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.....Chapter 14  
**THE ROLE OF THE  
COURTS IN PROTECTING  
ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS .....**

*Learning Objectives*

- *To familiarize the participants with the main international legal instruments protecting economic, social and cultural rights*
- *To explain to the participants the intrinsic relationship between economic, social and cultural rights, on the one hand, and civil and political rights, on the other*
- *To acquaint the participants with the nature of States parties' legal obligations with respect to the enforcement of economic, social and cultural rights*
- *To inform the participants of the content of some economic, social and cultural rights*
- *To discuss with the participants the question of justiciability of economic, social and cultural rights*
- *To familiarize the participants with the important role of domestic courts in protecting economic, social and cultural rights*
- *To increase the participants' awareness of their potential as judges and lawyers to contribute to the enforcement of economic, social and cultural rights at the domestic level*

*Questions*

- *How are economic, social and cultural rights protected and enforced in the country in which you work?*
- *What role do the courts play in the enforcement of these rights?*
- *What mechanisms other than the courts exist in your country for the promotion and/or enforcement of economic, social and cultural rights?*
- *What aspects of economic, social and cultural rights are particularly relevant in the country in which you work?*

## Questions (cont.d)

- *Are there any vulnerable groups that are in particular need of legal protection in the field of economic, social and cultural rights?*
- *If so, who are they and in what sense do they need special protection?*
- *How, if at all, is this protection provided? Is it efficient?*
- *How would you envisage a remedy at the domestic level for efficiently protecting a person's economic, social and cultural rights?*

## Relevant Legal Instruments

### Universal Instruments

- International Covenant on Economic, Social and Cultural Rights, 1966
- Universal Declaration of Human Rights, 1948

### Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988
- European Social Charter, 1961, and European Social Charter (Revised), 1996

# 1. Introduction

The principal aim of this chapter is to describe the important role played by international monitoring bodies and domestic courts in contributing to the protection of economic, social and cultural rights at the national level.

The chapter will begin, however, by explaining in general terms why the original single human rights covenant was ultimately split into two covenants, one guaranteeing civil and political rights and the other protecting economic, social and cultural rights. It will then briefly describe the intrinsic relationship between these two categories of rights, which depend on each other for their mutual and effective realization. Thirdly, the chapter will undertake a survey of the economic, social and cultural rights guaranteed by the universal and regional human rights treaties and analyse the legal obligations of States to protect these rights. Fourthly, it will discuss the legal nature of economic, social and cultural rights, including their justiciability. This will be followed by an examination of the interpretation by the international monitoring bodies of the right to adequate housing and the right to health. In this connection, reference will be made to examples from domestic case law which show that courts are increasingly called upon to adjudicate questions appertaining to the field of economic, social and cultural rights. The chapter will conclude with a description of the important role played by the legal professions in ensuring the effective protection of these rights.

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It should be noted that, notwithstanding their fundamental importance, this chapter will not deal with the many conventions and recommendations adopted within the framework of the International Labour Organization, which provide extensive protection of workers' rights. However, a list of some major ILO Conventions is contained in **Handout No. 1**.

## 2. History Revisited: Why are there Two International Covenants on Human Rights?

### 2.1 A chronological overview

The hard lessons learnt from the Second World War are reflected in the Charter of the United Nations, which emphasizes that international peace and stability are conditional upon the promotion of

- ❖ “higher standards of living, full employment, and conditions of economic and social progress and development” (Art. 55(a));

- ❖ “solutions of international economic, social, health, and related problems; and international cultural and educational co-operation” (Art. 55(b)); and
- ❖ “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (art. 55(c)).

It is logical that this awareness of the need to satisfy all major dimensions of the human person also came to be reflected in the 1948 Universal Declaration of Human Rights, which not only includes the more traditional civil and political rights but also a number of economic, social and cultural rights such as the right to work, the right to social security, the right to an adequate standard of living and the right to education (arts. 22-27).

The goal pursued in drafting an international covenant on human rights was to translate the rather generally worded rights contained in the Universal Declaration into more detailed and legally binding undertakings. The Commission on Human Rights swiftly set about drafting the civil and political rights to be contained in the covenant, and at its fifth session in 1949 adopted, by 12 votes to none, but with 3 abstentions, a resolution in which it stated the view that it was necessary also to include provisions on the enjoyment of economic and social rights in the covenant.<sup>1</sup> However, following the debate at its sixth session in 1950, the Commission reversed its view and decided, by 13 votes to 2, **not** to include economic, social and cultural rights in the first covenant, which was to be limited to civil and political rights. This covenant was to be “the first of the series of covenants and measures to be adopted in order to cover the whole of the Universal Declaration”.<sup>2</sup> It had now clearly dawned on the Commission, which was under considerable pressure to show the peoples of the world that it could produce tangible results, that it would be extremely difficult to draw up a legally binding document that also covered the complex spectrum of economic, social and cultural rights within a short time.

During the fifth session of the General Assembly in 1950, the question of whether one or two covenants should be elaborated was discussed in the Third Committee. A majority was in favour of including the two categories of rights in one and the same covenant.<sup>3</sup> On the recommendation of the Third Committee, the General Assembly adopted resolution 421(V) in which it declared that “the Covenant should be drawn up in the spirit and based on the principles of the Universal Declaration of Human Rights [which] regards man as a person, to whom civic and political freedoms as well as economic, social and cultural rights indubitably belong”. It added that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” and that “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man”. For all these reasons, the General Assembly decided to include economic, social and cultural rights in the covenant on human rights as well as an explicit recognition of the equality of men and women in related rights. It therefore called on the Economic and Social Council “to request the

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<sup>1</sup>UN doc. E/1371 (E/CN.4/350), Report of the fifth session of the Commission on Human Rights, 1949, p. 15. The vote was 12 to none, with 3 abstentions.

<sup>2</sup>For the discussion in the Commission of Human Rights at its sixth session of the question of the inclusion of economic, social and cultural rights in the covenant, see UN docs. E/CN.4/SR.181 and 184-187; for the vote see UN doc. E/CN.4/SR.186, p. 21.

<sup>3</sup>See, for example, *GAOR, fifth session, 1950, Third Committee*, docs. A/C.3/SR.297-299 and 313.

Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft covenant”. Resolution 421 (V) as a whole was adopted by 38 votes to 7, with 12 abstentions, and section (E) thereof, which contained the ruling on economic, social and cultural rights, was adopted by 35 votes to 9, with 7 abstentions.<sup>4</sup> There was, in other words, at the time a large majority in favour of drafting just one legal instrument embracing civil, political, economic, social and cultural rights.

In response to the request by the General Assembly, the Economic and Social Council decided by resolution 349 (XII) to ask the Commission on Human Rights to prepare “a revised draft Covenant on the lines indicated by the General Assembly”.

At its seventh session in 1951, despite the General Assembly resolution, the Commission started its work by extensively debating the question whether or not to introduce economic, social and cultural rights into the covenant, which already contained eighteen articles on civil and political rights.<sup>5</sup> It eventually proceeded with the drafting of a single covenant, adding to the already existing civil and political rights a number of economic, social and cultural rights.<sup>6</sup> However, the debate in the Commission shows that the answer to why there are two covenants rather than only one is more complex than is sometimes believed.

After considering the Commission’s report, the Economic and Social Council, in view of “the difficulties which may flow from embodying in one covenant two different kinds of rights and obligations”, invited the General Assembly “to reconsider its decision in resolution 421 E (V) to include in one covenant articles on economic, social and cultural rights, together with articles on civic and political rights” (ECOSOC resolution 384 C (XIII)).

During its sixth session, after a very long and, in political terms, increasingly polarized discussion that was tainted by profound distrust between, in particular, the Socialist countries and some of the Western States, the General Assembly requested the Economic and Social Council “to ask the Commission on Human Rights to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights”. The covenants were to be approved by the General Assembly at the same time “in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights” (General Assembly resolution 543(VI)). The Commission therefore proceeded at its eighth session in 1952 with the drafting of two covenants.

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<sup>4</sup>GAOR, *fifth session, 1950, Plenary Meetings*, doc. A/PV.317, p. 564, paras. 170 and 162.

<sup>5</sup>For details of the discussion, see in particular UN docs. E/CN.4/SR.203-208, 237 and 248.

<sup>6</sup>See UN doc. E/1992 (E/CN.4/640), Report of the seventh session of the Commission on Human Rights, 1951, Annexes, pp. 57-85.

## 2.2 The substance of the debates

It should be noted at the outset that neither the importance of economic, social and cultural rights nor their intrinsic relationship with civil and political rights was challenged by the speakers. However, once the Commission began work on the drafting of the covenant, it soon became apparent that the very nature of economic, social and cultural rights made it impossible to discuss their substance without also discussing their implementation and hence whether they should be included in the same covenant as civil or political rights or in a separate treaty.

### 2.2.1 Principal arguments in favour of one covenant

The most important argument advanced by the countries that favoured a single covenant was *the need for unity of rights*, since civil and political rights and economic, social and cultural rights formed an indivisible whole. Some countries believed that two covenants would weaken the moral authority of the Universal Declaration, which reflected the interdependence of rights.<sup>7</sup> These countries considered in general that the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, was artificial and that the former would have no meaning or value without the latter.<sup>8</sup> Several of them thought that the question of whether one or two covenants should be drafted had been closed by General Assembly resolution 421(V) and should not be reopened.<sup>9</sup> It was further argued that “all those countries who opposed a single covenant automatically rejected the fundamental unity of economic, social and cultural rights with civil and political rights”<sup>10</sup> and that “a few States, including Canada, France, the United Kingdom and the United States of America [placed] their national interest above every other consideration [and] were trying to segregate the economic, social and cultural rights.”<sup>11</sup> Some countries also feared that the suggestion that the two covenants should be adopted and opened for ratification simultaneously would cause considerable delay in ratification. The idea was rejected by the USSR as nothing but “an attempt to shelve economic, social and cultural rights”. In its view, the United States and the United Kingdom were “again resorting to the sabotage and delaying manoeuvres to which they had had recourse in the case of the Universal Declaration of Human Rights”.<sup>12</sup>

<sup>7</sup>In this connection see, for example, *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 174, paras. 35-41 (Poland); pp. 175-176, paras. 48-60 (USSR); doc. A/C.3/SR.298, p. 178, paras. 9-15 (Mexico); pp. 178-179, paras. 16-19 (Yugoslavia); p. 181, para. 49 (Iran); pp. 182-183, paras. 63-65 (Iraq); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 81, para. 44 (Mexico); doc. A/C.3/SR.366, p. 114, paras. 13-14 (Indonesia); doc. A/C.3/SR.366, p. 116, paras. 37-40 and doc. A/C.3/SR.393, p. 275, para. 46 (Cuba). For other countries favouring a single covenant, see, for example, *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.299, p. 187, para. 27 (Saudi Arabia); p. 187, para. 31 (Czechoslovakia); p. 188, para. 40 (Argentina); p. 189, para. 53 (Syria).

<sup>8</sup>See, for example, UN doc. E/CN.4/203, p. 22 (Ukrainian SSR); *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 176, paras 69-72 (Chile); doc. A/C.3/SR.298, p. 178, para. 13 (Mexico); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.362, p. 91, para. 23 (Iraq); doc. A/C.3/SR.368, p. 127, paras.1-2 (Byelorussian SSR); p. 130, paras. 30-31 (Poland); doc. A/C.3/SR.370, p. 135, para. 3, and doc. A/C.3/SR.395, p. 285, paras. 2-4 (USSR); doc. A/C.3/SR.393, p. 272, paras. 10-11 (Saudi Arabia).

<sup>9</sup>See, for example, *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.367, p. 123, para. 24 (Ukrainian SSR); doc. A/C.3/SR.368, p. 127, paras.1-2 (Byelorussian SSR); p. 130, para. 38 (Poland).

<sup>10</sup>*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 108, para. 8 (Yugoslavia);

<sup>11</sup>*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.368, p. 127, para. 1 (Byelorussian SSR).

<sup>12</sup>*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, pp. 135-136, para. 6. On fears of delay in linking the two covenants, see also doc. A/C.3/SR.366, p. 118, para. 57 (Czechoslovakia) and doc. A/C.3/SR.393, p. 272, para. 16 (Syria).

Differences of view existed with regard to the implementation mechanism in a single covenant containing both civil and political and economic, social and cultural rights. While some wanted a uniform implementation mechanism,<sup>13</sup> others wanted different implementation machinery for the two categories of rights.<sup>14</sup> In the opinion of the USSR, however, “there was only one method of implementation which conformed with international law” and that was “the adoption by governments, in their territories, of all the legislative and other measures needed to guarantee peoples the enjoyment of all their rights”.<sup>15</sup> With regard to the enforcement problem, the USSR also denied that “it would be easier to implement civil and political rights since legislative action was all that was needed” and cited examples in support of its opinion.<sup>16</sup>

## 2.2.2 Principal arguments in favour of two covenants

As noted above, the countries arguing for the elaboration of two covenants also emphasized the intrinsic relationship between the two categories of rights as well as the need for an international instrument that also guaranteed economic, social and cultural rights. In order to stress the equal value of these rights, they wanted the two covenants to be opened for signature simultaneously.<sup>17</sup> However, some speakers warned against confusing “the unity of the rights themselves with uniform enforcement” because there was “a distinction between the unity of human rights in principle and their separation in practice”.<sup>18</sup>

Many of the countries favouring a separate covenant on economic, social and cultural rights<sup>19</sup> considered that it would be better to finalize the covenant on civil and political rights since any attempt to draft a treaty covering all rights might entail a considerable delay.<sup>20</sup> However, the major argument in support of their opinion was *that*, because of their specific nature, economic, social and cultural rights were more difficult to define than civil and political rights, *that* it was more complex and time-consuming to enforce economic, social and cultural rights, *and that* a different mechanism was therefore needed for their implementation.<sup>21</sup> According to Liberia, it

<sup>13</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 108, para. 9 (Yugoslavia).

<sup>14</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 79, para. 23 (Guatemala); doc. A/C.3/SR.393, p. 273, para. 30 (Philippines);

<sup>15</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, p. 135, para. 5.

<sup>16</sup>*Ibid.*, p. 135, para. 4.

<sup>17</sup>See, for example, GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, p. 98, para. 8 (Netherlands); see also the amendment submitted by Belgium, India, Lebanon and the United States in UN docs. A/C.3/L.184 and A/C.3/L.184/Rev.1, as well as the statement by Lebanon, in GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, pp. 138-139, paras. 35-37.

<sup>18</sup>GAOR, *sixth session 1951-1951, Third Committee*, doc. A/C.3/SR.394, pp. 280-281, para. 20 (Lebanon).

<sup>19</sup>For countries favouring two or even more covenants, see, for example, UN doc. E/CN.4/SR.205, pp. 8-9 (Denmark); GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 172, para. 17 (USA); p. 173, para. 29 (Netherlands); p. 174, para. 34 (United Kingdom); doc. A/C.3/SR.298, p. 180, paras. 39-40 (Venezuela); p. 182, para. 60 (Dominican Republic); doc. A/C.3/SR.299, p. 186, paras. 8-12 (India).

