiciable. However, there are some elements, as with the case of civil and political rights, that need to be spelled out in more detail in terms of jurisprudence, national legislation, and tailored to the specific facts, national context, needs and resources.

As a useful starting point, justiciability may extend immediately, although not exclusively, to the aspects of ESC rights that are not subject to progressive realisation (eg to ‘minimum core obligations’) such as the right to non-discrimination in access to available health facilities, the right to emergency medical care or freedom from interference with one’s health. The breach of the core governmental obligations stemming from these rights can be justiciable. The CESCR has expressed ‘concern’ about, and indicated that it ‘disagrees’ with, the position that the rights under the ICESCR (including the right to health) ‘constitute principles and programmatic objectives rather than legal obligations that are justiciable’. It has expressed ‘concern’ about the view that ‘some economic, social and cultural rights are not justiciable’ but mere ‘policy objectives’, and expressed ‘regret’ about the failure of states to translate the rights under the Covenant into justiciable rights in the domestic legal order. In this respect, the incorporation in the domestic legal order of international instruments recognising the right to health can significantly enhance justiciability and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

It has to be emphasised that the concept of justiciability is in itself very fluid and reflects differences in legal traditions and in philosophical views about the relationship between courts and the state in a given place at a given time. Furthermore, human rights

243 See VA Leary, ‘Justiciability and Beyond; Complaint Procedures and the Right to Health’ [December 1995] ICJ Review 105–22 at 19 noting that ‘there is adequate proof that there is no logical or intrinsic reason to argue against justiciability of the right [to health].’
245 Ibid.
250 CESCR, Concluding Observations: Canada UN Doc E/C.12/1993/5 (27 May 1993), para 21; Canada, UN Doc E/C.12/1/Add.31 (4 December 1998), para 52, where the Committee reiterated that ESC rights should not be downgraded to ‘principles and objectives’.
252 CESCR, General Comment 14, para 60.
253 Ibid, para 60.
255 Ibid. See also Craven, above n 246, 2.
can still be human rights even when they are not (initially) justiciable in all aspects\textsuperscript{256} since what is paramount is the effective protection of the rights in question, be it through courts or through other mechanisms.\textsuperscript{257} As noted in chapter 1, human rights should not necessarily be confused with legal rights since they precede law and are derived not from law but from the concept of human dignity. Therefore, there is nothing in principle to prevent rights (including ESC rights such as health) being internationally and nationally recognised human rights even if they may not be considered justiciable. Nonetheless, the development towards justiciable ESC rights on an international, regional or national level is of significant contribution towards the effective protection and enforcement of rights such as health as it provides an effective way of checking human rights violations by the state and NSAs. As the following cases illustrate, the courts and other bodies can clarify the key concepts relevant to the right to health.

B. Progressive Realisation and Resource Availability

\textbf{[8.67]} The obligation to take steps to the maximum of available resources to achieve progressively the full realisation of the right to health can be, and in some cases has been, subjected to judicial accountability. For example, in South Africa the case of \textit{Minister of Health v Treatment Action Campaign} concerned state provision of Nevirapine, an anti-retroviral drug used to prevent mother-to-child-transmission of HIV.\textsuperscript{258} Applying the concepts of progressive realisation and resource availability, the South African Constitutional Court declared that:

Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.\textsuperscript{259}

Such a programme must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.\textsuperscript{260} As shown in chapter 4, in \textit{Soobramoney}, the Constitutional Court found, on the facts, that the hospital’s policy and guidelines were reasonable and fairly applied.\textsuperscript{261}

C. Immediate Obligations

\textbf{[8.68]} Some aspects of the right to health are not subject to progressive realisation and

\begin{itemize}
  \item \textsuperscript{256} A Eide, above n 137, 112. But see M Cranston, ‘Human Rights Real or Supposed’, in D Raphael (ed), \textit{Political Theory and the Rights of Man} (London, Macmillan, 1967), 43 who takes the view that a right necessarily presupposes a remedy—where there is no remedy there is no right.
  \item \textsuperscript{259} \textit{Ibid}, para 135. The text of s 27(1) and (2) is set out in ch 4, s 2(b) of the Constitution of the Republic of South Africa, 1996.
  \item \textsuperscript{260} \textit{Ibid}.
  \item \textsuperscript{261} \textit{Soobramoney v Minister of Health KwaZulu Natal} (1998) 1 SA 765.
\end{itemize}
resource availability, e.g., equal treatment of men and women regarding access to healthcare and the underlying determinants of health. A state may not argue that it has insufficient resources to provide equal services for men and women, and so for the time being it is going to focus on services for men, but will progressively make them available to women as the necessary resources become available. As the CESCR has confirmed, the implementation of Article 3, in relation to Article 12 of the ICESCR, requires at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality.\textsuperscript{262} This includes, inter alia, addressing the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for healthcare workers to deal with women’s health issues.\textsuperscript{263}

[8.69] In addition, provision of emergency treatment has been considered to give rise to immediate obligations that are not subject to resources availability. In \textit{Paschim Banga Khet Mazdoor Samity v State of West Bengal}, the Supreme Court of India held that that ‘a State could not avoid this constitutional obligation [to provide emergency treatment] on account of financial constraints’.\textsuperscript{264} In this case, a man fell from a train and suffered serious head trauma. He was refused treatment at six successive state hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed, or trauma and neurological services. The issue before the Court was whether inadequate medical facilities for emergency treatment constituted a denial of the right to life. The Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the state to safeguard the right to life of every person and that preservation of human life is of paramount importance. This obligation on the state stands irrespective of constraints in financial resources. The Court stated that denial of timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of this right. The Court found that it was the duty of a state to ensure that medical facilities for emergency treatment were adequately available. It required the state to ensure that primary health centres were equipped to provide immediate stabilising treatment for serious injuries and emergencies. In addition, the Court ordered the state to increase the number of specialist and regional clinics around the country available to treat serious injuries, and to create a centralised communication system among state hospitals so that patients could be transported immediately to the facilities where space is available.

D. Available, Accessible, Acceptable and of Good Quality

[8.70] As shown above, health facilities, goods and services must be available, accessible, acceptable and of good quality. All these aspects of the right to health are justiciable. A state, for example, should not discriminate against vulnerable groups such as illegal immigrants and children regarding access to healthcare. In \textit{Internal-
tional Federation of Human Rights Leagues (FIDH) v France, FIDH claimed that France had violated the European Social Charter (ESC), Article 13 (right to medical assistance) by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. FIDH also submitted that a 2002 legislative reform restricting access to medical services for children of illegal immigrants violated Article 17 (the rights of children and young persons). Such children had to wait three months to qualify for medical assistance, and were only accorded assistance in ‘situations that involve an immediate threat to life’. The European Committee on Social Rights drew upon the Vienna Convention on the Law of Treaties, 1969 to support a purposive interpretation of the ESC so as to give life and meaning to fundamental social rights. Restriction on rights should be read narrowly. The Committee also emphasised that the Charter was complementary to the European Convention on Human Rights (ECHR) and that: ‘The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights’ (para 27). The Committee stated that the circumstances of this particular case addressed a right of fundamental importance to the individual, connected to the right to life and going to the dignity of the human being. Stating that human dignity is the fundamental value of positive European human rights law and that healthcare is a prerequisite for the preservation of human dignity, the Committee concluded that

legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter.

However since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for ‘emergencies and life threatening conditions’ there was no violation of Article 13. There was a violation of Article 17, even though children had similar access to healthcare as adults. The Committee noted that Article 17 was inspired by the UN CRC and that it protects in a general manner the right of children and young persons to care and assistance. The case is highly significant in two ways. First, it provides an expansive interpretation of the Charter with respect to vulnerable groups, particularly illegal migrants and children. This partially brings the European Social Charter into line with other international human rights instruments, which do not make access to rights conditional on lawful residency within a territory. Second, the case illustrates the use by decision-makers of a range of international legal instruments (eg the Vienna Convention and the ECHR) to complement and consolidate statements of legal obligation in the ESC. By linking the Charter to the ECHR, the case reinforces the principle of interdependence.

[8.71] It should be noted that not all elements of the right to health demand many resources. This is clear from some of the cases considered above. For example, the Szijjarto case demanded respectful treatment, and in Dr Mohiuddin Farooque v Bangladesh the court required quality controls on food imports. In this case, Dr Farooque challenged the failure of the authorities to take effective measures to deal


\[266\] 48 DLR (1996) HCD 438.
with a large consignment of imported skimmed milk powder that contained radioactive material. The court found that the contaminated powder was a threat to health and thereby gave rise to a breach of the right to life under the Constitution of Bangladesh, 1972, Article 32. Through an interpretation of Constitution of Bangladesh, Article 18 that requires the state to improve the quality of health and nutrition, the court interpreted the right to life to include, inter alia, the ‘protection of health and normal longevity of an ordinary human being’. The court ordered the Government to test the consignment’s radiation level.

E. Reproductive Rights and Freedom from Non-consensual Sterilisation

[8.72] The CEDAW Committee discussed the scope of women’s right to freedom from non-consensual sterilisation in Andrea Szijjarto v Hungary.\textsuperscript{267} (The facts of this case are set out at [8.42] above.)

[8.73] Szijjarto’s civil claim against the hospital for damages for negligence failed before the domestic courts because, inter alia, the sterilisation had been medically necessary. She claimed before the CEDAW Committee that she had been subjected to coerced sterilisation by medical staff, arguing that Hungary had violated Articles 10(h), 12 and 16(1)(e) of CEDAW. On the merits, the Committee found that Hungary had failed to fulfill its obligations under all three Articles.

[8.74] Under Article 10(h), states parties undertake to ensure

access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.

The Committee recalls its General Recommendation 21\textsuperscript{268} on equality in marriage and family relations, which recognises in the context of ‘coercive practices which have serious consequences for women, such as forced . . . sterilization’ that informed decision-making about safe and reliable contraceptive measures depends upon a woman having ‘information about contraceptive measures and their use, and guaranteed access to sex education and family planning services’.\textsuperscript{269} The Committee held that Article 10(h) guaranteed the complainant a right

\begin{itemize}
  \item to specific information on sterilization and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice.\textsuperscript{270}
\end{itemize}

The Committee concluded, notwithstanding the finding of fact by the Hungarian courts that the complainant had been in a condition to understand the situation and give informed consent, that the complainant’s state of health at the hospital and the emergency situation meant that any information and counselling she was given ‘must have been given under stressful and most inappropriate conditions’.\textsuperscript{271} Accordingly, the Committee found a failure of the state party, through the hospital personnel, to

\textsuperscript{267} Above n 181.
\textsuperscript{268} UN Doc A/49/38 at 1 (1994).
\textsuperscript{269} Above n 181, para 11.2.
\textsuperscript{270} Ibid, para 11.2.
\textsuperscript{271} Ibid.
provide appropriate information and advice on family planning, which constitutes a violation of the complaint’s right under Article 10(h).

[8.75] According to Article 12 of the Convention, states parties shall ‘ensure to women appropriate services in connection with pregnancy, confinement, and the post-natal period’. The CEDAW Committee cited its General Recommendation 24 on women and health\textsuperscript{272} in which it explained that ‘acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity’. The Committee further stated that

States parties should not permit forms of coercion, such as non-consensual sterilization . . . that violate women’s rights to informed consent and dignity.\textsuperscript{273}

In the circumstances in which the complainant was taken to hospital, the Committee concluded that

it is not plausible that during that period of time hospital personnel provided the author with thorough enough counselling and information about sterilization, as well as alternatives, risks and benefits, to ensure that the author could make a well-considered and voluntary decision to be sterilized.

The Committee also took note of the unchallenged fact that the author enquired of the doctor after the operation when it would be safe to conceive again, clearly indicating that she was unaware of the consequences of sterilisation. Thus, the Committee considered in the present case that the state party had not ensured that the complainant gave her fully informed consent to be sterilised and that consequently the rights of the complainant under Article 12 were violated.

[8.76] Article 16(1)(e) of CEDAW requires states parties to ensure, on a basis of equality of men and women, the

same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

The CEDAW Committee recalled its General Recommendation 19 on violence against women in which it states that

Compulsory sterilization . . . adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.\textsuperscript{274}

The Committee found that the sterilisation surgery was performed on the complainant without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity.\textsuperscript{275} Accordingly, the Committee found the complainant’s rights under Article 161(e) to have been violated.

[8.77] The Committee made the following recommendations. First, concerning the complainant the Committee recommended that the state party provide ‘appropriate compensation . . . commensurate with the gravity of the violations of her rights’. This

\textsuperscript{272} UN Doc A/54/38 at 5 (1999).
\textsuperscript{273} Above n 181, para 11.3.
\textsuperscript{274} UN Doc A/47/38 at 1 (1993), para 22.
\textsuperscript{275} Above n 181, para 11.4.
left the determination of what is appropriate to the state. Secondly, the Committee made three general recommendations to the state party as follows:

(i) Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee’s general recommendations Nos 19, 21 and 24 in relation to women’s reproductive health and rights are known and adhered to by all relevant personnel in public and private health centres, including hospitals and clinics.

(ii) Review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards, including the Convention of the Council of Europe on Human Rights and Biomedicine (‘the Oviedo Convention’) and World Health Organization guidelines. In that connection, consider amending the provision in the Public Health Act whereby a physician is allowed ‘to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances’.

(iii) Monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.276

The case above demonstrates that quasi-judicial international bodies can play a key role by making states accountable for violations of the right to health.

VIII. CONCLUSION

[8.78] The right to health is a fundamental human right that accrues to everyone simply by virtue of being human. It is well established in existing international treaties as a legally binding human right and its realisation is fundamental to the enjoyment of all other human rights. While the normative content, scope and nature of states’ obligations in relation to the right to health has been a subject of debate with limited agreement, the adoption of General Comment 14 on the right to health by the CESCR has been critical for the development of a human rights framework for the right to health. Despite some limitations, the Committee’s General Comment on the right to health clarifies specific legal obligations and rights.

[8.79] As argued above, the right to health includes the right to healthcare and to the underlying determinants of health. It includes freedom to control one’s health and body, and freedom from interference, such as non-consensual medical treatment and experimentation. It entitles the individual to a system of health protection in which everyone can enjoy the highest attainable standard of health. States are accordingly obliged to respect, protect and fulfil the ‘highest attainable standard of health’ of everyone within a state’s jurisdiction by ensuring that healthcare facilities, goods and services are sufficiently available, accessible, acceptable and of good quality. Unfortunately

for millions of people throughout the world, the full enjoyment of the right to the highest attainable standard of physical and mental health still remains a distant goal and that, in

276 Ibid, para 11.5.
many cases, especially for those living in poverty, this goal is becoming increasingly remote.\textsuperscript{277}

The low availability of medicines, particularly in the public sector, remains a key barrier to access to affordable essential medicines in developing countries, especially for the poor.\textsuperscript{278} As noted by the African Commission,

millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.\textsuperscript{279}

\textbf{[8.80]} The gap between the availability of, and accessibility to, health facilities in developed states and developing states is widening and there are growing gaps between the rich and poor and between different areas within states\textsuperscript{280} The WHO’s noted in August 2008 that this unequal distribution of health-damaging experiences is not in any sense a ‘natural’ phenomenon but is the result of a ‘toxic combination of poor social policies and programmes, unfair economic arrangements, and bad politics’.\textsuperscript{281} Since generally women as a social class and as primary care-givers most acutely experience the violation and non-realisation of the right to health, health inequalities have a gendered character. Therefore, having due regard to this depressing but real state of affairs, states are required to take concrete and targeted steps, while taking full advantage of available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind. This calls for a renewal of governmental commitment and investment of appropriate human and financial resources to achieve the enjoyment of the right to health in practice. States should also carry out health impact assessments before implementation of all policies and decisions that may have a detrimental effect on health, taking into account full public participation.\textsuperscript{282}

\textsuperscript{277} Commission on Human Rights Resolution 2002/31, preamble, para 6.
\textsuperscript{281} Commission on the Social Determinants of Health, Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health (Geneva, WHO, 2008), above n 13, Executive Summary, 1.
The Right to Education: Articles 13 and 14

ICESCR, 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.
ICESCR, 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.

I. INTRODUCTION

[9.01] Although education is protected as a human right in international human rights law, in practice, in the world today, education is described in terms of market shares and competitive prices, with university education, in particular, traded like any other service. This trade in education casts doubt as to the future of education as a human right. Some aspects of the right to education have been examined in a number of reports of the UN Special Rapporteur. In a broader context, ‘education’ goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable human beings, individually and collectively, to develop their personalities, talents and abilities, and to live a full and satisfying life within society.

Education is both a human right in itself, and an indispensable means of realising and promoting other human rights (such as the rights to work, health, housing, food) and basic democratic principles. This is because it empowers individuals with the skills and abilities necessary to realise, reinforce and enhance other rights.


Thus, education is one of the principal means available to foster a deeper and more harmonious form of human development and thereby to reduce poverty, exclusion, ignorance, oppression and war. UNESCO has highlighted the four ‘pillars’ of learning as follows: ‘learning to live together’, ‘learning to know’, ‘learning to do’ and ‘learning to be’. Education thereby contributes to the development of personality and enables individuals to act with greater autonomy, judgement, critical thinking and personal responsibility. Education is an indispensable tool for individual efforts to achieve in the course of one’s life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena.

In particular, higher education is a means to ‘spur political action and to demand more social and economic rights’. For example, in the Indian state of Kerala, higher education and political awareness made a crucial difference in health achievements which surpassed those even in states that have higher per capita spending on health and more hospital beds per person.

Although education has been variously classified as an ESC right, it is also, in many ways, a precondition for exercising in a meaningful way civil and political rights, such as the right to political participation, and freedoms of expression, conscience and religion. This is because it empowers individuals to exercise civil and political rights, and education is increasingly a ‘means to retain or to eliminate inequality’ in the exercise of all human rights. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights. It consists of a variety of rights and freedoms for parents, children or students and of different obligations for states, and arguably some obligations for NSAs.

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[9.04] Although the importance and content of the right to education has been stressed, the enjoyment of the right to education, especially for girls and women,
remains a distant goal for millions of individuals throughout the world, especially in sub-Saharan Africa and South and West Asia where the goal is even becoming increasingly remote.\textsuperscript{15} Due to discrimination against girls and women in most societies, their access to education remains constrained.\textsuperscript{16} Girls face several obstacles in schools including being victims of sexual abuse by their teachers, the very people who are supposed to protect them.\textsuperscript{17} In 2004 the estimated number of children and youths affected by armed conflict and without access to formal education was estimated to be at least 27 million.\textsuperscript{18} According to 2007 estimates, 77 million children of primary age were not in school;\textsuperscript{19} more than half of these—39 million children—lived in areas affected by war and conflict.\textsuperscript{20} This suggests that the number of children affected by armed conflict is increasing. Girls are disproportionately affected since some attacks in states such as Afghanistan are directed against girls’ schools.\textsuperscript{21} Yet, education can bring protection and stability, and the potential to start building a more peaceful and prosperous society.\textsuperscript{22}

[9.05] This chapter aims at examining the scope of the right to education and the human rights obligations arising in respect of this right as protected in several international human rights instruments. A major proposition of this chapter is that the international right to education for everyone, and state obligations for giving effect to this right, is adequately protected in international law (see e.g. Articles 13 and 14 of the ICESCR set out above and section 2 below), and its realisation has been emphasised in several international conferences and declarations.\textsuperscript{23} A corollary is that although ratifying states have the obligation to respect, protect and fulfil the right to education for everyone within a state’s jurisdiction by making education available, accessible, acceptable and adaptable,\textsuperscript{24} a number of states, especially developing states, have not yet fulfilled their obligations due to several obstacles. In considering these propositions, the present chapter begins with a brief overview of the international and regional human rights instruments that establish the right to education (section II). This provides a solid foundation and framework to identify the scope and

\textsuperscript{15} Education For All (EFA), \textit{Global Monitoring Report 2003/4} (UNESCO, 2003), ch 2, available at http://portal.unesco.org/education/en/ev.php-URL_ID=23023&URL_DO=DO_TOPIC&URL_SECTION=201.html. By 2000, two-thirds of the 860 illiterate million adults were women. 57 per cent of the 104 million children not in school were girls. The number of out-of-school girls was highest in sub-Saharan Africa (23 million), followed by South and West Asia (21 million).

\textsuperscript{16} EFA, \textit{ibid}, ch 3, 115–53.

\textsuperscript{17} For example in Uganda a total of 4 per cent of upper primary school girls (43,635 of the 1,090,853 girls) were reportedly defiled by their teachers in just one year in 2007. See C Kiwawulo, ‘40,000 Pupils Defiled by Their Teachers’, \textit{The New Vision}, 1 August 2008.


\textsuperscript{20} \textit{Ibid}.


\textsuperscript{22} Save the Children, above n 19, 4.

\textsuperscript{23} See eg \textit{Report of the United Nations Conference on Environment and Development}, A/CONF.151/26 (Agenda 21) ch 36, para 3; ch 3, para 2; ch 24, para 3; Copenhagen Declaration, Commitment 6; Beijing Platform for Action, paras 69, 80, 81, and 82; Habitat Agenda, paras 2.36 and 3.43; World Declaration on Education for All, Preamble and Article 1. These documents are available at http://www.pdhre.org/rights/education.html.

\textsuperscript{24} See below section 3.
content of the right to education (section III) and corresponding state obligations (section IV), followed by concluding observations highlighting some key obstacles (section V).

II. INTERNATIONAL PROTECTION OF THE RIGHT TO EDUCATION

[9.06] The right to education, despite its neglect in practice, has been formally recognised at an international level in several international and regional human rights instruments adopted after the Second World War.\textsuperscript{25} It is not intended to examine all such instruments here, only a general overview is made to set the context for the subsequent discussion. The UN Charter required the UN to promote ‘international cultural and educational co-operation’ for peaceful and friendly relations among nations.\textsuperscript{26} All UN members pledged themselves to take joint and separate action in co-operation with UNESCO for the achievement of the purposes of the UN, including the promotion of educational co-operation.\textsuperscript{27} The Charter provided that one of the purposes of the UN was to

achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.\textsuperscript{28}

Although the right to education was not expressly defined, it was implied by reference to ‘international problems’ of economic, social and cultural character. In addition, the reference in the Charter to the promotion of human rights for all without discrimination prepared the way for the future development of the non-discriminatory nature of the right to education, as shown below by the later human rights instruments that followed the UN Charter.

[9.07] The UN Charter provided a basis for the creation of a specialised agency in the fields of education and culture.\textsuperscript{29} As a result, UNESCO was established on 16 November 1945.\textsuperscript{30} In its preamble, the UNESCO Constitution states:

the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which \textit{all the nations must fulfil} in a spirit of mutual assistance and concern; \ldots{} the States Parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of \textit{objective truth}, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the

\textsuperscript{26} UN Charter, Art 55(b), emphasis added.
\textsuperscript{27} \textit{Ibid}, Art 56.
\textsuperscript{28} \textit{Ibid}, Art 1(3).
\textsuperscript{29} \textit{Ibid}, Art 57.
\textsuperscript{30} Useful information on UNESCO is available at http://portal.unesco.org/.
purposes of mutual understanding and a truer and more perfect knowledge of each other’s lives.\textsuperscript{31}

Therefore the right to education is at the core of UNESCO’s Constitution given that it is considered to be a duty all states are obliged to ‘fulfil’.

\textbf{[9.08]} The UDHR set out in detail the human rights content of the UN Charter obligations under Articles 55 and 56. By Article 26 of the UDHR:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

It is clear that Article 26(1) of the UDHR proclaims a general right to education\textsuperscript{32} (at different levels: elementary and fundamental stages, technical and professional, and higher education) and Article 26(2) of the UDHR provides the central purpose to which education must be directed, namely ‘the full development of the human personality’ and respect for human rights.\textsuperscript{33} It also declared a right of parents under Article 26(3) to ‘choose the kind of education that shall be given to their children’. This guarantees parents and legal guardians a right of choice between state-organised (public) and private (fee-paying) education.

\textbf{[9.09]} In 1960 the UNESCO Assembly adopted the Convention against Discrimination in Education (‘the UNESCO Convention’).\textsuperscript{34} This Convention has a twofold purpose: the elimination of discrimination in education, and the promotion of equality of opportunity and treatment in education.\textsuperscript{35} As made clear by Article 4 of the UNESCO Convention:

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:


\textsuperscript{33} See also ICESCR, Art 13(1); CRC, Art 29(1); Protocol of San Salvador, Art 13(2).

\textsuperscript{34} 429 UNTS 93. Adopted by UNESCO General Conference on 14 December 1960 and entered into force 22 May 1962. Ninety-five states were parties to the UNESCO Convention by December 2007. On the same day the General Conference adopted a (non-binding) Recommendation against Discrimination in Education (preferred by some Member States), identical in content with the Convention. For the analysis of the UNESCO Convention, see W McKean, \textit{Equality and Discrimination under International Law} (Oxford University Press, 1983), 128–35.

\textsuperscript{35} See F Coomans, ‘UNESCO and Human Rights’, in R Hanski and M Suksi (eds), \textit{An Introduction to the International Protection of Human Right}, 219–30 at 221.
(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

(b) To ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of education provided are also equivalent;

(c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;

(d) To provide training for the teaching profession without discrimination.

Accordingly, the UNESCO Convention obliges states parties to eliminate and prevent discrimination ‘against any person or group of persons’—including vulnerable groups such as refugees,\(^{36}\) stateless persons (persons who are not considered as nationals by any state under the operation of its law),\(^{37}\) persons with disabilities\(^{38}\) and mentally retarded persons\(^{39}\)—in education in law and in fact.\(^{40}\) Equality of opportunity for all in their access to education is essential to achieve the full respect for and protection of all human rights. Thus, under Article 8(1) of the Declaration on the Right to Development,\(^{41}\)

States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to . . . education.

[9.10] States parties to the UNESCO Convention undertake under Article 6 ‘to pay the greatest attention to any recommendations hereafter adopted by the General Conference’ of UNESCO in the field of education. Several such Recommendations have been adopted, including: the Recommendation concerning the Status of Teachers, adopted in 1966 (focusing, inter alia, on the rights and responsibilities of teachers); the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and

\(^{36}\) See Convention Relating to the Status of Refugees, 189 UNTS 150 (1951), entered into force on 22 April 1954: 144 state parties as of 1 October 2008. Art 22(1) provides: ‘The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. (2) The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.’ See also Human Rights Watch et al, *NGO Background Paper on the Refugee and Migration Interface* (29 June 2001), available at http://www.hrw.org/campaigns/refugees/ngo-document/.


\(^{38}\) Declaration on the Rights of Disabled Persons (1975), proclaimed by GA Res 3447 (XXX) of 9 December 1975, principle 6. Principle 1 defines the term ‘disabled person’ to refer to ‘any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities’.


\(^{40}\) UNESCO Convention, Arts 1(1), 3 and 4.

Fundamental Freedoms, adopted in 1974 (which sets out guiding principles in the field of human rights education); and the Recommendation on Development of Adult Education, adopted in 1976 (which sets out principles to which Member States should give effect when developing and implementing a policy on adult education). In addition, UNESCO has a Declaration on Race and Racial Prejudice, which explicitly rejects theories that claim that specific racial or ethnic groups are inherently superior or inferior. It urges states to take all appropriate steps, inter alia, by legislation, particularly concerning education, to prevent, prohibit and eradicate all forms of racial discrimination.

[9.11] Similarly, Article 5 of the ICERD obliges states parties to guarantee the enjoyment of civil, political, economic, social and cultural rights without racial discrimination. In respect of education, Article 5(e)(v) of the CERD provides that

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

Schools offering programmes involving traineeships should not agree to employers’ requests to send only trainees of a particular ethnic origin. As shown below, in Murat Er v Denmark the Committee on the Elimination of Racial Discrimination (‘the CERD Committee’) found that a school practice of not sending students of non-Danish origin to certain employers for traineeship was in itself enough to constitute de facto discrimination towards all non-ethnic Danish students. According to the Committee, this constituted

an act of racial discrimination and a violation of the petitioner’s right to enjoyment of his right to education and training under article 5, paragraph e (v) of the Convention.

It is important to note that the elimination of racial discrimination in education often requires a state to meet the specific educational needs of racial minorities. Regarding the education of the Roma children (as compared to that of their Polish counterparts) in Poland, for example, the CERD Committee observed in 2003:

The Committee notes efforts to meet the specific educational needs of Roma children, but is concerned that in some cases these efforts have led to segregated classes having a lower standard of education than the Polish counterparts. The Committee recommends that new programmes integrate Roma children into mainstream schools as far as possible, in order to avoid discrimination, and that the State party recruit more teachers and teaching assistants

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43 Adopted unanimously and by acclamation by the General Conference on 27 November 1978.
44 Adopted and opened for signature and ratification by UN GA Res 2106 (XX) of 21 December 1965. Entered into force 4 January 1969: 169 states parties as of 2 November 2003. See also Art 3(1) of the Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by the UNGA Res 1904 (XVIII) of 20 November 1963 that had previously urged UN Member States to undertake particular efforts 'to prevent discrimination based on race, colour or ethnic origin, especially in the fields of . . . education'.
47 Ibid, para 7.3.
48 Ibid.
from the Roma minority. The Committee invites the State party to include in its next periodic report more detailed information on this issue and on the progress achieved.\footnote{CERD, Concluding Observations: Poland, UN Doc CERD/C/62/CO/6 (21 March 2003), para 13.}

\begin{itemize}
\item[9.12] As regards discrimination against women in education, the CEDAW\footnote{GA res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981.} obliges states parties to take ‘all appropriate measures’ to eliminate discrimination against women in order to ensure to them equal rights with men in education:
\begin{itemize}
\item[(a)] The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
\item[(b)] Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
\item[(c)] The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
\item[(d)] The same opportunities to benefit from scholarships and other study grants;
\item[(e)] The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
\item[(f)] The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
\item[(g)] The same opportunities to participate actively in sports and physical education;
\item[(h)] Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.\footnote{CEDAW, Art 10 (emphasis added).}
\end{itemize}
\end{itemize}

In order to attain this, ratifying states are obliged to

embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle.\footnote{CEDAW, Art 2(a).}

In states where religious dress has been banned in schools, appropriate measures including monitoring should be undertaken to ensure that girls are not excluded from schools on account of dress codes.

\begin{itemize}
\item[9.13] To cite one example, in 2004, in pursuance of the principle of \textit{laïcité} (secularism) the French Parliament enacted the law on so-called ‘conspicuous’ schools (the Act of 15 March 2004) which banned students from wearing ‘conspicuous’ or ‘ostensible’ religious symbols in French public (ie government-operated) primary and secondary schools.\footnote{The full title of the law is Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et}
\end{itemize}
the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited’. The ban on ‘overtly’ religious symbols was enacted based on the recommendation of the Stasi Commission to ‘safeguard public order’. The impact of a ban on ‘conspicuous’ religious symbols, even though phrased in neutral terms to apply to all denominations, could affect some groups more than others given that France has made only limited provisions—through distance or computer-based learning—for students who feel that, as a matter of conscience and faith, they must wear a head-covering such as a skullcap (or kippah), a headscarf (or hijab) or a turban. Thus, observant Jewish, Muslim and Sikh students may be excluded from attending school in company with other French children. The impact of the ban has fallen disproportionately on Muslim girls due to France’s high Muslim population, for whom the wearing of the Islamic headscarf is considered a religious obligation. As noted by the HRC ‘respect for a public culture of laïcité would not seem to require forbidding wearing such common religious symbols’. Several UN treaty-monitoring bodies have made recommendations calling on France to monitor the impact of the Act of 15 March 2004. For example, in 2005 the CERD Committee recommended that France should continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that everyone can always exercise that right. The Committee on the Rights of the Child made similar observations and recommended that France continues to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure they enjoy the right of access to education.