<sup>20</sup>GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 172, para. 17 (United States); p. 174, para. 34 (United Kingdom); doc. A/C.3/SR.298, p. 182, para. 60 (Dominican Republic); doc. A/C.3/SR.299, p. 186, para. 10 (India); GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.362, p. 89, para. 3 (Denmark); p. 91, para. 32 (Canada); doc. A/C.3/SR.367, p. 123, para. 25 (Dominican Republic).

<sup>21</sup>See, for example, the proposal by Denmark, in UN doc. E/CN.4/SR.205, p. 9; see also, for example, the view of Australia on the need for a different form of implementation of economic, social and cultural rights in UN doc. E/CN.4/SR.203, p. 21 and GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, pp. 100-101, paras. 39-41. At an early stage, however, Australia was inclined to favour one covenant, see UN doc. E/CN.4/SR.203, p. 21. See also UN doc. E/CN.4/SR.248, p. 10 (United

would “be useless to attempt to include civil and political rights and economic, social and cultural rights in one instrument” because, in so doing, one would fail to take into account “the unequal degree of development of the various States composing the world community”.<sup>22</sup>

Some countries submitted that, while appropriate legislative and administrative action would in principle be sufficient to protect civil and political rights, the protection of many economic, social and cultural rights depended, *inter alia*, on the financial resources and stage of development of each country and required social reforms, more or less long-term plans and possibly international cooperation.<sup>23</sup> It was also observed in this context that Governments generally have a much more active role to play in ensuring economic, social and cultural rights since they are responsible for the material well-being of their citizens, while they have a more passive role to fulfil with regard to the implementation of civil and political rights, which call for the restraining of governmental powers *vis-à-vis* the individual.<sup>24</sup>

In explaining the greater difficulties involved in giving effect to economic and social rights and the resultant need for progressive implementation, the representative of France pointed out that it had taken his country “no less than forty years to evolve a more or less complete system of social security”<sup>25</sup> and that “the struggle against illiteracy, for instance, demanded the setting up of schools and the training of teachers, a task which in certain countries might require 20 to 25 years.”<sup>26</sup> In the view of France, ratification of the draft covenant would not be facilitated by ignoring the fact that the realization of economic, social and cultural rights always took time.<sup>27</sup> The United States also pointed out that rights such as medical care and access to education “depended very much on resources of finance, equipment and personnel, which were undoubtedly not available in sufficient measures in all countries”.<sup>28</sup>

Some countries also rejected as untenable the argument that civil and political rights had no value in themselves, and Lebanon emphasized that these rights had an absolute character which the other rights did not, although they were complementary.<sup>29</sup>

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Kingdom); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 78, paras. 9-12 (United States); doc. A/C.3/SR.362, p. 89, para. 3 (Denmark); p. 91, paras. 27-31 (Canada); doc. A/C.3/SR.367, p. 121, paras. 3-5 (New Zealand). France considered that economic, social and cultural rights “were very different in character, and that a whole legislative and technical structure was required to translate them into practice”, see UN doc. E/CN.4/203, p. 10.

<sup>22</sup>*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.366, p. 115, para. 21.

<sup>23</sup>In this connection see, for example, UN doc. E/CN.4/SR.205, p. 10 (Denmark); *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.298, pp. 177-178, paras. 6-8 (France) (France had an “open mind” as to the number of covenants, “although at first sight it would appear that two parallel documents might be preferable”, para. 7); p. 98, para. 14 (France); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 78, paras. 9-13 (USA); doc. A/C.3/SR.362, p. 91, paras. 30-31 (Canada).

<sup>24</sup>See, for example, UN doc. E/CN.4/SR.207, p. 10 (Denmark); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.367, p. 121, para. 3 (New Zealand). See also the statement by Venezuela to the effect that “the effective implementation of civil and political rights depended on the goodwill of the State and its subjects; whereas such goodwill was in itself inadequate for the implementation of economic, social and cultural rights”, p. 122, para. 12.

<sup>25</sup>UN doc. E/CN.4/SR.237, p. 7.

<sup>26</sup>UN doc. E/CN.4/SR.203, p. 11.

<sup>27</sup>UN doc. E/CN.4/SR.237, p. 8.

<sup>28</sup>UN doc. E/CN.4/SR.203, p. 15.

<sup>29</sup>*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, p. 139, paras. 36-37.



### 2.2.3 Pleadings in favour of a practical solution

As underlined by some countries, there was an apparent need to find middle ground between a general enumeration of rights such as that already contained in the Universal Declaration of Human Rights and unduly detailed provisions that would prevent many countries from ratifying the covenant.<sup>30</sup> Uruguay advocated a realistic approach: “The principal matter of concern was that international protection should be extended immediately to the greatest possible number of human rights by the greatest possible number of States.”<sup>31</sup> In a similar vein France warned against “the danger of undue delay in producing at least a first draft covenant, limited in scope though it might be”,<sup>32</sup> and emphasized the need to ensure the universality of the Universal Declaration by having as many countries as possible ratify the provisions adopted.<sup>33</sup>

Thus, throughout the debates, France adopted a practical approach, arguing that it would be “an unpardonable anachronism” not to adopt a covenant containing economic, social and cultural rights, whether jointly or separately with civil and political rights. It was a matter of finding the “right path”, which could only be done by “progressive efforts”.<sup>34</sup> The debate had shown that what was important was “the essential unity of all human rights, a unity which had inspired the Universal Declaration of Human Rights itself”. However, “that unity did not necessarily extend to technicalities [and] the question whether there should be one covenant or two was an essentially technical matter [because] two or more covenants on human rights could well be interlinked by a common underlying design.”<sup>35</sup> France also observed that “some of the partisans of unity *à outrance* had not perhaps altogether lived up to their principles,” as when they had “disdained” the inclusion of the right to freedom from arbitrary arrest in the covenant.<sup>36</sup> On the other hand, it also considered that the partisans of two covenants tended to exaggerate the differences between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, because “among the latter there were many susceptible of immediate implementation”.<sup>37</sup> It was important “not to be hypnotized by differences in the origin and development of various rights, and the only truly valid criterion was whether, and on what conditions, any given right could be implemented”.<sup>38</sup> The adoption of two covenants “was therefore permissible on grounds of convenience” in that it would “reduce the number of points of disagreement, and would enjoy greater support”.<sup>39</sup>

It followed logically that for France “the problem of human rights was a single problem from the point of view of principle but a multiple problem from the point of view of the forms it assumed.” Hence, while speaking in favour of unity, France considered that “the most important problem was not the unity or duality of the

<sup>30</sup>See, for example, UN docs. E/CN.4/SR.203, p. 20 (Australia); E/CN.4/SR.204, p. 10 (Sweden).

<sup>31</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 110, para. 31.

<sup>32</sup>GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.304, p. 211, para. 8.

<sup>33</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, p. 98, para. 12.

<sup>34</sup>GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.298, p. 177, paras. 1-2.

<sup>35</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.371, p. 142, para. 14.

<sup>36</sup>*Ibid.*, p. 142, para. 15.

<sup>37</sup>*Ibid.*, loc. cit.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*, p. 142, para. 16.

covenant, but the implementation of the rights.”<sup>40</sup> One of the essential things to do in order to move forward was therefore to design “measures of implementation suited to the nature of each of the obligations assumed”.<sup>41</sup>

In view of “the different concepts of their nature and of the methods by which they should be implemented held by different countries, and of the fact that a longer period of time was often required to ensure their enjoyment,” France considered it necessary at an early stage to introduce a general clause that would provide for the progressive implementation of economic, social and cultural rights,<sup>42</sup> a proposal criticized by Yugoslavia<sup>43</sup> but adopted, as amended, by the Commission.<sup>44</sup> Australia agreed that “the concept of progressive realization was of positive value and should be retained.” It further observed that “the idea expressed in the word ‘progressively’, which must be taken in conjunction with the words ‘full realization of the rights’, was not a static one [but] meant that certain rights would be applied immediately, others as soon as possible”, because, after all, “the immediate implementation of any right or measure such as, for instance, old age pensions, was a practical impossibility.”<sup>45</sup>

#### **2.2.4 The question of justiciability**

During the debates at the seventh session of the United Nations Commission on Human Rights, India strongly favoured the drafting of two covenants, emphasizing that economic, social and cultural rights differed from civil and political rights “inasmuch as the former were not justiciable”. It saw no reason to include both categories in one and the same Covenant which would “lack equilibrium”. India therefore wanted the Commission to ask the Economic and Social Council to reconsider its decision to have all rights contained in one covenant.<sup>46</sup>

Yugoslavia could not accept India’s view that “alleged violations of economic, social and cultural rights could not be brought into court”. In its view, “if governments were to assume definite obligations in respect of the observance of such rights, they would have to take legislative and other measures enabling an action to be brought in respect of their non-observance, the courts being empowered to provide redress.”<sup>47</sup> Guatemala also considered that it was “incorrect” to refer to economic, social and cultural rights as non-justiciable rights as had been done in the preamble to the Indian proposal, and that it “might even prove dangerous”.<sup>48</sup> The USSR considered this distinction to be “completely arbitrary”, adding that the assumption that civil and political rights but not economic, social and cultural rights could be defended by legal action “would not bear scrutiny, as in many countries certain civil and political rights,

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<sup>40</sup> GAOR, sixth session, 1951-1952, Third Committee, doc. A/C.3/SR.395, p. 286, para. 7.

<sup>41</sup> GAOR, sixth session, 1951-1952, Third Committee, doc. A/C.3/SR.363, p. 98, para. 12.

<sup>42</sup> UN doc. E/CN.4/SR.237, p. 7.

<sup>43</sup> Ibid., p. 8.

<sup>44</sup> Ibid., p. 13; for the text of the French proposal see UN doc. E/CN.4/618.

<sup>45</sup> UN doc. E/CN.4/SR.237, p. 6.

<sup>46</sup> UN doc. E/CN.4/SR.248, p. 6.

<sup>47</sup> Ibid., p. 19.

<sup>48</sup> Ibid., p. 21.

such as, for instance, the right to vote, could not easily be defended by legal action initiated by the individual”.<sup>49</sup>

India explained that by “justiciable rights” it meant “those rights for the violation of which governments could be sued”. Governments could not, however, be sued “for failing to carry out economic, social and cultural rights, since the responsible party might well, for example, be employers”.<sup>50</sup>

The formal Indian proposal read as follows:<sup>51</sup>

“*The Commission on Human Rights,*

*Considering* that the economic, social and cultural rights though equally fundamental and therefore important, form a separate category of rights from that of the civil and political rights in that they are not justiciable rights;

*Considering* that the method of their implementation is, therefore, different;

*Recommends* to the Economic and Social Council that the decision to include the economic, social and cultural rights in the same covenant with the civil and political rights, be reconsidered.”

The Commission **rejected** this proposal by 12 votes to 5, with 1 abstention.<sup>52</sup> The Commission thereby also rejected the view contained in the draft resolution that economic, social and cultural rights were not justiciable. Although the Commission did accept that economic, social and cultural rights required a different implementation procedure from civil and political rights, this opinion was thus not based on the justiciable or non-justiciable nature of economic, social and cultural rights per se but on the simple fact that their nature required in many instances considerable efforts by States who, possibly helped by international institutions, would have to engage actively in comprehensive, persistent and long-term planning for their fulfilment.

Warnings against overemphasis on the differences between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, were subsequently raised, in particular, by Israel and France in the General Assembly. Israel submitted that it was not only civil and political rights that could be ensured by legislative or administrative measures but also some economic, social and cultural rights. France for its part, as indicated above, considered that there were “many” among the latter that were “susceptible of immediate implementation”<sup>53</sup> and that many could also be justiciable.<sup>54</sup>

<sup>49</sup>Ibid., p. 13.

<sup>50</sup>Ibid., p. 25.

<sup>51</sup>See UN doc. E/CN.4/619/Rev.1.

<sup>52</sup>UN doc. E/CN.4/SR.248, p. 26. The following countries voted **in favour** of the resolution: Denmark, Greece, India, the United Kingdom and the United States of America; the following countries voted **against**: Chile, China, Egypt, France, Guatemala, Lebanon, Pakistan, Sweden, Ukrainian SSR, USSR, Uruguay and Yugoslavia; Australia **abstained**.

<sup>53</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 82, paras. 54-55 (Israel) and doc. A/C.3/SR.371, p. 142, para. 15 (France).

<sup>54</sup>GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.390, p. 254, para. 30.

*All civil, cultural, economic, political and social human rights are of equal value and dependent on each other for their mutual realization.*

*There are two International Covenants on Human Rights because of the more complex nature of economic, social and cultural rights which needed particularly careful drafting and mechanisms of implementation adjusted to their specific nature.*

*In view of the different levels of development of States, the Covenant had to provide for the possibility of progressive implementation, although this was never meant to imply that there were no immediate obligations.*

*The suggestion that economic, social and cultural rights are not justiciable was never accepted in the course of the elaboration of the International Covenant on Economic, Social and Cultural Rights.*

### 3. Interdependence and Indivisibility of Human Rights

As made clear by the drafters of the two International Covenants on Human Rights, economic, social, and cultural rights, on the one hand, and civil and political rights, on the other, should not be conceived in opposition to each other but as intrinsically interdependent in ensuring that they are all fully respected. The importance of this basic tenet of international human rights law is consistently borne out in practice: in countries where there are obstacles to the enjoyment of civil and political rights, economic, social and cultural rights are less likely to flourish and, conversely, where economic, social and cultural rights fail to thrive, there is little scope for the full development of civil and political rights.

Although the terms “interdependence and indivisibility” of human rights are not explicitly contained in the Universal Declaration of Human Rights, the wording, structure and spirit of the Declaration as a whole confirm that the authors wished to give equal weight to these two categories of rights. They envisioned “a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want” (second preambular paragraph). As seen above, the General Assembly itself emphasized as early as in 1950 that economic, social and cultural rights and civil and political rights are “interconnected and interdependent”, a view subsequently confirmed in the third preambular paragraph of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In the third preambular paragraph of the former, the States parties recognize

“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”.

In the corresponding preambular paragraph of the International Covenant on Civil and Political Rights, the States parties recognize

“that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”.

This intrinsic relationship between the two categories of rights has subsequently been stressed in a number of resolutions such as General Assembly resolution 41/128 of 4 December 1986 containing the Declaration on the Right to Development. Article 6 of the Declaration states this clearly:

- “1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.”

The Vienna Declaration and Programme of Action, which was adopted by consensus on 25 June 1993 by the World Conference on Human Rights, is an even more recent confirmation by the States Members of the United Nations of the bond that unites all human rights. In paragraph 5 of part I of the Vienna Declaration, the Member States recognize that:

“5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

Given the emphasis that has been placed, since drafting work began in the 1940s on the International Bill of Human Rights, on the intrinsic relationship between economic, social and cultural rights and civil and political rights, it was quite logical for the Committee on Economic, Social and Cultural Rights to stress the importance of the following two general principles in the field of *human rights and technical cooperation activities*:

- ❖ The *first general principle* “is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should [therefore] do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights.”<sup>55</sup>
- ❖ “The *second principle of general relevance* is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of ‘development’ have subsequently been recognized as ill-conceived and even counter-productive in human rights terms.”<sup>56</sup> A deliberate effort must therefore be made to design development programmes in such a way that they do in fact enhance the human rights of individuals, including, for instance, their right to equality before the law and non-discrimination, legal issues on which domestic courts are particularly well qualified to adjudicate.