In 2008 the HRC recommended that France should re-examine Act No 2004/228 of 15 March 2004 in light of the guarantees of article 18 of the Covenant [ICCPR] concerning freedom of conscience and religion, including the lycées publics. The bill was passed by France’s National Assembly by 494 to 36 votes, followed on March 3 by a Senate vote of 276 to 20. It was signed into law by President Jacques Chirac on 15 March 2004 (thus the technical name is law 2004-228 of 15 March 2004) and came into effect on 2 September 2004. See Journal Officiel de la République Française, 17 March 2004, 5190.

Ibid.


Ibid.

There are about 6 million Muslims in France—about 10 per cent of the population—the largest Muslim population in Western Europe, although estimates of how many of these are practising vary widely. See European Muslim Population (in 2006), at www.islamicpopulation.com/europe_islam.html; and International Religious Freedom Report 2008, at http://www.state.gov/g/drl/rls/irf/2008/108446.htm.


Ibid.


right to manifest one’s religion in public as well as private, as well as the guarantee of equality under article 26.63

[9.14] As shown in chapter 2, the elimination of discrimination cannot be done simply by enacting laws.64 This is especially the case regarding certain groups of women, who in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. In this respect, states may need to take specific temporary special measures to achieve de facto/substantive equality or to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.65 The obligation to eliminate discrimination against women in education requires serious attention in view of the fact that in 2003 57 per cent of the estimated 104 million children of primary school age out of school worldwide were girls.66 The reasons cited for the denial of girls’ right to education include the need of girls to work in order to supplement family income, the power of tradition, the prohibitive cost of education, early marriage, vulnerability to HIV/AIDS, conflict, and violence in schools.67 This calls for, inter alia, ‘preventive measures, including . . . education programmes to change attitudes concerning the roles and status of women’.68 It must be realised, however, that the elimination of discrimination against women in education is a broader issue that requires states to find solutions to the underlying causes of discrimination against women. As the CEDAW Committee has noted:

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.69

States should intensify the application of temporary special measures in the field of education at all levels, within their national contexts, and create institution(s) responsible for designing, implementing, monitoring, evaluating and enforcing such temporary special measures. The aim of such measures must be to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against, or are disadvantageous to, women in education.

[9.15] The non-discriminatory and equality provisions of the ICCPR as laid down in

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63 HRC, Concluding Observations: France, above n 56 para 23.
64 HRC, General Comment 28: Equality of Rights Between Men and Women, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000).
67 Ibid, ch 3.
69 CEDAW Committee, General Recommendation 25, above n 65, para 10.
Articles 2(1), 3 and 26 may also extend to the educational obligations of states. For example, the HRC has expressed the view that the right to equality before the laws and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields, such as education.

As an example, in a case involving religious schooling in Canada, where public funding was provided to Roman Catholic schools and not, inter alia, to Jewish schools, the HRC stated that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.

This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.

[9.16] However, where free (public) state schools coexist with (private) fee-paying schools, the HRC has found that a state cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy for the two types of establishment, when the private system is not subject to State supervision.

In a similar case, which dealt with the provision of free textbooks and school meals to children in public but not in private schools, the Committee affirmed its previous view. It observed that a state party made public-sector schooling and a variety of ancillary benefits (such as free transport by bus, free textbooks and school meals) available to all children subject to compulsory education. It nonetheless found that a state ‘cannot be deemed to be under an obligation to provide the same benefit to private school.’ The Committee added that the preferential treatment given to public sector schooling is reasonable and based on objective criteria. A State Party cannot be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all.

[9.17] As noted above, the ICESCR devotes two articles, Articles 13 and 14, to the right to education. Article 13 of the ICESCR is the longest provision in the Covenant and the most wide-ranging and comprehensive Article on the right to education in international human right law. By Article 13(1) ‘States Parties to the present...
Covenant recognize the right of everyone to education.\textsuperscript{79} The travaux préparatoires indicate that in the drafting of the ICESCR, it was proposed that the Covenant should provide that states parties ‘understood’ (rather than ‘recognise’) their obligations in relation to primary, secondary and higher education.\textsuperscript{80} Some doubt was expressed as to the legal significance of the words ‘it is understood’ in paragraph 13(2). In order to have a term with stronger legal significance,\textsuperscript{81} the word ‘understood’ was substituted with the current formulation that reads the states parties to the Covenant ‘recognise’ that, with a view to achieving the full realisation 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.

The use of the term ‘recognise’ signifies the notion of progressive realisation. As the UNESCO representative explained in 1951 during the preparatory work in the Commission on Human Rights:

recognition meant first and foremost that States should accept the obligation to do all in their power to achieve certain clearly defined aims, without, however, undertaking to attain them in a specified period. Admittedly, they could be achieved only by slow degrees, and the time involved would vary according to the relative magnitude of the problems of each country and the means at its disposal.\textsuperscript{82}

Therefore, ‘recognition triggers the application of general State obligations under Article 2(1)’.\textsuperscript{83}

\textbf{[9.18]} Article 13(2) enumerates the specific steps to be taken by states to achieve the full realisation of the right to primary, secondary and higher education.\textsuperscript{84} A similar guarantee is contained in Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘the Protocol of San Salvador’).\textsuperscript{85} Under Article 13(3), there is an undertaking to have ‘respect’ for parents or legal guardians’ ‘liberty’

\begin{itemize}
  \item 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.
\end{itemize}

A similar provision was included in Article 18(4) of the ICCPR, which provides that

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

\textsuperscript{79} Emphasis added.
\textsuperscript{82} UN Doc E/CN.4/AC.14/SR.1, 14 (17 May 1951).
\textsuperscript{84} See section IV below on state obligations.
[9.19] However, neither the ICESCR nor the ICCPR defines the terms ‘religious’ or ‘convictions’. There is a similar provision, under Article 2 of the First Protocol to the ECHR. According to this Article:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

This Article has been interpreted by the European Court of Human Rights in Campbell and Cosans v UK and appears to be equally useful in understanding parental rights regarding their children’s education even under Article 13(3) of the ICESCR to the extent that a state is obliged to ensure the religious and moral education of children in conformity with the parents’ own convictions.

[9.20] In the Campbell case corporal punishment in state-funded schools in Scotland was challenged by two Scottish mothers. Both Mrs Campbell and Mrs Cosans lived in Scotland. Each of them had one child of compulsory school age at the relevant time. For both financial and practical reasons, the applicants had no realistic and acceptable alternative to sending their children to state schools. Each mother complained that the use of corporal punishment as a disciplinary measure in the school attended by her child, inter alia, failed to respect her right as a parent to ensure her son’s education and teaching in conformity with her philosophical convictions, as guaranteed by the second sentence of Article 2 of Protocol No 1. In concluding that Mrs Campbell and Mrs Cosans have accordingly been victims of a violation of the second sentence of Article 2 of Protocol No 1, the Court stated:

In its ordinary meaning the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’, . . . it is more akin to the term ‘beliefs’ (in the French text: ‘convictions’) appearing in Article 9—which guarantees freedom of thought, conscience and religion—and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

As regards the adjective ‘philosophical’, it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned from the travaux préparatoires. The Commission pointed out that the word ‘philosophy’ bears numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The Courts agrees with the Commission that neither of these two extremes can be adopted for the purposes of interpreting Article 2: the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.

Having regard to the Convention as a whole, including Article 17, the expression ‘philosophical convictions’ in the present context denotes, in the Court’s opinion, such convictions as are worthy of respect in a ‘democratic society’ and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 (P1–2) being dominated by its first sentence.

The applicants’ views relate to a weighty and substantial aspect of human life and


behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general.

[9.21] The above judgment makes it clear that

the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’... it is more akin to the term ‘beliefs’... and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.88

According to the Court, ‘religious’ convictions refer to beliefs of a ‘known religion’.89 Thus, any person whose convictions can be described as those of a ‘known religion’ will be able to argue that they have religious convictions. However, determining what is and what is not a ‘known religion’ to amount to ‘religious convictions’ in the context of parents’ religious convictions may cause some difficulties. For example, is ‘Islamic fundamentalism’90 a ‘known religion’ sufficient to amount to religious convictions? It would seem that in approaching such issues, each claimed religious convictions must be considered on a case-by-case basis, taking into account the need to preserve a democratic society. It should also be considered whether the religious beliefs in question are genuinely held (not whether they are correct), and an objective assessment be made of the beliefs, particularly whether or not they are compatible with human dignity or with everyone’s human rights including the right to education.

[9.22] Regarding religious and moral education, in General Comment No 22, the HRC stated:

The Committee is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.91

In principle it appears that the above comment equally applies even in the context of Article 13(3) of the ICESCR. However, respect for parents’ religious convictions does not permit a parent to object to the integrated teaching of religious or philosophical

88 Ibid, para 36.
89 Valsamis v Greece Appl 21787/93, judgment of 18 December 1996; (1997) 24 EHRR 294. In this case, the Court recalled its case-law under Art 9 and acknowledged that Jehovah’s Witnesses ‘enjoy both the status of a “Known Religion” and the advantages flowing from that as regards observance’.
90 For example, in Afghanistan the Talibans’ strict interpretation of Islam reportedly prohibited women from attending schools, showing their faces, or even walking alone on the street. See M Wojcik, C Revaz, and B Apt, ‘International Human Rights’ (2002) 36(2) The International Lawyer 683–97 at 687.
information conveyed ‘in an objective, critical and pluralistic manner’. 92 The state is
forbidden to pursue an aim of indoctrination that might be considered as not
respecting parents’ religious and moral (or philosophical) convictions. 93

[9.23] The central obligation regarding parental rights is to ‘respect’, which means
more than ‘acknowledge’ or ‘taken into account’. 94 In addition to the essentially nega-
tive obligations against state interference with parents’ freedom to choose private
schools for their children and with parents’ religious convictions in such schools, the
state should actively respect parental convictions within public schools. This applies
to all functions the state exercises in connection with education, whether academic
(including the contents of education and the manner of its provision) or administra-
tive. 95

[9.24] In order to guarantee the right to establish and direct private educational insti-
tutions, while at the same time maintain minimum standards, Article 13(4) of the
ICESCR provides:

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 1 of this article and to the requirement that the educa-
tion given in such institutions shall conform to such minimum standards as may be laid
down by the State.

By way of summary, Article 13 of the ICESCR obliges states parties to make all
education, whether public or private, formal or non-formal, to be directed towards the
aims and objectives identified in Article 13(1). 96 These objectives reflect the funda-
mental purposes of the UN, as enshrined in Articles 1 and 2 of the UN Charter, and
in Article 26(2) of the UDHR. However, Article 13 adds to the UDHR in three
respects: it requires education to be directed to the development of human personality
and the sense of dignity, in order to ‘enable all persons to participate effectively in a
free society’, and to promote understanding among all nations and all racial, ethnic or
religious groups. 97 The aims and objectives of education have further been expounded
in several other instruments 98 that closely correspond to Article 13(1) of the ICESCR
and with new elements such as the explicit reference to gender equality and respect for
the environment. These new elements are ‘implicit in, and reflect a contemporary
interpretation of article 13(1)’. 99

92 Kjeldesen, BuskMadsen and Pedersen v Denmark, judgment of 7 December 1976, Series A, No 23;
(1979–80) 1 EHRR 711, para 53.
93 Ibid.
77(a).
95 Ibid, paras 33–6; Valsamis v Greece, above n 89, para 27.
96 See section 3 below on state obligations.
97 ICESCR, Art 13(1).
98 See eg the World Declaration on Education for All (1990), (adopted by 155 governmental delegations)
Art 1; the Convention on the Rights of the Child, Art 29(1); the Vienna Declaration and Programme of
Action, (adopted by 171 governmental delegations) Part I, para 33 and Part II, para 80; and the Plan of
Action for the UN Decade for Human Rights Education (adopted by consensus resolution of the General
Assembly), para 2.
99 CESCR, General Comment 14, para 5.
The ICESCR further obliges state parties under Article 14 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.\(^{100}\)

The ICESCR prompted more than a dozen state parties to submit reservations to its provision on the right to education, which ranges from acknowledgements that financial constraints to access to primary education were beyond the capacity of the state, to assertions that education should be treated as a monopoly of the state, or that parents should be allowed to educate their children themselves, in their own homes.\(^{101}\)

The provisions of the ICESCR dealing with the right to education and other foregoing human rights instruments are reinforced by the Convention on the Rights of the Child (1989),\(^{102}\) which lays down the full scope of the right to education from a child’s rights perspective.\(^{103}\) The Convention, whose \textit{travaux préparatoires} in respect of Article 28 indicate that it was based upon Article 13 in conjunction with Article 2(1) of the ICESCR,\(^{104}\) contains the principle of free education, compulsory education, non-discrimination and equal access to education, educational disciplinary measures, objectives of education, safeguards against work that interferes with children’s primary education, and calls for international co-operation in educational matters.\(^{105}\) In order not to impede a child’s right to education, Article 32(1) provides for protective measures by the state against economic exploitation of children (child labour).

As a result of what states perceived as the demanding nature (in terms of resources) of the states’ obligations concerning education, a number of states made a variety of reservations.\(^{106}\) The reservations of Singapore and Malaysia offer some illustration. With respect to free and compulsory primary education under Article 28(1)(a), the Republic of Singapore reservation states that Singapore does not consider itself bound by the requirement to make primary education compulsory because such a measure is ‘unnecessary in our social context’ where in practice virtually all children attend primary school; and that Singapore ‘reserves the right to

\(^{100}\) ICESCR, Art 14; CESCR, General Comment 11, paras 6–7.

\(^{101}\) CESCR, Status of the ICESCR and Reservations, Withdrawals, Declarations and Objections under the Covenant: Note by the Secretary-General, UN Doc E/C.12/1993/3/Rev.3. See also Appendix H.

\(^{102}\) GA Res. 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990. See also the Declaration of the Rights of the Child, adopted by GA Res 1386, on 20 November 1959, Principle 7 declares in part that ‘[t]he child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages’.


\(^{106}\) CRC, Reservations, Declarations and Objections Relating to the CRC. Note by the Sec-Gen, UN Doc CRC/C/2/Rev.7. The text of the reservations to the CRC is available at http://www2.ohchr.org/english/bodies/ratification/11.htm#reservations.
provide primary education free only to children who are citizens of Singapore’. The reservation of the Government of Malaysia states that the Government subjected certain provisions of the Convention to national law. The reservation states that Malaysia:

accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles ... 28, [paragraph 1(a)], ... of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

Such reservations to human rights treaties (subjecting central provisions of the treaty to domestic law that is incompatible with treaty provisions) have generally been problematic, especially when they appear to be incompatible with the object and purpose of a treaty.

Not surprisingly, therefore, some states (including Austria, Belgium, and Denmark) objected to such reservations. For example, the Belgian Government believed the Malaysian reservation to be incompatible with the object and purpose of the Convention and that, consequently, in accordance with Article 51, paragraph 2, of the Convention, it is not permitted.

Similarly, Denmark observed that the Malaysian reservation extended to the ‘central provisions of the Convention’ and considered the said reservation as ‘incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law’. On its part the CRC Committee has considered Malaysian reservation as ‘not necessary’ and recommended that Malaysia expedites its ongoing efforts to review the nature of its reservations with a view to withdrawing them. As noted in chapter 5, in line with the encouragement of states given by the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 to review and withdraw reservations, the CRC Committee noted that ‘States should withdraw reservations’ to ensure full and undiluted respect for human rights. With respect to the Singapore reservation regarding the right to free and compulsory primary education under Article 28 (and other reservations), the Committee observed in 2003:

The Committee is concerned about the declarations on articles 12-17, 19 and 39 and reservations to articles 7, 9, 10, 22, 28 and 32 entered by the State party on its accession to the Convention. In light of the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights, the Committee recommends that the State party withdraw its declarations on and reservations to the Convention.
Indeed, a reservation to a state’s obligation in relation to primary education undermines the minimum core obligation of a state relating to the right to education, which, as noted in chapter 2, must be respected at all times. As noted in chapter 5, such a reservation is unlikely to be compatible with the object and purpose of the treaty, and should be considered to be invalid.

[9.29] Although the CRC made a step forward in protecting a child’s right to education, like the ICESCR, the CRC does not impose on states the obligation to provide any type of early childhood care and pre-school education. This is the case despite UNESCO’s proposal to include an obligation on states to

facilitate the provision of early childhood care and education, using all possible means, in particular for the disadvantaged child, in order to contribute to the young child’s growth, development and to enhance his or her later success at other levels of education.

This proposal faced opposition by many states on the ground that it would increase their educational expenditure. It was not seen as increasing educational investment. The lack of reference to pre-school education has been described as an unfortunate omission as the opportunity to participate in pre-school education is important because children's attitudes, for example on race, are often formed in the pre-school years.

In addition, Article 28(1)(a) of the CRC is weaker than Article 13(2)(a) and 14 of the ICESCR in respect of primary education, since the CRC does not specify any timeframe for the progressive implementation of the principle of compulsory and free primary education. However, the CRC recognises under Article 28(3) that ‘international cooperation’ in matters relating to education is essential to address ‘the needs of developing countries’.

[9.30] At a regional level, the right to education is also firmly recognised in the three regional human rights treaties in Europe, the Americas and Africa. Article 17(1) of the African Charter on Human and Peoples’ Rights (‘the African Charter’ or ‘the Charter’) simply states in very general terms: ‘[E]very individual shall have the right to education’. The African Commission found that a two-year-long closure of universities and secondary schools in Zaire (as it was at the time, now the Democratic Republic of Congo) constituted a violation of Article 17. The Commission noted (paragraph 48) that:

Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools in Zaire (as it was at the time, now the Democratic Republic of Congo) constituted a violation of Article 17.

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117 Ibid.
118 Van Bueren, above n 105, 234.
120 CRC Committee, General Comment 5, above n 113, paras 60–4.
121 See the ECHR, Art 14 together with Art 2 of protocol I thereof; ACHPR, Arts 2 and 17(1); and the Additional Protocol to the American Convention on Human Rights in the Area of ESCR, Arts 3 and 13.
Although the Commission found a violation of the right to education, it did not define the content of the right to education. This left the content of the right to education under the African Charter uncertain.

[9.31] Article 11(3) of the African Charter on the Rights and Welfare of the Child\textsuperscript{124} clarifies the above general provision on education under the African Charter, by obliging states parties to ‘take all appropriate measures’ with a view to achieving the full realisation of the right to education and in particular:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;

(c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

According to the Commission guidelines for national periodic reports on the right to education under Article 17(1) of the African Charter, states are required to report, inter alia, on the measures taken to achieve the full realisation of the right of everyone to receive compulsory and free primary education;\textsuperscript{125} on the measures taken in respect of secondary education, including technical and vocational secondary education; and on higher education and fundamental education for persons who have not received or completed the whole period of their primary education.\textsuperscript{126}

[9.32] In the Inter-American system, the Protocol of San Salvador\textsuperscript{127} states: ‘Every one has the right to education’.\textsuperscript{128} In Article 13(3) the states parties to this Protocol ‘recognise’ that in order to achieve the full exercise of the right to education:

(a) Primary education should be compulsory and accessible to all without cost;

(b) Secondary education in its different forms, including technical and vocational secondary education, should 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 should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

\textsuperscript{124} OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

\textsuperscript{125} See ‘Guidelines for National Periodic Reports’, reproduced in R Murray and M Evans (eds), Documents of the African Commission on Human and Peoples’ Rights (Oxford, Hart Publishing, 2001), 70. Art 62 of the African Charter requires states parties to submit every two years reports on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter.

\textsuperscript{126} Ibid.

\textsuperscript{127} OAS Treaty Series No 69 (1988).

\textsuperscript{128} Ibid, Art 13.
(d) Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

(e) Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

The Protocol protects parents’ ‘right to select the type of education to be given to their children’ and states that

Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.129

[9.33] The ESC of 1961130 only focused on one aspect of the right to education, namely the right to vocational guidance and training.131 Under Article 17(1) of the Revised Charter, the contracting parties undertake to ensure the provision of institutions and services to provide care, education and training to children and young persons up to the age of 18.132 By Article 17(2) of the Revised Charter, contracting parties undertake to take all appropriate and necessary measures designed
to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

In relation to Article 17, the Appendix to the Revised Charter states that ‘[i]t is understood that this provision covers all persons below the age of 18 years, . . . This does not imply an obligation to provide compulsory education up to the above-mentioned age’ since in some European states only primary education is compulsory.133 The implication of this is that ‘Article 17(2) does not require that education, whether primary or secondary, be compulsory.’134 As made clear by the Charter of Fundamental Rights of the European Union,135 there is only a ‘possibility’ (i.e. mere ‘likelihood’)136 to receive free compulsory education. The Charter provides:

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.137

[9.34] Article 17 of the Revised Charter ‘complements and to some extent overlaps with the guarantee of the right to education in Article 2 of the First Protocol to the ECHR’,138 which, as noted above, provides in the first sentence that ‘No person shall be denied the right to education.’ Although this Article has a negative formulation, in

129 Art 13(4) and (5).
130 529 UNTS 89, signed by members of the Council of Europe at Turin 18 October 1961, entered into force 26 February 1965.
131 ESC (1961), Arts 9 and 10.
133 Ibid, para 74.
138 Harris and Darcy, above n 134, 269.
the *Belgian Linguistics* case\(^{139}\) the European Court of Human Rights (‘the Court’) found:

In spite of its negative formulation, this provision [Article 2] uses the term ‘right’ and speaks of a ‘right to education’. Likewise, the Preamble to the Protocol specifies that the object of the protocol lies in the collective enforcement of ‘rights and freedoms’. There is therefore no doubt that Article 2 does enshrine a right.\(^{140}\)

Consequently, the Court held that the first sentence of Article 2 of the First Protocol enshrined, firstly, a right of access to educational institutions existing at a given time.\(^{141}\) Secondly, it enshrined a right to be educated in the national language or in one of the national languages so as to realise an effective and meaningful education. Thirdly, it entails a right to official recognition of the studies an individual has successfully completed.\(^{142}\) The Court further held that the content of the right to education would vary from time to time and place to place, according to economic and social circumstances. However the Court, at the same time, stated that

the negative formulation indicates . . . that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level.\(^{143}\)

In this respect, it is narrower than guarantees under international human rights instruments such as those under the ICESCR and CRC, as reviewed above.

### III. SCOPE AND CONTENT OF THE RIGHT TO EDUCATION

#### A. Scope and Content

[9.35] The European Court of Human Rights defined ‘the education of children’ as the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.\(^{144}\)

The UNESCO Convention states that the term ‘education’ refers to

| to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.\(^{145}\) |

The preceding survey of international and regional instruments defines the content of the right to education and corresponding state obligations, which includes:

\(^{139}\) Judgment of 23 July 1968, Series A, No 6; (1979–80) 1 EHRR 252.
\(^{141}\) *Ibid*.
\(^{142}\) *Ibid*.
\(^{143}\) *Ibid*, 31.
\(^{145}\) UNESCO Convention, Art 1(2).
1. provision of primary/basic education that is free and compulsory;\(^\text{146}\)
2. progressive introduction of free secondary, higher and fundamental education;\(^\text{147}\)
3. access to public educational institutions and programmes on non-discriminatory basis;\(^\text{148}\)
4. educational quality that conforms to the internationally recognised objectives;\(^\text{149}\)
5. guarantee of parental choice in the education of their children without interference from the state or third parties, subject to conformity with ‘minimum educational standards’.\(^\text{150}\)

These elements (discussed below) constitute the core obligations of states in respect of the right to education.\(^\text{151}\)

### B. Levels of Education

#### (i) Primary Education

\(^{\textbf{[9.36]}}\) Several of the international human rights treaties reviewed above require ‘primary education’ to be ‘compulsory’ and ‘available free to all’\(^\text{152}\). However, such treaties neither define what ‘primary education’ is, nor do they indicate what is meant by ‘compulsory’ or ‘available free to all’. Guidelines from UNESCO indicate that primary education relates to the first layer of a formal school system; it usually begins between the ages of five and seven year and lasts approximately six years, but in any case no fewer than four years.\(^\text{153}\) There is a trend to lengthen the duration of compulsory schooling beyond eleven years of age so that compulsory schooling lasts to at least the minimum age of employment.\(^\text{154}\) Primary education focuses on imparting basic learning skills and providing ‘basic education’—literacy, numeracy, skills relating to one’s health and social skills such as oral expression,\(^\text{155}\) as well as the objectives of education as laid down in the international human rights instruments.\(^\text{156}\) It can be enjoyed in one form or another, not necessarily in the formal traditional school and classroom teaching.\(^\text{157}\)

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\(^{\text{146}}\) ICESCR, Art 13(2); CRC, Art 28(1)(a); Protocol of San Salvador, Art 13(3)(a); African Charter on the Rights and Welfare of the Child, Art 11(3)(a).

\(^{\text{147}}\) ICESCR, 13(2)(b) and (c); CRC, 28(1)(b) and (c); Protocol of San Salvador, Art 13(3)(b) and (c); African Charter on the Rights and Welfare of the Child, Art 11(3)(b) and (c).

\(^{\text{148}}\) UDHR, Art 26(1); ICESCR, Art 13(1); CRC, Art 29(1); UNESCO Convention, Art 3; CERD, Art 5; CEDAW, Art 10.

\(^{\text{149}}\) UDHR, Art 26(2); ICESCR, Art 13(1); CRC, Art 29; Protocol of San Salvador, Art 13(2); African Charter on the Rights and Welfare of the Child, Art 12(2).

\(^{\text{150}}\) ICESCR, Art 13(3) and 4; ECHR, Art 2; CESCR, General Comment 13, para 57; F Coomans, ‘Clarifying the Core Elements of the Right to Education’ (1995) 18 SIM Special 11–25.

\(^{\text{151}}\) CESCR, General Comment 13, para 57; Tomasevski, above n 12, 53; F Coomans, ‘In Search of the Core Content of the Right to Education’, in D Brand and S Russell (eds), Exploring the Core Content of Socio-economic Rights: South African and International Perspectives (Pretoria, Protea Book House, 2002), 159–82.

\(^{\text{152}}\) See eg ICESCR, Art 13(2)(a); UNESCO Convention, Art 4(a); CRC, Art 28(1)(a).


\(^{\text{154}}\) Tomasevski, UN Doc E/CN.4/2000/6, above n 2, para 46.


\(^{\text{156}}\) UDHR, Art 26(2); ICESCR, Art 13(1); CRC, Art 29(1).

\(^{\text{157}}\) UNESCO Convention, Art 1(2).
Primary education is fundamental to the development of an individual’s abilities and society as a whole, and should thus have priority in available resource allocation. It is part of the minimum core obligation of states below which a state would be in prima facie violation of the right to education. As the CESCR observed

the obligation of States Parties to the Covenant to ensure that 'primary education shall be compulsory and available free to all’ applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school.

This reinforces the compulsory nature of primary education and the requirement that primary education must be ‘free of charge’.

The CESCR explained the meaning of the terms ‘compulsory’ and ‘free of charge’ in its General Comment No 11 as follows:

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 emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation 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 jeopardise its realisation. 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 recognised 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’.

It is clear that the phrase ‘available free to all’, means that primary education should be provided ‘without [direct or indirect] charge to the child, parents or guardians’ at the point of use. Surprisingly, by December 2003, school fees were charged for primary education in 91 states, mostly in Africa and Asia. In many

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158 CESCR, General Comment 13, para 51.
159 Ibid para 57.
162 Ibid, para. 7.
163 Ibid.
states indirect fees for primary education, such as expenses for meals in school canteens, school transport, uniforms, medical expenses, boarding fees or provision of labour by parents for constructing, running or maintaining the school may undermine the right to free primary education.\textsuperscript{165} Indeed states have given a limited definition of the obligation to provide ‘free’ primary education.

\textbf{[9.40]} For example, in 1995, regarding the meaning of ‘free’ basic education, the Constitutional Court of Czech Republic held:

Education free of charge unquestionably means that the state shall bear the costs of establishing schools and school facilities, of their operation and maintenance, but above-all it means that the state may not demand tuition, that is, the provision of primary- and secondary-level education for payment. . . . The provision on the degree to which the government provides free textbooks, teaching texts, and basic school materials can not be placed under the heading of the right to education free of charge. . . . It is clear that education free of charge cannot consist in the fact that the state bears all costs incurred by citizens when pursuing their right to education. . . . The expenses connected with putting the right to education into effect are a long-term investment into the life of the citizen. The state bears the essential part of these costs, however, it is not obliged to bear all of them.\textsuperscript{166}

It has to be noted that this is a narrow interpretation of ‘free’ education that exonerates the state from indirect costs of education such as contributions towards textbooks and basic teaching materials. Such a narrow interpretation may jeopardise the realisation of the right to primary education for those who are too economically disadvantaged to afford such materials. Thus, a broader interpretation of ‘free’ education is preferred. As Meron put it, generally ‘broad interpretations of rights are necessary for the effective protection of human dignity, which is the goal of human rights law’.\textsuperscript{167}

\textbf{[9.41]} The compulsory nature of primary education necessitates states to take measures (such as the provision of schools within a reasonable distance from the children’s home) to encourage regular attendance at schools and reduce drop-out rates.\textsuperscript{168} A state’s failure (unwillingness as opposed to impossibility or inability) to introduce, as a matter of priority, primary education that is compulsory and available free to all, is a violation of the right to education.\textsuperscript{169} For example, in respect of the Democratic Republic of the Congo (formerly Zaire), the CESCR was ‘profoundly dissatisfied with the education system in the Congo’.\textsuperscript{170} It expressed the view that that ‘the fact that Zaire was not able to secure primary education free of charge was not in conformity with articles 13 and 14 of the Covenant’.\textsuperscript{171} It called on the state party to provide

\textsuperscript{165} Coomans, above n 14 (2002), 228.
\textsuperscript{166} Constitutional Court of the Czech Republic, Case No PL.US 25/94, 13 June 1995, (1995) 2 Bulletin on Constitutional Case-Law, 151. The Court was interpreting Art 33(2) of the Charter of Fundamental Rights and Basic Freedoms of Czech Republic, which guarantees to all citizens the right to elementary and secondary education ‘free of charge’.
\textsuperscript{168} CRC, Art 28(1)(e); African Charter on the Rights and Welfare of the Child, Art 11(3)(d).
\textsuperscript{170} CESCR, Concluding Observations: Republic of the Congo, UN Doc E/C.12/1/Add.45 (23 May 2000) para 23.
\textsuperscript{171} See CESCR, Concluding Observations: Zaire, above n 169.
primary education ‘free of charge in the near future’. States must therefore ensure that primary education is free for all and compulsory by law, in addition to putting in place official state inspection to supervise this obligation with respect to parents, schools, employers and pupils.

(ii) Fundamental Education

[9.42] The ICESCR guarantees the right to ‘fundamental education’ for individuals ‘who have not received or completed the whole period of their primary education’. In General Comment No 13 on the Right to Education, the CESCR explained that:

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All. 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 emphasised 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.

[9.43] The text of the ICESCR does not oblige states to ‘ensure’ that fundamental education is available but only that it ‘shall be encouraged or intensified as far as possible’. The use of the terms to ‘encourage’ (meaning to ‘inspire with confidence’ or ‘support’) or ‘intensify’ (meaning to ‘make of great strength’ or ‘escalate, step up, boost, increase, raise, sharpen, or strengthen’) fundamental education does not entail a heavy obligation especially since this is even qualified by ‘as far as possible’. Nonetheless, in general terms, ‘fundamental education’ corresponds to ‘basic education’ which is a right of all age groups. It has to entail basic literacy and numeracy skills as well as basic professional skills to enable individuals to function as members of society, to take part in social and cultural life, to generate

172 Ibid.
173 See the Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties (hereinafter ‘Reporting Guidelines’), UN Doc HRI/GEN/2/Rev.1 (2001), and Appendix I, para 59.
174 ICESCR, 13(2)(d); Reporting Guidelines for Article 13, UN Doc HRI/GEN/2/Rev.1 (2001); UNESCO Convention, Art 4(c); Protocol of San Salvador, Art 13(d).
176 ICESCR, 13(2)(d).
179 Collins Gem English Dictionary, above n 177, 284.
180 The New Oxford Thesaurus of English, above n 178, 517.
income, to participate in community development projects, and to have access to and utilise information from a variety of sources. Therefore under the new reporting guidelines states are required to indicate ‘the measures taken to promote literacy, as well as adult and continuing education, in a life-long perspective’ (Appendix I, para 62).

(iii) Secondary Education

[9.44] International human rights treaties oblige states to make secondary education ‘generally available and accessible to all’. Some key texts are set out below:

**ICESCR, Article 13(2)(b)**
The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: 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.

**Convention against Discrimination in Education,**\(^{182}\) Article 4(a)
The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular: To . . . make secondary education in its different forms generally available and accessible to all; . . .

**Convention on the Rights of the Child,**\(^{183}\) Article 28(1)(b)
States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.

[9.45] International human rights treaties require that secondary education ‘shall be generally available’.\(^{184}\) This 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.\(^{185}\)

The state is obliged to use ‘every appropriate means’ to ensure the availability of secondary education.\(^{186}\) This requires states to adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.\(^{187}\) The ultimate aim should be the ‘progressive introduction of free

\(^{181}\) Coomans, above n 14 (2002), 227.
\(^{182}\) 429 UNTS 93.
\(^{183}\) UN Doc A/44/49 (1989).
\(^{184}\) See ICESCR, Art 13(2)(b). See also UNESCO Convention, Art 4; Protocol of San Salvador, Art 13(3)(b) uses a weaker phrase ‘should be generally available’. This was made deliberately to avoid a strict obligation. See AG/Res 836 (XVI-O/86).
\(^{185}\) CESCR, General Comment 13, para 13.
\(^{186}\) ICESCR, Art 13(2)(b); chapter 2 above.
\(^{187}\) Ibid.
which means that while states must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary education. \(^{189}\) The Reporting Guidelines,\(^{190}\) for Article 13 of the ICESCR require states to indicate whether secondary education, including technical and vocational secondary education, is generally accessible to all and concrete steps taken by the state towards progressively achieving free secondary education.

[9.46] In reality, many states charge fees for all levels of education.\(^{191}\) These fees epitomise the impossibility of making secondary education accessible and alleviating poverty through education for all those who are too poor to afford it.\(^{192}\) They also reflect discriminatory denials of the right to education on the grounds of poverty.\(^{193}\) Consequently, children from poor families, particularly girls, are, at best, denied a right of access to good-quality secondary education or, at worst, even to poor-quality secondary education. This broadens the gap between ‘haves and have-nots’.\(^{194}\)

[9.47] The comparable obligation imposed by Article 28(1)(b) of the CRC is to ‘encourage’ the development of different forms of secondary education, make them available and accessible to every child, and take appropriate measures ‘such as’ (not ‘in particular’) the introduction of free education and financial assistance in case of need. It is notable that while the ICESCR obliges states to make secondary education ‘generally available and accessible to all’, the obligation under the CRC merely to ‘encourage’ the development of different forms of secondary education appears to be weaker (see paragraph 9.44 above).

[9.48] Apart from providing that secondary education includes technical and vocational education (TVE),\(^{195}\) none of the applicable treaties define the term ‘secondary education’, which thus remains an ambiguous term. According to a general literal definition,

it [secondary education] belongs to an amorphous zone that lies between basic [primary] education and higher education. Secondary education is a step for pupils between the ages of 11 or 12 and 18. At this level, pupils are expected to broaden their knowledge and experiences from the basic level and prepare for work or higher education.\(^{196}\)

[9.49] TVE, as part of secondary education, ‘shall be generally available’.\(^{197}\) The UDHR similarly states that technical and professional education ‘shall be made generally available’.\(^{198}\) Neither the ICESCR nor the UDHR and the Protocol of San

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\(^{188}\) ICESCR, Art 13(2)(b); African Charter on the Rights and Welfare of the Child, Art 11(3)(b); Protocol of San Salvador, Art 13(3)(b).

\(^{189}\) CESCR, General Comment 13, para 14.

\(^{190}\) See Appendix I, para 60.

\(^{191}\) More than 80 states lack free public primary education available to all primary school age children. See http://www.right-to-education.org/.


\(^{193}\) Ibid.

\(^{194}\) Ibid, para 22.

\(^{195}\) ICESCR, Art 13(2)(b); Protocol of San Salvador, Art 13(3)(b).


\(^{197}\) ICESCR, Art 13(2).

\(^{198}\) Art 26(1).
Salvador define the meaning of ‘technical’ or ‘vocational’ education. But according to Article 1(a) of 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.

In order to enable individuals to enjoy TVE, it is essential that states make the relevant information and guidance available. Thus, Article 28(1)(d) of the CRC obliges states to ‘make educational and vocational information and guidance available and accessible to all children’. However, the persistence of patriarchal attitudes and stereotypical behaviour with respect to the role of women and men in the family and society still limit women’s accessibility to secondary education and perpetuate direct and indirect discrimination against girls and women.

[9.50] It is essential to note that the continually increasing complexity of human existence and the world of work, spurred along by the information society and the knowledge-based economy, demand a level of education that goes beyond the seven years of primary education. As Tomaševski rightly pointed out:

Available evidence indicates that the key to reducing poverty is secondary rather than primary education. The Republic of Korea, often cited as the model for the economic rationale behind its investment in education, has found that secondary education had the ‘crucial relationship with economic growth’. The South African Human Rights Commission has objected to eight years of schooling defined as ‘basic education’, deeming it acceptable under the current fiscal constraints, but urging the Government to extend it to 10 years. The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) has found that young people have to complete secondary education to achieve an 80 per cent probability of avoiding poverty, and its subsequent research has confirmed that between 72 and 96 per cent of families where the parents have less than nine years of education live in poverty.

200 See also CESCR, General Comment 13, para 16.
206 Economic Commission for Latin America and the Caribbean, The Equity Gap: Latin America, the Caribbean and the Social Summit (Santiago de Chile, 1997). 116; Equidad, desarrollo y ciudadania (Equity, Development and Citizenship) (Santiago de Chile, 2000), 72.
(iv) Higher Education

[9.51] The right to higher education is protected in international human rights treaties. Some key provisions are stated below:

ICESCR, Article 13(2)(c)
The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: 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.

Convention against Discrimination in Education, Article 4(a)
The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular: To . . . make higher education equally accessible to all on the basis of individual capacity.

Convention on the Rights of the Child, Article 28(1)(c)
States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: Make higher education accessible to all on the basis of capacity by every appropriate means.

[9.52] With regard to higher education, international human rights treaties do not oblige states to make higher education ‘generally available’, but only ‘accessible to all, on the basis of capacity’. This suggests that there is no legal obligation to make higher education generally available. Individuals can only claim access (without discrimination, geographically and economically) to what is available on the basis of capacity. ‘Capacity’ of individuals should be assessed by reference to all their relevant ability, expertise and experience. Due to the limited facilities for higher education, it is not incompatible with the right to higher education to restrict access to those students who have attained the academic level required to most benefit from the courses offered. There is no guidance as to what is meant by ‘higher education’ in international human rights treaties. However, it has been understood to include education provided by post-secondary institutions such as ‘universities, polytechnics, colleges, and other providers of higher education’.

[9.53] The textual reading of Article 13(2)(c) of the ICESCR, which is followed in other relevant instruments (reviewed in sections II and III above), requires states to use ‘every appropriate means’ to make higher education accessible, in particular by ‘the progressive introduction of free education’ to higher education. Thus, the failure to take ‘deliberate, concrete and targeted’ measures towards the progressive

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207 ICESCR, 13(2)(c); UNESCO Convention, Art 4(a); CRC, Art 28(1)(c); Protocol of San Salvador, Art 13(3)(c); African Charter on Rights and Welfare of the Child, Art 11(3)(c).
208 CESCR, General Comment 13, para 19.
211 CESCR, General Comment 13, para 43.
212 Maastricht Guidelines, para 14(c)–(f); CESR, General Comment 3, para 9; CESCR, General Comment 13, para 45; Coomans, above n 14 (2002), 239.
realisation of higher education in quantitative and qualitative terms would violate a state’s obligation. For example, deliberately reversing existing levels of realisation, or obstructing further realisation without sufficient justification, amounts to a violation. A common deliberate retrogressive measure is either the (re)introduction or the raising of fees, which has a negative impact upon students from less-privileged backgrounds. In Mauritius, for example, government-encouraged and costly private tuition that rendered access to secondary and tertiary education more difficult for the poorer segments of the population in 1994 was considered by the CESCR to have amounted to ‘the re-introduction of fees at the tertiary level of education, which constitutes a deliberately retrogressive step’. In case of the UK, the Committee noted

with concern that the introduction of tuition fees and student loans, which is inconsistent with article 13(2)(c) of the Covenant, has tended to worsen the position of students from less privileged backgrounds, who are already underrepresented in tertiary education.

The Committee urged the UK
to take effective measures to ensure that the introduction of tuition fees and student loans does not have a negative impact upon students from less privileged backgrounds. Nonetheless, in several states, tuition fees for university education are increasing, despite the fact that Article 13 of the ICESCR calls for the progressive introduction of free higher education.

The comparable specific obligation under Article 28(1)(c) of the CRC is to ‘[m]ake higher education accessible to all on the basis of capacity by every appropriate means’. Although in many respects this follows the text of the Covenant, it would appear to be weaker in as far as it does not specifically oblige states to make progressive introduction of free higher education.

There has been an ongoing process of state withdrawal from funding higher education. This was spurred in part by the overall policy of structural adjustment under the IMF and the World Bank. With particular reference to the education sector, increased state-withdrawal from funding higher education and encouragement of private educational services was ‘recommended’ by a World Bank study on education in sub-Saharan Africa. The World Bank claimed:

Public investment in Universities and Colleges brings meagre returns compared to the returns for primary and secondary education and higher education magnifies inequalities.

215 Ibid, para 41.
216 See eg CESCR, Concluding Observations: Germany, UN Doc E/C.12/1/Add.29 (4 December 1998), para 22.
Influenced by such arguments, many governments in developing states cut tertiary-level education funding and introduced a policy known as ‘cost-sharing’ in state-owned tertiary institutions. This meant that students formerly sponsored by the government had to contribute in terms of fees and other levies towards the total cost of education. ‘Cost-sharing’ also meant a shift in international assistance from funding universities and other institutions of higher learning. As a result, higher educational institutions have been starved of public funds and higher education has been redefined from a free public service to ‘a freely traded commodity’. It is of interest to note that the World Bank recently acknowledged the fact that ‘higher education is no longer [and indeed has never been] a luxury, it is essential to national, social and economic development’. Primary and secondary education alone cannot help developing states to get into the global economy. The Bank has accepted the reality that investment in tertiary institutions is important if poor countries are to succeed in the era of globalisation. Thus, ‘[t]o focus exclusively on basic education would effectively doom a country’s efforts to secure a hold on the global economy’.

IV. HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF EDUCATION

A. Making Education Available, Accessible, Acceptable and Adaptable

In order to implement the content of the right to education, states are obliged to make education available, accessible, acceptable and adaptable.

GENERAL COMMENT 13, UN Doc E/C12/1999/10 (1999)

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:
(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.

[9.58] The General Comment above establishes four state obligations regarding the right to education. The first state obligation is to ensure that ‘functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State’. The second state obligation is to ensure that ‘educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party’. States have to ‘ensure, when possible, that children belonging to minority [linguistic] groups have access to education in their mother tongue’. The third state obligation is to ensure that education is

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 set out ‘four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability’. See UN Doc E/CN.4/1999/49, para 50.

228 CESCR, General Comment 13, para 6(a).

229 Ibid, 6(b).

230 CRC, Concluding Observations: Armenia, UN Doc CRC/C/15/Add.225 (30 January 2004), para 55(e); Greece UN Doc E/C.12/1/Add.97 (7 June 2004), para 50.
‘acceptable both to parents and to children’.\textsuperscript{231} This requires a guaranteed quality of education\textsuperscript{232} and respect for parents to have their children educated in conformity with their religious, moral or philosophical convictions.\textsuperscript{233} It also requires respect of parental liberty (as individuals or organisation) to establish and operate private educational institutions at all levels, subject to meeting educational standards set by the state.\textsuperscript{234} In addition, school discipline has to be acceptable and humane,\textsuperscript{235} particularly the need to refrain from subjecting children to inhuman or degrading disciplinary measures such as corporal punishment or public humiliation so as to protect the child’s dignity.\textsuperscript{236} Acceptability also requires states to ‘ensure that pregnant teenagers are given an opportunity to complete their education’.\textsuperscript{237} The final state obligation is to ensure that education has to be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of children, pupils and students within their diverse social and cultural settings.\textsuperscript{238} In particular, education of the child should be adapted to the internationally recognised human rights-related aims and objectives of education.\textsuperscript{239}

B. Levels of State Obligations: Respect, Protect and Fulfil

\textsuperscript{[9.59]} The three levels of obligations on states arising from the right to education as protected in the ICESCR were addressed by the CESCR in its General Comment 13, UN Doc E/C12/1999/10 (1999). The relevant paragraphs are set out below:

\begin{itemize}
\item \textsuperscript{232} Tomasevski, above n 12, 51.
\item \textsuperscript{233} ICESCR, Art 13(3); ICCPR, Art 18(4); ECHR Protocol 1, Art 2; Protocol of San Salvador, Art 13(4); African Charter on the Rights and Welfare of the Child, Art 11(4). For a discussion of religious education in public schools, see C Evans, ‘Religious Education in Public Schools: An International Human Rights Perspective (2008) 8 Human Rights Law Review 449–73.
\item \textsuperscript{234} ICESCR, Art 13(4); Protocol of San Salvador, Art 13(5); African Charter on the Rights and Welfare of the Child, Art 11(7).
\item \textsuperscript{235} CRC, Art 29(2); African Charter on the Rights and Welfare of the Child, Art 11(5).
\item \textsuperscript{236} CESCR, General Comment 13, para 41 ‘corporal punishment is inconsistent with . . . the dignity of the individual . . . . 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.’ See also CRC, Concluding Observations: Zimbabwe, UN Doc CRC/C/15/Add.55 (7 June 1996), para 18: ‘The Committee expresses its concern at the acceptance in the legislation of the use of corporal punishment in school, as well as within the family. It stresses the incompatibility of corporal punishment, as well as any other form of violence, injury, neglect, abuse or degrading treatment, with the provisions of the Conventions.’ See further CRC, Concluding Observations: Guyana, UN Doc CRC/C/15/Add.224 (30 January 2004), paras 31–2; India, CRC/C/5/Add.228 (30 January 2004), paras 44–5; Indonesia, UN Doc CRC/C/15/Add.223 (30 January 2004), paras 43–4; Japan, UN Doc CRC/C/15/Add.231 (30 January 2004) paras 35–6; Papua New Guinea, UN Doc CRC/C/15/Add.229 (30 January 2004) paras 37–8; Campbell and Cosans v UK (1982) 4 EHRR 293 (ECtHR).
\item \textsuperscript{237} CRC, Concluding Observations: Guyana: CRC/C/15/Add.224 (30 January 2004), para 48(b). See also CRC, Concluding Observations: Indonesia, UN Doc CRC/C/15/Add.223 (30 January 2004), para 63(e).
\item \textsuperscript{238} CESCR, General Comment 13, para 6(d).
\item \textsuperscript{239} ‘States Parties agree that the education of the child shall be directed to: (a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment’.
\end{itemize}
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 an 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.

[9.60] As noted in the Comment above, states are obliged to respect, protect and fulfil the right to education. The obligation to respect the right to education requires states parties to refrain from all measures that directly or indirectly interfere, impair, hinder or prevent the enjoyment of the right to education for all those within its jurisdiction.240 For example, states must refrain from denying or limiting equal access for all individuals and groups to all levels of education—primary or fundamental, secondary, or higher—on prohibited grounds. In addition, states are obliged to refrain from prohibiting or impeding private educational institutions. A state must equally refrain from acts such as the closure of public or private schools241 that comply with minimum educational standards, approval of corporal punishments in schools, limiting access to means of maintaining education, censoring or withholding education-related information, and limiting access to education services as a punitive measure. In *Aloeboetoe et al v Suriname*242 the Inter-American Court of Human Rights ordered the state, inter alia, to open a school as part of the remedy for violations of the rights of the Maroons (Bushnegroes). The Court’s reasoning was that the compensation ordered, which included a payment so that minors could continue their education.

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241 CESCR, General Comment 13, para 50.
242 IACHR (Ser C) No 15, 1993. ‘The Court believes that, as part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994. In addition, the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year.’
education, would not be realised unless the order was made. It seems that such an order was within the ‘letter and spirit’ of the American Convention on Human Rights which provides for progressive realisation of economic and social rights in Article 26.

[9.61] The obligation to protect the right to education requires states to take measures—through legislation or by other means as shown in chapter 1—to prevent and prohibit third parties (private groups and individuals) from interfering with the enjoyment of the right to education. This requires, for example, that the state adopt legislation or other measures to ensure equal access to education provided by third parties by ensuring that private educational institutions do not discriminate in making admissions. Similarly, the state must ensure that third parties, including parents and employers, do not prevent (pregnant) girls, women and other disadvantaged or marginalised groups from having access to education. States also have an obligation to ensure that communities and families are not dependent on child labour243 or early marriage that interferes with the child’s right to education. Protection also demands that states establish ‘minimum educational standards’ to which all educational institutions, including private institutions, are required to conform. Similarly, a state must ensure that privatisation244 of the education sector does not constitute a threat to the availability, accessibility, acceptability and adaptability of education;245 and to ensure that teachers and other education professionals meet appropriate standards of education, skill and ethical codes of conduct. As shown in chapter 3, the CESCR has stated that a state has to take into account its legal obligations when entering into bilateral or multilateral agreements with other states or NSAs. By implication, states are obliged to ensure that service agreements with private parties ensure that the advancement of human rights is a paramount objective.

[9.62] The obligation to fulfil requires states to adopt appropriate measures—legislative, administrative, budgetary, judicial, promotional and other measures—towards the full realisation of the right to education. It can be seen as involving both an obligation of conduct (to take certain steps) and an obligation of result (to achieve a specific result) such as free and compulsory primary education or the progressive introduction of free secondary and higher education. In order to achieve this, a state is obliged, inter alia, to give sufficient recognition to the right to education in the national political and legal systems, preferably by way of legislative implementation. The obligation to fulfil contains obligations to facilitate and to provide.

[9.63] The obligation to fulfil (facilitate) requires states to take positive measures that enable and assist individuals and communities to enjoy the right to education in practice. A state is obliged, for example, to fulfil (facilitate) the availability of education by

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243 According to the ILO, by June 2004, around 10 million children, mostly girls, worldwide were working as domestic servants in private homes, subjected to abuse, health risks and violence. States with the highest rates included Indonesia with about 700,000, Brazil with 559,000, Pakistan with 264,000, Haiti with 250,000, Kenya with 200,000, and Sri Lanka with 100,000. See ILO, Helping Hands or Shackled Lives? Understanding Child Domestic Labour and Responses to It (2004), http://www.ilo.org/childlabour.

244 ‘Privatisation’ is used here to broadly encompass a wide range of private sector involvements in the delivery of education, and is not limited to full divesture (complete transfer of a public enterprise to a private actor).

245 The CESCR took a similar view in respect of health (General Comment 14, para 35); and in respect of water (General Comment 15, para 24).
taking positive measures to ensure that schools and teachers are available in sufficient quantity. Article 12(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa obliges states to facilitate the realisation of the women’s right to education in the following terms:

States Parties shall take specific positive action to: a) promote literacy among women; b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

States should similarly facilitate acceptability by ensuring that education is culturally appropriate for minorities and indigenous peoples, and is of good quality for all.246

[9.64] States are also obliged to fulfil (provide) the adaptability of education by designing and providing resources for curricula that 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.247 Finally, states may fulfil (provide) the right to education by assisting, eg through a system of scholarships, those who cannot afford fees charged for education. In this respect, Article 11(3)(e) of the African Charter on the Rights and Welfare of the Child obliges states to

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\text{take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.}
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C. Justiciability of the Right to Education

[9.65] It is important to stress that violations of the above obligations are justiciable. This section considers some of the cases decided on the right to education from international, regional and national bodies. It is by no means exhaustive but rather seeks to show how different bodies have determined whether states and in some cases NSAs are complying with their obligations with respect to the right to education, especially in the context of vulnerable persons. For ease of analysis, the cases are considered under the following sections.

(i) Making Education Available, Accessible and of Good Quality

[9.66] In the Campaign for Fiscal Equity et al v the State of New York et al,248 the Supreme Court of New York was asked to rule on an alleged case of discrimination in the funding afforded by the State of New York to different schools. The plaintiffs challenged the state’s funding of New York City’s public schools in relation to the effect of funding on children from minorities. Adequate funding was claimed to be

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247 CESC, General Comment 13, para 50.

measured by the securing of a ‘sound basic education’. The Supreme Court of New York had to clarify the meaning of ‘education’ as a right and understand the content of the right—by considering the meaning of a ‘sound basic education’. In this case, the Supreme Court of New York decided that in order to provide sound basic education, the state had a duty to take steps to ensure that the following resources are available to the city’s public school students: (i) sufficient number of qualified teachers and other personnel; (ii) appropriate class sizes; (iii) adequate and accessible school buildings; (iv) sufficient up-to-date books and technology; (v) suitable curricula; (vi) adequate resources for students with extraordinary needs; and (vii) a safe, orderly environment.

(ii) Non-discrimination

[9.67] In *Dilcia Yean and Violeta Bosica v Dominican Republic* two girls born in the Dominican Republic of Haitian immigrant mothers were denied birth certificates necessary to prove that they were citizens of the Dominican Republic. Without such birth certificates they were unable to enrol in school. The Inter-American Commission on Human Rights considered the case under the Declaration on the Rights and Duties of Man, Article XII (right to education) and the American Convention on Human Rights, Article 19 (rights of the child). It held that the Government had deprived the petitioners of their right to education under Article XII by discriminatorily depriving them of their legal identity under domestic law. Under the American Convention on Human Rights, Article 19, as informed by the Convention on the Rights of the Child, the state is obliged to provide special protections to children, including preventing economic and social degradation. Article 19 obligations include the right to education as education gives rise to the possibility of children having a better standard of living and contributes to the prevention of unfavourable situations for the child and for society itself. The Government violated Article 19 by not extending such protections to Dominican children of Haitian descent and by taking actions which denied the petitioners the most basic rights of citizenship, including education. The Inter-American Court of Human Rights confirmed that the migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights.

The Court ordered that the State should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children.

[9.68] Particular attention should be given to ‘groups with heightened vulnerabilities’ as noted by the European Committee of Social Rights in *Autisme-Europe v France*. In this case the complainant alleged that the French Government’s inadequate

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250 *The Yean and Bosico Children v Dominican Republic*, judgment of 8 September 2005, IACtHR (Ser C) No 130 (2005) para 156(a).
251 *Ibid* para 244.
educational provision for autistic persons violated the ESC, eg the obligation to ensure the effective exercise by persons with disabilities of their right to independence, social integration and participation in the life of the community by taking the necessary measures to provide such persons with education (Article 15(1)), the obligation to secure the right to education of all children and young persons (Article 17(1)), and the principle of non-discrimination in the enjoyment of Charter rights (Article E). It emphasised that states parties are obliged to take both legal and practical action to give full effect to Charter rights. When the achievement of a right is exceptionally complex and particularly expensive to resolve, state parties must take measures which allow them to achieve the objectives of the Charter within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings. (para 53)

Since the numbers of autistic children being educated in either general or specialist schools were disproportionately low in comparison to other children, and there was a chronic shortage of care and support facilities for autistic adults, France was in violation of Articles 15(1) and 17(1) whether read alone or in conjunction with Article E.

[9.69] In Murat Er v Denmark253 the CERD Committee dealt with a claim of racial discrimination in education. Murat (the petitioner), a Danish citizen of Turkish origin, was a carpentry student at Copenhagen Technical School. As part of the study programme, students were offered the possibility of doing traineeships in private companies. Murat found out that the school accepted instructions from employers not to send interns of non-Danish origin. This took place on 8 September 2003, when Murat accidentally saw a note in a teacher’s hands, where the words ‘not P’ appeared next to the name of a potential employer applying for trainees to work in his company. When asked about the meaning of that note, the teacher explained to him that the P stood for ‘perkere’ (‘Pakis’) and that it meant that the employer in question had instructed the school not to send Pakistani or Turkish students for training in that company. He abandoned the idea of becoming a carpenter and started working as a home carer. He contended before the CERD Committee that, as a consequence of the school’s discriminatory practice, he was not offered the same possibilities of education and training as his fellow students and no remedies were allegedly made available to address this situation effectively, in violation of Article 5(e)(v) of the Convention. The school claimed that the rejection of the petitioner’s application for traineeship in September 2003 was based on his academic records.

[9.70] The CERD Committee observed that the uncontroversial fact that one of the teachers at the school admitted having accepted an employer’s application containing the note ‘not P’ next to his name and knowing that this meant that students of non-Danish ethnic origin were not to be sent to that company for traineeship is in itself enough to ascertain the existence of a de facto discrimination towards all non-ethnic Danish students, including the petitioner. The Committee further held that the

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school’s allegation that the rejection of the petitioner’s application for traineeship in September 2003 was based on his academic records does not exclude that he would have been denied the opportunity of training in that company in any case on the basis of his ethnic origin. Indeed, irrespective of his academic records, his chances in applying for an internship were more limited than other students because of his ethnicity. According to the Committee, this constituted

an act of racial discrimination and a violation of the petitioner’s right to enjoyment of his right to education and training under article 5, paragraph e (v) of the Convention

[9.71] In *Tengur v The Minister of Education and the State of Mauritius* the Supreme Court of Mauritius considered a claim of alleged discrimination on the basis of religion in education. In this case, the applicant alleged that the practice of reserving 50 per cent of the seats in secondary schools managed by the Roman Catholic Authority and funded out of public funds reserved for children of Catholic faith was discriminatory against non-Catholics. The Court had to decide whether this was unlawful discrimination or a lawful differentiation of treatment which is justifiable or valid on the ground that the criteria for such differentiation are reasonable and objective and the aim of the differentiation is to achieve a purpose which is legitimate under the Constitution or any other law.

The Court considered this claim in light of section 16 of the Constitution of Mauritius. Significantly, in arriving at its decision, the Court considered the provisions of the UNESCO Convention against Discrimination in Education (‘the Convention’) and the ICESCR, to which Mauritius is a signatory, noting that it is a well-recognised canon of construction that domestic legislation, including the Constitution, should if possible, be construed so as to conform to such international instruments.

The Court then relied on General Comment 13 on the Right to Education, adopted in 1999, by the CESCR; and quoted in full paragraphs 6(b), 13, 31–4, 46 and 47 of this General Comment. The Court stated that the overall purpose behind the Convention is to combat all forms of discrimination in education. The Court noted that:

> The prohibition against discrimination enshrined in article 2(2) of the Covenant [ICESCR] 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.