The inherent link between economic, social and cultural rights, on the one hand, and civil and political rights, on the other, is particularly apparent in relation to *the right to life*, which is guaranteed by article 6(1) of the International Covenant on Civil and Political Rights. This link has not escaped the Human Rights Committee, which has noted “that the right to life has been too often narrowly interpreted”.<sup>57</sup> In the Committee’s view:

“The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”<sup>58</sup>

Bearing in mind this wide interpretation of the right to life, the Human Rights Committee has sometimes asked States parties, in connection with the consideration of their initial and/or periodic reports, what measures they have taken, for instance, to improve peoples’ health conditions and increase their life expectancy,<sup>59</sup> reduce the infant mortality rate and satisfy the population’s food needs,<sup>60</sup> or protect the population against epidemics.<sup>61</sup> In considering the fourth periodic report of Mongolia in March 2000, the Human Rights Committee expressed concern about “the acute problem of maternal mortality, due in part to unsafe abortions, and the unavailability of family planning advice and facilities”.<sup>62</sup> These issues could equally well have been considered

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<sup>55</sup>See the Committee’s General Comment No. 2 (International technical assistance measures (art. 22 of the Covenant)) in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, p. 16, para. 6 (hereinafter referred to as *United Nations Compilation of General Comments*)

<sup>56</sup>*Ibid.*, p. 16, para. 7; emphasis added.

<sup>57</sup>*Ibid.*, General Comment No. 6 (Article 6 – the right to life), p. 115, para. 5.

<sup>58</sup>*Ibid.*, loc. cit.

<sup>59</sup>With regard to the Gambia, UN doc. GAOR, A/39/40, pp. 61-62, para. 327.

<sup>60</sup>With regard to Peru, UN doc. GAOR, A/38/40, p. 61, para. 264.

<sup>61</sup>With regard to Sri Lanka, UN doc. GAOR, A/39/40, p. 21, para. 105; Congo, GAOR, A/42/40, p. 61, para. 230; and Belgium, UN doc. GAOR, A/47/40, p.105, para. 408.

<sup>62</sup>See UN doc. GAOR, A/55/40 (I), p. 50, para. 323(b).

under article 12 of the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to enjoy “the highest attainable standard of physical and mental health”, a fact that testifies to the intrinsic link that exists between this right and “the inherent right to life” protected by article 6(1) of the International Covenant on Civil and Political Rights.

Trade union rights also illustrate the fundamental relationship between the two categories of rights. While article 22 of the International Covenant on Civil and Political Rights guarantees to everyone the general right to freedom of association, which includes “the right to form and join trade unions for the protection of his interests”, article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights recognizes “the right of everyone to form trade unions and join the trade union of his choice”. Not to allow the formation of associations or trade unions of employers and employees would seriously undermine the right to freedom of association per se, a right which, as emphasized in the General Assembly during the drafting of article 22, is of fundamental importance in a democratic society.<sup>63</sup>

The intrinsic link between trade union rights and civil rights has consistently been emphasized by the various organs of the International Labour Organization, especially its Committee of Experts on the Application of Conventions and Recommendations. For instance, in its 1994 General Survey on Freedom of Association and Collective Bargaining, the Committee pointed out that its experience showed “that the restriction of civil and political liberties is a major factor in violations of freedom of association”.<sup>64</sup> The chapter on trade union rights and civil liberties reached the following conclusion:

“43. The Committee considers that the guarantees set out in the international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments, notably the International Covenant on Civil and Political Rights, are genuinely recognized and protected. These intangible and universal principles ... should constitute the common ideal to which all peoples and all nations aspire.”<sup>65</sup>

It is beyond dispute that, for the right to freedom of association to be effective, trade union members must, inter alia, enjoy full freedom of opinion, information, expression and movement, and be able to assemble freely to discuss issues relevant to their interests. They must furthermore enjoy protection against arbitrary arrest, and if a trade union member is nevertheless arrested for whatever reason, *he or she has a right to all due process guarantees described in Chapters 4 to 7, including the right to be treated humanely as set forth in Chapter 8 of this Manual.*

<sup>63</sup>See, for example *GAOR, sixteenth session, 1961, Third Committee*, doc. A/C.3/SR.1087, p. 134, para. 16 (Sweden) and doc. A/C.3/SR.1088, p. 139, para. 7 (Italy). Italy referred here to “freedom of political association” which “completed the freedoms of opinion, expression and assembly”.

<sup>64</sup>General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), International Labour Conference, eighty-first session, Geneva, 1994, p. 13, para. 23.

<sup>65</sup>*Ibid.*, p. 21, para. 43; italic omitted.

These are just two practical examples of the fundamental and complex relationship that exists between, on the one hand, economic, social and cultural rights, and, on the other, civil and political rights, which, in theory as well as in practical application, should not be regarded as two separate categories of rights competing for funds and attention *but rather as forming a whole set of legal rules for the protection of all dimensions of the human person, rules between which there is an ongoing dialectical relationship aimed at the achievement of justice, security and well-being of all.*

*The evolution of international human rights law, including its interpretation by international monitoring bodies, has confirmed that essential links exist between civil and political rights and economic, social and cultural rights.*

*Governments have a fundamental legal duty simultaneously to proceed with the implementation of all these rights which are aimed at protecting the most fundamental dimensions of human life and the human person.*

## 4. Universal and Regional Treaties for the Protection of Economic, Social and Cultural Rights: The Rights Guaranteed

This section contains a list of the principal economic, social and cultural rights guaranteed by the major universal and regional treaties. The treaties cover a wide range of rights, and it is well beyond the scope of this Manual to analyse them all. A strict selection has therefore been made of rights that will be subjected to more extensive analysis in sections **6 and 7**.

For details of the procedures for implementation of universal and regional treaties for the protection of economic, social and cultural rights, see Chapters 2 and 3 of this Manual.

### 4.1 The universal level

#### 4.1.1 *International Covenant on Economic, Social and Cultural Rights, 1966*

The present section, which deals with the universal level, will focus on the International Covenant on Economic, Social and Cultural Rights, the enforcement of which is monitored by the Committee on Economic, Social and Cultural Rights on the basis of reports submitted by States parties. For further information regarding the



Committee's interpretation of the various provisions of the Covenant, see **Handout No. 2**, which contains a list of all General Comments adopted by the Committee up to 26 April 2001. As of 8 February 2002, the Covenant had 145 States parties. It guarantees, in particular, the following rights:

- ❖ the right to equality and non-discrimination in the enjoyment of rights – article 2(2) (non-discrimination in general) and article 3 (between men and women);
- ❖ the right to work, including the right to gain one's living by work freely chosen or accepted – article 6;
- ❖ the right to enjoy just and favourable conditions of work, including fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living for workers and their families; safe and healthy working conditions; equal opportunity to be promoted; rest, leisure and reasonable limitation of working hours and periodic holidays with pay – article 7;
- ❖ the right to form trade unions and join the trade union of one's choice, including the right to establish national federations or confederations – article 8(1)(a) and (b);
- ❖ the right to strike – article 8(1)(d);
- ❖ the right to social security, including social insurance – article 9;
- ❖ the right to protection and assistance for the family; entry into marriage with free consent, maternity protection; protection and assistance for children and young persons – article 10(1)-(3);
- ❖ the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions – article 11(1);
- ❖ the right to the highest attainable standard of physical and mental health – article 12;
- ❖ the right to education – article 13;
- ❖ the right to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author – article 15(1).

## 4.2 The regional level

### 4.2.1 African Charter on Human and Peoples' Rights, 1981

At the regional level, the African Charter on Human and Peoples' Rights provides protection not only for the economic, social and cultural rights of individuals but also for those of peoples (see article 22 of the Charter). However, the following list relates only to the rights of individuals, which include:

- ❖ the right to non-discrimination in the enjoyment of the rights protected by the Charter – article 2;
- ❖ the right to freedom of association – article 10;
- ❖ the right to work under equitable and satisfactory conditions; the right to receive equal pay for equal work – article 15;
- ❖ the right to enjoy the best attainable state of physical and mental health – article 16;
- ❖ the right to education – article 17(1);

- ❖ the right freely to take part in the cultural life of one's community – article 17(2);
- ❖ the right of the aged and disabled to special measures of protection in keeping with their physical or moral needs – article 18(4).

Other provisions contained in article 18 of the Charter are not framed as rights but as duties of States, for example their obligation to take care of the physical and moral health of the family (art. 18(1)), to assist the family (art. 18(2)) and to ensure the elimination of discrimination against women and protection of the rights of the woman and the child as stipulated in international declarations and conventions (art. 18(3)).

#### **4.2.2 American Convention on Human Rights, 1969, including the Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988**

In the Americas, civil, cultural, economic, political and social rights were contained at the outset in the 1948 American Declaration of the Rights and Duties of Man. When the American Convention on Human Rights was adopted in 1969, Chapter III entitled “Economic, Social and Cultural Rights” consisted solely of article 26, according to which:

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

These rights were elaborated in greater detail in the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the “Protocol of San Salvador”. The Protocol, which entered into force on 16 November 1999, protects the following rights in particular:

- ❖ the right to non-discrimination in the exercise of the rights guaranteed – article 3;
- ❖ the right to work, including the opportunity to secure the means for living a dignified and decent existence – article 6;
- ❖ the right to just, equitable and satisfactory conditions of work, including remuneration which guarantees, as a minimum, to all workers and their families dignified and decent living conditions; fair and equal wages for equal work; the right to promotion; safety and hygiene at work; prohibition of night work and unhealthy or dangerous working conditions for persons below the age of 18 years; a reasonable limitation of working hours and rest, leisure and paid vacations – article 7;
- ❖ trade union rights such as the right of workers to organize trade unions and to join the union of their choice for the purpose of promoting and protecting their interests, and the right to strike – article 8(1);
- ❖ the right to social security – article 9;
- ❖ the right to health, “understood to mean the enjoyment of the highest level of physical, mental and social well-being” – article 10;

- ❖ the right to a healthy environment – article 11;
- ❖ the right to food, meaning “the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development” – article 12;
- ❖ the right to education – article 13;
- ❖ the right to the benefits of culture, including scientific and technological progress – article 14(1);
- ❖ the right to the formation and protection of families – article 15;
- ❖ the rights of children – article 16;
- ❖ the right of the elderly to special protection – article 17;
- ❖ the right of the handicapped person to receive special attention “designed to help him achieve the greatest possible development of his personality” – article 18.

### **4.2.3 European Social Charter, 1961, and European Social Charter (revised), 1996**

As of 19 June 2002, the European Social Charter of 1961 had been ratified by 25 member States of the Council of Europe. It contains the rights enumerated below:

- ❖ the right to work – article 1;
- ❖ the right to just conditions of work – article 2;
- ❖ the right to safe and healthy working conditions – article 3;
- ❖ the right to a fair remuneration – article 4;
- ❖ the right to organize – article 5;
- ❖ the right to bargain collectively – article 6;
- ❖ the right of children and young persons to protection – article 7;
- ❖ the right of employed women to protection – article 8;
- ❖ the right to vocational guidance – article 9;
- ❖ the right to vocational training – article 10;
- ❖ the right to protection of health – article 11;
- ❖ the right to social security – article 12;
- ❖ the right to social and medical assistance – article 13;
- ❖ the right to benefit from social welfare services – article 14;
- ❖ the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement – article 15;
- ❖ the right of the family to social, legal and economic protection – article 16;
- ❖ the right of mothers and children to social and economic protection – article 17;
- ❖ the right to engage in a gainful occupation in the territory of other Contracting Parties – article 18;
- ❖ the right of migrant workers and their families to protection and assistance – article 19.

The 1988 Additional Protocol entered into force on 4 September 1992 and had been ratified, as of 19 June 2002, by ten States. Under this Protocol, which does not prejudice the provisions of the European Social Charter, the Contracting Parties also undertake to consider themselves bound by one or more articles recognizing the following rights:

- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – article 1;
- ❖ the right to information and consultation for workers – article 2;
- ❖ the right of workers to take part in the determination and improvement of the working conditions and working environment – article 3;
- ❖ the right of elderly persons to social protection – article 4.

The revised version of the European Social Charter was adopted in 1996 and entered into force on 1 July 1999. As of 19 June 2002, it had been ratified by 13 States. The revised Social Charter will progressively replace the original Charter, the terms of which it updates and extends. By taking into account new social and economic development, the revised Charter amends certain existing provisions and adds new ones. The new features include, in particular, a considerably longer list of rights and principles in Part I than those contained in the old Charter (31 rights and principles, compared with 19 in the 1961 Charter). In addition to the rights taken from the 1988 Additional Protocol, new important features include:

- ❖ the right to protection in cases of termination of employment – article 24;
- ❖ the right of workers to protection of their claims in the event of the insolvency of their employer – article 25;
- ❖ the right to dignity at work – article 26;
- ❖ the right of workers with family responsibilities to equal opportunities and equal treatment – article 27;
- ❖ the right of workers' representatives to protection in the undertaking, and facilities to be accorded to them – article 28;
- ❖ the right to information and consultation in collective redundancy procedures – article 29;
- ❖ the right to protection against poverty and social exclusion – article 30;
- ❖ the right to housing – article 31.

*The economic, social and cultural rights guaranteed by international human rights law cover wide areas and essential aspects of human life such as the right to work and to favourable conditions of work, the right to an adequate standard of living, the right to adequate physical and mental health, the right to education and the right to special assistance for families and children.*

*The enjoyment of all these rights is conditioned by respect for the principle of equality before the law and in the application of the law.*

## 5. The Legal Obligations of States to Protect Economic, Social and Cultural Rights

### 5.1 International Covenant on Economic, Social and Cultural Rights, 1966

#### 5.1.1 Introductory remarks

The general legal duties of States parties to give effect to their obligations under the International Covenant on Economic, Social and Cultural Rights are laid down in article 2, which reads as follows:

“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.”

It should be pointed out in general that, unlike article 2(1) of the International Covenant on Civil and Political Rights, which imposes a legal duty of *immediate enforcement* of the rights guaranteed, article 2(1) of the International Covenant on Economic, Social and Cultural Rights allows for *progressive realization* of the rights recognized. However, as is clear from the debates during the drafting of the Covenants as summarized in section 2, it would not only be a serious oversimplification, but legally incorrect, to conclude that the International Covenant on Economic, Social and Cultural Rights only entails duties of progressive implementation with no obligation of immediate action. The nature of the rights per se, the way in which they are phrased, the views of the drafters, and the opinions expressed to date by the Committee on Economic, Social and Cultural Rights show that the nature and extent of the legal obligations that States parties have assumed in ratifying or otherwise adhering to the Covenant are much more dynamic. This conclusion is only logical in view of the fact that, notwithstanding the many economic and social problems facing Governments, the Covenant has been and remains a legal tool aimed at achieving a steady improvement in the living conditions of people worldwide.