[9.73] In light of the foregoing, the Court held that a perusal of the relevant provisions of the Constitution, the Convention and the Covenant shows clearly that no express or implied derogation is allowed in respect of the overriding principle of the

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254 Record No 77387, Supreme Court of Mauritius, 2002 SCJ 48. See also Mauritius, Fourth Periodic Report to the HRC, UN Doc CCPR/C/MUS/2004/4 (28 June 2004), para 17. It should be noted that the judgment was delivered by Chief Justice AG Pillay, a member of the CESCR.

255 Record No 77387, *ibid* at 13.

256 Subject to some exceptions, s 16 prohibits discrimination on several grounds including ‘creed’. S 16(1) provides that ‘no law shall make any provision that is discriminatory either of itself or in its effect’. S 6(2) provides that ‘no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority’.

specificity of the co-defendants’ schools. There is no doubt that there might be historical, social, religious and cultural reasons for such a principle. The overriding principle of specificity inherent in the admission policy of the co-defendants is not a permissible derogation under the Convention, the ICESCR, the Constitution or the Act. Consequently, the school admission policy which is governed by the overriding principle of specificity constitutes unlawful discrimination since Catholics had, all other things being equal, an advantage over non-Catholics in being admitted to the secondary schools run by the Roman Catholic Authority. The Court further held that it is clear also that by knowing of, and acquiescing in, such an admission policy of the school, the second defendant (State of Mauritius) is acting in material breach of its international obligations under both the Convention and the Covenant. The Court concluded that the admission policy of the co-defendants, whereby they reserved 50 percent of seats in secondary schools for pupils of Catholic faith, was in violation of section 16(2) of the Constitution of Mauritius. The defendants lodged an appeal against this declaratory judgment to the Judicial Committee of the Privy Council; this appeal was heard in December 2003 and decided in the applicant’s favour.

(iii) Making Education Acceptable

[9.74] Should religious symbols or religious dress be banned in schools? This issue has been much debated especially following the ban of so-called ‘conspicuous’ religious symbols in France in elementary and primary schools by Act No 2004/228 of 15 March 2004. Apart from having the effect of excluding pupils who wish to observe religious symbols, a general ban on religious symbols in schools may undermine the acceptability of education. Such a ban negatively impacts on the right to manifest religion in public. This point was noted in the following observation of the HRC on France in 2008:

23. The Committee is concerned that both elementary and high school students are barred by Act No 2004/228 of 15 March 2004 from attending the public schools if they are wearing so-called ‘conspicuous’ religious symbols. The State party has made only limited provisions—through distance or computer-based learning—for students who feel that, as a matter of conscience and faith, they must wear a head covering such as a skullcap (or kippah), a headscarf (or hijab), or a turban. Thus, observant Jewish, Muslim, and Sikh students may be excluded from attending school in company with other French children. The Committee notes that respect for a public culture of laïcité would not seem to require forbidding wearing such common religious symbols. (articles 18 and 26)

The State party should re-examine Act No 2004/228 of 15 March 2004 in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one’s religion in public as well as private, as well as the guarantee of equality under article 26.

[9.75] The Grand Chamber (GC) of the European Court of Human Rights in the case of Sahin v Turkey considered, inter alia, the question of whether there was a violation of the applicant’s right to education arising out of insisting on wearing the Islamic

258 Ibid, 16.
headscarf. The applicant, a university medical student and a practising Muslim, who considered it her religious duty to wear the Islamic headscarf, was refused access to a lecture and written examination at Istanbul University because she refused to comply with a university circular forbidding admission of students to lectures who wore the headscarf. The applicant submitted that the ban imposed by the public authorities on wearing the Islamic headscarf clearly constituted interference with her right to education, which had resulted in her being refused access to oncology examinations on 12 March 1998, prevented from enrolling with the university’s administrative department on 20 March 1998 and being refused access to a lecture on neurology on 16 April 1998 and a written examination on public health on 10 June 1998. The applicant asked the Court to find that the decision to refuse [her] access to the University when wearing the Islamic headscarf amounts in the present case to a violation of her right to education, as guaranteed by Article 2 of Protocol No 1, read in the light of Articles 8, 9 and 10 of the Convention.

The first sentence of Article 2 of Protocol No 1 provides that ‘no one shall be denied the right to education’. The government claimed that the prohibition served the aims of the promotion of secularism and gender equality.

[9.76] The GC accepted that:

Although the provision makes no mention of higher education, there is nothing to suggest that it does not apply to all levels of education, including higher education.

More specifically, the GC stated that:

While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education.

Accordingly any institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No 1, since the right of access to such institutions is an inherent part of the right set out in that provision.

As to the content of the right to education and the scope of the obligation it imposes, the GC noted that in the Belgian linguistic case it stated:

The negative formulation indicates, as is confirmed by the ‘preparatory work’ . . . that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a ‘right’ does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State.

261 Ibid, para 143.
263 Ibid, para 134.
264 Ibid, para 136.
265 Ibid, para 141.
266 In the case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’, judgment (on the merits) of 23 July 1968, (1968) Series A, No 6, 31, para 3; 1 EHRR 252.
According to the GC:

Although that Article [Article 2 of Protocol No 1] does not impose a duty on the Contracting States to set up institutions of higher education, any State so doing will be under an obligation to afford an effective right of access to them.\textsuperscript{267}

Effective access to education includes a right for ‘everyone’ to benefit from existing educational facilities at a given time without discrimination. Implicit in the phrase ‘No person shall . . . ’ is the principle of equality of treatment of all citizens in the exercise of their right to education.\textsuperscript{268} Although the GC accepted that

the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education\textsuperscript{269}

the GC, by sixteen votes to one, held that ‘there has been no violation of the first sentence of Article 2 of Protocol No 1’ \textsuperscript{270} for several reasons. First, the right to education is not absolute, but may be subject to limitations; these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State’.\textsuperscript{271} Second, the right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules.\textsuperscript{272} Third, the restriction was foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order. The obvious purpose of the restriction was to preserve the secular character of educational institutions.\textsuperscript{273} Fourth, it would be unrealistic to imagine that the applicant, a medical student, was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction.\textsuperscript{274}

In Judge Tulkens’s dissenting opinion, she found that the majority in the GC ‘deprive[d] the applicant of that right [to education] for reasons which do not appear to me to be either relevant or sufficient’.\textsuperscript{275} Judge Tulkens noted that the applicant did not, on religious grounds, seek to be excused from certain activities or requested changes to be made to the university course for which she had enrolled as a student.\textsuperscript{276} She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the university and during the initial years of her university career, when she had been free to wear the headscarf without any problem.\textsuperscript{277} She also noted that a limitation will only be consistent with the right to education if there is ‘a

\textsuperscript{267} Ibid, para 137.
\textsuperscript{268} Ibid, para 152.
\textsuperscript{269} Ibid, para 157.
\textsuperscript{270} Ibid, para 162.
\textsuperscript{271} Ibid, para 154.
\textsuperscript{272} Ibid, para 156.
\textsuperscript{273} Ibid, para 158.
\textsuperscript{274} Ibid, para 160.
\textsuperscript{275} Tulkens Dissent, in Sahin v Turkey above n 260, para 15.
\textsuperscript{276} Ibid.
\textsuperscript{277} Ibid.
reasonable relationship of proportionality between the means employed and the aim pursued’. In this respect she noted that:

before refusing the applicant access to lectures and examinations, the authorities should have used other means either to encourage her (through mediation, for example) to remove her headscarf and pursue her studies, or to ensure that public order was maintained on the university premises if it was genuinely at risk. The fact of the matter is that no attempt was made to try measures that would have had a less drastic effect on the applicant’s right to education in the instant case. My second point is that it is common ground that by making the applicant’s pursuit of her studies conditional on removing the headscarf and by refusing her access to the university if she failed to comply with the requirements, the authorities forced the applicant to leave the country and complete her studies at the University of Vienna. She was thus left with no alternative.

Lastly, Judge Tulkens observed that the GC did not weigh up the competing interests, namely, on the one hand, the damage sustained by the applicant—who not only was deprived of any possibility of completing her studies in Turkey because of her religious convictions but also maintained that it was unlikely that she would be able to return to her country to practice her profession owing to the difficulties that existed there in obtaining recognition for foreign diplomas—and, on the other, the benefit to be gained by Turkish society from prohibiting the applicant from wearing the headscarf on the university premises. In these circumstances, Judge Tulkens considered that

by refusing the applicant access to the lectures and examinations that were part of the course at the Faculty of Medicine, she was de facto deprived of the right of access to the University and, consequently, of her right to education.

In her opinion, ‘it is ironic that young women should be deprived of that education on account of the headscarf’. Following the reasoning above, it is submitted that Judge Tulkens dissent remains very persuasive. The majority view excluded Sahin and other women who wore the Islamic headscarf from university education unless such women refrain from practising their religion. In the context of the ECHR, Sahin v Turkey is an important decision in as far as it stated clearly that the right not to be denied education applied to all levels of education, including higher education.

V. CONCLUSION

This chapter has examined the right to education as a human right in international law. The provisions of international and regional human rights instruments have been examined to assess the adequacy of a framework that applies to state obligations relating to the right to education. As shown above, the right to education is

278 Ibid, para 16.
279 Ibid, para 17.
280 Ibid.
281 Ibid, para 15.
282 Ibid, para 19.
well-established in existing widely ratified international treaties as a legally binding human right, and its realisation is fundamental to the enjoyment of all other human rights. As argued above, the right to education in international law obliges states to make (primary, fundamental, secondary and higher) education available, accessible, acceptable and adaptable. Significantly, the constitutions of more than 140 states protect some aspects of the right to education.283

[9.81] Unfortunately the gap between the availability and accessibility of education facilities between developed states and developing states is widening. The working conditions of teachers, especially in the world’s poorest states, remain miserable: most of the world’s 57 million teachers lack the resources and support they need to work effectively, a fact that affects the quality of education.284 Increasingly, education (including primary education) is not affordable to those who are disadvantaged, marginal and living in poverty. As a result, the enjoyment of the right to education, especially for girls and women, remains a distant goal for millions of individuals throughout the world, especially in sub-Saharan Africa and South and West Asia, where the goal is even becoming increasingly remote.285 Such an educational model, which excludes those who are unable to pay, is ‘a recipe for perpetuating poverty and inequality’ because it reproduces economic and social stratification.286 Even within some developed states there are ‘grave disparities which appear to prevail in the level of education depending on the social origin of the pupil’ and there are ‘regional differences in the quality of the education provided to children’.287 This calls for a renewal of governmental commitment and investment of appropriate human and financial resources, as well as international co-operation to achieve the right to education of ‘everyone’ in practice.

[9.82] In order not to undermine state efforts to respect, protect and fulfil the right to education, NSAs should co-operate effectively with states and pay greater attention to the realisation of the right to education (particularly by the marginalised and vulnerable groups) in their policies and programmes.288 This calls for education impact assessments before implementation of all policies and decisions that may have a detrimental effect on the availability of, and accessibility to, education. The UNESCO should play a greater role in this regard to ensure that the right to education is enjoyed at all times.

[9.83] The right to education—like all other human rights—brings a set of globally agreed norms or standards, which give rise to state obligations in relation to which effective and transparent monitoring and accountability mechanisms are required. This combination of globally legitimised norms, obligations, monitoring and accountability empowers disadvantaged and marginalised individuals and commu-
nities. This contributes to poverty reduction, equality, non-discrimination and participation. For this reason, it is essential to integrate the right to education throughout the activities of all states and NSAs at the local, national and international policy-making processes, strategies and programmes.
Conclusion: Towards a World Court of Human Rights

[10.01] This book has focused on the analysis of ESC rights in international law and considered some examples of the domestic implementation of these rights. It has been shown that states are obliged to ‘take steps’ to the ‘maximum of available resources’ with a view to achieving the progressive realisation of ESC rights. Such steps may be taken by each state individually or through ‘international assistance and cooperation’. In addition, states must guarantee that ESC rights will be exercised ‘without discrimination’. It has also been noted that violations of ESC rights are capable of judicial scrutiny and that this is essential to enhance their protection and enforcement. Given the fact that there is presently no international body to hand down legally binding judgments against states and other actors for violations of human rights, including ESC rights, is it desirable to consider the creation of a World Court of Human Rights? Or is this politically far too controversial and unrealistic?

[10.02] In 2003 Stefan Trechsel stated that:

Realistically speaking, the creation of a world court for human rights is, at present time, neither desirable, nor necessary, nor probable.\(^1\)

He advanced three main reasons for this view. First, he noted that states would be reluctant to agree to submit to such a court because they are aware of the fact that none of them are immune from allegations of human rights violations and that the process of being publicly accused of having violated human rights is disliked by states.\(^2\) Second, he noted that states adhering to a regional human rights system with regional human rights courts (currently the IACtHR, the ECtHR, and, more recently, the African Court of Justice and Human Rights\(^3\)) may see little purpose in joining an additional universal one.\(^4\) Third, he argued that, on a more practical level, an

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\(^2\) Ibid, para 14.

\(^3\) See the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/13(XI). The Protocol provides for the merger of the institutions of the African Court of Justice and African Court on Human and Peoples’ Rights, to be known as the African Court of Justice and Human Rights.

\(^4\) Trechsel, above n 1, para 15.
international court is a rather expensive affair and that it might be difficult to convince states to provide resources required for the effective functioning of the World Court.\footnote{Ibid, para 17.}

[10.03] Are the above reasons convincing? While these reasons should be taken into account in considering whether a World Court of Human Rights is desirable, they do not appear, in my view, to be an obstacle to the creation of such a court. Although it is true that states would be reluctant to be held accountable for human rights violations by an independent international judicial body, it is well known that all existing regional human rights systems decided to entrust the decision on cases of alleged human rights violations to regional human rights courts and that these courts have contributed significantly to the enhancement of international human rights law, which has, in turn, impacted upon international law in general. As noted by the President of the IACtHR, the ECtHR and the IACtHR have reached a common understanding on several human rights issues, for example:

That human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character of ordre public; that their terms are to be autonomously interpreted; that, in their application, one ought to ensure effective protection of the guaranteed rights . . . ; that the obligations enshrined therein do have an objective character and must be duly complied with by the States Parties; and that permissible restrictions (limitations and derogations) to the exercise of rights are to be restrictively interpreted.\footnote{Antonio AC Trindade, ‘The Merits of Coordination of International Courts on Human Rights’ (2004) 2 Journal of International Criminal Justice 309.}

Only the Asian region lacks a human rights court due to the general lack of a regional human rights system. This broader consensus indicates that states have already accepted that they can be held accountable by regional human rights courts for violations of human rights. In any case the decision whether or not to become a party to a statute creating the World Court of Human Rights, should one be adopted in the future, would be optional. Those states that might be reluctant to ratify would be free not to become parties.

[10.04] Regarding the second objection, most of the states parties to regional human rights treaties have also ratified the UN human rights treaties and accepted the competence of existing UN treaty-monitoring bodies, including the possibility of individual communications. In principle, therefore, it is reasonable to expect some states to accept the jurisdiction of the World Court of Human Rights. In addition, some of the existing regional human rights courts, in particular the ECtHR, do not consider cases alleging violations of ESC rights. Thus, a World Court with a potential to consider cases involving alleged breaches of all human rights, including ESC rights, would offer some extra protection and reinforce the indivisible and interdependent nature of all human rights. It would also demonstrate solidarity with states in other parts of the world beyond a particular region. While a permanent World Court of Human Rights would require adequate resources for its effective functioning, this would be a necessary cost in view of its advantages.
As noted in chapter 1, while the existing international human rights system with respect to ESC rights is generally rich in human rights norms and ideals, it remains wanting in political will and enforcement. In particular, until December 2008 when the UN General Assembly adopted the Optional Protocol to the ICESCR, the absence of a complaints mechanism at an international level has meant that normative standards in respect of ESC rights are not as developed as those in respect of civil and political rights because the CESCR has not been in a position to apply the ICESCR in specific cases beyond General Comments and Concluding Observations. In addition, victims of violations of ESC rights—individuals and groups of individuals—have not been able to bring communications before the Committee where either local remedies have been exhausted or they are not effective. This reduced status of ESC rights has disadvantaged vulnerable, marginal and disadvantaged groups such as women because:

Much of what is fundamental to economic and social rights is related to gender issues in society, real and fundamental social problems and challenges that are critical in the lives of most women, but which could easily be taken for granted by the small group of free men the 17th and 18th century philosophers had in mind when they discussed rights.7

It is useful to recall that human rights derive from the inherent dignity and worth of all persons, with the human person as the central subject and primary beneficiary of human rights.8 The notion of human rights implies that rights-holders must have some possibility to hold duty-bearers accountable for not living up to their legally binding human rights obligations. As noted by the CESCR, ‘rights and obligations demand accountability: unless supported by a system of accountability, they can become no more than window-dressing’.9 While the state holds the primary duty to respect, protect and fulfil human rights, as argued in chapter 3, other actors, including NSAs, bear obligations, which must be subject to scrutiny. Accordingly, the adequate protection of human rights, including ESC rights, needs accessible, transparent and effective accountability mechanisms to ensure that rights are respected, protected and fulfilled, and where they are not, that victims can find an effective remedy or redress against violations of human rights by states and NSAs.10 Such redress could take several forms, including a proper investigation into gross and systematic human rights violations; interim measures to prevent further violations; damages to the victims; restitution; rehabilitation; satisfaction; and guarantees of non-repetition.

How, then, can states and NSAs be held accountable for violations of ESC

8 See eg the Preambles to the UDHR, the ICESCR and the ICCPR. See also Art 5 of the 1993 Vienna Declaration and Programme of Action.
10 The right to effective remedy is laid down in Art UDHR, Art 8 which declares that: ‘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.’ See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, UN Doc A/RES/60/147 (16 December 2005).
rights at an international level? As a starting point in order to strengthen the current state reporting procedure, it is useful to ratify a complaints procedure as an Optional Protocol to the ICESCR to enable communications to be brought for and on behalf of individuals and groups dealing with specific claims of alleged violations of ESC rights. Among others, this would help to develop ESC rights jurisprudence in specific cases to further clarify the scope of several substantive rights protected in the Covenant. The most effective method to implement the right to an effective remedy on the international level is to allow direct access of the rights-holders to a fully independent human rights court with the power to render legally binding judgments and to grant adequate reparation to the victims of human rights violations. As observed in chapter 1, the existing system of monitoring state compliance with human rights obligations under the ICESCR based on a state reporting system is a fairly weak system of accountability. Even if this is supplemented by the Optional Protocol (providing for individual communications, inter-state communications and an inquiry procedure) it would still be weak because the relevant quasi-judicial body, the CESCR, would still lack the competence to hand down any legally binding decisions. In this context, the creation of an independent international human rights court to take over from treaty bodies the jurisdiction to decide on individual, group and inter-state complaints, as well as to initiate inquiry procedures, while strengthening the existing regional human rights courts, deserves serious consideration.

[10.08] How can such a World Court of Human Rights be established? Would it require any treaty amendments and/or abolition of the existing treaty bodies? Could this World Court exercise its jurisdiction against states as well as NSAs? The World Court of Human Rights could be created without any treaty amendment and without abolishing the existing treaty bodies unless they were replaced by a unified treaty body for examining state reports. Like the International Criminal Court, it could be based on a new treaty, the Statute of the World Court of Human Rights, with jurisdiction to hand down legally binding judgments against states parties. At the time of ratification, states should indicate which treaties the court may apply in cases brought against them. In addition to states, the Statute could provide for a possibility of NSAs willing to ratify the Statute to become parties and accept the jurisdiction of the Court in relation to human rights in the sphere of their respective influence. It could, therefore, help to resolve the question of accountability of NSAs and provide an independent judicial counterpart to the Human Rights Council as the main political human rights body of the UN, which could be charged with the supervision of the execution of the Court’s judgments. In this way, the creation of a World Court of Human Rights would strengthen the effectiveness of international human rights law.

13 Nowak, above n 11, 255.
Who should be entitled to bring applications alleging violations of human rights before the World Court? Given that this would be a human rights court to enforce rights of individuals and groups, it would be essential to provide for a possibility of applications brought before court by or on behalf of individuals and groups of individuals under the jurisdiction of a state party, since victims of human rights abuses have a much greater incentive to pursue those who commit human rights abuses and thus have shown a far greater interest in seeing that their human rights are enforced. In addition, provision could be made for inter-state communications to enable the court to receive and consider communications concerning state party claims that another state party is not fulfilling its human rights obligations under the applicable human rights treaties. Furthermore, provision could be made to allow NSAs including international organisations such as the European Union, African Union, or the Organisation of American States as well as NGOs such as Human Rights Watch, Amnesty International and the International Commission of Jurists.

In order to reduce the number of communications brought before the Court, a number of provisions relating to admissibility could be made. For example, that the Court shall not consider a communication unless it has ascertained that all available domestic and regional remedies have been exhausted; and that the author of the communication has suffered a clear disadvantage, unless the communication raises a serious issue of general importance. The Court could declare communications inadmissible on the basis of generally accepted grounds, such as those contained in Article 3 of the Optional Protocol to the ICESCR (Appendix B). These include when a communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; the facts that are the subject of the communication occurred prior to the entry into force of the Court’s jurisdiction for the state party concerned unless those facts continued after that date; the same matter has already been examined by the Court or has been or is being examined under another procedure of international investigation or settlement; the communication is incompatible with international human rights law; the communication is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; or it is an abuse of the right to submit a communication; or when it is anonymous or not in writing.

In sum, while international human rights law has protected ESC rights of everyone, it has not provided effective means to enforce those rights at an international level. The implication is that states have to do more at domestic and regional levels in order to translate ESC rights into realities. But where states fail to provide effective domestic remedies, international enforcement remains helpful for victims of human rights violations. Accordingly, the adoption of the Optional Protocol to the ICESCR providing for individual and group communications, among others, is a welcome development which deserves further support from all relevant actors. However, as noted above, the recommendations of the CESCR under the Protocol would not be legally binding. As such, states could afford to ignore them. Thus,

ultimately the Protocol should be seen as a step in a long journey towards the creation of a World Court of Human Rights with the powers to hand down legally binding judgments and thereby empower individuals and groups to enforce their human rights including ESC rights. But when would such a court ever be created?
Appendices

APPENDIX A
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Preamble
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
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 co-operation 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 advis-
ability 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 specialized
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 1 of
this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secre-
tary-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 acces-
sion.

**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 1 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.
APPENDIX B
OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Preamble

The States Parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures,

Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

Article 1
Competence of the Committee to receive and consider communications

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.

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2 UN Doc A/63/435, Annex. The Optional Protocol was adopted unanimously by the General Assembly on 10 December 2008, the 60th Anniversary of the Universal Declaration of Human Rights.
3 Resolution 217 A (III).
4 Resolution 2200 A (XXI), annex.
2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

**Article 2**

**Communications**

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

**Article 3**

**Admissibility**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.

2. The Committee shall declare a communication inadmissible when:

   (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;

   (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;

   (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

   (d) It is incompatible with the provisions of the Covenant;

   (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;

   (f) It is an abuse of the right to submit a communication; or when

   (g) It is anonymous or not in writing.

**Article 4**

**Communications not revealing a clear disadvantage**

The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

**Article 5**

**Interim measures**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.
Article 6
Transmission of the communication
1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7
Friendly settlement
1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

Article 8
Examination of communications
1. The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.
4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Article 9
Follow-up to the views of the Committee
1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party’s subsequent reports under articles 16 and 17 of the Covenant.
Article 10
Inter-State communications

1. A State Party to the present Protocol may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under the present article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under the present article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them. In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to
the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 11
Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.

2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15 of the present Protocol.

8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 12
Follow-up to the inquiry procedure

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 11 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 13
Protection measures

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.
Article 14
International assistance and cooperation

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.

2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.

3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

4. The provisions of the present article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

Article 15
Annual report

The Committee shall include in its annual report a summary of its activities under the present Protocol.

Article 16
Dissemination and information

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

Article 17
Signature, ratification and accession

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 18
Entry into force

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

Article 19
Amendments
1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 20
Denunciation
1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 2 and 10 or to any procedure initiated under article 11 before the effective date of denunciation.

Article 21
Notification by the Secretary-General
The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1, of the Covenant of the following particulars:
(a) Signatures, ratifications and accessions under the present Protocol;
(b) The date of entry into force of the present Protocol and of any amendment under article 19;
(c) Any denunciation under article 20.

Article 22
Official languages
1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.
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<td>21 Feb 1967</td>
<td>1 Apr 1970</td>
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<tr>
<td>Uzbekistan</td>
<td></td>
<td>28 Sep 1995 a</td>
</tr>
<tr>
<td>Venezuela (Bolivarian Republic of)</td>
<td>24 Jun 1969</td>
<td>10 May 1978</td>
</tr>
<tr>
<td>Viet Nam</td>
<td></td>
<td>24 Sep 1982 a</td>
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<tr>
<td>Yemen</td>
<td></td>
<td>9 Feb 1987 a</td>
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<tr>
<td>Zambia</td>
<td></td>
<td>10 Apr 1984 a</td>
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<tr>
<td>Zimbabwe</td>
<td></td>
<td>13 May 1991 a</td>
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</table>
### APPENDIX D

**A LIST OF THE GENERAL COMMENTS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

<table>
<thead>
<tr>
<th>General Comment</th>
<th>Subject</th>
<th>Year</th>
<th>UN Doc and Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>The right to social security (Art 9)</td>
<td>2008</td>
<td>E/C.12/GC/19 (4 February 2008)</td>
</tr>
<tr>
<td>18</td>
<td>The right to work (Art 6)</td>
<td>2005</td>
<td>E/C.12/GC/18 (6 February 2006)</td>
</tr>
<tr>
<td>17</td>
<td>The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art 15 (1)(c))</td>
<td>2005</td>
<td>E/C.12/GC/17 (12 January 2006)</td>
</tr>
<tr>
<td>16</td>
<td>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3)</td>
<td>2005</td>
<td>E/C.12/2005/4 (11 August 2005)</td>
</tr>
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<td>14</td>
<td>The right to the highest attainable standard of health (Art 12)</td>
<td>2000</td>
<td>E/C.12/2000/4 (11 August 2000)</td>
</tr>
<tr>
<td>13</td>
<td>The right to education (Art 13)</td>
<td>1999</td>
<td>E/C.12/1999/10 (8 December 1999)</td>
</tr>
<tr>
<td>12</td>
<td>The right to adequate food (Art 11)</td>
<td>1999</td>
<td>E/C.12/1999/5 (12 May 1999)</td>
</tr>
</tbody>
</table>

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6 The general comments of all UN human rights treaty bodies are compiled in the UN document HRI/GEN/1/Rev.7.
The relationship between economic sanctions and respect for economic, social and cultural rights

The right to adequate housing: forced evictions (Art 11 (1))

The economic, social and cultural rights of older persons

Persons with disabilities

The right to adequate housing

The nature of states parties’ obligations (Art 2 (1))

International technical assistance measures (Art 22)

Reporting by states parties


The statements adopted by the Committee appear in its annual reports to the Economic and Social Council (the symbol number of the report in which the statement is contained is indicated in brackets):

Preparatory activities relating to the World Conference on Human Rights: recommendations to the Preparatory Committee for the World Conference (Sixth Session; E/1992/23-E/C.12/1991/4, chap IX);

Statement to the World Conference on Human Rights on behalf of the Committee (Seventh Session; E/1993/22-E/C.12/1992/2, annex III);


Fourth World Conference on Women: Action for Equality, Development and Peace - Statement by the Committee (12th Session; E/1996/22-E/C.12/1995/18, annex VI);


Globalization and its impact on the enjoyment of economic, social and cultural rights (18th Session; E/1999/22-E/C.12/1998/26; chap VI, s A, para 515);

⁷ Available at http://www2.ohchr.org/english/bodies/cescr/statements.htm.

Statement of the Committee to the Convention to draft a Charter of Fundamental Rights of the European Union (22nd Session; E/2001/22-E/C.12/2000/21, annex VIII);


Statement of the Committee to the special session of the General Assembly for an overall review and appraisal of the implementation of the decisions taken at the United Nations Conference on Human Settlements (Habitat II) (New York, 6–8 June 2001) (25th Session; E/2002/22-E/C.12/2001/17, annex XI);

Statement of the Committee to the International Consultative Conference on School Education in Relation to Freedom of Religion and Belief, Tolerance and Non-Discrimination (27th Session; E/2002/22-E/C.12/2001/17, annex XII);

Statement of the Committee on human rights and intellectual property (27th Session; E/2002/22-E/C.12/2001/17, annex XIII);

Statement of the Committee to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit for Sustainable Development (Bali, Indonesia, 27 May–7 June 2002) (28th Session; E/2003/22-E/C.12/2002/13, annex VI);

The Millennium Development Goals and economic, social and cultural rights: joint statement by the Committee and the Special Rapporteurs on economic, social and cultural rights of the Commission on Human Rights (29th Session; E/2003/22-E/C.12/2002/13, annex VII);

Statement by the Committee: An evaluation of the obligation to take steps to the ‘Maximum of available resources’ under an optional protocol to the Covenant (38th session; E/C.12/2007/1, 10 May 2007).

APPENDIX E
LIMBURG PRINCIPLES ON THE IMPLEMENTATION
OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
MAASTRICHT, 2–6 JUNE 1986

Introduction

(i) A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant.

(ii) The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat, and the sponsoring organizations. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.

(iii) The participants agreed unanimously upon the following principles which they believe reflect the present state of international law, with the exception of certain recommendations indicated by the use of the verb “should” instead of “shall”.

PART 1: THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS

A. GENERAL OBSERVATIONS

1. Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.


3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

8 At the initiative of the Netherlands Government, these Principles have been issued as an official United Nations document (UN Doc E/CN.4/1987/17, Annex); they have also been published in (1987) 9 Human Rights Quarterly 122–35 and in the [1986] Review of the International Commission of Jurists No 37, December, 43–55.
4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna, 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice.

5. The experience of the relevant specialized agencies as well as of United Nations bodies and intergovernmental organizations, including the United Nations working groups and special rapporteurs in the field of human rights, should be taken into account in the implementation of the Covenant and in monitoring States parties’ achievements.

6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States parties must at all times act in good faith to fulfill the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.