As pointed out by the Committee on Economic, Social and Cultural Rights in one of its earliest general comments, the legal obligations laid down in article 2 of the Covenant include both “*obligations of conduct and obligations of result*”.<sup>66</sup> This means, inter alia, that, “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, *it also imposes various obligations which are of immediate effect*.”<sup>67</sup> One of these obligations of immediacy is the undertaking in article 2(2) to guarantee that the rights contained in the Covenant are exercised without discrimination.<sup>68</sup> A second such obligation “is the undertaking in article 2(1) ‘to take steps’, which in itself is not qualified or limited by other considerations”.<sup>69</sup> As noted by the Committee, the full meaning of the phrase can also be gauged by comparing the English text with the French and Spanish versions, according to which the States parties undertake “to act” (French: “s’engage à agir”) and “to adopt measures” (Spanish: “a adoptar medidas”).<sup>70</sup> This legal obligation means that

“while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be *deliberate, concrete* and *targeted* as clearly as possible towards meeting the obligations recognized in the Covenant.”<sup>71</sup>

A third obligation has to be added to the obligations of conduct and result, namely the duty *to give effect to the relevant legal duties, including by providing domestic remedies*. These three aspects of States parties’ legal undertakings are interrelated and to some extent overlapping, but, as noted by the Committee, they have distinctive features that will be described below.

### 5.1.2 The obligation of conduct

With regard to the means that States parties should use to comply with the obligation “to take steps”, article 2(1) of the Covenant refers to “all appropriate means, including particularly the adoption of legislative measures”. While it is for States parties themselves to assess what are the most “appropriate” measures, in addition to *legislation*, to fulfil their treaty obligations under the Covenant, the Committee holds that such measures “include, but are not limited to, *administrative, financial, educational, and social* measures”.<sup>72</sup>

Another measure that is considered “appropriate” by the Committee is “the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective

<sup>66</sup>See General Comment No. 3 (The nature of States parties’ obligations -article 2(1)), *United Nations Compilation of General Comments*, p. 18, para. 1; emphasis added.

<sup>67</sup>*Ibid.*, loc. cit.; emphasis added.

<sup>68</sup>*Ibid.*

<sup>69</sup>*Ibid.*, p. 18, para. 2.

<sup>70</sup>*Ibid.*, loc. cit.

<sup>71</sup>*Ibid.*; emphasis added.

<sup>72</sup>*Ibid.*, p. 19, para. 7; emphasis added.

remedies”.<sup>73</sup> In addition, there are a number of provisions of the Covenant, including articles 3, 7(a) (i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3), “which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.”<sup>74</sup>

### 5.1.3 The obligation of result

The “principal obligation of result” contained in article 2(1) “is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant”.<sup>75</sup> However, as underlined by the Committee, the fact that the Covenant allows for the “progressive realization” of rights, i.e. for “realization over time”, “should not be misinterpreted as depriving the obligation of all meaningful content”.<sup>76</sup> The Committee describes this obligation in the following terms:

“It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”<sup>77</sup>

Moreover, the Committee is of the view that every State party has “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” guaranteed by the Covenant, failing which the latter “would be largely deprived of its *raison d’être*”.<sup>78</sup> This means, for instance, in the words of the Committee, that

“a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>79</sup>

In this regard the Committee has further specified that, since article 2(1) requires each State party “to take the necessary steps ‘to the maximum of its available resources’”, a State must, in order to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, “demonstrate that every

<sup>73</sup>Ibid., p. 19, para. 5.

<sup>74</sup>Ibid., loc. cit.

<sup>75</sup>Ibid., p. 20, para. 9.

<sup>76</sup>Ibid., loc. cit.

<sup>77</sup>Ibid.

<sup>78</sup>Ibid., p. 20, para. 10.

<sup>79</sup>Ibid., loc. cit.

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”.<sup>80</sup> However, as emphasized by the Committee, “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.”<sup>81</sup>

#### **5.1.4 The obligation to give effect: the provision of domestic remedies**

In General Comment No. 9 concerning the domestic application of the Covenant, the Committee on Economic, Social and Cultural Rights elaborated on some of the statements made in General Comment No. 3. It noted in particular that the Covenant, by requiring Governments to give effect to the rights it guarantees “by all appropriate means”, 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.<sup>82</sup> “But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus, the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental responsibility must be put in place.”<sup>83</sup>

In the Committee’s view, “questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law”:

- ❖ **first**, pursuant to article 27 of the Vienna Convention on the Law of Treaties, a State party may not invoke the provisions of its internal law to justify non-performance of its treaty obligations; hence, in order to give effect to its treaty obligations, it “should modify the domestic legal order as necessary”;<sup>84</sup>
- ❖ **second**, according to article 8 of the Universal Declaration of Human Rights, “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”; although the International Covenant on Economic, Social and Cultural Rights does not directly require States parties to establish judicial remedies for alleged violations of its provisions, the Committee considers that “a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not ‘appropriate means’, within the terms of article 2, paragraph 1 ... or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.”<sup>85</sup>

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<sup>80</sup>Ibid.

<sup>81</sup>Ibid., p. 20, para. 11.

<sup>82</sup>Ibid., p. 58, para. 1.

<sup>83</sup>Ibid., p. 58, para. 2.

<sup>84</sup>Ibid., p. 58, para. 3.

<sup>85</sup>Ibid., pp. 58-59, para. 3.



From the Committee's General Comments it may be concluded that, *as a general rule, the effective enforcement of the International Covenant on Economic, Social and Cultural Rights requires the availability of domestic remedies for those who consider that their rights have been violated by the State.* The fact that the Covenant, unlike the International Covenant on Civil and Political Rights, does not expressly provide for legal or other remedies for aggrieved persons indicates a reluctance on the part of the drafters to subject themselves to individual complaints in a field that depends to a considerable extent on financial resources and stage of development. This reluctance has recently been confirmed by the difficulties encountered in securing adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights which would provide for an international individual and group complaints procedure.

*The States parties to the International Covenant on Economic, Social and Cultural Rights cannot rely on their internal legislation to justify failure to implement the Covenant.*

*The States parties to the Covenant have an **obligation of conduct** and must, in particular, take all legislative, administrative, financial, educational and social measures that are appropriate to give effect to the terms of the Covenant.*

*The States parties also have an **obligation of result** in that they must move as expeditiously and effectively as possible towards the realization of the rights contained in the Covenant, using their available resources to the maximum.*

*Every State party has a legal duty **immediately** to ensure the **minimum core obligations** of each of the rights contained in the Covenant.*

*Even in situations of demonstrably inadequate resources, the States parties have to prove that they are striving to ensure the widest possible enjoyment of the rights contained in the Covenant.*

*States parties have a legal duty to give effect to the Covenant by using all means at their disposal. This duty comprises the provision of **means of redress or remedies** enabling individuals effectively to vindicate their economic, social and cultural rights at the domestic level.*

## 5.2 African Charter on Human and Peoples' Rights, 1981

Article 1 of the African Charter on Human and Peoples' Rights defines the legal obligations of States parties with regard to all rights, duties and freedoms contained in the Charter, including economic, social and cultural rights. This means that they "shall recognize" them and "shall undertake to adopt legislative or other measures to give effect to them". Neither this provision nor the provisions defining the rights in question suggest anything other than a legal duty to implement the legal obligations *immediately*.

### 5.3 American Convention on Human Rights, 1969, and Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988

In article 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the members of the Organization of American States (OAS) have opted for a *progressive approach*, whereby the States parties

“undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol”.

Although the approach is progressive, it is clearly also result-oriented in that the States parties “undertake to adopt the necessary measures” for the purpose of achieving “the full observance of the rights recognized” in the Protocol.

### 5.4 European Social Charter, 1961, and European Social Charter (revised), 1996

It may be said in general that the revision of the European Social Charter of 1961 was not intended to represent “a lowering of the level of protection provided for therein” but that, on the contrary, “the reform would involve taking account both of developments in social and economic rights as reflected in other international instruments and in legislation of member states and also of social problems not covered by the other international instruments in force.”<sup>86</sup> It was further agreed that “all amendments were to be made bearing in mind the need to ensure equal treatment of men and women.”<sup>87</sup>

With regard to the precise legal obligations, both the 1961 and 1966 versions of the European Social Charter contain a specific scheme of undertakings that allows the Contracting States to engage in progressive implementation of the rights they contain. However, while each Contracting Party accepts that it considers Part I of each Charter “as a declaration of the aims which it will pursue by all appropriate means” (article 20(1)(a) of the 1961 Charter and article A of the 1996 Charter), *both Charters also define the core undertakings all States have to accept when becoming Parties thereto.*

Under the 1961 Charter, the Contracting Parties undertake to become bound by at least *five* of the following articles:

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<sup>86</sup>See *European Social Charter: Explanatory Report (ETS No. 163)*, at the Council of Europe web site: <http://conventions.coe.int/treaty/en/Reports/Html/163.htm> p. 1.

<sup>87</sup>*Ibid.*, loc. cit.

- ❖ the right to work – article 1;
- ❖ the right to organize – article 5;
- ❖ the right to bargain collectively – article 6;
- ❖ the right to social security – article 12;
- ❖ the right to social and medical assistance – article 13;
- ❖ the right of the family to social, legal and economic protection – article 16;
- ❖ the right of migrant workers and their families to protection and assistance – article 19.

Moreover, the States parties have to choose to be bound by no less than a total of 10 articles or 45 numbered paragraphs (art. 20(1)(c)).

Under the revised 1996 Charter, the number of core obligations was increased and the Contracting States have to accept to be bound by at least **six** of the core articles, to which the following two have been added to those contained in the old Charter:

- ❖ the right of children and young persons to protection – article 7;
- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – article 20.

The Contracting States must then also accept to be bound by an additional number of provisions totalling no less than 16 articles or 63 numbered paragraphs (Part III, art. A).

The Contracting States must thus agree to be bound by a considerable number of provisions to be implemented with effect from the day of ratification of the respective Charter and they are, of course, free to increase the number of provisions by which they want to be bound at any time thereafter (see art. 20(3) of the 1961 Charter and art. A(3) of the 1996 Charter).

*The European Social Charter adopts a hybrid approach to international legal duties in that it imposes on the Contracting States a certain number of immediately enforceable rights while allowing them to engage in progressive implementation of other rights.*

## 6. Economic, Social and Cultural Rights: Are they Justiciable?

As described in sub-section 2.2.4, the question of justiciability of economic, social and cultural rights was discussed in connection with the elaboration of the Covenant. Although a handful of Governments in the Commission on Human Rights voted at the time in favour of a resolution which expressly denied that these rights were justiciable, the States concerned were in a clear minority. Other countries emphasized the inaccuracy and even danger of labelling economic, social and cultural rights

non-justiciable and France pointed out that many aspects of such rights would be justiciable. Although half a century has passed in the meantime, there is still no unanimity in practice with regard to the competence that domestic courts have or should have in adjudicating claims involving alleged violations of economic, social and cultural rights. This uncertainty was highlighted by a Workshop on the Justiciability of Economic, Social and Cultural Rights, with Particular Reference to an Optional Protocol to the Covenant on Economic, Social and Cultural Rights held in Geneva, Switzerland, in February 2001. It was organized by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists. As shown by the reports submitted to the Workshop, domestic courts are being called upon with increasing frequency to adjudicate claims relating to economic, social and cultural rights, such as the right to adequate housing and the right to equality before the law. Taken together with an objective analysis of the rights concerned, this evolution shows that the issue of justiciability is not clear-cut and that decisions as to whether specific rights lend themselves to judicial review may have more to do with political expediency than law *stricto sensu*.

An interesting parallel indicates that the same argument also applies to some extent in the field of civil and political rights. Questions concerning the lawfulness of the exercise of emergency powers by Governments in times of crisis have often been held to be non-justiciable, but the European and American Courts of Human Rights in particular have shown that the declaration of a public emergency and the imposition of extraordinary limitations on the exercise of human rights in derogation of international legal obligations are justiciable issues that have to be examined in the light of the relevant State's treaty obligations.<sup>88</sup>

With regard to the International Covenant on Economic, Social and Cultural Rights, the competent Committee has considered the question of justiciability in connection with the role of legal remedies in General Comment No. 9. Although the Committee considers that “the right to an effective remedy need not be interpreted as always requiring a judicial remedy” and that “administrative remedies will, in many cases, be adequate,” it is also of the view that

“whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”<sup>89</sup>

In this General Comment the Committee regrets that, in contrast to civil and political rights, the “assumption is too often made” that judicial remedies are not essential with regard to violations of economic, social and cultural rights, although “this discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.”<sup>90</sup> The Committee notes that it has already made clear “that it considers many of the provisions in the Covenant to be capable of immediate implementation,” for instance articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3).<sup>91</sup> These provisions, which the Committee cites *by way of example*, contain the following rights:

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<sup>88</sup>For more information on this issue, see Chapter 16 of this Manual.

<sup>89</sup>*United Nations Compilation of General Comments*, p. 60, para. 9.

<sup>90</sup>*Ibid.*, p. 60, para. 10.

<sup>91</sup>*Ibid.*, loc. cit.

- ❖ the right to equality between men and women in the enjoyment of rights – article 3;
- ❖ the right to fair wages and equal remuneration for work of equal value – article 7(a)(i);
- ❖ the right to form trade unions that can function freely; the right to strike – article 8;
- ❖ the right of children and young people to special measures of protection and assistance, to be taken without discrimination – article 10(3);
- ❖ the right to free compulsory primary education for all – article 13(2)(a);
- ❖ the right of parents or legal guardians to choose for their children schools other than public schools to ensure religious and moral education in conformity with their convictions – article 13(3);
- ❖ the right of individuals and bodies to establish and direct educational institutions in conformity with legal standards – article 13(4);
- ❖ the freedom indispensable for scientific research and creative activity – article 15(3).

On the issue of justiciability of the rights contained in the International Covenant on Economic, Social and Cultural Rights, the Committee added that:

“It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”<sup>92</sup>

With regard to the self-executing nature of the provisions of the Covenant, the Committee has pointed out that “the Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered ‘non-self-executing’ were strongly rejected.”<sup>93</sup> The Committee goes on to say that:

“In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of

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<sup>92</sup>Ibid.