10. States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

12. The supervision of compliance with the Covenant should be approached in a spirit of co-operation and dialogue. To this end, in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, hereinafter called ‘the Committee’, should analyze the causes and factors impeding the realization of the rights covered under the Covenant and, where possible indicate solutions. This approach should not preclude a finding, where the information available warrants such a conclusion, that a State party has failed to comply with its obligations under the Covenant.

13. All organs monitoring the Covenant should pay special attention to the principles of non-discrimination and equality before the law when assessing States parties’ compliance with the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant’s objectives.

B. INTERPRETATIVE PRINCIPLES SPECIFICALLY RELATING TO PART II OF THE COVENANT

Article 2(1): ‘to take steps . . . by all appropriate means, including particularly the adoption of legislation’
16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfill the obligations of the Covenant. It should be noted, however, that article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular state shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

‘to achieve progressively the full realization of the rights’

21. The obligation ‘to achieve progressively the full realization of the rights’ requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be affected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.

‘to the maximum of its available resources’

25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. ‘Its available resources’ refers to both the resources within a State and those available from the international community through international co-operation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

‘individually and through international assistance and co-operation, especially economic and technical’

29. International co-operation and assistance pursuant to the Charter of the United Nations (arts 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political.
30. International co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (cf art 28 Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant.

33. International co-operation and assistance shall be based on the sovereign equality of states and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international co-operation and assistance pursuant to article 2(1) the role of international organizations and the contribution of non-governmental organizations shall be kept in mind.

Article 2(2): Non-discrimination

35. Article 2(2) calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.

36. The grounds of discrimination mentioned in article 2(2) are not exhaustive.

37. Upon becoming a party to the Covenant states shall eliminate de jure discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

38. De facto discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

39. Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved.

40. Article 2(2) demands from States parties that they prohibit private persons and bodies from practising discrimination in any field of public life.

41. In the application of article 2(2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination as well as to the activities of the supervisory committee (CERD) under the said Convention.

Article 2(3): Non-nationals in developing countries

42. As a general rule the Covenant applies equally to nationals and non-nationals.

43. The purpose of article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2(3) should be interpreted narrowly.
44. This narrow interpretation of article 2(3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.

Article 3: Equal rights for men and women

45. In the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of the supervisory committee (CEDAW) under the said Convention.

Article 4: Limitations

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the state.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

'determined by law’

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on economic, social and cultural rights.

'promoting the general welfare’

52. This term shall be construed to mean furthering the wellbeing of the people as a whole.

'in a democratic society’

53. The expression ‘in a democratic society’ shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a state imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

'compatible with the nature of these rights’

56. The restriction ‘compatible with the nature of these rights’ requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

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10 Compare Siracusa Principles 19–21, above n 7, 5.
Article 5

57. Article 5(1) underlines the fact that there is no general, implied or residual right for a state to impose limitations beyond those which are specifically provided for in the law. None of the provisions in the law may be interpreted in such a way as to destroy ‘any of the rights or freedoms recognized’. In addition article 5 is intended to ensure that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

58. The purpose of article 5(2) is to ensure that no provision in the Covenant shall be interpreted to prejudice the provisions of domestic law or any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected. Neither shall article 5(2) be interpreted to restrict the exercise of any human right protected to a greater extent by national or international obligations accepted by the State party.

C. INTERPRETATIVE PRINCIPLES SPECIFICALLY RELATING TO PART III OF THE COVENANT

Article 8: ‘prescribed bylaw’

59. See the interpretative principles under the synonymous term ‘determined by law’ in article 4.

‘necessary in a democratic society’

60. In addition to the interpretative principles listed under article 4 concerning the phrase ‘in a democratic society’, article 8 imposes a greater restraint upon a State party which is exercising limitations on trade union rights. It requires that such a limitation is indeed necessary. The term ‘necessary’ implies that the limitation:

(a) responds to a pressing public or social need,
(b) pursues a legitimate aim, and
(c) is proportional to that aim.

61. Any assessment as to the necessity of a limitation shall be based upon objective considerations.

‘national security’

62. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

63. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

64. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may be invoked only when there exist adequate safeguards and effective remedies against abuse.

65. The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

66. The expression ‘public order (ordre public)’ as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (ordre public).

67. Public order (ordre public) shall be interpreted in the context of the purpose of the particular economic, social and cultural rights which are limited on this ground.

68. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

69. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

D. VIOLATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, inter alia, if:
   — it fails to take a step which it is required to take by the Covenant;
   — it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfillment of a right;
   — it fails to implement without delay a right which it is required by the Covenant to provide immediately;
   — it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
   — it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
   — it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeur;
   — it fails to submit reports as required under the Covenant.

73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.
PART II. CONSIDERATION OF STATES PARTIES' REPORTS AND INTERNATIONAL CO-OPERATION UNDER PART IV OF THE COVENANT

A. PREPARATION AND SUBMISSION OF REPORTS BY STATES PARTIES

74. The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

75. The preparation of reports under article 16 of the Covenant could be facilitated by the implementation of elements of the programme of advisory services and technical assistance as proposed by the chairmen of the main human rights supervisory organs in their 1984 report to the General Assembly (UN Doc. A 39/484).

76. States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft. The preparation of reports should also be an occasion to review the extent to which relevant national policies adequately reflect the scope and content of each right, and to specify the means by which it is to be realized.

77. States parties are encouraged to examine the possibility of involving non-governmental organizations in the preparation of their reports.

78. In reporting on legal steps taken to give effect to the Covenant, States parties should not merely describe any relevant legislative provisions. They should specify, as appropriate, the judicial remedies, administrative procedures and other measures they have adopted for enforcing those rights and the practice under those remedies and procedures.

79. Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-operation in order to increase the relevance and comparability of data submitted by States parties in their reports.

80. Where necessary, governments should conduct or commission studies to enable them to fill gaps in information regarding progress made and difficulties encountered in achieving the observance of the Covenant rights.

81. Reports by States parties should indicate the areas where more progress could be achieved through international co-operation and suggest economic and technical co-operation programmes that might be helpful toward that end.

82. In order to ensure a meaningful dialogue between the States parties and the organs assessing their compliance with the provisions of the Covenant, States parties should designate representatives who are fully familiar with the issues raised in the report.
B. ROLE OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

83. The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, its role is to consider States parties’ reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties. The decision of the Economic and Social Council to replace its sessional Working Group by a Committee of independent experts should lead to a more effective supervision of the implementation by States parties.

84. In order to enable it to discharge fully its responsibilities the Economic and Social Council should ensure that sufficient sessions are provided to the Committee. It is imperative that the necessary staff and facilities for the effective performance of the Committee’s functions be provided, in accordance with ECOSOC Resolution 1985/17.

85. In order to address the complexity of the substantive issues covered by the Covenant, the Committee might consider delegating certain tasks to its members. For example, drafting groups could be established to prepare preliminary formulations or recommendations of a general nature or summaries of the information received. Rapporteurs could be appointed to assist the work of the Committee in particular to prepare reports on specific topics and for that purpose consult States parties, specialized agencies and relevant experts and to draw up proposals regarding economic and technical assistance projects that could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations.

86. The Committee should, pursuant to articles 22 and 23 of the Covenant, explore with other organs of the United Nations, specialized agencies and other concerned organizations, the possibilities of taking additional international measures likely to contribute to the progressive implementation of the Covenant.

87. The Committee should reconsider the current six-year cycle of reporting in view of the delays which have led to simultaneous consideration of reports submitted under different phases of the cycle. The Committee should also review the guidelines for States parties to assist them in preparing reports and propose any necessary modifications.

88. The Committee should consider inviting States parties to comment on selected topics leading to a direct and sustained dialogue with the Committee.

89. The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, in so far as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant. The Committee should take due account of the indicators selected by or in the framework of the specialized agencies and draw upon or promote additional research, in consultation with the specialized agencies concerned, where gaps have been identified.

90. Whenever the Committee is not satisfied that the information provided by a State party is adequate for a meaningful assessment of progress achieved and difficulties encountered it should request supplementary information, specifying as necessary the precise issues or questions it would like the State party to address.

91. In preparing its reports under ECOSOC Resolution 1985/17, the Committee should consider, in addition to the ‘summary of its consideration of the reports’, highlighting thematic issues raised during its deliberations.
C. RELATIONS BETWEEN THE COMMITTEE AND SPECIALIZED AGENCIES, AND OTHER INTERNATIONAL ORGANS

92. The establishment of the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialized agencies and other international organs.

93. New arrangements under article 18 of the Covenant should be considered where they could enhance the contribution of the specialized agencies to the work of the Committee. Given that the working methods with regard to the implementation of economic, social and cultural rights vary from one specialized agency to another, flexibility is appropriate in making such arrangements under article 18.

94. It is essential for the proper supervision of the implementation of the Covenant under Part IV that a dialogue be developed between the specialized agencies and the Committee with respect to matters of common interest. In particular consultations should address the need for developing indicators for assessing compliance with the Covenant; drafting guidelines for the submission of reports by States parties; making arrangements for submission of reports by the specialized agencies under article 18. Consideration should also be given to any relevant procedures adopted in the agencies. Participation of their representatives in meetings of the Committee would be very valuable.

95. It would be useful if Committee members could visit specialized agencies concerned, learn through personal contact about programmes of the agencies relevant to the realization of the rights contained in the Covenant and discuss the possible areas of collaboration with those agencies.

96. Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realization of the rights recognized in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States parties to implement the Covenant and possibilities of technical and economic co-operation under article 22 of the Covenant.

97. The Commission on Human Rights, in addition to its responsibilities under article 19 of the Covenant, should take into account the work of the Committee in its consideration of items on its agenda relating to economic, social and cultural rights.

98. The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or other Covenant, there are several rights and provisions referred to in both instruments which are not susceptible to clear differentiation. Both Covenants moreover share common provisions and articles. It is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee.

99. Given the relevance of other international legal instruments to the Covenant, early consideration should be given by the Economic and Social Council to the need for developing effective consultative arrangements between the various supervisory bodies.

100. International and regional intergovernmental organizations concerned with the realization of economic, social and cultural rights are urged to develop measures, as appropriate, to promote the implementation of the Covenant.

101. As the Committee is a subsidiary organ of the Economic and Social Council, non-governmental organizations enjoying consultative status with the Economic and Social Council are
urged to attend and follow the meetings of the Committee and, when appropriate, to submit
information in accordance with ECOSOC Resolution 1296 (XLIV).

102. The Committee should develop, in co-operation with intergovernmental organizations and
non-governmental organizations as well as research institutes an agreed system for recording,
storing and making accessible case law and other interpretative material relating to interna-
tional instruments on economic, social and cultural rights.

103. As one of the measures recommended in article 23 it is recommended that seminars be
held periodically to review the work of the Committee and the progress made in the realization
of economic, social and cultural rights by States parties.
APPENDIX F
MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
MAASTRICHT, 22–26 JANUARY 1997

Introduction

On the occasion of the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter ‘the Limburg Principles’), a group of more than thirty experts met in Maastricht from 22–26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

I. The significance of economic, social and cultural rights

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world’s population. The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world’s population receiving 1.4% of the global income and the richest fifth 85%. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take

these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.

3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made firm commitments to address more effectively economic, social and cultural rights within the framework of seven UN World Summits conferences (1992–1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

5. As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles, the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter ‘the Covenant’). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

II. The meaning of violations of economic, social and cultural rights

Obligations to respect, protect and fulfil

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Obligations of conduct and of result

7. The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the
obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Margin of discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the ‘progressive realization’ provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

Minimum core obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [. . .]. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.’ Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

Availability of resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

State policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, 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.

Gender discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination Against Women. That standard requires the elimination
of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to comply

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through acts of omission

15. Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

III. Responsibility for violations

State responsibility

16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

Alien domination or occupation

17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

Acts by non-state entities

18. The obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

Acts by international organizations

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in
countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

**IV. Victims of violations**

*Individuals and groups*

20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

*Criminal sanctions*

21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalizing persons for being homeless. Nor should anyone be penalized for claiming their economic, social and cultural rights.

**V. Remedies and other responses to violations**

*Access to remedies*

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

*Adequate reparation*

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

*No official sanctioning of violations*

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aide in formulating any decisions relating to violations of economic, social and cultural rights.

*National institutions*

25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

*Domestic application of international instruments*

26. The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

*Impunity*

27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.
Role of the legal professions

28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.

Special rapporteurs

29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the UN Commission on Human Rights should appoint thematic Special Rapporteurs in this field.

New standards

30. In order to further clarify the contents of States obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

Optional protocols

31. The optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

Documenting and monitoring

32. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organizations. It is indispensable that the relevant international organizations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialized agencies and other international organizations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.
Appendix G

Montreal Principles on Women’s Economic, Social and Cultural Rights

The Montréal Principles were adopted at a meeting of experts held December 7 – 10, 2002 in Montréal, Canada. These principles are offered to guide the interpretation and implementation of the guarantees of non-discrimination and equal exercise and enjoyment of economic, social and cultural rights, found, inter alia, in Articles 3 and 2(2) of the International Covenant on Economic, Social and Cultural Rights, so that women can enjoy these rights fully and equally.

The participants at the Montreal meeting were: Sneh Aurora, Fareda Banda, Reem Bahdi, Stephanie Bernstein, Gwen Brodsky, Ariane Brunet, Christine Chinkin, Mary Shanthi Dairiam, Shelagh Day, Leilani Farha, Ruth Goba, Soledad Garcia Muñoz, Sara Hossain, Lucie Lamarche, Marianne Møllmann, Dianne Otto, Karrisha Pillay, Inés Romero, and Alison Symington. They unanimously agreed on the following principles.

A. Introduction

Sex or gender inequality is a problem experienced primarily by women. The systems and assumptions which cause women’s inequality in the enjoyment of economic social and cultural rights are often invisible because they are deeply embedded in social relations, both public and private, within all States. Acknowledging this systemic and entrenched discrimination is an essential step in implementing guarantees of non-discrimination and equality.

The terms ‘gender’ and ‘sex’ should both be understood as referring to the range of economic, social, cultural, historical, political and biological constructions of norms of behaviour that are considered appropriate for women and men. Implicit in such an understanding of ‘gender’ or ‘sex’ relations is that male and female norms have been constructed so as to privilege men and disadvantage women. ‘Gender’ and ‘sex’ discrimination can be used interchangeably, and both ‘gender inequality’ and ‘sex inequality’ are used to refer to the disadvantaged position of women. In order to reflect this understanding of women’s disadvantage, the Montréal Principles use the terms ‘discrimination against women’ and ‘women’s equality’ wherever possible.

Economic, social and cultural rights have a particular significance for women because as a group, women are disproportionately affected by poverty, and by social and cultural marginalization. Women’s poverty is a central manifestation, and a direct result of women’s lesser social, economic and political power. In turn, women’s poverty reinforces their subordination, and constrains their enjoyment of every other right.

The UN Charter mandates universal respect for, and observance of all human rights, including the right of women to equal exercise and enjoyment of their economic social and cultural rights. All regional and global instruments which set out economic social and cultural rights contain guarantees of non-discrimination and of equal enjoyment for women of these rights. An expression of this global consensus is found in Articles 3 and 2(2) of the International Covenant on Economic, Social and Cultural Rights.

In the political context of the early 21st century, it is particularly important to underline this long-standing international consensus regarding human rights primacy. The lack of priority

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accorded to securing universal enjoyment of economic, social and cultural rights hurts women disproportionately.

Women's particular vulnerability to social and economic deprivation is deepened further in conflict and post-conflict situations and when economic sanctions are imposed. The Committee on Economic, Social and Cultural Rights has stated that economic, social and cultural rights must be taken into account when imposing sanctions, and State Parties to the Covenant should take account of the suffering that such sanctions are likely to inflict on certain sectors, such as women. As the UN Security Council has recognized, peace and women's equality are inextricably linked.[3]

The inequality in the lives of women that is deeply embedded in history, tradition and culture[4] affects women's access to and enjoyment of economic, social and cultural rights. To ensure women's enjoyment of these rights, they must be implemented in a way that takes into account the context in which women live. For example, the traditional assignment to women and girls of the role of primary care-giver for children, older persons and the sick restricts women's freedom of movement and consequently their access to paid employment and education. The economic and social devaluation of the work, paid and unpaid, that women traditionally do from a very young age, contributes further to fixing women in a position of economic and social inequality. These factors diminish women's earning capacity and their economic autonomy, and contribute to the high rates of poverty among women worldwide. Traditional, historical, religious or cultural attitudes are also used to justify and perpetuate discrimination against women in the delivery of economic, social and cultural rights, including health services and education, by public and private agencies.

Inequality in women's enjoyment of economic, social and cultural rights contributes to their economic dependence, denial of personal autonomy and lack of empowerment. These in turn limit still further women's ability to participate in public life, including fora for economic, social, political and legal policy and decision-making. As the Committee on the Elimination of Discrimination against Women has noted: 'Policies developed and decisions made by men alone reflect only part of human experience and potential.'[5] Such policies and decisions are less likely to take account of gendered consequences, and the economic and social factors that affect women's lives.

Economic, social and cultural rights and civil and political rights are particularly indivisible and interconnected in the lives of women: inequality in economic, social and cultural rights undermines women's ability to enjoy their civil and political rights, which then limits their capacity to influence decision and policy-making in public life. Since '[a]ll human rights are universal, indivisible and interdependent and interrelated'[6] equality in civil and political rights[7] is undermined unless equality in the exercise and enjoyment of economic, social and cultural rights is secured.

It is especially important that women's entitlement to equal enjoyment of economic, social and cultural rights is acknowledged and re-emphasized in the current climate of neo-liberalism and economic globalization. Policies of privatization, economic austerity and structural adjustment have negative impacts for women.[8] For example, women are often the hardest hit by economic transition, financial crises and rising unemployment. In part, this is because women are relied upon to provide services that are cut such as caring for children, older persons and the sick, because women are often in insecure, part-time employment, they are commonly the first to lose their jobs. Furthermore, poverty can lead to a decrease in food intake among women and girls; girls are the first to drop out of schools; greater numbers of women are forced to migrate; and women are vulnerable to trafficking, violence and ill health. Economic and political insecurity provoke private and public backlash against women's rights that may be expressed through violence and articulated in the form of defending cultures and traditions.
To fully implement the rights set out in Articles 3 and 2(2) of the International Covenant on Economic Social and Cultural Rights, and similar guarantees in other human rights instruments, requires an understanding that focuses upon the subordination, stereotyping and structural disadvantage that women experience. It requires more than just formal legal recognition of equality between the sexes. It requires commitment by all responsible parties to take all necessary steps to address the actual material and social disadvantage of women.

B. Definition of Women’s Economic, Social and Cultural Rights

1. Women’s economic, social and cultural rights include, but are not limited to, the right to:

An adequate standard of living including:

- food and freedom from hunger;
- water;
- clothing;
- housing and freedom from forced eviction;
- continuous improvement of living conditions;

*See for example:* International Covenant on Economic, Social and Cultural Rights (ICESCR) article 11(1) and (2); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 14(2)(h); Universal Declaration of Human Rights (UDHR) article 25; Universal Declaration on Eradication of Hunger and Malnutrition (UDEHM) article 1; Declaration on the Right to Development (DRD) article 8(1); Committee on Economic, Social and Cultural Rights, General Comment 15 ("The right to water"); Additional Protocol to the American Convention on Economic, Social and Cultural Rights (San Salvador Protocol) article 12; Rome Declaration on Food Security; Istanbul Declaration and Program of Action on Human Settlements.[9]

The highest attainable standard of mental and physical health throughout a woman’s life cycle, including reproductive and sexual health and freedom;

*See for example:* ICESCR article 10(2) and 12; International Covenant on Civil and Political Rights (ICCPR) article 6(4) and 18(4); Declaration on the Elimination of Discrimination Against Women (DEDAW) article 9(e); CEDAW articles 10(h), 11(2)(a) and 12; UDHR article 25; Declaration on Population and Development para. 7; Beijing Declaration and Program of Action paras. 89, 94 and 96; Convention on the Rights of the Child (CRC) articles 24, 3(2); American Convention on Human Rights (ACHR) article 4(5); San Salvador Protocol article 10; Inter-American Convention on the Protection, Punishment and Eradication of Violence Against Women (ICPPEWAV) article 4(b); American Declaration on the Rights and Duties of Man (ADRDM) article xi; Declaration on Social Progress and Development (DSPD) article 11(b); DRD article 8(1); Maternity Protection Convention (MPC) article 3; African Charter on Human and Peoples’ Rights (African Charter) article 16; Committee on the Elimination of Discrimination Against Women, General Comment 24.[10]

Equal inheritance and ownership of land and property;

*See for example:* ICESCR article 11(1); CEDAW articles 13(b), 14(20)(e) and (g), 15(2) and 16(h); DEDAW article 6(1)(a); DRD article 8(1); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) articles 5(d)(v) and 5(d)(vi); UDHR article 17; ACHR article 21; African Charter, article 14; Beijing Declaration and Program of Action, para. 61(b), 62, and 63.[11]

Social security, social protection, social insurance and social services, including special assistance before, during and after childbirth;
See for example: ICESCR articles 9 and 10(2); CERD article 5(e)(iv); DEDAW article 10(1)(c); CEDAW articles 11(1)(e), 11(2)(a), and 14(2)(c); MPC articles 4 and 6; UDHR article 22, 23(1) and 25(1); San Salvador Protocol articles 9(2) and 15 (3)(a); ADRDM article xvi; ICCPEVAW, article 8; CRC article 28. [12]

Training and education;

See for example: ICESCR articles 6 and 13; CEDAW articles 10 and 14(2)(d); DEDAW article 9; UDEHM article 4; CERD article 5(e)(v); UDHR article 26; ACHR article 17(1); ICPPEVAW article 6(b); San Salvador Protocol article 13(1)(2) and (3); CRC article 28; Convention Against Discrimination in Education article 1; ADRDM article xii; Beijing Declaration and Program of Action para. 69. [13]

Freely chosen work as well as just and favourable conditions of work including fair wages, equal remuneration and protection from sexual harassment and sex discrimination at work;

See for example: ICESCR articles 6 (1), 6(2) and 7; CEDAW articles 11(1)(c), (f); CERD article 5(e); ICCPR article 8(3)(a); DEDAW article 10(1)(a); Abolition of Forced Labour Convention (AFLC) article 1; DSPD article 6; UDHR articles 4 and 23; Declaration on the Elimination of Violence against Women (DEVAW) article 3; ACHR article 6(2); African Charter articles 5 and 15; ADRM, article xiv; San Salvador Protocol articles 6 and 7; Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) article 4(2); MPA article 8; Equal Remuneration Convention (ERC) article 1; Convention on Employment Policy articles 1 (1) and (2); ILO Declaration on Fundamental Principles and Rights at Work; ICPPEVAW, article 2(b). [14]

Form and join trade unions;

See for example: ICESCR article 8; ICCPR article 22; CERD article 5(e)(ii); DSPD article 10; San Salvador Protocol article 8; ILO Convention on Freedom of Association and Protection of the Right to Organize. [15]

Protection from economic exploitation;

See for example: ICESCR articles 8 and 10 (3); ICCPR article 8; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery article 1(b); CRC article 32; ILO Convention on Worst Forms of Child Labour; UDHR article 4; ACHR article 6. [16]

Protection from coerced and uninformed marriage;

See for example: ICESCR article 10(1); CEDAW article 16(1)(b); DEDAW article 6(2)(a); ICCPR article 23(3); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (Marriage Convention) article 1; CERD article 5(d)(iv); UDHR article 16(2); ACHR article 17(3). [17]

A clean and healthy environment;

See for example: ICESCR article 12(2)(b); African Charter article 24. [18]

Participate in cultural life;

See for example: ICESCR article 15(1)(a); CRC article 29(1)(c); CEDAW article 13(c); ICCPR article 27; DEVAW article 3; CERD article 5(e)(vi); UDHR article 27; ACHR article 26; African Charter articles 17(2) and 22(1); ICPPEVAW article 5; San Salvador Protocol articles 14(1)(a) and (b). [19]

Claim and enjoy the benefits of patents and intellectual property;

See for example: ICESCR article 15(1)(c); San Salvador Protocol article 14(c). [20]

Nationality; and to bestow nationality on children;
2. Indivisibility and Interdependence of Rights

Economic, social and cultural rights and civil and political rights are indivisible, interdependent and interconnected. In the real lives of women, it is difficult to separate these rights. For example, a woman's right to life is threatened as much by the deprivation of economic, social and cultural rights as by the deprivation of civil and political rights.

3. No Justification for Restriction

Nothing in the wording or substance of any international or regional human rights document, policy, practice or custom can be used to justify restricting women's equal enjoyment and exercise of economic, social and cultural rights.

4. Non-Retrogression

International law entitles women to claim the highest level of available protection for their rights that is afforded by international human rights instruments or national law, policy or custom.

C. Principles of Equality and Non-discrimination

5. Women's Sex and Gender Inequality

Unequal power relations between women and men must be acknowledged and changed, and the entrenched disadvantage caused by this power imbalance must be addressed, if women are to achieve the equal exercise and equal enjoyment of their economic, social and cultural rights.

6. Non-Discrimination and Equality

Legal guarantees of non-discrimination based on sex and legal guarantees of equality for women, though expressed differently, are articulations of the same obligation. This obligation is not confined to negative restraints on States and third parties because negative restraints, alone, do not successfully eliminate discrimination against women. Both the right to non-discrimination and the right to equality mandate measures that prevent harmful conduct and positive steps to address the long-standing disadvantage of women.

7. Definition of Sex Discrimination

Sex or gender discrimination occurs when intentionally or unintentionally, a law, program or policy, or an act or a failure to act, has the effect or purpose of impairing or nullifying the recognition, exercise or enjoyment by women of their economic, social and cultural rights.

8. Forms of Sex Discrimination

Sex or gender discrimination is experienced as discrimination because of being a woman. It can also be experienced as discrimination on the basis of marital status, for example, as discrimination against wives, co-habitees, unmarried women, divorced women or widows, or on the basis
of family status, family responsibility, pregnancy, reproductive capacity, or sexuality. Sexual harassment of women and violence against women must also be understood as forms of sex discrimination.

9. Substantive Equality

Economic, social and cultural rights must be interpreted and implemented in a manner that ensures to women substantively equal exercise and enjoyment of their rights. Substantively equal enjoyment of rights cannot be achieved through the mere passage of laws or promulgation of policies that are gender-neutral on their face. Gender neutral laws and policies can perpetuate sex inequality because they do not take into account the economic and social disadvantage of women; they may therefore simply maintain the status quo. De jure equality does not, by itself, provide de facto equality. De facto, or substantive equality, requires that rights be interpreted, and that policies and programs - through which rights are implemented - be designed in ways that take women's socially constructed disadvantage into account, that secure for women the equal benefit, in real terms, of laws and measures, and that provide equality for women in their material conditions. The adequacy of conduct undertaken to implement rights must always be assessed against the background of women's actual conditions and evaluated in the light of the effects of policies, laws and practices on those conditions.

10. Intersectionality

Many women encounter distinct forms of discrimination due to the intersection of sex with such factors as: race, language, ethnicity, culture, religion, disability, or socio-economic class. Indigenous women, migrant women, displaced women, and non-national or refugee women experience distinct forms of discrimination because of the intersection of their sex and race, or their sex and citizenship status. Women may also confront particular forms of discrimination due to their age or occupation; family status, as single mothers or widows; health status, such as living with HIV/AIDS; sexuality, such as being lesbian; or because they are engaged in prostitution. Intersecting discrimination can determine the form or nature that discrimination takes, the circumstances in which it occurs, the consequences of the discrimination, and the availability of appropriate remedies. To ensure that all women enjoy the benefits of their economic, social and cultural rights, specific measures are needed to address the ways in which women are differently affected in their enjoyment of a right as a result of the intersection of discrimination based on sex with discrimination based on other characteristics.

11. Autonomy

Women are entitled to exercise and enjoy their economic social and cultural rights as autonomous persons. They cannot enjoy their economic, social and cultural rights equally if they are treated as inferior to men or as adjuncts of, or dependents of men, whether those men are family members or others. In turn, economic, social and cultural rights must be interpreted and applied in ways that recognize women's right to full legal personhood and autonomy.

D. Impediments to Women’s Equal Enjoyment of Economic, Social and Cultural Rights

12. Impediments

Structural impediments to women's equal exercise and enjoyment of economic social and cultural rights include, but are not limited to: (i) social norms, customs and traditions that legitimize women's inequality; (ii) failure to take account of women's disadvantage or their distinct experiences when designing laws or measures to implement economic, social and cultural rights; (iii) restrictions on access to legal or administrative bodies where remedies for rights violations may be sought; (iv) women's under-representation in decision-making processes; (v) women's unequal status in their families; (vi) the failure to recognize women's unremunerated
work, and to encourage the fairer distribution between women and men of family and community-supporting labour; (vii) the neglect of women’s economic, social and cultural rights in conflict and post-conflict situations; and (viii) the gender-differentiated effects of economic globalization. These impediments must be addressed and eliminated to ensure that measures adopted to implement economic, social and cultural rights will benefit women equally.

E. Legal Obligations

13. Justiciability and Allocation of Resources

Women’s rights to non-discrimination and equality are enforceable by judicial bodies and administrative tribunals in all circumstances, including when they raise issues of government allocation of resources for the realization of economic, social and cultural rights.

14. Immediate Obligation

The right to non-discrimination and to the equal exercise and enjoyment of economic, social and cultural rights imposes an immediate obligation on States. This obligation is not subject to progressive realization. The obligation is also an immediate one for inter-governmental bodies and quasi-State actors or other groups exercising control over territory or resources.

15. Respect, Protect, Fulfil and Promote

Women’s right to non-discrimination and equality imposes four specific obligations on States: the obligations to respect, protect, fulfill and promote women’s exercise and enjoyment of economic, social and cultural rights. These four obligations are indivisible and interdependent and must be implemented by States simultaneously and immediately.

16. Range of Conduct

The obligations to respect, protect, fulfill and promote women’s economic, social and cultural rights require a range of conduct from States. States are obliged to both refrain from acting harmfully and to take positive steps to advance women’s equality. States are required to repeal laws and policies that discriminate either directly or indirectly. They are also required to guarantee women’s rights to non-discrimination and to the equal exercise and enjoyment of economic, social and cultural rights in appropriate domestic laws, such as national constitutions and human rights legislation, and in the interpretation of customary and personal laws. States are obliged to regulate the conduct of third parties, such as employers, landlords, and service providers. States are also obliged to design and implement policies and programmes to give long-term and full effect to women’s economic, social and cultural rights. These may include the adoption of temporary special measures to accelerate women’s equal enjoyment of their rights, gender audits, and gender-specific allocation of resources.