<sup>93</sup>Ibid., p. 61, para. 11.

the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.”<sup>94</sup>

In the light of what has been said in the foregoing sections, the question of whether economic, social and cultural rights lend themselves to judicial determination may be summarized as follows:

*Neither the nature of economic, social and cultural rights as such nor the terms of the International Covenant on Economic, Social and Cultural Rights or its travaux préparatoires may be invoked to deny the justiciability of such rights.*

*On the contrary, many aspects of the rights concerned lend themselves to judicial determination.*

*States parties to the Covenant must provide judicial remedies for alleged violations of economic, social and cultural rights whenever such measures are necessary for their effective enforcement. Such remedies must exist alongside adequate administrative remedies.*

*The classification of economic, social and cultural rights as non-justiciable amounts to a denial of the indivisibility and interdependence of such rights and civil and political rights.*

## 7. Case-Study I: The Right to Adequate Housing

### 7.1 Introductory remarks

The following sections will present two rights, *the right to adequate housing* and *the right to health*, first analysing them in terms of their interpretation by the competent international monitoring bodies and then giving examples of rulings by domestic tribunals on their enjoyment or the enjoyment of certain aspects of them.

It is beyond the scope of this chapter to provide a complete picture of the multiple roles of domestic courts in enforcing economic, social and cultural rights.

<sup>94</sup>Ibid., loc. cit.

However, as a general rule both ordinary and administrative courts in many countries adjudicate a multitude of questions relating to, for instance, various forms of social security such as help for the sick, the elderly and persons with disabilities, the rights of minorities to culture, the right to adequate housing, questions of equality and non-discrimination, and so forth. Furthermore, labour courts may exist to decide issues relating to occupational rights such as the right to freedom of association and collective bargaining of trade unions, the right to strike and occupational health hazards. Although domestic law may not expressly provide, for instance, for the right to food or the right to adequate housing as defined by international human rights law, it may nonetheless provide legal guarantees that enable local judges to arrive at the same or similar substantive results. Economic, social and cultural rights constitute, in other words, a field of law in which courts fulfil an important role alongside administrative procedures.

The rights dealt with below have been selected because of their somewhat more difficult legal contours as compared to other economic and social rights that are more easily accepted as lending themselves to judicial decision-making, such as the relatively long list of workers' rights.

## 7.2 International Covenant on Economic, Social and Cultural Rights: article 11(1)

The right to adequate housing, following its recognition in article 25 of the Universal Declaration of Human Rights, was incorporated in article 11(1) of the International Covenant on Economic, Social and Cultural Rights as a component of the right to an adequate standard of living. At the universal level, the right to housing may also be found, in particular, in article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women and article 27(3) of the Convention on the Rights of the Child. At the regional level, only the revised European Social Charter of 1996 expressly guarantees the right to housing (art. 31).

The right to housing has also been affirmed in numerous other documents such as article 8(1) of the Declaration on the Right to Development. At the 1996 United Nations Conference on Human Settlements (Habitat II), the participating Governments also unanimously agreed to reaffirm their “commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments”.<sup>95</sup> They further recognized that they have “an obligation ... to enable people to obtain shelter and to protect and improve dwellings and neighbourhoods”, and they committed themselves

“to the goal of improving living and working conditions on an equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure”.<sup>96</sup>

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<sup>95</sup>See UN doc. A/CONF.165/14, report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996, p. 17, para. 39.

<sup>96</sup>Ibid., loc. cit.

Lastly, the Governments agreed to “implement and promote this objective in a manner fully consistent with human rights standards”.<sup>97</sup>

In the present context, however, the principal legal text to be considered is article 11(1) of the International Covenant on Economic, Social and Cultural Rights. The texts of other relevant conventions and declarations may be found in **Handout 3**.

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Article 11(1) of the International Covenant on Economic, Social and Cultural Rights reads:

“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, *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” (emphasis added).

This provision has to be read in conjunction with article 2(1), which provides that:

“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.”

As may be seen, the right to “an adequate standard of living” in article 11(1) is a right with many components. This section will only consider the question of adequate housing, which was dealt with in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights. It has also been dealt with in General Comment No. 7 on forced evictions. The Committee’s work shows that problems relating to adequate housing exist in virtually all countries and affect a considerable part of humanity. As noted by the Committee in its General Comments Nos. 4 and 7, the right to adequate housing has the following personal and material fields of application:

### 7.2.1 Persons covered by the right

The right to adequate housing “applies to everyone” and “the concept of ‘family’ must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status or such factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination.”<sup>98</sup>

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<sup>97</sup>Ibid.

<sup>98</sup>United Nations *Compilation of General Comments*, p. 23, para. 6.



## 7.2.2 Interpretative approach, including interdependence of rights

The Committee has rejected a “narrow or restrictive” interpretation of the right to adequate housing, which would imply, for instance, the mere provision of a shelter in the sense of having a roof over one’s head or which would view shelter exclusively “as a commodity”. “Rather it should be seen as the right to live somewhere in security, peace and dignity.”<sup>99</sup> This interpretation consists of at least two components:

- ❖ the fact that “the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised”, and
- ❖ the concept of adequacy.<sup>100</sup>

With regard to the first component, the Committee holds that the right to adequate housing cannot be considered in isolation but requires, for its full enjoyment, the protection of other rights as well, such as “the concept of human dignity and the principle of non-discrimination, ... the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making”. Similarly, “the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.”<sup>101</sup> In view of its particular complexity, the concept of adequacy will be dealt with separately.

## 7.2.3 The concept of adequacy

In the Committee’s opinion, “the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute ‘adequate housing’ for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:”<sup>102</sup>

- ❖ **Legal security of tenure:** This means that “notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats;”<sup>103</sup>
- ❖ **Availability of services, materials, facilities and infrastructure:** “An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;”<sup>104</sup>

<sup>99</sup>Ibid., p. 23, para. 7.

<sup>100</sup>Ibid., loc. cit.

<sup>101</sup>Ibid., p. 25, para. 9.

<sup>102</sup>Ibid., p. 23, para. 8.

<sup>103</sup>Ibid., p. 23, para. 8(a).

<sup>104</sup>Ibid., p. 24, para. 8(b).

- ❖ **Affordability:** “Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of house-related costs is, in general, commensurate with income levels.” Moreover, “tenants should be protected by appropriate means against unreasonable rent levels or rent increases;”<sup>105</sup>
- ❖ **Habitability:** “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the [WHO] *Health Principles of Housing*.”<sup>106</sup>
- ❖ **Accessibility:** “Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups;”<sup>107</sup>
- ❖ **Location:** “Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas.” Further, “housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of the inhabitants;”<sup>108</sup>
- ❖ **Cultural adequacy:** “The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed and that, *inter alia*, modern technological facilities, as appropriate are also ensured.”<sup>109</sup>

## 7.2.4 Immediate legal obligations

In spite of the progressive nature of the legal undertakings incurred by States parties to the Covenant, the Committee has defined a number of steps that they are required to take with *immediate effect*, regardless of their state of development,<sup>110</sup> for example:

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<sup>105</sup>Ibid., p. 24, para. 8(c).

<sup>106</sup>Ibid., p. 24, para. 8(d).

<sup>107</sup>Ibid., p. 24, para. 8(e). On the right to *accessible* housing for persons with disabilities, see also General Comment No. 5, p. 35, para. 33.

<sup>108</sup>Ibid., General Comment No. 4, p. 24, para. 8(f).

<sup>109</sup>Ibid., p. 25, para. 8(g).

<sup>110</sup>Ibid., p. 25, para. 10.

- ❖ “States parties must give due priority to those social groups in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others;”<sup>111</sup>
- ❖ “While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a *national housing strategy*” in order to define “the objectives for the development of shelter conditions, ... the resources available to meet these goals and the most cost-effective way of using them and ... the responsibilities and time-frame for the implementation of the necessary measures”. Such a national housing strategy “should reflect extensive genuine consultation with, and participation by, all those affected, including the homeless, the inadequately housed and their representatives”.<sup>112</sup>
- ❖ *Effective monitoring*: “Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations under article 11(1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction.”<sup>113</sup>

### 7.2.5 Domestic remedies

On the question of domestic legal remedies, “the Committee views many component elements of the right to adequate housing as being at least consistent with the provision of [such] remedies.” They might include, for instance:

- ❖ “legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions”;
- ❖ “legal procedures seeking compensation following an illegal eviction”;
- ❖ “complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination”;
- ❖ “allegations of any form of discrimination in the allocation and availability of access to housing”; and
- ❖ “complaints against landlords concerning unhealthy or inadequate housing conditions”.<sup>114</sup>

<sup>111</sup>Ibid., p. 25, para. 11.

<sup>112</sup>Ibid., pp. 25-26, para. 12; emphasis added.

<sup>113</sup>Ibid., p. 26, para. 13.

<sup>114</sup>Ibid., pp. 26-27, para. 17.

The **right to adequate housing** is an essential component of the right to an adequate standard of living. It must be interpreted in the light not only of other economic, social and cultural rights but also of civil and political rights.

The **principle of adequacy** means that:

- there must be legal security of tenure;
- there must be availability of basic services, materials, facilities and infrastructure;
- the housing must be affordable, habitable, accessible and located close to employment and other facilities;
- the housing must be built so as not to jeopardize the health of its occupants;
- the housing must be culturally adequate.

The International Covenant on Economic, Social and Cultural Rights imposes, in particular, the following **immediate obligations** on States parties:

- they must give particular consideration to social groups living in unfavourable conditions;
- they must almost invariably adopt a national housing plan to define the objectives, resources, responsibilities and time frame of the measures required;
- they must effectively monitor the housing situation.

States parties must also provide **domestic legal remedies**, in particular for cases of eviction and demolition of houses, discrimination, illegal action by landlords, and unhealthy and inadequate housing conditions.

## 7.2.6 Forced evictions

In its General Comment No. 4, the Committee states that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”<sup>115</sup> In General Comment No. 7, the Committee defines the term “forced evictions” as:

“the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.”<sup>116</sup>

<sup>115</sup>Ibid., p. 27, para. 18.

<sup>116</sup>Ibid., pp. 49-50, para. 3.

The Committee points out that such evictions, while “manifestly breaching” the rights enshrined in the International Covenant on Economic, Social and Cultural Rights, may also, owing to the interrelationship and interdependency which exist among all human rights, “result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions”.<sup>117</sup> *In other words, in cases of forced eviction, States parties must not only comply with the requirements of the International Covenant on Economic, Social and Cultural Rights but also with the relevant provisions of the International Covenant on Civil and Political Rights.*

In situations where it may be necessary to impose *limitations* on the right to adequate housing and the right not to be subjected to forced eviction as guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights, “full compliance with article 4 of the Covenant is required”. Accordingly, the rights guaranteed may be subjected “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”.<sup>118</sup>

In essence therefore, the obligations of States parties in relation to forced evictions are based on article 11(1) of the Covenant “read in conjunction with other relevant provisions”. These obligations include, in particular:

- ❖ “The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced convictions;”<sup>119</sup>
- ❖ Interpreting the words “all appropriate means” in article 2(1) in this context, the Committee states that “it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must ... apply to all agents acting under the authority of the State or who are accountable to it. Moreover, ... States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies;”<sup>120</sup>
- ❖ States parties must comply with the provisions of articles 2(2) and 3 of the Covenant, which impose an additional obligation upon them “to ensure that, where evictions do occur, appropriate measures are taken to ensure that *no form of discrimination is involved*”. The Committee notes in this regard that “women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction;”<sup>121</sup>

<sup>117</sup>Ibid., p. 50, para. 4.

<sup>118</sup>Ibid., p. 50, para. 5.

<sup>119</sup>Ibid., p. 50, para. 8.

<sup>120</sup>Ibid., p. 51, para. 9.

<sup>121</sup>Ibid., p. 51, para. 10; emphasis added.

- ❖ “Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause”, the competent authorities must “ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected”;<sup>122</sup>
- ❖ “Forced eviction and house demolition as a punitive measure are ... inconsistent with the norms of the Covenant;”<sup>123</sup>
- ❖ “States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those affected by the eviction orders” as well as “adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure ‘an effective remedy’ for persons whose rights have been violated and the obligation upon the ‘competent authorities (to) enforce such remedies when granted’;”<sup>124</sup>
- ❖ “In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions on international human rights law and in accordance with *general principles of reasonableness and proportionality*.” In this regard, the Committee on Economic, Social and Cultural Rights found it “especially pertinent” to invoke the terms of General Comment No. 16 of the Human Rights Committee, according to which “interference with a person’s home can only take place ‘in cases envisaged by the law’”, a law that “‘should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’”. The Human Rights Committee also indicated that relevant legislation must “specify in detail the precise circumstances in which such interferences may be permitted”;<sup>125</sup>
- ❖ “Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available;”<sup>126</sup>
- ❖ “Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

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<sup>122</sup>Ibid., p. 51, para. 11.

<sup>123</sup>Ibid., p. 51, para. 12.

<sup>124</sup>Ibid., pp. 51-52, para. 13.

<sup>125</sup>Ibid., p. 52, para. 14; emphasis added.

<sup>126</sup>Ibid., p. 52, para. 16.

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) 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.”<sup>127</sup>

*Forced evictions are prima facie incompatible not only with the International Covenant on Economic, Social and Cultural Rights but also with the International Covenant on Civil and Political Rights.*

*Domestic legislation should provide effective protection against forced evictions, including evictions carried out by private persons. The law should provide, inter alia, the following guarantees:*

*Whenever evictions occur, they must conform to international human rights law and must not involve any form of discrimination.*

*Forced eviction and demolition of houses as punitive measures are prohibited.*

*Evictions must only be carried out after due notice and consultation with the persons affected and there must be provision for adequate domestic legal remedies and compensation for any property affected by the eviction.*

*Evictions should not result in people being rendered homeless.*

### 7.3 Relevant European case law: The *Selçuk and Asker* case

Although the right to adequate housing is not, per se, guaranteed by the European Convention on Human Rights, the right to respect for one’s private and family life and home, as well as the right to peaceful enjoyment of one’s possessions, are guaranteed, respectively, by article 8 of the Convention and article 1 of Protocol No. 1 to the Convention. Further, article 3 of the Convention provides that no person “shall be subjected to torture or to inhuman or degrading treatment or punishment”.

<sup>127</sup>Ibid., p. 52, para. 15.

In the case of *Selçuk and Asker v. Turkey*, the European Court of Human Rights had to deal with allegations that the applicants' property had been destroyed by Turkish security forces. Mrs. Selçuk was a widow and the mother of five children, while Mr. Asker was married and had seven children. Both were Turkish citizens of Kurdish origin living in the village of Islamköy. The facts, "proved beyond reasonable doubt", were as follows:<sup>128</sup>

In the morning of 16 June 1993, a large force of gendarmes arrived in Islamköy, and a number of them, under the "apparent command" of CO Cömert, went to Mr. Asker's house and set it on fire, thereby causing the destruction of the property and most of its contents. Villagers who came to see what was happening were prevented from putting out the fire. Mr. and Mrs. Asker ran inside the house in an attempt to save their possessions and this occurred either while the gendarmes were setting fire to the house by pouring petrol on it, or just before. A number of gendarmes, including CO Cömert, then proceeded to Mrs. Selçuk's house and, despite her protests, poured petrol on it and set it on fire "by, or under the orders of, CO Cömert". Villagers were again prevented from putting out the fire, which completely destroyed Mrs. Selçuk's house and its contents. About ten days later, a force of gendarmes returned to Islamköy where they set fire to, and thereby destroyed, a mill belonging to Mrs. Selçuk and others; CO Cömert was seen with the gendarmes at the mill on this occasion.