17. Rights-claiming Mechanisms

States must ensure that women’s rights to non-discrimination and to the equal exercise and enjoyment of economic, social and cultural rights can be effectively interpreted and applied by judicial and quasi-judicial bodies that are independent from government. Further, States must ensure that the right to be free from discrimination and the right to equality are interpreted substantively, rather than formally, by judicial and quasi-judicial bodies, so as to foster the equal enjoyment by women of economic, social and cultural rights. States, when appearing as parties or intervenors before judicial or quasi-judicial bodies must advocate for the interpretation and application of rights that will ensure women’s substantive enjoyment of them.
18. Maximum Available Resources

States must use the maximum available resources to respect, protect, fulfill and promote economic, social and cultural rights. The maximum available resources must be distributed in a manner that provides substantively equal exercise and enjoyment of economic, social and cultural rights by women.

19. Trade, Trade Agreements and International Financial Institutions

States have a non-derogable obligation to guarantee women’s equal enjoyment of their economic, social and cultural rights in their actions and decision-making in the context of trade, trade agreements, and agreements with, or participation in, international and regional financial institutions.

20. Due Diligence

All States when participating in international financial institutions, trade agreements, or aid and development programs shall apply a due diligence test to assess, foresee and prevent any adverse consequences of trade agreements, structural adjustment programs, development and humanitarian assistance, and other economic and social policies on women’s economic, social and cultural rights. Where harm is caused by such agreements or programs, the responsible States and institutions shall implement compensatory measures. This applies at national, regional and international levels, in public and private spheres of life.

21. Provision for Basic Needs

In the context of scarcity, States shall make sure that the basic needs of women are satisfied, especially in regard to health care, access to potable water, sanitation services, housing, education, energy and social protection. This obligation prevails as well in times of conflict and post-conflict. States and other inter-governmental bodies must ensure that services are provided in a manner that does not discriminate against women, and that ensures women’s equality.

22. Privatization and Regulation of Third Parties

Where services are partially or wholly privatized, at a minimum States are required to adopt an effective regulatory system to monitor the distribution of such services and service providers must work in cooperation with the State to ensure the substantively equal enjoyment of services by women in fulfilment of the State’s international legal obligations.

23. Regulation of Transnational Corporations and Third Parties

States have an obligation to require transnational corporations and other commercial entities, when they are providing services or programs related to the enjoyment of economic, social and cultural rights, to ensure that women benefit equally. States also have an obligation to prevent transnational corporations and other commercial entities from violating women’s economic, social and cultural rights on their territory. When such rights are violated, States have a duty to provide women with effective remedies.

24. Recognition of Unremunerated Work

States must adopt specific measures to recognize the economic and social contribution of the women who carry out unremunerated activities. States must also ensure that women or particular groups of women do not carry out a disproportionately large part of the unremunerated and devalued workload of families and communities, including domestic labour and the care of children, sick, and older persons.
25. Participation
States and inter-governmental bodies must ensure that women can and do participate fully in the formulation, development, implementation and monitoring of economic, social and cultural programs and policies. They must also ensure the full participation of women in the formulation, development, implementation and monitoring of specific strategies, plans and policies that aim to eliminate their gender specific disadvantages. This may require States and intergovernmental bodies to ensure women’s participation in decision-making where non-State actors provide programs or services that are related to the enjoyment of economic, social and cultural rights.

F. Violations

26. Commission and Omission
Violations of women’s economic, social and cultural rights can occur through acts of commission or omission by States and other actors who are insufficiently regulated by the State, or not regulated by the State.

27. Failure to Correct
Where the economic, social and cultural rights of women, or particular groups of women, have been violated, States are obliged to adopt concrete measures designed to ensure the immediate enjoyment of these rights by the affected women.

28. Undermining the Rights
Undermining women’s enjoyment or exercise of their economic, social and cultural rights constitutes a violation. A State undermines these rights by: adopting overly restrictive interpretations of rights-conferring provisions; taking the position that economic, social and cultural rights are not justiciable; restricting access by women, and organizations which represent them, to judicial and quasi-judicial bodies; implementing women’s equal enjoyment progressively rather than immediately; and, failing to maintain adequately funded and effective enforcement institutions.

29. Retrogressive Measures
The adoption of retrogressive measures that further reduce women’s access to or enjoyment of their economic, social or cultural rights constitutes a violation.

30. Unwillingness to Use Resources
A State which is unwilling to use the maximum of its available resources for the realization of economic, social and cultural rights violates women’s economic, social and cultural rights.

G. Mechanisms and Remedies

31. Judicial and Quasi-Judicial Mechanisms
States must establish and maintain effective mechanisms for fully claiming and enforcing women’s economic, social and cultural rights, including independent courts and tribunals, administrative authorities and national human rights and women’s commissions. Judges and other adjudicators must be provided with adequate training regarding women’s rights to equality and to the equal enjoyment of their economic, social and cultural rights. States must also ratify relevant international and regional treaties that allow international remedies and communication procedures without reservations that have the effect of undermining women’s equal exercise and enjoyment of their economic, social and cultural rights.
32. Policy Mechanisms

States are required to ensure that there is a national system of institutions and mechanisms, including national human rights institutions, commissions, and ombuds offices, which will support the development of strategies, plans and policies specifically designed to guarantee women's equal exercise and enjoyment of their economic, social and cultural rights. This system must guarantee the effective inclusion of women's perspectives in the design and application of public policies in economic, social and cultural areas.

33. Resources for Mechanisms

States must provide sufficient financial and physical resources to the institutions and mechanisms that have the responsibility to implement and enforce women's economic, social and cultural rights in order to ensure their effectiveness and accessibility.

34. Access

States must remove any obstacles that prevent women or certain groups of women from accessing institutions and mechanisms which enforce and implement women's economic social and cultural rights and provide women with information regarding how to access them. States must also adopt measures, such as legal aid, to facilitate women's access to institutions and mechanisms that can implement and enforce women's economic, social and cultural rights.

35. Standards, Data and Review

States must continuously review and revise the implementation and enforcement of women's economic, social and cultural rights by developing gender-sensitive standards, methodologies, criteria, targets and indicators, as well as tools for gender disaggregation of statistical data and for budgetary analysis to specifically assess women's substantively equal enjoyment of their economic, social and cultural rights.

36. Remedies

In the event of an infringement of the right to non-discrimination or the right to equal enjoyment of women's economic and cultural rights, States are required to provide one or more of the following non-exhaustive list of remedies: compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes, prevention programmes, revised policies, benchmarks and implementation programmes, and other effective and appropriate remedies. The State has a related obligation to ensure that the appropriate remedy is both ordered and effectively implemented.

\[1\]UN Charter Articles 55, 56, and 103.
\[2\]International Covenant on Economic Social and Cultural Rights, Articles 2(2) and 3; American Convention on Human Rights, Article 1(1); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 3; European Convention for the Protection of Human Rights and Fundamental Freedoms (read in conjunction with its Protocols), Article 14; African Charter on Human and Peoples' Rights, Article 2; Cairo Declaration on Human Rights in Islam, Article 1.
\[4\]As identified by the Human Rights Committee at para 5 in its General Comment 28: Equality of rights between men and women (article 3). 29/03/2000. CCPR/C/21/Rev.1/Add.10.
\[7\]As reiterated in HRC General Comment 28, supra note 4.


Appendix G: Montreal Principles on Women’s ESC Rights


APPENDIX H
DECLARATIONS AND RESERVATIONS TO THE
ICESCR AND OBJECTIONS
(AS OF 5 JANUARY 2009)

Unless otherwise indicated, the declarations and reservations (available at http://www2.ohchr.org/english/bodies/ratification/3.htm) were made upon ratification, accession or succession.

Afghanistan
Declaration:
The presiding body of the Revolutionary Council of the Democratic Republic of Afghanistan declares that the provisions of paragraphs 1 and 3 of article 48 of the International Covenant on Civil and Political Rights and provisions of paragraphs 1 and 3 of article 26 of the International Covenant on Economic, Social and Cultural Rights, according to which some countries cannot join the aforesaid Covenants, contradicts the International character of the aforesaid Treaties. Therefore, according to the equal rights of all States to sovereignty, both Covenants should be left open for the purpose of the participation of all States.

Algeria
Interpretative declarations:
1. The Algerian Government interprets article 1, which is common to the two Covenants, as in no case impairing the inalienable right of all peoples to self-determination and to control over their natural wealth and resources.

It further considers that the maintenance of the State of dependence of certain territories referred to in article 1, paragraph 3 of the two Covenants and in article 14 of the Covenant on Economic, Social and Cultural Rights is contrary to the purposes and principles of the United Nations, to the Charter of the Organization and to the Declaration on the Granting of Independence to Colonial Countries and Peoples [General Assembly resolution 1514 (XV)].

2. The Algerian Government interprets the provisions of article 8 of the Covenant on Economic, Social and Cultural Rights and article 22 of the Covenant on Civil and Political Rights as making the law the framework for action by the State with respect to the organization and exercise of the right to organize.

3. The Algerian Government considers that the provisions of article 13, paragraphs 3 and 4, of the Covenant on Economic, Social and Cultural Rights can in no case impair its right freely to organize its educational system.

4. The Algerian Government interprets the provisions of article 23, paragraph 4, of the Covenant on Civil and Political Rights regarding the rights and responsibilities of spouses as to marriage, during marriage and at its dissolution as in no way impairing the essential foundations of the Algerian legal system.
Bangladesh
Declarations:

‘Article 1:
It is the understanding of the Government of the People’s Republic of Bangladesh that the words “the right of self-determination of Peoples” appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation and similar situations.

Articles 2 and 3:
The Government of the People’s Republic of Bangladesh will implement articles 2 and 3 in so far as they relate to equality between man and woman, in accordance with the relevant provisions of its Constitution and in particular, in respect to certain aspects of economic rights viz. law of inheritance.

Articles 7 and 8:
The Government of the People’s Republic of Bangladesh will apply articles 7 and 8 under the conditions and in conformity with the procedures established in the Constitution and the relevant legislation of Bangladesh.

Articles 10 and 13:
While the Government of the People’s Republic of Bangladesh accepts the provisions embodied in articles 10 and 13 of the Covenant in principle, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country.’

Barbados

‘The Government of Barbados states that it reserves the right to postpone-

‘(a) The application of sub-paragraph (a) (1) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work;

‘(b) The application of article 10 (2) in so far as it relates to the special protection to be accorded mothers during a reasonable period during and after childbirth; and

‘(c) The application of article 13 (2) (a) of the Covenant, in so far as it relates to primary education; since, while the Barbados Government fully accepts the principles embodied in the same articles and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation are such that full application of the principles in question cannot be guaranteed at this stage.’

Belarus

Belgium
Interpretative declarations:

1. With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.
2. With respect to article 2, paragraph 3, the Belgian Government understands that this provision cannot infringe the principle of fair compensation in the event of expropriation or nationalization.

**Bulgaria**

‘The People’s Republic of Bulgaria deems it necessary to underline that the provisions of article 48, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights, under which a number of States are deprived of the opportunity to become parties to the Covenants, are of a discriminatory nature. These provisions are inconsistent with the very nature of the Covenants, which are universal in character and should be open for accession by all States. In accordance with the principle of sovereign equality, no State has the right to bar other States from becoming parties to a covenant of this kind.’

**China**

Statement made upon signature and confirmed upon ratification:

The signature that the Taiwan authorities affixed, by usurping the name of ‘China’, to the [said Covenant] on 5 October 1967, is illegal and null and void.

Statement made upon ratification:

In accordance with the Decision made by the Standing Committee of the Ninth National People’s Congress of the People’s Republic of China at its Twentieth Session, the President of the People’s Republic of China hereby ratifies *The International Covenant on Economic, Social and Cultural Rights*, which was signed by Mr. Qin Huasun on behalf of the People’s Republic of China on 27 October 1997, and declares the following:

1. The application of Article 8.1 (a) of the Covenant to the People’s Republic of China shall be consistent with the relevant provisions of the *Constitution of the People’s Republic of China*, *Trade Union Law of the People’s Republic of China* and *Labor Law of the People’s Republic of China*;

2. In accordance with the official notes addressed to the Secretary-General of the United Nations by the Permanent Representative of the People’s Republic of China to the United Nations on 20 June 1997 and 2 December 1999 respectively, the *International Covenant on Economic, Social and Cultural Rights* shall be applicable to the Hong Kong Special Administrative Region of the People’s Republic of China and the Macao Special Administrative Region of the People’s Republic of China and shall, pursuant to the provisions of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* and the *Basic Law of the Macao Special Administrative Region of the People’s Republic of China*, be implemented through the respective laws of the two special administrative regions.

**Congo**

**Czech Republic**

**Denmark**

‘The Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of article 7(d) on remuneration for public holidays.’
Egypt

Declaration:

...Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it...

France

Declarations:

(1) The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (especially Articles 1 and 2 thereof), its obligations under the Charter will prevail.

(2) The Government of the Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits.

(3) The Government of the Republic declares that it will implement the provisions of article 8 in respect of the right to strike in conformity with article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter.

Guinea

In accordance with the principle whereby all States whose policies are guided by the purposes and principles of the Charter of the United Nations are entitled to become parties to covenants affecting the interests of the international community, the Government of the Republic of Guinea considers that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are contrary to the principle of the universality of international treaties and the democratization of international relations.

The Government of the Republic of Guinea likewise considers that article 1, paragraph 3, and the provisions of article 14 of that instrument are contrary to the provisions of the Charter of the United Nations, in general, and United Nations resolutions on the granting of independence to colonial countries and peoples, in particular.

The above provisions are contrary to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States contained in General Assembly resolution 2625 (XXV), pursuant to which every State has the duty to promote realization of the principle of equal rights and self-determination of peoples in order to put an end to colonialism.

Hungary

Upon signature:

‘The Government of the Hungarian People’s Republic declares that paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and paragraph 1 of article 48 of the International Covenant on Civil and Political Rights according to which certain States may not become signatories to the said Covenants are of a discriminatory nature and are contrary to the basic principle of international law that all States are entitled to become signatories to general multilateral treaties. These discriminatory provisions are incompatible with the objectives and purposes of the Covenants.’

Upon ratification:
‘The Presidential Council of the Hungarian People’s Republic declares that the provisions of article 48, paragraphs 1 and 3, of [...] the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the universal character of the Covenants. It follows from the principle of sovereign equality of States that the Covenants should be open for participation by all States without any discrimination or limitation.’

India
Declarations:
‘I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words ‘the right of self-determination’ appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation—which is the essence of national integrity.

‘II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.

‘III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners.

‘IV. With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12,19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.

‘V. With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16(4) of the Constitution of India.’

Indonesia
Declaration:
‘With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights, the Government of [the] Republic of Indonesia declares that, consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993, the words “the right of self-determination” appearing in this article do not apply to a section of people within a sovereign independent state and can not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.’
Iraq

Upon signature and confirmed upon ratification:

‘The entry of the Republic of Iraq as a party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights shall in no way signify recognition of Israel nor shall it entail any obligation towards Israel under the said two Covenants.’

‘The entry of the Republic of Iraq as a party to the above two Covenants shall not constitute entry by it as a party to the Optional Protocol to the International Covenant on Civil and Political Rights.’

Upon ratification:

‘Ratification by Iraq . . . shall in no way signify recognition of Israel nor shall it be conducive to entry with her into such dealings as are regulated by the said [Covenant].’

Ireland

Reservations:

‘Article 2, paragraph 2
In the context of Government policy to foster, promote and encourage the use of the Irish language by all appropriate means, Ireland reserves the right to require, or give favourable consideration to, a knowledge of the Irish language for certain occupations.

Article 13, paragraph 2 (a)
Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State’s obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their s provided that these minimum standards are observed.”

Japan

Reservations and declarations made upon signature and confirmed upon ratification:

‘1. In applying the provisions of paragraph (d) of article 7 of the International Covenant on Economic, Social and Cultural Rights, Japan reserves the right not to be bound by “remuneration for public holidays” referred to in the said provisions.

‘2. Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of article 8 of the International Covenant on Economic, Social and Cultural Rights, except in relation to the sectors in which the right referred to in the said provisions is accorded in accordance with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan.

‘3. In applying the provisions of sub-paragraphs (b) and (c) of paragraph 2 of article 13 of the International Covenant on Economic, Social and Cultural Rights, Japan reserves the right not to be bound by “in particular by the progressive introduction of free education” referred to in the said provisions.

‘4. Recalling the position taken by the Government of Japan, when ratifying the Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise, that `the police’ referred to in article 9 of the said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that “members of the police” referred to in paragraph 2 of article 8 of the International Covenant on Economic, Social and Cultural Rights as
well as in paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan.’

Kenya

‘While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation.’

Kuwait

Interpretative declaration regarding article 2, paragraph 2, and article 3:
Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.

Interpretative declaration regarding article 9:
The Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis.

Reservation concerning article 8, paragraph 1 (d):
The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1 (d).

Libyan Arab Jamahiriya

‘The acceptance and the accession to this Covenant by the Libyan Arab Republic shall in no way signify a recognition of Israel or be conducive to entry by the Libyan Arab Republic into such dealings with Israel as are regulated by the Covenant.’

Madagascar

The Government of Madagascar states that it reserves the right to postpone the application of article 13, paragraph 2, of the Covenant, more particularly in so far as relates to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.

Malta

‘Article 13—The Government of Malta declares that it is in favour of upholding the principle affirmed in the words “and to ensure the religious and moral education of their children in conformity with their own convictions”. However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta.’
Mexico

Interpretative statement:

The Government of Mexico accedes to the International Covenant on Economic, Social and Cultural Rights with the understanding that article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation.

Monaco

Interpretative declarations and reservations made upon signature and confirmed upon ratification:

The Princely Government declares that it interprets the principle of non-discrimination on the grounds of national origin, embodied in article 2, paragraph 2, as not necessarily implying an automatic obligation on the part of States to guarantee foreigners the same rights as their nationals.

The Princely Government declares that articles 6, 9, 11 and 13 should not be constituting an impediment to provisions governing access to work by foreigners or fixing conditions of residence for the granting of certain social benefits.

The Princely Government declares that it considers article 8, paragraph 1, subparagraphs (a), (b) and (c) on the exercise of trade union rights to be compatible with the appropriate legislative provisions regarding the formalities, conditions and procedures designed to ensure effective trade union representation and to promote harmonious labour relations.

The Princely Government declares that in implementing the provisions of article 8 relating to the exercise of the right to strike, it will take into account the requirements, conditions, limitations and restrictions which are prescribed by law and which are necessary in a democratic society in order to guarantee the rights and freedoms of others or to protect public order (ordre public), national security, public health or morals.

Article 8, paragraph 2, should be interpreted as applying to the members of the police force and agents of the State, the Commune and public enterprises.

Mongolia

Declaration made upon signature and confirmed upon ratification:

The Mongolian People’s Republic declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

Netherlands

Reservation with respect to Article 8, paragraph 1 (d)

‘The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles with regard to the latter’s central and local government bodies. [The Kingdom of the Netherlands] clarify that although it is not certain whether the reservation [. . .] is necessary, [it] has preferred the form of a reservation to that of a declaration. In this way the Kingdom of the
Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned.

**New Zealand**

‘The Government of New Zealand reserves the right not [to] apply article 8 to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.’

Norway

Subject to reservations to article 8, paragraph 1(d) ‘to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway.’

**Pakistan**

Declaration;

‘While the Government of Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan.’

Reservation upon ratification:

‘Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources.’

**Romania**

Upon signature:

The Government of the Socialist Republic of Romania declares that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are at variance with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

Upon ratification:

(a) The State Council of the Socialist Republic of Romania considers that the provisions of article 26 (1) of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the principle that multilateral international treaties whose purposes concern the international community as a whole must be open to universal participation.

(b) The State Council of the Socialist Republic of Romania considers that the maintenance in a state of dependence of certain territories referred to in articles 1 (3) and 14 of the International Covenant on Economic, Social and Cultural Rights is inconsistent with the Charter of the United Nations and the instruments adopted by the Organization on the granting of independence to colonial countries and peoples, including the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted unanimously by the United Nations General
Assembly in its resolution 2625 (XXV) of 1970, which solemnly proclaims the duty of States to promote the realization of the principle of equal rights and self-determination of peoples in order to bring a speedy end to colonialism.

**Russian Federation**

Declaration made upon signature and confirmed upon ratification:

The Union of Soviet Socialist Republics declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

**Rwanda**

The Rwandese Republic [is] bound, however, in respect of education, only by the provisions of its Constitution. (The Government of the Republic of Rwanda withdrew this reservation on 15 Dec 2008.)

**Slovakia**

**Sweden**

Sweden enters a reservation in connexion with article 7(d) of the Covenant in the matter of the right to remuneration for public holidays.

**Syrian Arab Republic**

1. The accession of the Syrian Arab Republic to these two Covenants shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said two Covenants.

2. The Syrian Arab Republic considers that paragraph 1 of article 26 of the Covenant on Economic, Social and Cultural Rights and paragraph 1 of article 48 of the Covenant on Civil and Political Rights are incompatible with the purposes and objectives of the said Covenants, inasmuch as they do not allow all States, without distinction or discrimination, the opportunity to become parties to the said Covenants.

**Thailand**

Interpretative declaration:

‘The Government of the Kingdom of Thailand declares that the term “self-determination” as appears in Article 1 Paragraph 1 of the Covenant shall be interpreted as being compatible with that expressed in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993.’

**Trinidad and Tobago**

In respect of article 8(1)(d) and 8(2):
‘The Government of Trinidad and Tobago reserves the right to impose lawful and or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which has been passed in accordance with the provisions of the Trinidad and Tobago Constitution.’

**Turkey**

Declaraions and reservation:

The Republic of Turkey declares that it will implement its obligations under the Covenant in accordance to the obligations under the Charter of the United Nations (especially Article 1 and 2 thereof).

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations.

The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance to the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey.

**Ukraine**

Declaration made upon signature and confirmed upon ratification:

The Ukrainian Soviet Socialist Republic declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

**United Kingdom of Great Britain and Northern Ireland**

Upon signature:

‘First, the Government of the United Kingdom declare their understanding that, by virtue of article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under article 1 of the Covenant and their obligations under the Charter (in particular, under articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.

‘Secondly, the Government of the United Kingdom declare that they must reserve the right to postpone the application of sub-paragraph (a)(i) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work, since, while they fully accept this principle and are pledged to work towards its complete application at the earliest possible time, the problems of implementation are such that complete application cannot be guaranteed at present.

‘Thirdly, the Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (b) of paragraph 1 in Hong Kong, in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations.'
‘Lastly, the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented.’

Upon ratification:

‘Firstly, the Government of the United Kingdom maintain their declaration in respect of article 1 made at the time of signature of the Covenant.

‘The Government of the United Kingdom declare that for the purposes of article 2 (3) the British Virgin Islands, the Cayman Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies, the Turks and Caicos Islands and Tuvalu are developing countries.

‘The Government of the United Kingdom reserve the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory.

‘The Government of the United Kingdom reserve the right to postpone the application of sub-paragraph (i) of paragraph (a) of article 7, in so far as it concerns the provision of equal pay to men and women for equal work in the private sector in Jersey, Guernsey, the Isle of Man, Bermuda, Hong Kong and the Solomon Islands.

‘The Government of the United Kingdom reserve the right not to apply sub-paragraph 1(b) of article 8 in Hong Kong.

‘The Government of the United Kingdom while recognising the right of everyone to social security in accordance with article 9 reserve the right to postpone implementation of the right in the Cayman Islands and the Falkland Islands because of shortage of resources in these territories.

‘The Government of the United Kingdom reserve the right to postpone the application of paragraph 1 of article 10 in regard to a small number of customary marriages in the Solomon Islands and the application of paragraph 2 of article 10 in so far as it concerns paid maternity leave in Bermuda and the Falkland Islands.

‘The Government of the United Kingdom maintain the right to postpone the application of sub-paragraph (a) of paragraph 2 of article 13, and article 14, in so far as they require compulsory primary education, in the Gilbert Islands, the Solomon Islands and Tuvalu.

‘Lastly the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented.’

**Viet Nam**

Declaration:

That the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights, and article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, under which a number of States are deprived of the opportunity to become parties to the Covenants, are of a discriminatory nature. The Government of the Socialist Republic of Viet Nam considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States without any discrimination or limitation.
Yemen

The accession of the People’s Democratic Republic of Yemen to this Covenant shall in no way signify recognition of Israel or serve as grounds for the establishment of relations of any sort with Israel.

Zambia

Reservation:

The Government of the Republic of Zambia states that it reserves the right to postpone the application of article 13(2)(a) of the Covenant, in so far as it relates to primary education; since, while the Government of the Republic of Zambia fully accepts the principles embodied in the same article and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.

Objections

Unless otherwise indicated, the objections were made upon ratification, accession or succession.

Cyprus

26 November 2003

With regard to the declarations made by Turkey upon ratification:

‘... the Government of the Republic of Cyprus wishes to express its objection with respect to the declarations entered by the Republic of Turkey upon ratification on 23 September 2003, of the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966.

‘The Government of the Republic of Cyprus considers that the declaration relating to the implementation of the provisions of the Covenant only to the States with which the Republic of Turkey has diplomatic relations, and the declaration that the Convention is “ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied” amount to reservations. These reservations create uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Covenant, and raise doubt as to the commitment of Turkey to the object and purpose of the said Covenant.

‘The Government of the Republic of Cyprus objects to the said reservations entered by the Republic of Turkey and states that these reservations or the objection to them shall not preclude the entry into force of the Covenant between the Republic of Cyprus and the Republic of Turkey.’

Denmark

17 March 2005

With regard to the declaration made by Pakistan upon signature:

‘The application of the provisions of the said Covenant has been made subject to the provisions of the constitution of the Islamic Republic of Pakistan. This general formulation makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises doubt as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

‘The Government of Denmark considers that the declaration made by the Islamic Republic of Pakistan to the international Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation and that this reservation is incompatible with the object and purpose of the Covenant.

‘For the above-mentioned reasons, the Government of Denmark objects to this declaration made by the Islamic Republic of Pakistan. This objection does not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and Denmark without Pakistan benefiting from her declaration.’

Finland
25 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

‘The Government of Finland notes that according to the interpretative declaration regarding article 2, paragraph 2, and article 3 the application of these articles of the Covenant is in a general way subjected to national law. The Government of Finland considers this interpretative declaration as a reservation of a general kind. The Government of Finland is of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted.

‘The Government of Finland also considers the interpretative declaration to article 9 as a reservation and regards this reservation as well as the reservation to article 8, paragraph 1(d), as problematic in view of the object and purpose of the Covenant.

‘It is in the common interests of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

‘The Government of Finland is further of the view that general reservations of the kind made by the Government of Kuwait, which do not clearly specify the extent of the derogation from the provisions of the Covenant, contribute to undermining the basis of international treaty law.

‘The Government of Finland therefore objects to the aforesaid reservations made by the Government of Kuwait to the [said Covenant].

‘This objection does not preclude the entry into force of the Covenant between Kuwait and Finland.’

13 December 1999

With regard to the declarations to Articles 2, 3, 7, 8, 10 and 13 made by Bangladesh upon accession:

‘The Government of Finland has examined the contents of the declarations made by the Government of Bangladesh to Articles 2, 3, 7, 8, 10 and 13 and notes that the declarations constitute reservations as they seem to modify the obligations of Bangladesh under the said articles.
A reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other Parties of the Convention the extent to which the reserving state commits itself to the Convention and therefore may raise doubts as to the commitment of the reserving state to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

Therefore the Government of Finland objects to the aforesaid reservations made by the Government of Bangladesh. This objection does not preclude the entry into force of the Convention between Bangladesh and Finland. The Convention will thus become operative between the two States without Bangladesh benefitting from these reservations.

13 October 2004

With regard to the declarations and the reservation made by Turkey upon ratification:

'The Government of Finland has examined the declarations and reservation made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights. The Government of Finland notes that the Republic of Turkey reserves the right to interpret and apply the provisions of the paragraphs 3 and 4 of Article 13 of the Covenant in accordance with the provisions under articles 3, 14 and 42 of the Constitution of the Republic of Turkey.

'The Government of Finland emphasises the great importance of the rights provided for in paragraphs 3 and 4 of Article 13 of the International Covenant on Economic, Social and Cultural Rights. The reference to certain provisions of the Constitution of the Republic of Turkey is of a general nature and does not clearly specify the content of the reservation. The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Turkey will ensure the implementation of the rights recognised in the Covenant and will do its utmost to bring its national legislation into compliance with the obligations under the Covenant with a view to withdrawing the reservation. This declaration does not preclude the entry into force of the Covenant between the Republic of Turkey and Finland.'

15 November 2005

With regard to declaration made by Pakistan upon signature:

'The Government of Finland has carefully examined the declaration made by the Government of the Islamic Republic of Pakistan regarding the International Covenant on Economic, Social and Cultural Rights. The Government of Finland takes note that the provisions of the Covenant shall, according to the Government of the Islamic Republic of Pakistan, be subject to the provisions of the constitution of the Islamic Republic of Pakistan.

'The Government of Finland notes that a reservation which consists of a general reference to national law without specifying the contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

'The Government of Finland therefore objects to the above-mentioned declaration made by the Government of the Islamic Republic of Pakistan to the Covenant. This objection does not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and Finland. The Covenant will thus become operative between the two states without the Islamic Republic of Pakistan benefitting from its declaration.'
France

The Government of the Republic takes objection to the reservation entered by the Government of India to article 1 of the International Covenant on Economic, Social and Cultural Rights, as this reservation attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination. The present declaration will not be deemed to be an obstacle to the entry into force of the Covenant between the French Republic and the Republic of India.

30 September 1999

With regard to the declarations made by Bangladesh upon accession:

The Government of France notes that the ‘declarations’ made by Bangladesh in fact constitute reservations since they are aimed at precluding or modifying the legal effect of certain provisions of the treaty. With regard to the declaration concerning article 1, the reservation places on the exercise of the right of peoples to self-determination conditions not provided for in the Charter of the United Nations. The declarations concerning articles 2 and 3 and articles 7 and 8, which render the rights recognized by the Covenant in respect of individuals subordinate to domestic law, are of a general nature and undermine the objective and purpose of the treaty. In particular, the country’s economic conditions and development prospects should not affect the freedom of consent of intended spouses to enter into marriage, non-discrimination for reasons of parentage or other conditions in the implementation of special measures of protection and assistance on behalf of children and young persons, or the freedom of parents or legal guardians to choose schools for their children. Economic difficulties or problems of development cannot free a State party entirely from its obligations under the Covenant. In this regard, in compliance with article 10, paragraph 3, of the Covenant, Bangladesh must adopt special measures to protect children and young persons from economic and social exploitation, and the law must punish their employment in work harmful to their morals or health and should also set age limits below which the paid employment of child labour should be prohibited. Consequently, the Government of France lodges an objection to the reservations of a general scope mentioned above. This objection does not prevent the entry into force of the Covenant between Bangladesh and France.

11 November 2005

With regard to the declaration made by Pakistan upon signature:

The Government of the French Republic has examined the declaration made by the Government of the Islamic Republic of Pakistan upon signing the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, according to which ‘The provisions of the Covenant shall be subject to the provisions of the constitution of the Islamic Republic of Pakistan’. Such a declaration is general in scope and unclear and could render the provisions of the Covenant null and void. The Government of the French Republic considers that the said declaration constitutes a reservation which is incompatible with the object and purpose of the Covenant and it therefore objects to that declaration. This objection does not preclude the entry into force of the Covenant between France and Pakistan.

Germany

15 August 1980

‘The Government of the Federal Republic of Germany strongly objects, ... to the declaration made by the Republic of India in respect of article 1 of the International Covenant on Economic, Social and Cultural Rights and of article 1 of the International Covenant on Civil and Political Rights.'
'The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. All peoples, therefore, have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants.'

10 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

‘The Government of the Federal Republic of Germany notes that article 2(2) and article 3 have been made subject to the general reservation of national law. It is of the view that these general reservations may raise doubts as to the commitment of Kuwait to the object and purpose of the Covenant.

‘The Government of the Federal Republic of Germany regards the reservation concerning article 8(1)(d), in which the Government of Kuwait reserves the right not to apply the right to strike expressly stated in the Covenant, as well as the interpretative declaration regarding article 9, according to which the right to social security would only apply to Kuwaitis, as being problematic in view of the object and purpose of the Covenant. It particularly feels that the declaration regarding article 9, as a result of which the many foreigners working on Kuwaiti territory would, on principle, be totally excluded from social security protection, cannot be based on article 2(3) of the Covenant.

‘It is in the common interest of all parties that a treaty should be respected, as to its object and purpose, by all parties.


‘This objection does not preclude the entry into force of the Covenant between Kuwait and the Federal Republic of Germany.’

13 October 2004

With regard to the declarations and the reservation made by Turkey upon ratification:

‘The Government of the Republic of Turkey has declared that it will implement the provisions of the Covenant only to the states with which it has diplomatic relations. Moreover, the Government of the Republic of Turkey has declared that it ratifies the Covenant exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied. Furthermore, the Government of the Republic of Turkey has reserved the right to interpret and apply the provisions of Article 13 paragraphs (3) and (4) of the Covenant in accordance with the provisions of Articles 3, 14 and 42 of the Constitution of the Republic of Turkey.

‘The Government of the Federal Republic of Germany would like to recall that it is in the common interest of all states that treaties to which they have chosen to become parties are respected and applied as to their object and purpose by all parties, and that states are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties. The Government of the Federal Republic of Germany is therefore concerned about declarations and reservations such as those made and expressed by the Republic of Turkey with respect to the International Covenant on Economic, Social and Cultural Rights.

‘However, the Government of the Federal Republic of Germany believes these declarations do not aim to limit the Covenant’s scope in relation to those states with which Turkey has established bonds under the Covenant, and that they do not aim to impose any other restrictions
that are not provided for by the Covenant. The Government of the Federal Republic of Germany attaches great importance to the liberties recognized in Article 13 paragraphs (3) and (4) of the Covenant. The Government of the Federal Republic of Germany understands the reservation expressed by the Government of the Republic of Turkey to mean that this Article will be interpreted and applied in such a way that protects the essence of the freedoms guaranteed therein.’

8 November 2004

With regard to the declaration made by Pakistan upon signature:

‘The Government of the Islamic Republic of Pakistan declared that it “will implement the . . . Provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country”. Since some fundamental obligations resulting from the International Covenant on Economic, Social and Cultural Rights, including in particular the principle of non-discrimination found in Article 2 (2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed immediately, the declaration represents a significant qualification of Pakistan’s commitment to guarantee the human rights referred to in the Covenant.

‘The Government of the Islamic Republic of Pakistan also declared that “the provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan”. The Government of the Federal Republic of Germany is of the opinion that this leaves it unclear to which extent the Islamic Republic of Pakistan considers itself bound by the obligations resulting from the Covenant.

‘The Government of the Federal Republic of Germany therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

‘The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan.’

Greece

11 October 2004

With regard to the declarations made by Turkey upon ratification:
‘The Government of Greece has examined the declarations made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.

‘The Republic of Turkey declares that it will implement the provisions of the Covenant only to the States with which it has diplomatic relations.

‘In the view of the Government of Greece, this declaration in fact amounts to a reservation. This reservation is incompatible with the principle that inter-State reciprocity has no place in the context of human rights treaties, which concern the endowment of individuals with rights. It is therefore contrary to the object and purpose of the Covenant.

‘The Republic of Turkey furthermore declares that the Covenant is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.
‘In the view of the Government of Greece, this declaration in fact amounts to a reservation. This reservation is incompatible with the obligation of a State Party to respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of such State Party. Accordingly, this reservation is contrary to the object and purpose of the Covenant.

‘For these reasons, the Government of Greece objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

‘This objection shall not preclude the entry into force of the Covenant between the Hellenic Republic and the Republic of Turkey. The Covenant, therefore, enters into force between the two States without the Republic of Turkey benefiting from these reservations.’

Italy
25 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

‘The Government of Italy considers these reservations to be contrary to the object and the purpose of this International Covenant. The Government of Italy notes that the said reservations include a reservation of a general kind in respect of the provisions on the internal law.

‘The Government of Italy therefore objects to the aforesaid reservations made by the Government of Kuwait to the [said Covenant].

‘This objection does not preclude the entry into force in its entirety of the Covenant between the State of Kuwait and the Italian Republic.’

Latvia
10 November 2005

With regard to the declaration made by Pakistan upon signature:

‘The Government of the Republic of Latvia has carefully examined the declaration made by the Islamic Republic of Pakistan to the International Covenant on [Economic, Social and Cultural] Rights upon accession.

‘The Government of the Republic of Latvia considers that the declaration contains general reference to national law, making the provisions of International Covenant subject to the national law of the Islamic Republic of Pakistan.

‘Thus, the Government of the Republic of Latvia is of the opinion that the declaration is in fact a unilateral act deemed to limit the scope of application of the International Covenant and therefore, it shall be regarded as a reservation.

‘Moreover, the Government of the Republic of Latvia noted that the reservation does not make it clear to what extent the Islamic Republic of Pakistan considers itself bound by the provisions of the International Covenant and whether the way of implementation of the provisions of the International Covenant is in line with the object and purpose of the International Covenant.

‘The Government of the Republic of Latvia recalls that customary international law as codified by Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out the reservations that are incompatible with the object and purpose of a treaty are not permissible.

‘The Government of the Republic of Latvia therefore objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.'
‘However, this objection shall not preclude the entry into force of the International Covenant between the Republic of Latvia and the Islamic Republic of Pakistan. Thus, the International Covenant will become operative without the Islamic Republic of Pakistan benefiting from its reservation.’

Netherlands
12 January 1981

‘The Government of the Kingdom of the Netherlands objects to the declaration made by the Government of the Republic of India in relation to article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights, since the right of self determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of article 1 common to the two Covenants but as well from the most authoritative statement of the law concerned, i.e., the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.’

18 March 1991

With regard to the interpretative declaration made by Algeria concerning article 13, paragraphs 3 and 4 upon ratification:

‘In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant it follows that the reservation with respect to article 13 paragraphs 3 and 4 made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it.

‘[This objection is] not an obstacle to the entry into force of [the Covenant] between the Kingdom of the Netherlands and Algeria.’

22 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

[Same objection identical in essence, mutatis mutandis, as the one made for Algeria.]

23 April 2002

With regard to the statement made by China made upon ratification:

‘. . . the statement made by the Government of the People’s Republic of China to article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights.

‘The Government of the Kingdom of the Netherlands has examined the statement and would like to recall that, under well established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. The Government of the Kingdom of the Netherlands considers that the statement made by the Government of the People’s Republic of China to article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.'
‘The Government of the Kingdom of the Netherlands notes that the application of Article 8.1 (a) of the Covenant is being made subject to a statement referring to the contents of national legislation. According to the Vienna Convention on the Law of Treaties, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to abide by the treaty. Furthermore, the right to form and join a trade union of one’s choice is one of the fundamental principles of the Covenant.

‘The Government of the Kingdom of the Netherlands therefore objects to the reservation made by the People’s Republic of China to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and China.’

7 October 2005

With regard to the declaration made by Pakistan upon signature:


‘The Government of the Kingdom of the Netherlands would like to recall that the status of a statement is not determined by the designation assigned to it. The application of the provisions of the International Covenant on Economic, Social and Cultural Rights has been made subject to the provisions of the constitution of the Islamic Republic of Pakistan.

‘This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty. It is of the common interest of States that all parties respect treaties to which they have chosen to become parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. A reservation as formulated by the Islamic Republic of Pakistan is thus likely to contribute to undermining the basis of international treaty law.

‘The Government of the Kingdom of the Netherlands considers that the declaration made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

‘The Government of the Kingdom of the Netherlands therefore objects to the declaration made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

‘This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and the Islamic Republic of Pakistan, without Pakistan benefiting from its declaration.’

Norway

22 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

‘In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities by invoking general principles of internal law may create doubts about the commitment of the reserving State to the objective and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. Furthermore, the Government of Norway finds the reservations made to article 8, paragraph 1 (d) and article 9 as being problematic in view of the object and
purpose of the Covenant. For these reasons, the Government of Norway objects to the said reservations made by the Government of Kuwait.

‘The Government of Norway does not consider this objection to preclude the entry into force of the Covenant between the Kingdom of Norway and the State of Kuwait.’

23 April 2002

With regard to the statement made by China made upon ratification:


‘It is the Government of Norway’s position that the statement made by China in substance constitutes a reservation, and consequently can be made subject to objections.

‘According to the first paragraph of the statement, the application of Article 8.1(a) of the Covenant shall be consistent with relevant provisions of national legislation. This reference to national legislation, without further description of its contents, exempts the other States Parties from the possibility of assessing the intended effects of the statement. Further, the contents of the relevant provision is not only in itself of fundamental importance, as failure to implement it can also contribute to a less effective implementation of other provisions of the Covenant, such as Articles 6 and 7.

‘For these reasons, the Government of Norway objects to the said part of the statement made by the People’s Republic of China, as it is incompatible with the object and purpose of the Covenant.

‘This objection does not preclude the entry into force in its entirety of the Covenant between the Kingdom of Norway and the People’s Republic of China. The Covenant thus becomes operative between Norway and China without China benefiting from the reservation.’

17 November 2005

With regard to the declaration made by Pakistan upon signature:

‘The Government of the Kingdom of Norway have examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966). According to the first part of the Declaration, the Government of the Islamic Republic of Pakistan “will implement the (...) provisions (embodied in the Covenant) in a progressive manner, in keeping with the existing economic conditions and the development plans of the country”. Since some fundamental obligations embodied in the Covenant, including in particular the principle of non-discrimination found in Article 2 (2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed immediately, the Government of the Kingdom of Norway consider that this part of the Declaration represents a significant qualification of Pakistan’s commitment to guarantee the provisions embodied in the Covenant.

‘According to the second part of the Declaration, “(t)he provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan. ”The Government of the Kingdom of Norway note that a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

‘The Government of the Kingdom of Norway consider that both parts of the Government of the Islamic Republic of Pakistan’s Declaration seek to limit the scope of the Covenant on a unilateral basis and therefore constitute reservations. The Government of the Kingdom of
Norway consider both reservations to be incompatible with the object and purpose of the Covenant, and therefore object to the reservations made by the Government of the Islamic Republic of Pakistan.

‘This objection does not preclude the entry into force in its entirety of the Covenant between the Kingdom of Norway and the Islamic Republic of Pakistan, without the Islamic Republic of Pakistan benefiting from its reservations.’

Portugal
26 October 1990

‘The Government of Portugal hereby presents its formal objection to the interpretative declarations made by the Government of Algeria upon ratification of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The Government of Portugal having examined the contents of the said declarations reached the conclusion that they can be regarded as reservations and therefore should be considered invalid as well as incompatible with the purposes and object of the Covenants.

‘This objection shall not preclude the entry into force of the Covenants between Portugal and Algeria.’

13 October 2004

With regard to the declarations and the reservation made by Turkey upon ratification:

‘The Government of Portugal considers that reservations by which a State limits its responsibilities under the International Covenant on Economic, Social and Cultural Rights (ICESCR) by invoking certain provisions of national law in general terms may create doubts as to the commitment of the reserving State to the object and purpose of the convention and, moreover, contribute to undermining the basis of international law. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

‘The Government of Portugal therefore objects to the reservation by Turkey to the ICESCR. This objection shall not constitute an obstacle to the entry into force of the Covenant between Portugal and Turkey.’

Spain
15 November 2005

With regard to the declaration made by Pakistan upon signature:


‘The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.

‘The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national
law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

‘The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.

‘According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.

‘Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

‘This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.’

**Sweden**

23 July 1997

With regard to the declarations and the reservation made by Kuwait upon accession:

‘[The Government of Sweden] is of the view that these general reservations may raise doubts as to the commitment of Kuwait to the object and purpose of the Covenant.

‘The Government of Sweden regards the reservation concerning article 8(1)(d), in which the Government of Kuwait reserves the right not to apply the right to strike expressly stated in the Covenant, as well as the interpretative declaration regarding article 9, according to which the right to social security would only apply to Kuwaitis, as being problematic in view of the object and purpose of the Covenant. It particularly considers the declaration regarding article 9, as a result of which the many foreigners working on Kuwaiti territory would, in principle, be totally excluded from social security protection, cannot be based on article 2(3) of the Covenant.

‘It is in the common interest of all parties that a treaty should be respected, as to its object and purpose, by all parties.

‘The Government of Sweden therefore objects to the above-mentioned general reservations and interpretative declarations.

‘This objection does not preclude the entry into force of the Covenant between Kuwait and Sweden in its entirety.’

14 December 1999

With regard to the declarations made by Bangladesh upon accession:

‘In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Covenant.
'The declaration concerning article 1 places on the exercise of the right of peoples to self-determination conditions not provided for in international law. To attach such conditions could undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

‘Furthermore, the Government of Sweden notes that the declaration relating to articles 2 and 3 as well as 7 and 8 respectively, imply that these articles of the Covenant are being made subject to a general reservation referring to relevant provisions of the domestic laws of Bangladesh.

‘Consequently, the Government of Sweden is of the view that, in the absence of further clarification, these declarations raise doubts as to the commitment of Bangladesh to the object and purpose of the Covenant and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

‘It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.


‘This objection does not preclude the entry into force of the Covenant between Bangladesh and Sweden. The Covenant will thus become operative between the two States without Bangladesh benefiting from the declarations.’

2 April 2002

With regard to the statement made by China upon ratification:

‘The Government of Sweden has examined the statement and would like to recall that, under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. The Government of Sweden considers that the statement made by the Government of the People’s Republic of China to article 8.1(a) of the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

‘The Government of Sweden notes that the application of Article 8.1(a) of the Covenant is being made subject to a statement referring to the contents of national legislation. According to the Vienna Convention on the Law of Treaties, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to abide by the treaty. Furthermore, the right to form and join a trade union of one’s choice is one of the fundamental principles of the Covenant. The Government of Sweden wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

‘The Government of Sweden therefore objects to the reservation made by the People’s Republic of China to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between China and Sweden. The Covenant enters into force without China benefiting from the reservation.’

30 June 2004

With regard to the declarations and reservation made by Turkey upon ratification:

‘The Government of Sweden has examined the declarations and reservation made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.
‘The Republic of Turkey declares that it will implement the provisions of the Covenant only to the State Parties with which it has diplomatic relations. This statement in fact amounts, in the view of the Government of Sweden, to a reservation. The reservation of the Republic of Turkey makes it unclear to what extent the Republic of Turkey considers itself bound by the obligations of the Covenant. In absence of further clarification, therefore, the reservation raises doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

‘The Government of Sweden notes that the interpretation and application of paragraphs 3 and 4 of article 13 of the Covenant is being made subject to a reservation referring to certain provisions of the Constitution of the Republic of Turkey without specifying their contents. The Government of Sweden is of the view that in the absence of further clarification, this reservation, which does not clearly specify the extent of the Republic of Turkey’s derogation from the provisions in question, raises serious doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

‘According to established customary law as codified by the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

‘The Government of Sweden therefore objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

‘This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations.’

1 March 2005

With regard to the declaration made by Pakistan upon signature:

‘The Government of Sweden would like to recall that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty.

‘The Government of Sweden is of the view that although Article 2 (1) of the Covenant allows for a progressive realization of the provisions, this may not be invoked as a basis for discrimination.

‘The application of the provisions of the Covenant has been made subject to provisions of the constitution of the Islamic Republic of Pakistan. This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant. The Government of Sweden considers that the declaration made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

‘It is of common interest of States that all Parties respect treaties to which they have chosen to become parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

‘The Government of Sweden therefore objects to the reservation made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.'
‘This objection shall not preclude the entry into force of the Covenant between Pakistan and Sweden, without Pakistan benefiting from its reservation.’

**United Kingdom of Great Britain and Northern Ireland**

17 August 2005

With regard to the declaration made by Pakistan upon signature:


‘The Government of the United Kingdom consider that the Government of Pakistan’s Declaration which seeks to subject its obligations under the Covenant to the provisions of its own Constitution is a reservation which seeks to limit the scope of the Covenant on a unilateral basis. The Government of the United Kingdom note that a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to this reservation made by the Government of Pakistan.

‘This objection shall not preclude the entry into force of the Covenant between the United Kingdom of Great Britain and Northern Ireland and Pakistan.’

**NOTES**

1. The thirty-fifth instrument of ratification or accession was deposited with the Secretary-General on 3 October 1975. The Contracting States did not object to having those instruments accompanied with reservations taken into account under article 27 (1) for the purpose of determining the date of general entry into force of the Covenant.

2. The former Yugoslavia had signed and ratified the Covenant on 8 August 1967 and 2 June 1971, respectively. See also note 1 under ‘Bosnia and Herzegovina’, ‘Croatia’, ‘former Yugoslavia’, ‘Slovenia’, ‘The Former Yugoslav Republic of Macedonia’ and ‘Yugoslavia’ in the ‘Historical Information’ section in the front matter of this volume.

3. The signature was effected by Democratic Kampuchea. In this regard the Secretary-General received, on 5 November 1980, the following communication from the Government of Mongolia:

   “The Government of the Mongolian People’s Republic considers that only the People’s Revolutionary Council of Kampuchea as the sole authentic and lawful representative of the Kampuchean people has the right to assume international obligations on behalf of the Kampuchean people. Therefore the Government of the Mongolian People’s Republic considers that the signature of the Human Rights Covenants by the representative of the so-called Democratic Kampuchea, a régime that ceased to exist as a result of the people’s revolution in Kampuchea, is null and void.

   ‘The signing of the Human Rights Covenants by an individual, whose régime during its short period of reign in Kampuchea had exterminated about 3 million people and had thus grossly violated the elementary norms of human rights, each and every provision of the Human Rights Covenants is a regrettable precedence, which discredits the noble aims and lofty principles of the United Nations Charter, the very spirit of the above-mentioned Covenants, gravely impairs the prestige of the United Nations.’

   Thereafter, similar communications were received from the Government of the following States on the dates indicated and their texts were circulated as depositary notifications or, at the request of the States concerned, as official documents of the General Assembly (A/33/781 and A/35/784):

<table>
<thead>
<tr>
<th>Participant</th>
<th>Date of receipt</th>
</tr>
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<tbody>
<tr>
<td>German Democratic Republic*</td>
<td>11 Dec 1980</td>
</tr>
<tr>
<td>Poland</td>
<td>12 Dec 1980</td>
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<tr>
<td>Ukraine</td>
<td>16 Dec 1980</td>
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<tr>
<td>Hungary</td>
<td>19 Jan 1981</td>
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<tr>
<td>Bulgaria</td>
<td>29 Jan 1981</td>
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</tbody>
</table>
4. Although Democratic Kampuchea had signed both [the International Covenant on Economic, Social and Political Rights and the International Covenant on Civil and Political Rights] on 17 October 1980 (see note 3 in this chapter), the Government of Cambodia deposited an instrument of accession to the said Covenants.

5. Signed on behalf of the Republic of China on 5 October 1967. See note 1 under ‘China’ in the ‘Historical Information’ section in the front matter of this volume.

With reference to the above-mentioned signature, communications have been addressed to the Secretary-General by the Permanent Representatives of Permanent Missions to the United Nations of Bulgaria, Byelorussian SSR, Czechoslovakia, Mongolia, Romania, the Ukrainian SSR, the Union of Soviet Socialist Republics and Yugoslavia, stating that their Governments did not recognize the said signature as valid since the only Government authorized to represent China and to assume obligations on its behalf was the Government of the People's Republic of China.

In letters addressed to the Secretary-General in regard to the above-mentioned communications, the Permanent Representative of China to the United Nations stated that the Republic of China, a sovereign State and Member of the United Nations, had attended the twenty-first regular session of the General Assembly of the United Nations and contributed to the formulation of, and signed the Covenants and the Optional Protocol concerned, and that ‘any statements or reservations relating to the above-mentioned Covenants and Optional Protocol that are incompatible with or derogatory to the legitimate position of the Government of the Republic of China shall in no way affect the rights and obligations of the Republic of China under these Covenants and Optional Protocol’.

6. In its notification of territorial application to Macau, the Government of Portugal stated the following:

   . . . The Covenants are confirmed and proclaimed binding and valid, and they shall have effect and be implemented and observed without exception, bearing in mind that:

   Article 1. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, ratified, respectively, by Act No 29/78 of 12 June, and by Act No 45/78 of 11 July, shall be applicable in the territory of Macau.

   Article 2. 1. The applicability in Macau of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and in particular of article 1 in both Covenants, shall in no way affect the status of Macau as defined in the Constitution of the Portuguese Republic and in the Organic Statute of Macau.

   2. The applicability of the Covenants in Macau shall in no way affect the status of Macao as defined in the Constitution of the Portuguese Republic and in the Organic Statute of Macau.

   Article 3. Article 25 (b) of the International Covenant on Civil and Political Rights shall not apply to Macau with respect to the composition of elected bodies and the method of choosing and electing their officials as defined in the Constitution of the Portuguese Republic, the Organic Statute of Macau and provisions of the Joint Declaration on the Question of Macau.

   Article 4. Article 12 (4) and article 13 of the International Covenant on Civil and Political Rights shall not apply to Macau with respect to the entry and exit of individuals and the expulsion of foreigners from the territory. These matters shall continue to be regulated by the Organic Statute of Macau and other applicable legislation, and also by the Joint Declaration on the Question of Macau.

   Article 5. 1. The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that are applicable to Macau shall be implemented in Macau, in particular through specific legal documents issued by the organs of government of the territory.

   Subsequently, on 21 October and 3 December 1999, the Secretary-General received communications concerning the status of Macao from Portugal and China (see note 3 under ‘China’ and note 1 under ‘Portugal’ regarding Macao in the ‘Historical Information’ section in the front matter of this volume). Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Covenant
with reservation made by China will also apply to the Macao Special Administrative Region as well as with the following declaration:

1. The application of the Covenant, and its article 1 in particular, to the Macao Special Administrative Region shall not affect the status of Macao as defined in the Joint Declaration and in the Basic Law.

2. The provisions of the Covenant which are applicable to the Macao Special Administrative Region shall be implemented in Macao through legislation of the Macao Special Administrative Region.

The residents of Macao shall not be restricted in the rights and freedoms that they are entitled to, unless otherwise provided for by law. In case of restrictions, they shall not contravene the provisions of the Covenant that are applicable to the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a Party to the Covenant.

7. Czechoslovakia had signed and ratified the Covenant on 7 October 1968 and 23 December 1975, respectively, with declarations. For the text of the declarations, see United Nations, Treaty Series, vol 993, pp 78 and 85. See also note 3 in this chapter and note 1 under ‘Czech Republic’ and note 1 under ‘Slovakia’ in the ‘Historical Information’ section in the front matter of this volume.

8. The German Democratic Republic had signed and ratified the Convention with reservations on 27 March 1973 and 8 November 1973, respectively. For the text of the reservations, see United Nations, Treaty Series, vol 993. p 83. See also note 2 under ‘Germany’ in the ‘Historical Information’ section in the front matter of this volume.

9. See note 1 under ‘Germany’ regarding Berlin (West) in the ‘Historical Information’ section in the front matter of this volume.

10. See note 1 under ‘Netherlands’ regarding Aruba/Netherlands Antilles in the ‘Historical Information’ section in the front matter of this volume.

11. See note 1 ‘New Zealand’ regarding Tokelau under in the ‘Historical Information’ section in the preliminary pages in the front matter of this volume.

12. In a communication received on 10 May 1982, the Government of Solomon Islands declared that Solomon Islands maintains the reservations entered by the United Kingdom save in so far as the same cannot apply to Solomon Islands.

13. With regard to the application of the Covenant to Hong Kong, the Secretary-General received communications concerning the status of Hong Kong from China and the United Kingdom (see note 2 under ‘China’ and note 2 under ‘United Kingdom of Great Britain and Northern Ireland’ concerning Hong Kong in the ‘Historical Information’ section in the front matter of this volume). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Covenant with the reservation made by China will also apply to the Hong Kong Special Administrative Region.

Further, on 20 April 2001, the Secretary-General received from the Government of China the following communication:

1. Article 6 of the Covenant does not preclude the formulation of regulations by the HKSAR for employment restrictions, based on place of birth or residence qualifications, for the purpose of safeguarding the employment opportunities of local workers in the HKSAR.

2. ‘National federations or confederations’ in Article 8.1(b) of the Covenant shall be interpreted, in this case, as ‘federations or confederations in the HKSAR’, and this Article does not imply the right of trade union federations or confederations to form or join political organizations or bodies established outside the HKSAR.

14. See note 1 under ‘Montenegro’ in the ‘Historical Information’ section in the front matter of this volume.

15. On 3 October 1983 the Secretary-General received from the Government of Argentina the following objection:

[The Government of Argentina makes a] formal objection to the [declaration] of territorial extension issued by the United Kingdom with regard to the Malvinas Islands (and dependencies), which that country is illegally occupying and refers to as the ‘Falkland Islands’.

The Argentine Republic rejects and considers null and void the [said declaration] of territorial extension.

With reference to the above-mentioned objection the Secretary-General received, on 28 February 1985, from the Government of the United Kingdom of Great Britain and Northern Ireland the following declaration:

‘The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to their right, by notification to the Depositary under the relevant provisions of the above-mentioned Convention,
to extend the application of the Convention in question to the Falkland Islands or to the Falkland Islands Dependencies, as the case may be.

For this reason alone, the Government of the United Kingdom are unable to regard the Argentine [communication] under reference as having any legal effect.’

Upon ratification, the Government of Argentina made the following declaration with regard to the above-mentioned declaration made by the United Kingdom of Great Britain and Northern Ireland:

‘The Argentine Republic rejects the extension, notified to the Secretary-General of the United Nations on 20 May 1976 by the United Kingdom of Great Britain and Northern Ireland, of the application of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16 December 1966, to the Malvinas, South Georgia and South Sandwich Islands, and reaffirms its sovereign rights to those archipelagos, which form an integral part of its national territory.

The General Assembly of the United Nations had adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6 and 40/21 in which it recognizes the existence of a sovereignty dispute regarding the question of the Falkland Islands (Malvinas) and urges the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to pursue negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute, through the good offices of the Secretary-General of the United Nations, who shall inform the General Assembly of the progress made.’

With reference to the above-mentioned declaration by the Government of Argentina, the Secretary-General received, on 13 January 1988, from the Government of the United Kingdom of Great Britain and Northern Ireland the following communication:

‘The Government of the United Kingdom of Great Britain and Northern Ireland rejects the statements made by the Argentine Republic, regarding the Falkland Islands and South Georgia and the South Sandwich Islands, when ratifying the said Covenants and acceding to the said Protocol.

The Government of the United Kingdom of Great Britain and Northern Ireland has no doubt as to British sovereignty over the Falkland Islands and South Georgia and the South Sandwich Islands and its consequent right to extend treaties to those territories.’

16. The formality was effected by the Yemen Arab Republic. See also note 1 under ‘Yemen’ in the ‘Historical Information’ section in the front matter of this volume.

17. With respect to the interpretative declarations made by Algeria the Secretary-General received, on 25 October 1990, from the Government of Germany the following declaration:

[The Federal Republic of Germany] interprets the declaration under paragraph 2 to mean that the latter is not intended to eliminate the obligation of Algeria to ensure that the rights guaranteed in article 8, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and in article 22 of the International Covenant on Civil and Political Rights may be restricted only for the reasons mentioned in the said articles and that such restrictions shall be prescribed by law.

It interprets the declaration under paragraph 4 to mean that Algeria, by referring to its domestic legal system, does not intend to restrict its obligation to ensure through appropriate steps equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

18. In this regard, the Secretary-General received communications from the following Governments on the dates indicated hereinafter:

Germany (17 December 1999):

‘The Government of the Federal Republic of Germany notes that the declaration concerning article 1 constitutes a reservation that places on the exercise of the right of all peoples to self-determination conditions not provided for in international law. To attach such conditions could undermine the concept of self-determination and seriously weaken its universally acceptable character.