The Court first examined the facts under article 3 of the Convention, emphasizing that this article "enshrines one of the fundamental values of democratic society" and that "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."<sup>129</sup> The Court concluded that the treatment suffered by the applicants in this case was so severe as to constitute a violation of article 3. It referred in particular to the fact that the applicants' homes and most of their property

"were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards."<sup>130</sup>

"Bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as *inhuman treatment* within the meaning of Article 3."<sup>131</sup>

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<sup>128</sup>For the summary of the facts as established, see *Eur. Court HR, Case of Selçuk and Asker v. Turkey, judgment of 24 April 1998, Reports 1998-II*, p. 900, paras. 27-30; see also pp. 904-905, paras. 50-57.

<sup>129</sup>*Ibid.*, p. 909, para. 75.

<sup>130</sup>*Ibid.*, p. 910, para. 77.

<sup>131</sup>*Ibid.*, p. 910, para. 78; emphasis added.



Moreover, “even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, *this would not provide a justification for the ill-treatment.*”<sup>132</sup>

The Court also found a violation of article 8 of the Convention and article 1 of Protocol No. 1. It recalled in this context that “it established that security forces deliberately destroyed the applicants’ homes and household property, and the mill partly owned by Mrs Selçuk, obliging them to leave Islamköy ... There [could] be no doubt that these acts, in addition to giving rise to violations of Article 3, constituted particularly grave and unjustified interferences with the applicants’ right to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.”<sup>133</sup>

The Court concluded that the Turkish Government had violated article 13 of the European Convention since it had not carried out “a thorough and effective investigation” as required by that article. The applicants therefore did not have an effective domestic remedy at their disposal for the violations of their rights under the Convention as required by article 13.<sup>134</sup>

The *Selçuk and Asker* case is an excellent example not only of the justiciability of acts interfering with the right to respect for one’s home but also of the fundamental interdependence of rights and of the far-reaching and devastating consequences that the demolition of a person’s home and belongings can have for the person concerned. The next case chosen from South African jurisprudence confirms these conclusions.

## 7.4 Relevant domestic case law: The example of South Africa

The question of *forced eviction* was considered by the South African Constitutional Court in the *Grootboom and Others* case, which was brought by Mrs. Grootboom on her own behalf and on behalf of 510 children and 390 adults who had allegedly been “rendered homeless as a result of their eviction from their informal homes”.<sup>135</sup> The analysis in this case is of such relevance to the judicial protection of economic, social and cultural rights that it warrants extensive consideration.

The following is a brief description of the facts of the case.<sup>136</sup> Mrs. Grootboom and most other respondents had lived in an informal squatter settlement called Wallacedene where their shacks had no water, sewage or refuse removal services. Only 5 per cent of them had electricity. Having failed to obtain subsidized low-cost housing, the respondents left Wallacedene one day and put up their shacks and shelters on vacant land that was privately owned and had been ear-marked for low-cost housing. They called the land “New Rust”. The owner obtained an eviction order and

<sup>132</sup>Ibid., p. 910, para. 79; emphasis added.

<sup>133</sup>Ibid., p. 911, paras. 86-87.

<sup>134</sup>Ibid., pp. 913-914, paras. 96-98.

<sup>135</sup>*The Government of South Africa v. Irene Grootboom and Others, Case CCT 11/00, judgment of 4 October 2000, para. 4.*

<sup>136</sup>Ibid., paras. 7-11.

the respondents' homes were bulldozed and burnt and their possessions destroyed. They put up new shelters on the Wallacedene sports field with such temporary structures as they could find, but when the winter rains started shortly afterwards "the plastic sheeting they had erected afforded scant protection". Having failed to obtain help, Mrs. Grootboom and the other respondents applied for an order directing the authorities on the basis of Section 26 of the South African Constitution to provide "adequate basic temporary shelter or housing to the respondents and their children pending their obtaining permanent accommodation".<sup>137</sup>

Justice Yacoob, with whom all other Justices concurred, wrote the judgment, which contains a rich legal analysis of the right of access to adequate housing under South African constitutional law. However, only the major points of the judgment can be reflected here and only insofar as they concern Section 26 of the South African Constitution which states:

- (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."

***On the question of justiciability:*** On the issue of whether socio-economic rights are at all justiciable in South Africa, the Court stated clearly that this had been "put beyond question by the text of [the] Constitution as construed in the *Certification* judgment". In response to the contention in that case that these rights were not justiciable and should not have been contained in the new Constitution, the Court had held that:

"[T]hese rights are, at least to some extent, justiciable. As we have stated ... many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give right to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost invariably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."<sup>138</sup>

***The question was not therefore whether socio-economic rights were justiciable under the South African Constitution "but how to enforce them in a given case"***.<sup>139</sup>

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<sup>137</sup>Ibid., para. 13. This chapter will not deal with the aspect of the case relating to children's right to shelter under article 28(1)(c) of the South African Constitution.

<sup>138</sup>Ibid., para. 20.

<sup>139</sup>Ibid., loc. cit.

**On the interdependence of rights:** Interpreting the obligations imposed on the State by Section 26, the Court pointed out that the Constitution entrenches both civil and political rights and social and economic rights, and that all these rights “are inter-related and mutually supporting”. In the Court’s view, “there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the Constitution]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”<sup>140</sup>

The Court added that “the right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights [which] must all be read together in the setting of the Constitution as a whole.” In the words of the Court:

“The state is obliged to take *positive* action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.”<sup>141</sup>

**On the impact of international law on South African constitutional law:** The South African Constitution provides in Section 39(1)(b) that, “when interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law.” According to the Court, “the relevant international law can be a guide to interpretation, but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”<sup>142</sup>

In examining the extent to which articles 11(1) and 2(1) of the International Covenant on Economic, Social and Cultural Rights may be a guide to an interpretation of Section 26 of the South African Constitution, the Court noted that there are two differences between the legal instruments insofar as they relate to housing: *first*, “the Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access to adequate housing*” and, *second*, “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.”<sup>143</sup>

In response to the argument made to the Court that the States parties to the International Covenant have, as stated by the Committee on Economic, Social and Cultural Rights, an obligation to guarantee *a minimum core of obligations* to ensure the satisfaction of, at the very least, the minimum essential levels of each right, the Court noted that “the determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions.” It did not in the event

<sup>140</sup>Ibid., para. 23.

<sup>141</sup>Ibid., para. 24; emphasis added.

<sup>142</sup>Ibid., para. 26; footnote omitted.

<sup>143</sup>Ibid., para. 28.

find it necessary to decide whether it was “appropriate for a court to determine in the first instance the minimum core content of a right”.<sup>144</sup> It noted, however, that the Committee had not specified what the minimum core precisely means.<sup>145</sup>

**On the domestic right of access to adequate housing:** With regard to the South African constitutional requirement that everyone has the right to have *access* to adequate housing, the Court ruled that all of the following conditions have to be met:

- ❖ “there must be *land*,”
- ❖ “there must be *services*,”
- ❖ “there must be *a dwelling*,” and
- ❖ “access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.”<sup>146</sup>

It follows that “the state must create the conditions for access to adequate housing for people at all economic levels of our society.”<sup>147</sup> Although this obligation depends on the particular circumstances and context of each place or person involved, “the poor are particularly vulnerable and their needs require special attention.”<sup>148</sup>

**On the State’s positive constitutional obligation:** The positive obligation imposed on the State under Section 26(2) of the South African Constitution “requires the state to devise a comprehensive and workable plan to meet its obligation”. However, this obligation “is not an absolute or unqualified one” but is defined by “three key elements”:

- ❖ the obligation to “take *reasonable* legislative and other measures”;
- ❖ the obligation “to achieve the *progressive* realisation” of the right; and
- ❖ the obligation to act “within *available* resources”.<sup>149</sup>

With regard to the requirement that the state take “*reasonable legislative and other measures*”, the Court held that “a reasonable programme ... must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.”<sup>150</sup> Further, it must be a “comprehensive” programme and “the measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means ... The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.”<sup>151</sup> It was, however, “necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the

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<sup>144</sup>Ibid., para. 33.

<sup>145</sup>Ibid., para. 30.

<sup>146</sup>Ibid., para. 35; emphasis added.

<sup>147</sup>Ibid., loc. cit.

<sup>148</sup>Ibid., paras. 35-37; quote from para. 36.

<sup>149</sup>Ibid., para. 38; emphasis added.

<sup>150</sup>Ibid., paras. 39; emphasis added.

<sup>151</sup>Ibid., paras. 40-41.

requirement of reasonableness.”<sup>152</sup> On the other hand, as further held by the Court, “mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will [therefore] invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation ... An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”<sup>153</sup>

*What is meant then by the term “reasonable” in this context?* The Court took the following view:

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

44. *Reasonableness must also be understood in the context of the Bill of Rights as a whole.* The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”<sup>154</sup>

With regard to the obligation to achieve *the progressive realization of the right of access to adequate housing*, the Court held that “the term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal.” This means more particularly:

<sup>152</sup>Ibid., para. 41.

<sup>153</sup>Ibid., para. 42.

<sup>154</sup>Ibid., paras. 43-44; emphasis added.

“that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.”<sup>155</sup>

In support of its reasoning with regard to the term “progressive realisation” in Section 26(2) of the Constitution of South Africa, a term that was taken, in particular, from article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Court referred to paragraph 9 of General Comment No. 3, in which the Committee on Economic, Social and Cultural Rights “helpfully analysed this requirement in the context of housing”.<sup>156</sup> Although the General Comment was intended to explain States parties’ obligations under the Covenant, it was “also helpful in plumbing the meaning of ‘progressive realisation’ in the context of” the South African Constitution. According to the Court:

“The meaning ascribed to the phrase is in harmony with the text in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.”<sup>157</sup>

It remained for the Court to explain the meaning of “the third defining aspect of the obligation to take the requisite measures”, namely “*that the obligation does not require the state to do more than its available resources permit*”.<sup>158</sup> In the view of the Court, “this means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.” In other words, “there is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.”<sup>159</sup>

***On the application of the constitutional requirements to the national Housing Act:*** The Court then analysed the national Housing Act, which provides a framework establishing the responsibilities and functions of each sphere of government in respect of housing. It concluded that “it emerges from the general principles read together with the functions of national, provincial and local government that the concept of housing development, as defined, is central to the Act. Housing development as defined seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements.”<sup>160</sup> However, the Housing Act does not contemplate “the provision of housing that falls short of the definition of housing development in the Act”. In other words, there is no express provision

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<sup>155</sup>Ibid., para. 45.

<sup>156</sup>Ibid. This aspect of the Committee’s General Comment No. 3 was dealt with in sub-section 5.1.3.

<sup>157</sup>See the *Grootboom judgment*, para. 45.

<sup>158</sup>Ibid., para. 46; emphasis added.

<sup>159</sup>Ibid., loc. cit.

<sup>160</sup>Ibid., para. 51.

“to facilitate access to *temporary relief* for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.”<sup>161</sup>

Characterizing the execution of the housing programme as “a major achievement”, the Court nevertheless had to answer the question whether the measures adopted were “reasonable within the meaning of section 26 of the Constitution”.<sup>162</sup> In so doing, the Court found, in particular, *that* the allocation of responsibilities and functions had been “coherently and comprehensively addressed”; *that* the programme was “not haphazard” but represented “a systematic response to a pressing social need”; *that*, although problems of implementation existed in some areas, the evidence suggested that the State was “actively seeking to combat these difficulties”.<sup>163</sup>

It remained to be decided, however, *whether the nationwide housing programme was “sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements”*. This had to be done “in the context of the scope of the housing problem” in Cape Metro, which was “acute”, “desperate” and “compounded by rampant unemployment and poverty”.<sup>164</sup> It was “common cause” that, except for the newly designed Cape Metro land programme, which did not exist when the *Grootboom* case was launched, there was “no provision in the nationwide housing programme as applied within Cape Metro for people in desperate need”.<sup>165</sup> The programme therefore also fell short of “obligations imposed upon national government to the extent that it [failed] to recognise that the state must provide for relief for those in desperate need”. As stated by the Court, such people “are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.”<sup>166</sup>

With regard to *the conduct of the appellants towards the respondents* in this case, the Court emphasized that “all levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution ... Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”<sup>167</sup> However, Section 26 of the Constitution was “not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution”:

<sup>161</sup>Ibid., para. 52; emphasis added.

<sup>162</sup>Ibid., paras. 53-54.

<sup>163</sup>Ibid., para. 54.

<sup>164</sup>Ibid., paras. 56, 58-59; emphasis added.

<sup>165</sup>Ibid., para. 63.

<sup>166</sup>Ibid., para. 66.

<sup>167</sup>Ibid., para. 82.

“83. ... The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.”<sup>168</sup>

While the national legislature recognized this, consideration had to be given to “whether the state action (or inaction) in relation to the respondents met the required constitutional standard”.<sup>169</sup> The Court pointed out that “there was no suggestion however that the respondents’ circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred.”<sup>170</sup> Moreover, contrary to what could have been expected, the municipality had done nothing when the respondents began moving to New Rust “and the settlement grew by leaps and bounds”.<sup>171</sup> As to the eviction itself, it was funded by the municipality and carried out without any evidence of effective mediation. “The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt.”<sup>172</sup> Section 26(1) of the Constitution “burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.”<sup>173</sup>

Summarizing the case, the Court stated that it showed “the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.”<sup>174</sup> The Court was conscious that it was “an extremely difficult task for the state to meet these obligations” in the conditions prevailing in the country, but this was

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<sup>168</sup>Ibid., para. 83.

<sup>169</sup>Ibid., paras. 84-85.

<sup>170</sup>Ibid., para. 86.

<sup>171</sup>Ibid., para. 87.

<sup>172</sup>Ibid., para. 88.

<sup>173</sup>Ibid.

<sup>174</sup>Ibid., para. 93.



an aspect that was recognized by the Constitution, which “expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately”.<sup>175</sup> It stressed nevertheless that “despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”<sup>176</sup>

The Court concluded that while Section 26 of the Constitution does not entitle the respondents “to claim shelter or housing immediately upon demand”, it does oblige the State “to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations”. However, the programme that was in force in the Cape Metro at the time that this application was brought, “fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.”<sup>177</sup>

For all these reasons, the Court found it “necessary and appropriate to make a declaratory order” whereby the State was required “to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.”<sup>178</sup>

*The abovementioned work of the Committee on Economic, Social and Cultural Rights, the European Court of Human Rights and the South African Constitutional Court with regard to the right to adequate housing confirms several important aspects of States’ general legal obligations to enforce economic, social and cultural rights, namely:*

- *that it is indispensable to consider the effective implementation of economic, social and cultural rights also in the light of the effective implementation of civil and political rights;*
- *that economic, social and cultural rights or at least some aspects of such rights are justiciable and consequently lend themselves to judicial adjudication;*
- *that legal terms are meant to have an effect and that, consequently:*
- *terms like “taking steps” to achieve “progressively” the full realization of rights impose immediate positive duties on Governments in terms of conduct, result and effect;*
- *that the reference to “all appropriate means” implies that there is a built-in flexibility that makes it possible in any given case to strike a fair balance between the legal duties of a given State and the means at its disposal.*

<sup>175</sup>Ibid., para. 94.