The Government of the Federal Republic of Germany further notes that the declarations with regard to articles 2 and 3, 7 and 8, and 10 and 13 constitute reservations of a general nature in respect of provisions of the Covenant which may be contrary to the Constitution, legislation, economic conditions and development plans of Bangladesh.

The Government of the Federal Republic of Germany is of the view that these general reservations raise doubts as to the full commitment of Bangladesh to the object and purpose of the Covenant. It is in the common interest of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of the Federal Republic of Germany objects to the aforementioned reservations made by the Government of the People’s Republic of Bangladesh to the International Covenant on Economic, Social and Cultural Rights. This objection does not preclude the entry into force of the Covenant between the Federal Republic of Germany and the People’s Republic of Bangladesh.’
Netherlands (20 December 1999):

'The Government of the Kingdom of the Netherlands has examined the declarations made by the Government of Bangladesh at the time of its accession to the International Covenant on economic, social and cultural rights and considers the declarations concerning Articles 1, 2 and 3, and 7 and 8 as reservations. The Government of the Kingdom of the Netherlands objects to the reservation made by the Government of Bangladesh in relation to Article 1 of the said Covenant, since the right of self-determination as embodied in the Covenant is conferred upon all peoples. This follows not only from the very language of Article 1 of the Covenant but as well from the most authoritative statement of the law concerned, i.e. the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

Furthermore, the Government of the Kingdom of the Netherlands objects to the reservations made by the Government of Bangladesh in relation to Articles 2 and 3, and, 7 and 8 of the said Covenant.

The Government of the Kingdom of the Netherlands considers that such reservations which seek to limit the responsibilities of the reserving State under the Covenant by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of international treaty law.

It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose by all parties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Bangladesh.

These objections shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Bangladesh.'

19. On 30 September 1992, the Government of Belarus notified the Secretary-General its decision to withdraw the reservation made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, Treaty Series, vol 993, p 78.

20. On 21 March 2001, the Government of the Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows:

Reservation:

The Government of the People's Republic of the Congo declares that it does not consider itself bound by the provisions of article 13, paragraphs 3 and 4 . . .

Paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights embody the principle of freedom of education by allowing parents the liberty to choose for their children schools other than those established by the public authorities. Those provisions also authorize individuals to establish and direct educational institutions.

In our country, such provisions are inconsistent with the principle of nationalization of education and with the monopoly granted to the State in that area.

21. In a communication received on 14 January 1976, the Government of Denmark notified the Secretary-General that it withdraws its reservation made prior with regard to article 7(a)(i) on equal pay for equal work.

22. In two communications received by the Secretary-General on 10 July 1969 and 23 March 1971 respectively, the Government of Israel declared that it ‘has noted the political character of the declaration made by the Government of Iraq on signing and ratifying the above Covenants. In the view of the Government of Israel, these two Covenants are not the proper place for making such political pronouncements. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of Iraq an attitude of complete reciprocity.’

Identical communications, mutatis mutandis, were received by the Secretary-General from the Government of Israel on 9 July 1969 in respect of the declaration made upon accession by the Government of Syria, and on 29 June 1970 in respect of the declaration made upon accession by the Government of Libya. In the latter communication, the Government of Israel moreover stated that the declaration concerned ‘cannot in any way affect the obligations of the Libyan Arab Republic already existing under general international law’.

23. Upon ratification, the Government of Malta indicated that it had decided to withdraw its reservation made upon signature to paragraph 2article 10. For the text of the said reservation, see United Nations, Treaty Series, vol 993, p 80.
24. On 5 September 2003, the Government of New Zealand informed the Secretary-General that it had decided to withdraw the following reservation in respect only of the metropolitan territory of New Zealand. The reservation reads as follows:

‘The Government of New Zealand reserves the right to postpone, in the economic circumstances foreseeable at the present time, the implementation of article 10(2) as it relates to paid maternity leave or leave with adequate social security benefits.’

Moreover, the Government of New Zealand notified the Secretary-General of the following territorial exclusion:

‘Declares that, consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, the withdrawal of this reservation shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory.’

See also note 1 under ‘Cook Islands’ and note 1 under ‘Niue’ in the ‘Historical Information’ section in the front matter of this volume.

25. With regard to the declaration made by Pakistan upon signature, the Secretary-General received a communication from the following State on the date indicated hereinafter:

Austria (25 November 2005):

‘The Government of Austria has examined the declaration made by the Islamic Republic of Pakistan upon signature of the International Covenant on Economic, Social and Cultural Rights.

The application of the provisions of the Covenant has been made subject to provisions of national law. This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of Austria considers that the declaration made by the Islamic Republic of Pakistan to the Covenant in substance constitutes a reservation and that this reservation is incompatible with the object and the purpose of the Covenant.

The Government of Austria therefore objects to the reservation made by the Islamic Republic of Pakistan to the Covenant.

This objection shall not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and the Republic of Austria.’
APPENDIX I
GUIDELINES ON TREATY-SPECIFIC DOCUMENTS TO
BE SUBMITTED BY STATES PARTIES UNDER
ARTICLES 16 AND 17 OF THE INTERNATIONAL
COVENANT ON ECONOMIC, SOCIAL AND
CULTURAL RIGHTS

Note by the Secretary-General

1. In accordance with article 17 of the International Covenant on Economic, Social and Cultural Rights, the Economic and Social Council, by its resolution 1988 (LX) of 11 May 1976, established a programme under which the States parties to the Covenant would furnish in stages the reports referred to in article 16 of the Covenant and the Secretary-General, at the Council’s request, subsequently drew up an appropriate set of general guidelines. In response to the introduction of a new reporting cycle, the Committee on Economic, Social and Cultural Rights, at its fifth session, held from 26 November to 14 December 1990, adopted a set of revised general guidelines which replaced the original guidelines.

2. The purpose of reporting guidelines is to advise States parties on the form and content of their reports, so as to facilitate the preparation of reports and ensure that reports are comprehensive and presented in a uniform manner by States parties.

3. The Committee has decided to replace the revised general guidelines (E/C.12/1991/1) by the present guidelines to take into account the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN/2/Rev.5), as well as the evolving practice of the Committee in relation to the application of the Covenant, as reflected in its concluding observations, general comments and statements.

4. The text of the guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the Covenant is contained in the annex to the present document.

Annex

A. The revised reporting system and organization of information to be included in the common core document and in the treaty-specific document submitted to the Committee on Economic, Social and Cultural Rights

1. State reports submitted under the harmonized guidelines on reporting under the international human rights treaties consist of two parts: a common core document and treaty-specific documents. The common core document should contain general information about the reporting State, the general framework for the protection and promotion of human rights, as well as information on non-discrimination and equality, and effective remedies, in accordance with the harmonized guidelines.

14 Adopted by the Committee on Economic, Social and Cultural Rights at its 49th meeting (41st Session) on 18 November 2008, taking into consideration the guidelines on a common core document and treaty-specific documents, as contained in the harmonized guidelines (HRI/GEN/2/Rev.5). See UN Doc E/C.12/2008/2 (13 January 2009).
2. The treaty-specific document submitted to the Committee on Economic, Social and Cultural Rights should not repeat information included in the common core document or merely list or describe the legislation adopted by the State party. Rather, it should contain specific information relating to the implementation, in law and in fact, of articles 1 to 15 of the Covenant, taking into account the general comments of the Committee, as well as information on recent developments in law and practice affecting the full realization of the rights recognized in the Covenant. It should also contain information on the concrete measures taken towards that goal, and the progress achieved, including – except for initial treaty-specific documents – information on the steps taken to address issues raised by the Committee in the concluding observations on the State party’s previous report, or in its general comments.

3. In relation to the rights recognized in the Covenant, the treaty-specific document should indicate:

(a) Whether the State party has adopted a national framework law, policies and strategies for the implementation of each Covenant right, identifying the resources available for that purpose and the most cost-effective ways of using such resources;

(b) Any mechanisms in place to monitor progress towards the full realization of the Covenant rights, including identification of indicators and related national benchmarks in relation to each Covenant right, in addition to the information provided under appendix 3 of the harmonized guidelines and taking into account the framework and tables of illustrative indicators outlined by the Office of the United Nations High Commissioner for Human Rights (OHCHR) (HRI/MC/2008/3);

(c) Mechanisms in place to ensure that a State party’s obligations under the Covenant are fully taken into account in its actions as a member of international organizations and international financial institutions, as well as when negotiating and ratifying international agreements, in order to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined;

(d) The incorporation and direct applicability of each Covenant right in the domestic legal order, with reference to specific examples of relevant case law;

(e) The judicial and other appropriate remedies in place enabling victims to obtain redress in case their Covenant rights have been violated;

(f) Structural or other significant obstacles arising from factors beyond the State party’s control which impede the full realization of the Covenant rights;

(g) Statistical data on the enjoyment of each Covenant right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, on an annual comparative basis over the past five years.

4. The treaty-specific document should be accompanied by a sufficient number of copies in one of the working languages of the Committee (English, French, Russian and Spanish) of all other supplementary documentation which the State party may wish to have distributed to all members of the Committee to facilitate the consideration of the report.

5. If a State party is party to any of the ILO Conventions listed in appendix 2 of the harmonized guidelines, or to any other relevant conventions of United Nations specialized agencies, and has already submitted reports to the supervisory committee(s) concerned that are relevant to any of the rights recognized in the Covenant, it should append the respective parts of those reports rather than repeat the information in the treaty-specific document. However, all matters which arise under the Covenant and are not fully covered in those reports should be dealt with in the present treaty-specific document.
6. Periodic reports should address directly the suggestions and recommendations of the previous concluding observations.

B. Part of the treaty-specific document submitted to the Committee relating to general provisions of the Covenant

Article 1 of the Covenant

7. In what manner has the right to self-determination been implemented?

8. Indicate the ways and means by which the State party recognizes and protects the rights of indigenous communities, if any, to ownership of the lands and territories which they traditionally occupy or use as traditional sources of livelihood. Also indicate the extent to which indigenous and local communities are duly consulted, and whether their prior informed consent is sought, in any decision-making processes affecting their rights and interests under the Covenant, and provide examples.

Article 2

9. Indicate the impact of international economic and technical assistance and co-operation, whether received or provided by the State party, on the full realization of each of the Covenant rights in the State party or, as the case may be, in other countries, especially developing countries.

10. In addition to information provided in the common core document (paras. 50 to 58 of the harmonized guidelines), provide disaggregated and comparative statistical data on the effectiveness of specific anti-discrimination measures and the progress achieved towards ensuring equal enjoyment of each of the Covenant rights by all, in particular the disadvantaged and marginalized individuals and groups.

11. If the State party is a developing country, provide information on any restrictions imposed under article 2, paragraph 3, of the Covenant, on the enjoyment by non-nationals of the economic rights recognized in the Covenant.

Article 3

12. What steps have been taken to eliminate direct and indirect discrimination based on sex in relation to each of the rights recognized in the Covenant, and to ensure that men and women enjoy these rights on a basis of equality, in law and in fact?

13. Indicate whether the State party has adopted gender equality legislation and the progress achieved in the implementation of such legislation. Also indicate whether any gender-based assessment of the impact of legislation and policies has been undertaken to overcome traditional cultural stereotypes that continue to negatively affect the equal enjoyment of economic, social and cultural rights by men and women.

Articles 4 and 5

14. See paragraph 40 (c) of the harmonized guidelines on a common core document.

C. Part of the report relating to specific rights

Article 6

15. Provide information on effective measures taken to reduce unemployment including on:

15 General Comment 12, para 13; General Comment 14, para 27.
(a) The impact of targeted employment programmes in place to achieve full and productive employment among persons and groups considered particularly disadvantaged, in particular women, young persons, older persons, persons with disabilities and ethnic minorities, in rural and deprived urban areas; and

(b) The impact of measures to facilitate re-employment of workers, especially women and long-term unemployed workers, who are made redundant as a result of privatization, downsizing and economic restructuring of public and private enterprises.

16. Provide information on work in the informal economy in the State party, including its extent and the sectors with a large percentage of informal workers, and the measures taken to enable them to move out of the informal economy, as well as on measures taken to ensure access by informal workers, in particular older workers and women, to basic services and social protection.

17. Describe the legal safeguards in place to protect workers from unfair dismissal.

18. Indicate what technical and vocational training programmes are in place in the State party and their impact on empowering the workforce, especially disadvantaged and marginalized individuals, to enter or re-enter the labour market.

Article 7

19. Indicate whether a national minimum wage has been legally established, and specify the categories of workers to which it applies, as well as the number of persons covered by each category. If any category of workers is not covered by the national minimum wage, explain the reasons why. In addition, indicate:

(a) Whether a system of indexation and regular adjustment is in place to ensure that the minimum wage is periodically reviewed and determined at a level sufficient to provide all workers, including those who are not covered by a collective agreement, and their families, with an adequate standard of living; and

(b) Any alternative mechanisms in place, in the absence of a national minimum wage, to ensure that all workers receive wages sufficient to provide an adequate standard of living for themselves and their families.

20. Provide information on working conditions for all workers, including overtime, paid and unpaid leave and on the measures taken to reconcile professional, family and personal life.

21. Indicate the impact of the measures taken to ensure that women with the same qualifications do not work in lower-paid positions than men, in accordance with the principle of equal pay for work of equal value.

22. Indicate whether the State party has adopted and effectively implemented legislation that specifically criminalizes sexual harassment in the workplace, and describe the mechanisms to monitor such implementation. Also indicate the number of registered cases, the sanctions imposed on perpetrators and the measures taken to compensate and assist victims of sexual harassment.

23. Indicate what legal, administrative or other provisions have been taken to ensure safety and healthy conditions at the workplace and their enforcement in practice.

Article 8

24. Indicate:

(a) What substantive or formal conditions, if any, must be fulfilled to form or join the trade union of one’s choice. Also indicate whether there are any restrictions on the exercise of the right to form or join trade unions by workers, and how they have been applied in practice; and
(b) How trade unions are guaranteed independence to organize their activities without interference, as well as to federate and join international trade union organizations, and the legal and de facto restrictions, if any, on the exercise of this right.

25. Provide information on collective bargaining mechanisms in the State party and their impact on labour rights.

26. Indicate:
   (a) Whether the right to strike is constitutionally or legally guaranteed and to what extent such guarantees are observed in practice;
   (b) Any restrictions on the right to strike in the public and private sectors and their application in practice; and
   (c) The definition of essential services for which strikes may be prohibited.

Article 9

27. Indicate whether there is universal social security coverage in the State party. Also indicate which of the following branches of social security are covered: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans.16

28. Indicate whether there are legally established and periodically reviewed minimum amounts of benefits, including pensions, and whether they are sufficient to ensure an adequate standard of living for recipients and their families.17

29. Indicate whether the social security system also guarantees non-contributory social assistance allowances for disadvantaged and marginalized individuals and families who are not covered by the contributory schemes.18

30. Indicate whether the public social security schemes described above are supplemented by any private schemes or informal arrangements.19 If so, describe these schemes and arrangements and their inter-relationship with the public schemes.

31. Indicate if there is equal enjoyment by men and women of pension rights as regards the age of access, qualifying periods and amounts.

32. Provide information on social security programmes, including informal schemes, to protect workers in the informal economy, in particular in relation to health care, maternity and old age.20

33. Indicate to what extent non-nationals benefit from non-contributory schemes for income support, access to health care and family support.21

Article 10

34. Indicate how the State party guarantees the right of men and, particularly, women to enter into marriage with their full and free consent and to establish a family.

35. Provide information on the availability, coverage and funding of social services to support families, as well as on legal provisions in place to ensure equal opportunities for all families, in

16 General Comment 19, para 12(a)–(i).
17 Ibid, paras 22 and 59(a).
18 Ibid, paras 4(b) and 50.
19 Ibid, para 5.
20 General Comment 16, para 26 and General Comment 19, para 32.
21 General Comment 19, paras 16 and 34.
22 Ibid, para 37.
particular poor families, families from ethnic minorities, and single parent families, in relation
to:

(a) Child care,\textsuperscript{23} and

(b) Social services that enable older persons and persons with disabilities to remain in their
normal living environment for as long as possible\textsuperscript{24} and to receive adequate health and social
care when they are dependent.

36. Provide information on the system of maternity protection in the State party, including
working conditions and prohibition of dismissal during pregnancy. In particular, indicate:

(a) Whether it also applies to women involved in atypical work\textsuperscript{25} and women who are not
covered by work-related maternity benefits;

(b) The duration of paid maternity leave before and after confinement and the cash, medical
and other support measures provided during pregnancy, confinement and after childbirth;\textsuperscript{26}
and

(c) Whether paternity leave is granted to men, and parental leave to men and women.\textsuperscript{27}

37. Indicate the measures of protection and assistance taken on behalf of children and young
persons, including:

(a) Age limits below which the paid employment of children in different occupations is
prohibited under the law of the State party and the application of criminal law provisions in
place punishing the employment of under-aged children and the use of forced labour of chil-
dren;\textsuperscript{28}

(b) Whether any national survey has been undertaken in the State party on the nature and
extent of child labour and whether there is a national action plan to combat child labour; and

(c) The impact of measures taken to protect children against work in hazardous conditions
harmful to their health and against exposure to various forms of violence and exploitation.\textsuperscript{29}

38. Provide information on the legislation and mechanisms in place to protect the economic,
social and cultural rights of older persons in the State party, in particular on the implementa-
tion of laws and programmes against abuse, abandon, negligence and ill-treatment of older
persons.

39. Provide information on the economic and social rights of asylum seekers and their families
and on legislation and mechanisms in place for family reunification of migrants.

40. Indicate:

(a) Whether there is legislation in the State party that specifically criminalizes acts of
domestic violence, in particular violence against women and children,\textsuperscript{30} including marital rape
and sexual abuse of women and children and the number of registered cases, as well as the
sanctions imposed on perpetrators;

(b) Whether there is a national action plan to combat domestic violence, and the measures in
place to support and rehabilitate victims;\textsuperscript{31}

\textsuperscript{23} Ibid, paras 18 and 28; general comment 5, para 30; general comment 6, para 31.

\textsuperscript{24} General Comment 19, paras 15, 18 and 20; General Comment 5, para 30; General Comment 6, para 31.

\textsuperscript{25} General Comment 19, para 19.

\textsuperscript{26} Ibid

\textsuperscript{27} General Comment 16, para 26; see also draft General Comment 20, paras 10(b)(vii) and 16.

\textsuperscript{28} General Comment 18, para 24.

\textsuperscript{29} Ibid, para 15.

\textsuperscript{30} General comment 16, para 27; General Comment 14, paras 21 and 51.

\textsuperscript{31} General comment 16, para 27.
(c) Public awareness-raising measures and training for law enforcement officials and other involved professionals on the criminal nature of acts of domestic violence.

41. Indicate:

(a) Whether there is legislation in the State party that specifically criminalizes trafficking in persons and the mechanisms in place to monitor its strict enforcement. Also indicate the number of reported trafficking cases from, to and through the State party, as well as the sentences imposed on perpetrators; and

(b) Whether there is a national plan of action to combat trafficking and the measures taken to support victims, including medical, social and legal assistance.

Article 11

A. The right to the continuous improvement of living conditions

42. Indicate whether the State party has defined a national poverty line and on what basis it is calculated. In the absence of a poverty line, what mechanisms are used for measuring and monitoring the incidence and depth of poverty?

43. Indicate:

(a) Whether the State party has adopted a national action plan or strategy to combat poverty that fully integrates economic, social and cultural rights and whether specific mechanisms and procedures are in place to monitor the implementation of the plan or strategy and evaluate the progress achieved in effectively combating poverty; and

(b) Targeted policies and programmes to combat poverty, including among women and children, and the economic and social exclusion of individuals and families belonging to the disadvantaged and marginalized groups, in particular ethnic minorities, indigenous peoples and those living in rural and deprived urban areas.

B. The right to adequate food

44. Provide information on the measures taken to ensure the availability of affordable food in quantity and quality sufficient to satisfy the dietary needs of everyone, free from adverse substances, and culturally acceptable.

45. Indicate the measures taken to disseminate knowledge of the principles of nutrition, including of healthy diets.

46. Indicate the measures taken to promote equality of access by the disadvantaged and marginalized individuals and groups, including landless peasants and persons belonging to minorities, to food, land, credit, natural resources and technology for food production.

47. Indicate whether the State party has adopted or envisages the adoption, within a specified time frame, of the ‘Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security’. If not, explain the reasons why.

33 General Comment 12, para 8.
34 General comment 15, para 7.
35 Adopted by the 127th session of the Council of the Food and Agriculture Organization of the United Nations, November 2004.
C. The right to water

48. Indicate:

(a) The measures taken to ensure adequate and affordable access to water that is sufficient
and safe for personal and domestic uses for everyone;\(^{36}\)

(b) The percentage of households without access to sufficient and safe water in the dwelling
or within its immediate vicinity, disaggregated by region and urban/rural population\(^{37}\) and the
measures taken to improve the situation;

(c) The measures taken to ensure that water services, whether privately or publicly provided,
are affordable for everyone;\(^{38}\) and

(d) The system in place to monitor the quality of water.\(^ {39}\)

49. Provide information on education concerning the hygienic use of water, protection of water
sources and methods to minimize water wastage.\(^ {40}\)

D. The right to adequate housing

50. Indicate whether a national survey on homelessness and inadequate housing has been
undertaken, as well as its findings, in particular the number of individuals and families who are
homeless or inadequately housed and without access to basic infrastructures and services such
as water, heating, waste disposal, sanitation, and electricity, as well as the number of persons
living in over-crowded or structurally unsafe housing.

51. Indicate:

(a) The measures taken to ensure access to adequate and affordable housing with legal secu-
ritv of tenure for everyone, irrespective of income or access to economic resources;

(b) The impact of social housing measures, such as the provision of low-cost social housing
units for disadvantaged and marginalized individuals and families, in particular in rural and
deprived urban areas, whether there are waiting lists for obtaining such housing and the
average length of waiting time;

(c) Measures taken to make housing accessible and habitable for persons with special
housing needs, such as families with children, older persons\(^ {41}\) and persons with disabilities;\(^ {42}\)

52. Indicate the legislative and other measures in place to ensure that housing is not built on
polluted sites or in immediate proximity of pollution sources that threaten the health of inhab-
itants.\(^ {43}\)

53. Indicate whether there are any disadvantaged and marginalized individuals and groups,
such as ethnic minorities, who are particularly affected by forced evictions and the measures
taken to ensure that no form of discrimination is involved whenever evictions take place.\(^ {44}\)

54. Indicate the number of persons and families evicted within the last five years and the legal
provisions defining the circumstances in which evictions may take place and the rights of
tenants to security of tenure and protection from eviction.\(^ {45}\)

\(^ {36}\) General Comment 15, paras 12(a) and 37(a); General Comment 14, para 43(c).
\(^ {37}\) General comment 15, paras 12(c)(i) and 37(c).
\(^ {38}\) Ibid, paras 24 and 27.
\(^ {39}\) Ibid, para 12(b).
\(^ {40}\) Ibid, para 25.
\(^ {41}\) General Comment 6, para 33.
\(^ {42}\) Ibid
\(^ {43}\) General Comment 4, para 8(f).
\(^ {44}\) General Comment 7, para 10.
\(^ {45}\) Ibid, paras 9, 13–5, 16 and 19; see also Basic principles and guidelines on development-based evictions
and displacement (A/HRC/4/18, annex 1).
Article 12

55. Indicate whether the State party has adopted a national health policy and whether a national health system with universal access to primary health care is in place.

56. Provide information on the measures taken to ensure:

(a) That preventive, curative, and rehabilitative health facilities, goods and services are within safe reach and physically accessible for everyone, including older persons and persons with disabilities;\(^{46}\)

(b) That the costs of health-care services and health insurance, whether privately or publicly provided, are affordable for everyone, including for socially disadvantaged groups;\(^{47}\)

(c) That drugs and medical equipment are scientifically approved and have not expired or become ineffective; and

(d) Adequate training of health personnel, including on health and human rights.\(^{48}\)

57. Provide information on the measures taken:

(a) To improve child and maternal health, as well as sexual and reproductive health services and programmes, including through education, awareness-raising, and access to family planning, pre- and post-natal care and emergency obstetric services, in particular in rural areas and for women belonging to disadvantaged and marginalized groups;\(^{49}\)

(b) To prevent, treat and control diseases linked to water and ensure access to adequate sanitation;\(^{50}\)

(c) To implement and enhance immunization programmes and other strategies of infectious disease control;\(^{51}\)

(d) To prevent the abuse of alcohol and tobacco, and the use of illicit drugs and other harmful substances, in particular among children and adolescents, ensure adequate treatment and rehabilitation of drug users, and support their families;\(^{52}\)

(e) To prevent HIV/AIDS and other sexually transmitted diseases, educate high-risk groups, children and adolescents as well as the general public on their transmission, provide support to persons with HIV/AIDS and their families, and reduce social stigma and discrimination;\(^{53}\)

(f) To ensure affordable access to essential drugs, as defined by the WHO, including anti-retroviral medicines and medicines for chronic diseases;\(^{54}\) and

(g) To ensure adequate treatment and care in psychiatric facilities for mental health patients, as well as periodic review and effective judicial control of confinement.

Article 13

58. Indicate to what extent the form and substance of education in the State party are directed towards the aims and objectives identified in article 13, paragraph 1,\(^{55}\) and whether school curricula include education on economic, social and cultural rights.

\(^{46}\) General Comment 14, para 12(b).

\(^{47}\) Ibid, paras 12(b), 19 and 36.

\(^{48}\) Ibid, paras 12(d) and 44(e).

\(^{49}\) Ibid, paras 14, 21–3 and 44(a).

\(^{50}\) General Comment 15, paras 8 and 37(i).

\(^{51}\) General Comment 14, paras 16 and 44(b).

\(^{52}\) Ibid, para 16.

\(^{53}\) Ibid, para 16.

\(^{54}\) Ibid, para 43(d).

\(^{55}\) General Comment 13, paras 4–5 and 49.
59. Indicate how the obligation to provide primary education that is compulsory and available free for all is implemented in the State party, in particular:
   (a) The level or grade until which education is compulsory and free for all;
   (b) Any direct costs such as school fees, as well as the measures taken to eliminate them; and
   (c) Any indirect costs (e.g. expenses for school books, uniforms, transport, special fees such as exam fees, contributions to district education boards, etc.) and the measures taken to alleviate the impact of such costs on children from poorer households.

60. Indicate the measures taken to make secondary education in its different forms, including technical and vocational education, generally available and accessible to all, including:
   (a) Concrete steps taken by the State party towards progressively achieving free secondary education; and
   (b) The availability of technical and vocational education, and whether it enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability.

61. Indicate the measures taken to make higher education equally accessible to all and without discrimination, on the basis of capacity, and the concrete steps taken towards progressively achieving free higher education.

62. Indicate the measures taken to promote literacy, as well as adult and continuing education, in a life-long perspective.

63. Indicate whether minority and indigenous children have adequate opportunities to receive instruction in or of their native language and the steps taken to prevent lower educational standards for these children, their segregation in special classes, and their exclusion from mainstream education.

64. Indicate the measures taken to ensure the same admission criteria for boys and girls at all levels of education, and to raise awareness among parents, teachers and decision-makers on the value of educating girls.

65. Indicate the measures taken to reduce the drop-out rates, at the primary and secondary levels, for children and young persons, in particular girls, children from ethnic minorities, indigenous communities and poorer households, as well as migrant, refugee and internally displaced children.

Article 14

66. If compulsory and free primary education is not currently enjoyed in the State party, provide information on the required plan of action for the progressive implementation, within a reasonable number of years fixed in this plan, of this right. Also indicate any particular difficulties encountered, in the adoption and implementation of this plan of action, as well as the measures taken to overcome these difficulties.

Article 15

67. Provide information on the institutional infrastructure to promote popular participation in, and access to, cultural life, especially at the community level, including in rural and deprived

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56 Ibid, para 14.
57 Ibid, paras 15–6.
58 Ibid, para 20.
59 Ibid, para 30.
60 General Comment 16, para 30.
61 Ibid.
62 In General Comment 11, para 11, the Committee asks states parties to submit their plans of action as an integral part of the reports required under the Covenant.
urban areas. In this regard, indicate the measures taken to promote broad participation in, and access to, cultural goods, institutions and activities, including measures taken:

(a) To ensure that access to concerts, theatre, cinema, sport events and other cultural activities is affordable for all segments of the population;

(b) To enhance access to the cultural heritage of mankind, including through new information technologies such as the Internet;

(c) To encourage participation in cultural life by children, including children from poorer families, and migrant or refugee children; and

(d) To eliminate physical, social and communication barriers preventing older persons and persons with disabilities from fully participating in cultural life.63

68. Indicate the measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.

69. Provide information on school and professional education in the field of culture and the arts.

70. Indicate:

(a) The measures taken to ensure affordable access to the benefits of scientific progress and its applications for everyone, including disadvantaged and marginalized individuals and groups; and

(b) The measures taken to prevent the use of scientific and technical progress for purposes which are contrary to the enjoyment of human dignity and human rights.

71. Indicate the measures taken to ensure the effective protection of the moral and material interests of creators,64 in particular:

(a) To protect the right of authors to be recognized as the creators and for the protection of the integrity of their scientific, literary and artistic productions;65

(b) To protect the basic material interests of authors resulting from their productions, which enable them to enjoy an adequate standard of living;66

(c) To ensure the protection of the moral and material interests of indigenous peoples relating to their cultural heritage and traditional knowledge;67 and

(d) To strike an adequate balance between the effective protection of the moral and material interests of authors and the State party’s obligations in relation to the other rights recognized in the Covenant.68

72. Indicate the legal provisions in place to protect the freedom indispensable for scientific research and creative activity and any restrictions on the exercise of this freedom.

73. Indicate the measures taken for the conservation, development and diffusion of science and culture and to encourage and develop international contacts and co-operation in the scientific and cultural fields.

63 General Comment 5, paras 36–8; General Comment 6, paras 39–41.
64 General Comment 17, paras 39(a).
65 Ibid, para 39(b).
66 Ibid, para 39(c).
67 Ibid, para 32.
68 Ibid, para 39(e).
### APPENDIX J

**LIST OF LEAST DEVELOPED COUNTRIES**

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<td>Angola</td>
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70 Cape Verde graduated from LDC status on 21 December 2007.


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