<sup>176</sup>Ibid., loc. cit.

<sup>177</sup>Ibid., para. 95.

<sup>178</sup>Ibid., para. 96.

## 8. Case-Study II: The Right to Health

The second right to be considered in some more detail in this chapter is the right to health. The analysis will be based on article 12 of the International Covenant on Economic, Social and Cultural Rights and it will also show how the right to health has been dealt with by the Supreme Courts of Canada and India. Contrary to the constitutional law of South Africa, neither Canadian nor Indian constitutional law expressly provides for the right to health.

### 8.1 International Covenant on Economic, Social and Cultural Rights: article 12

The right to health is recognized in article 12 of the Covenant, which reads:

- “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.”

The Committee on Economic, Social and Cultural Rights has dealt with the right to health in several General Comments, which will be reviewed only in relatively broad terms in this section. For more details, readers are referred to the full text of General Comments Nos. 5, 6 and 14.<sup>179</sup>

The right protected by article 12 of the Covenant is the right to enjoy “the highest attainable standard of physical and mental health”. In General Comment No. 14, the Committee deals at length with both the normative content of article 12 and the corresponding legal obligations of States parties.

The right to health is included in numerous other international instruments, such as:

- ❖ The Universal Declaration of Human Rights – article 25(1);
- ❖ The International Convention on the Elimination of All Forms of Racial Discrimination – article 5(e)(iv);

<sup>179</sup>See, for example, *United Nations Compilation of General Comments by Human Rights Treaty Bodies*, pp. 28, 38 and 90 respectively.

- ❖ The Convention on the Elimination of All Forms of Discrimination against Women – article 11(1)(f);
- ❖ The Convention on the Rights of the Child – article 24;
- ❖ The African Charter on Human and Peoples’ Rights – article 16;
- ❖ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – article 10;
- ❖ The European Social Charter (Revised) – article 11.

As a general point of departure, the Committee on Economic, Social and Cultural Rights emphasizes that health “is a fundamental human right indispensable for the exercise of other human rights” and that every human being is entitled to the enjoyment of “the highest attainable standard of health conducive to living a life in dignity”.<sup>180</sup> More particularly

“The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.”<sup>181</sup>

In the Committee’s view, the reference to “the highest attainable standard of physical and mental health” is not confined to the right to health care but “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”.<sup>182</sup>

Moreover, according to the Committee, the right to health includes certain components which are legally enforceable. “For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.”<sup>183</sup>

### 8.1.1 The normative content of article 12(1)

First, the right to health as defined in article 12(1) “is not to be understood as a right to be *healthy*”. Second, it is a right that contains “both freedoms and entitlements”.<sup>184</sup> The Committee notes that “the *freedoms* include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the *entitlements* include the right

<sup>180</sup>Ibid., General Comment No. 14, p. 90, para. 1.

<sup>181</sup>Ibid., p. 90, para. 3.

<sup>182</sup>Ibid., pp. 90-91, para. 4; see also in further detail p. 92, para. 11.

<sup>183</sup>Ibid. p. 90, para. 1, including the footnote on p. 106.

<sup>184</sup>Ibid., p. 91, para. 8.

to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”<sup>185</sup>

Moreover, “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.” As good health cannot for various reasons be ensured by a State, “the right to health must be understood as *a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.*”<sup>186</sup>

This means, more specifically, that “the right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party”:

- ❖ **availability:** “Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party;”
- ❖ **accessibility:** “Health facilities, goods and services have to be accessible to everyone ... within the jurisdiction of the State party.” The four dimensions of accessibility are the *principle of non-discrimination, physical accessibility, economic accessibility* and *information accessibility*, which includes the right to seek, receive and impart information and ideas concerning health issues;
- ❖ **acceptability:** “All health facilities, goods and services must be respectful of medical ethics and culturally appropriate;”
- ❖ **quality:** “As well as being culturally acceptable, health facilities, goods and services must ... be scientifically and medically appropriate and of good quality.”<sup>187</sup>

### 8.1.2 The meaning of the provisions of article 12(2)

While article 12(1) provides a definition of the right to health, article 12(2), “enumerates illustrative, non-exhaustive examples of States parties’ obligations”.<sup>188</sup> These obligations may be summarized as follows:

- ❖ **“The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child” – article 12(2)(a):** According to the Committee, this provision “may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information”. In interpreting this provision it is necessary also to consider the terms of the Convention on the Rights of the Child.<sup>189</sup>

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<sup>185</sup>Ibid., loc. cit.; emphasis added.

<sup>186</sup>Ibid., p. 91, para. 9; emphasis added.

<sup>187</sup>Ibid., pp. 92-93, para. 12; emphasis added; footnotes omitted.

<sup>188</sup>Ibid., p. 91, para. 7.

<sup>189</sup>Ibid., p. 93, para. 14, and pp. 95-96, para. 22; footnotes omitted.

- ❖ **“The improvement of all aspects of environmental and industrial hygiene” – article 12(2)(b):** This obligation comprises, inter alia: “preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances”. The term “industrial hygiene” refers to “the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment”. Article 12.2(b) also embraces, inter alia, adequate housing and safe and hygienic working conditions.<sup>190</sup>
- ❖ **“The prevention, treatment and control of epidemic, endemic, occupational and other diseases” – article 12(2)(c):** This provision “requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The *right to treatment* includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The *control of diseases* refers to States’ individual and joint efforts to, *inter alia*, make available relevant technologies, ... the implementation and enhancement of immunization programmes and other strategies of infectious disease control.”<sup>191</sup>
- ❖ **“The creation of conditions which would assure to all medical service and medical attention in event of sickness” – article 12(2)(d):** This provision relates to both physical and mental health and “includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care”. A further important aspect of this obligation is the furtherance of popular participation in health services such as through the organization of the health sector and the insurance system.<sup>192</sup>

In implementing article 12 of the Covenant, States parties naturally also have to consider their *legal duty not to discriminate between people in general or between men and women* (arts. 2(2) and 3 of the Covenant).<sup>193</sup> In order to eliminate discrimination against women in the health sector there is, in particular, “a need to develop and implement a comprehensive national strategy for promoting women’s right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services.”<sup>194</sup>

<sup>190</sup>Ibid., pp. 93-94, para. 15.

<sup>191</sup>Ibid., p. 94, para. 16; emphasis added.

<sup>192</sup>Ibid., p. 94, para. 17.

<sup>193</sup>Ibid., pp. 94-95, paras. 18-19.

<sup>194</sup>Ibid., p. 95, para. 21.

Further, *persons with disabilities and elderly persons* all have the right to health under article 12(1) of the Covenant and they have the right to be provided with the same level of medical care as other members of the society in which they live. Moreover, the right to physical and mental health implies, for instance, “the right to have access to, and to benefit from, those medical and social services – including orthopaedic devices – which enable persons with disabilities to become independent, prevent further disabilities and support their social integration”.<sup>195</sup> In the case of the elderly, prevention through regular check-ups suited to their needs “plays a decisive role” as does rehabilitation by maintaining the functional capacities of elderly persons, “with a resulting decrease in the cost of investments in health care and social services”.<sup>196</sup> *Indigenous peoples* also have a right under article 12 “to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.”<sup>197</sup>

*The right to health as guaranteed by the International Covenant on Economic, Social and Cultural Rights means the right to enjoy facilities, goods and services, and conditions necessary for the realization of the highest attainable standard of health. The right includes freedom to control one’s own health and body and the right of access to a non-discriminatory system of health protection.*

*The health facilities must be **available, accessible, acceptable and of good quality.***

*Vulnerable groups such as persons with disabilities, women, elderly persons and indigenous peoples have the right to specific measures suited to their needs.*

### 8.1.3 The obligations of States parties

The Committee on Economic, Social and Cultural Rights divides the legal obligations of States parties under the International Covenant on Economic, Social and Cultural Rights into the following four categories: general, specific, international and core obligations. Some of the main elements of the first three categories will be summarized in this sub-section, while the core obligations will be dealt with separately below.

- ❖ **General legal obligations:** “While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of *immediate effect*.” Thus, the right to health, as guaranteed by article 12, must be exercised “without discrimination of any kind” (art. 2(2)) and steps must be taken (art. 2(1)) towards its full realization. “Such steps must be *deliberate, concrete, and targeted*”

<sup>195</sup>Ibid., p. 96, para. 26, read in conjunction with General Comment No. 5, p. 35, para. 34.

<sup>196</sup>Ibid., General Comment No. 14, p. 96, para. 25, read in conjunction with General Comment No. 6, p. 45, para. 35.

<sup>197</sup>Ibid., General Comment No. 14, pp. 96-97, para. 27.

*towards the full realization* of the right to health ... [P]rogressive realization means that States parties have *a specific and continuing obligation to move as expeditiously and effectively as possible* towards the full realization of article 12.” Deliberately retrogressive measures, which are strongly presumed not to be permissible, have to be duly justified by reference to all rights guaranteed by the Covenant and the State party’s “maximum available resources”.<sup>198</sup>

Lastly, States parties have the obligations “to *respect, protect, and fulfil* ... The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.”<sup>199</sup>

- ❖ ***Specific legal obligations:*** The obligations to respect, protect and fulfil the right to health have been reviewed in greater detail by the Committee on Economic, Social and Cultural Rights in General Comment No. 14. The obligation to *respect* the right to health means, for instance, that States must refrain “from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as States policy; and abstaining from imposing discriminatory practices relating to women’s health status and needs.” States must furthermore refrain, inter alia, “from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases”. They should also refrain “from limiting access to contraceptives and other means of maintaining sexual and reproductive health” and “from unlawfully polluting air, water and soil, e.g. through industrial waste”. Lastly, nuclear, biological or chemical weapons should not be used or tested “if such testing results in the release of substances harmful to human health”.<sup>200</sup>

The obligation to *protect* includes “the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the *availability, accessibility, acceptability* and *quality* of health facilities, foods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children,

<sup>198</sup>Ibid., pp. 97-98, paras. 30-32; emphasis added.

<sup>199</sup>Ibid., p. 98, para. 33.

<sup>200</sup>Ibid., p. 98, para. 34.

adolescents and older persons, in the light of gender-based expressions of violence.”<sup>201</sup>

The obligation to *fulfil* “requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access to all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions.” The obligations also include, for instance, “the provision of a public, private or mixed health insurance system which is affordable for all”. Lastly, the legal duty to *fulfil* also comprises specific obligations to *facilitate*, *provide*, and *promote* the right to health.<sup>202</sup>

- ❖ ***International obligations:*** States parties have the obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health”. In the spirit of article 56 of the Charter of the United Nations, articles 12, 2(1) and (2), 22 and 23 of the Covenant and the Alma-Ata Declaration on Primary Health Care, “States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health.” States parties also “have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries” if they are able to do so in accordance with international law. States parties have “a joint and individual responsibility” based both on the Charter of the United Nations and the resolutions adopted by the General Assembly and the World Health Assembly, “to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons”. Lastly, States parties should “refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment”.<sup>203</sup>

#### 8.1.4 The core obligations

The core obligations pertaining to the right to health are aimed at ensuring the satisfaction of minimum essential levels of this right. They are obligations that States parties must comply with at all times, since they are considered non-derogable.<sup>204</sup> These core obligations have been defined by the Committee on the basis of article 12 read in conjunction with the Programme of Action of the International Conference on Population and Development and the Alma-Ata Declaration. In the Committee’s view, they include at least the following obligations:

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<sup>201</sup>Ibid., pp. 98-99, para. 35; emphasis added.

<sup>202</sup>Ibid., p. 99, paras. 36-37; see also p. 98, para. 98.

<sup>203</sup>Ibid., pp. 99-100, paras. 38-41.

<sup>204</sup>Ibid., p. 101, para. 43, and p. 102, para. 47.



- ❖ “To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”;
- ❖ “To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone”;
- ❖ “To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water”;
- ❖ “To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs”;
- ❖ “To ensure equitable distribution of all health facilities, goods and services”;
- ❖ “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 [also] include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.”<sup>205</sup>

The Committee has also confirmed that “the following are obligations of comparable priority”:

- ❖ “To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care”;
- ❖ “To provide immunization against the major infectious diseases occurring in the community”;
- ❖ “To take measures to prevent, treat and control epidemic and endemic diseases”;
- ❖ “To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them”;
- ❖ “To provide appropriate training for health personnel, including education on health and human rights”.<sup>206</sup>

These eleven core obligations relating to the right to health provide helpful guidance to States parties in the implementation of their treaty obligations at the domestic level. It should be noted, in particular, that the right to shelter and housing is mentioned as a prerequisite for effectively guaranteeing the right to health. The essential importance of access to adequate housing for a person’s health has also been emphasized by the World Health Organization.

### **8.1.5 Violations of article 12**

The following are just a few examples of State actions or omissions that would amount to a breach of the legal duties incurred under the International Covenant on Economic, Social and Cultural Rights with regard to the right to health:

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<sup>205</sup>Ibid., p. 101, para. 43.

<sup>206</sup>Ibid., pp. 101-102, para. 44.

- ❖ “A State which is unwilling to use the maximum of its available resources for the realization of the right to health”. If a country is facing resource constraints, “it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above”;
- ❖ Actions or omissions violating the eleven core obligations described above, which must be complied with in all circumstances;
- ❖ “State actions, policies or laws that contravene the standards set out in article 12 ... and are likely to result in bodily harm, unnecessary morbidity and preventable morbidity. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of *de jure* or *de facto* discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment” (*violation of the obligation to respect*);
- ❖ The failure of a State “to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties”. This would include “the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; ... the failure to protect women against violence or to prosecute perpetrators” (*violation of the obligation to protect*);
- ❖ The failure of States parties “to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level” (*violation of the right to fulfil*).<sup>207</sup>

### 8.1.6 Implementation at the national level

The Committee admits that “the most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health.”<sup>208</sup> To this end, each State party must adopt a national strategy and formulate policies with the right to health indicators and benchmarks. National health strategies and plans of actions “should respect, *inter alia*, the principles of non-discrimination and people’s participation” and “should also be based on the principles of accountability, transparency and independence of the judiciary”.<sup>209</sup> Lastly, “States should consider adopting a framework law to

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<sup>207</sup>Ibid., pp. 102-103, paras. 46-52.

<sup>208</sup>Ibid., pp. 103-104, para. 53.

<sup>209</sup>Ibid., p. 104, paras. 54-55.

operationalize their right to health national strategy.” The law should create mechanisms for monitoring the implementation of the strategy and plan of action.<sup>210</sup>

With regard to the question of **remedies and accountability**, the Committee holds that “any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.”<sup>211</sup> In this connection, it encourages States parties to incorporate in their domestic legal order international instruments recognizing the right to health, since such incorporation “can significantly enhance the scope and effectiveness of remedial measures”. “Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.”<sup>212</sup> The Committee further states that “judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.”<sup>213</sup>

*States parties have a legal duty to take deliberate, concrete and targeted steps towards the full realization of the right to health. While some obligations can be implemented progressively, others are of immediate effect.*

*States parties have to respect, protect and fulfil their legal undertakings. The obligation to fulfil also implies that States parties have a legal duty to facilitate, provide and promote the right to health.*

*The States parties to the International Covenant have, at the very least, eleven core obligations which must be complied with at all times.*

*All alleged victims of violations of the right to health should have access to effective judicial or other appropriate remedies, inter alia at the national level, and the right to adequate reparation for violations of this right.*

*Judges and members of the legal professions in general should be encouraged to pay greater attention to violations of the right to health in the exercise of their responsibilities.*

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<sup>210</sup>Ibid., p. 104, para. 56.

<sup>211</sup>Ibid., p. 105, para. 59.

<sup>212</sup>Ibid., p. 105, para. 60.

<sup>213</sup>Ibid., p. 105, para. 61.

Although the next two cases selected from domestic jurisdictions do not involve the interpretation of the International Covenant on Economic, Social and Cultural Rights, they are of considerable interest since the judges in both cases found ways of interpreting already existing domestic constitutional human rights provisions in an extensive manner, thereby paving the way for the introduction of the right to health in the wider context of the right to equality (Canada) and the right to life (India).

## 8.2 Relevant domestic case law I: The example of Canada

The case of *Eldridge v. British Columbia*, which was decided by the Supreme Court of Canada in 1997, concerned *equality of rights with regard to the provision of medical services to persons with physical disabilities*.<sup>214</sup> The analysis contained in this judgment is of considerable interest and therefore warrants examination in some depth. It was drafted by Justice La Forest on behalf of the unanimous Supreme Court.

The facts of the case:<sup>215</sup> The appellants were born deaf and their preferred means of communication was sign language. They therefore contended that the absence of interpreters impaired their ability to communicate with their doctors and other health care providers, increasing the risk of misdiagnosis and ineffective treatment. Medical care in British Columbia is delivered through two primary mechanisms, the Hospital Insurance Act, R.S.B.C. 1979, c. 180 (later renamed R.S.B.C. 1996, c. 204), which reimburses hospitals for the medically required services they provide to the public, and the Medical and Health Care Services Act, S.B.C. 1992, c. 76 (later renamed the Medicare Protection Act, R.S.B.C. 1996, c. 286). Neither of these programmes paid for sign language interpretation for the deaf. One physician testified before the court that communication without an interpreter “was inhibiting and frustrating” and another emphasized that adequate communication was “particularly critical for childbirth” to enable the patient to help with the delivery and thereby reduce the risk of complications.<sup>216</sup>

The appellants filed an application in the Supreme Court of British Columbia seeking, in particular, “a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan” violated section 15(1) of the Canadian Charter of Rights and Freedoms,<sup>217</sup> according to which:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

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<sup>214</sup>(1997) 3 S.C.R. *Eldridge v. British Columbia (Attorney General)* 624. The text used for this chapter can be found on the following web site: [http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3\\_0624.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0624.html)

<sup>215</sup>*Ibid.* This summary is based on the facts as related in the judgment, paras. 2-7.

<sup>216</sup>*Ibid.*, paras. 5 and 7.

<sup>217</sup>*Ibid.*, para. 11.

The application was dismissed by the Court and, on appeal, the majority of the British Columbia Court of Appeal held that the lack of interpreting services in hospitals was not discriminatory “because the *Hospital Insurance Act* does not provide ‘any benefit of the law’ within the meaning of s. 15(1) of the *Charter*”.<sup>218</sup>

Leave to appeal was granted to the Canadian Supreme Court, which found that neither the Medical and Health Care Services Act nor the Hospital Insurance Act was constitutionally suspect. ***The potential violation of Section 15(1) of the Charter rather flowed from the decision-making power delegated to the subordinate authority.*** In other words, the legislation itself did not “either expressly or by necessary implication” prohibit hospitals (Hospital Insurance Act) or the Medical Services Commission (Medical and Health Care Services Act) from respectively providing sign language interpreters and determining that such interpretation “is a ‘medically required’ service and hence a benefit”.<sup>219</sup>

The Court rejected the respondents’ contention that the Charter on Rights and Freedoms was not applicable to hospitals. It found that there was “a ‘direct and ... precisely-defined connection’ between a specific government policy and the hospital’s impugned conduct”. The alleged discrimination, namely the failure to provide sign language interpretation, was “intimately connected to the medical service delivery system instituted by legislation”.<sup>220</sup> The provision of these services was “an expression of government policy”, with hospitals acting “as agents for the government in providing the specific medical services set out in the [Hospital Insurance] Act. The Legislature [could not therefore] evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective.”<sup>221</sup> With regard to the Medical Services Commission set up under the Medical and Health Care Services Act, it was not contested that it had to conform to the *Charter* in the exercise of its power, delegated to it by the Government, to determine whether a service is a “benefit” pursuant to the Act and thus also a “medically required” service to be provided free of charge.<sup>222</sup>

The Court having concluded “that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters,” it remained to be determined whether that failure infringed the appellants’ right to equality under Section 15(1) of the Charter. At the outset, the Court emphasized that, like other Charter rights, Section 15(1) “is to be generously and purposively interpreted” because a constitution incorporating a bill of rights calls for “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”<sup>223</sup>

<sup>218</sup>Ibid., para. 13.

<sup>219</sup>Ibid., para. 29 (regarding the Medical and Health Care Services Act) and para. 34 (regarding the Hospital Insurance Act).

<sup>220</sup>Ibid., para. 51.

<sup>221</sup>Ibid., loc. cit.

<sup>222</sup>Ibid., para. 52.

<sup>223</sup>Ibid., para. 53.

The Court further stated that Section 15(1) of the Charter serves the following “two distinct but related purposes. First, it expresses a commitment – deeply ingrained in our social, political and legal culture – to the equal worth and human dignity of all persons. ... Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups ‘suffering social, political and legal disadvantage in our society’.”<sup>224</sup> With regard to the special situation of persons with disabilities, the Court stated:

“56. It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social integration and advancement, subjected to invidious stereotyping and relegated to institutions ... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the ‘equal concern, respect and consideration’ that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms ... One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed.”<sup>225</sup>

The Court added that “deaf persons have not escaped this general predicament” and that “the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.”<sup>226</sup>

With regard to the question whether the appellants had been afforded “equal benefit of the law without discrimination” in accordance with Section 15(1) of the Charter, the Court pointed out that the claim before it was “one of ‘adverse effects’ discrimination”, since “on its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit ‘distinction’ based on disability by singling out deaf persons for different treatment.”<sup>227</sup> The Court added that it had consistently held that “s. 15(1) of the *Charter* protects against this type of discrimination” since it was “intended to ensure a measure of substantive, and not merely formal equality”.<sup>228</sup> A corollary to this principle was “that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation ... It is sufficient if the *effect* of the legislation is to deny someone the equal protection or benefit of the law.”<sup>229</sup>

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<sup>224</sup>Ibid., para. 54.

<sup>225</sup>Ibid., para. 56.

<sup>226</sup>Ibid., para. 57.

<sup>227</sup>Ibid., para. 60.

<sup>228</sup>Ibid., para. 61.

<sup>229</sup>Ibid., para. 62.

In the *Eldridge* case, the adverse effect suffered by the deaf persons stemmed “not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone”.<sup>230</sup> The Supreme Court therefore logically rejected the opinions of the lower courts, according to which sign language interpretation was “a discrete, non-medical ‘ancillary’ service” that did not deny the deaf persons a benefit available to the hearing population. In its view it was, on the contrary, “the means by which deaf persons may receive the same quality of medical care as the hearing population”.<sup>231</sup> In other words, whenever necessary for effective communication, “sign language interpretation should not ... be viewed as an ‘ancillary’ service”.<sup>232</sup>

In reply to the respondents’ suggestions “that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits,” the Court held that “this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence.”<sup>233</sup>

In the course of its in-depth analysis of the concept of equality and non-discrimination, the Court further stated that “the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.” As emphasized by the Court, “it is also a cornerstone of human rights jurisprudence ... that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation,” which, in this context, “is generally equivalent to the concept of ‘reasonable limits’”.<sup>234</sup>

The Court therefore concluded that “the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.”<sup>235</sup> This ruling did not mean, however, “that sign language interpretation will have to be provided in every medical situation. The ‘effective communication’ standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved ... For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases.”<sup>236</sup>

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<sup>230</sup>Ibid., para. 66.

<sup>231</sup>Ibid., paras. 68 and 71.

<sup>232</sup>Ibid., para. 71.

<sup>233</sup>Ibid., paras. 72-73.

<sup>234</sup>Ibid., paras. 78-79.

<sup>235</sup>Ibid., para. 80.

<sup>236</sup>Ibid., para. 82.

Lastly, the Court responded in the negative to the question whether there was any possible justification for this prima facie violation under Section 1 of the Charter, *according to which the right and freedoms guaranteed in the Charter can be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”* (emphasis added). Justice La Forest’s summing up on this point is well worth quoting, since the thrust of his argument is equally relevant to other disadvantaged groups in our societies who may not benefit from equal medical care:

“94. In summary, I am of the view that the failure to fund sign language interpretation is not ‘minimal impairment’ of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a ‘reasonable accommodation’ of the appellants’ disability. In the language of this Courts’ [*sic*] human rights jurisprudence, it has not accommodated the appellants’ needs to the point of ‘undue hardship’.”<sup>237</sup>

### 8.3 Relevant domestic case law II: The example of India

The right to life in article 21 of the Constitution of India was given an extensive interpretation by the Supreme Court of India in the case of *Consumer Education & Research Centre and Others v. Union of India and Others*, which concerned occupational health hazards and diseases affecting workmen employed in asbestos industries.<sup>238</sup> The Supreme Court concluded that the “right to health, medical aid to protect the health and vigour to a worker while in service or post-retirement is a fundamental right under Article 21, read with 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”.<sup>239</sup>

It may be noted, without going into the details of the case, that the petitioner sought “to fill in the yearning gaps and remedial measures for the protection of the health of the workers engaged in mines and asbestos industries with adequate mechanism for and diagnosis and control of the silent killer disease ‘asbestosis’.”<sup>240</sup> The Court analysed at length the data on the danger of exposure to asbestos and concluded that it results in a “long tragic chain of adverse medical, legal and societal

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<sup>237</sup>Ibid., para. 94.

<sup>238</sup>(1995) 3 Supreme Court Cases 42.

<sup>239</sup>Ibid., p. 70.

<sup>240</sup>Ibid., p. 47.



consequences”, thereby issuing a reminder of “the legal and social responsibility of the employer or the producer not to endanger the workmen or the community or the society”. It added that:

“He or it is not absolved of the inherent responsibility to the exposed workmen or the society at large. They have the responsibility – legal, moral and social to provide protective measures to the workmen and to the public or all those who are exposed to the harmful consequences of their products. Mere adoption of regulations for the enforcement has no real meaning and efficacy without professional, industrial and governmental resources and legal and moral determination to implement such regulations.”<sup>241</sup>

The Court then examined the case, *inter alia*, in the light of the Preamble and of articles 38 and 21 of the Constitution of India. According to the first preambular paragraph, all citizens of India shall be secured “justice, social, economic and political”. Article 38, which forms part of the “Directive Principles of State Policy”, concerns the duty of the State to secure a social order for the promotion of welfare of the people. Article 21 protects the right to life.

With regard to the Preamble and article 38 of the Constitution, the Court stated, *inter alia*, that:

“18. ... the supreme law, envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity ... Law is the ultimate aim of every civilised society, as a key system in a given era, to meet the needs and demands of its time ... The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy ... Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity; the State should provide facilities and opportunities to enable them to reach at least minimum standard of health, economic security and civilised living while sharing according to their capacity, social and cultural heritage.

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<sup>241</sup>Ibid., pp. 66-67.

19. In a developing country like ours steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of *social justice* ... What is due cannot be ascertained by absolute standard which keeps changing depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven practical content of 'life'. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.”<sup>242</sup>

The Court then stated that, through article 1 of the Universal Declaration of Human Rights, the Charter of the United Nations “reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive Principles of State Policy as part of the Constitution. The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality.”<sup>243</sup> The Court added that:

“22. The expression 'life' assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure ... If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live, leave aside what makes life liveable. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilisation which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned.”<sup>244</sup>

With regard to the right to health and the right to life of the worker, the Court specified that:

“24. The right to health to a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning for himself and his dependants, should not be at the cost of the health and

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<sup>242</sup>Ibid., pp. 67-68.

<sup>243</sup>Ibid., p. 68.

<sup>244</sup>Ibid., pp. 68-69.

vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. *Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read in conjunction with Articles 39(e), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity.*<sup>245</sup>

It therefore also followed that, since the health and strength of the worker are an integral facet of the right to life, “the State, be it Union or State Government or an industry, public or private, is enjoined to take all such actions which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness.”<sup>246</sup>

Among the various directives issued by the Court was the order to “all the factories whether covered by the Employees’ State Insurance Act or Workmen’s Compensation Act or otherwise ... to compulsorily insure health coverage to every worker”.<sup>247</sup>

*The cases considered by the Supreme Courts of Canada and India show that, although the right to health may not as such be included in domestic law, the domestic judge is not necessarily deprived of legal tools to protect the right to health of vulnerable groups:*

- *In Canada this was done by reference to the right to equal access to medical services, with the right to equality being given a dynamic, purposeful interpretation;*
- *In India it was done by an extensive interpretation of the right to life as understood in the light of other constitutional provisions concerning, inter alia, social justice.*

<sup>245</sup>Ibid., p. 70; emphasis added. Article 41 of the Constitution concerns the right to work, to education and to public assistance in certain cases; article 43 directs that the State shall “endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers”, p. 68.

<sup>246</sup>Ibid., p. 70.

<sup>247</sup>Ibid., p. 73.

## 9. The Role of Judges, Prosecutors and Lawyers in the Protection of Economic, Social and Cultural Rights: Lessons Learned

As this chapter shows, the legal professions have an essential role to play in promoting the protection of economic, social and cultural rights, a role that is particularly important for the most vulnerable groups in society. Although there are still countries in which the judiciary is reluctant to adjudicate alleged violations of these rights on the grounds that such issues fall within the power of the executive, such a reduced role for the judiciary in respect of societal problems appears not only increasingly anachronistic but particularly difficult to sustain in law. Without concluding that each and every issue relating to the exercise of economic, social and cultural rights lends itself to judicial determination, this chapter makes clear that many do and that unless there are efficient legal remedies at the disposal of, in particular, the poor and vulnerable, these persons or groups may have no option, in their despair and deprivation, but to take the law into their own hands in order to protect themselves, as in the South African case.

## 10. Concluding Remarks

The breadth and complexity of the subject of economic, social and cultural rights has by necessity limited the scope of this chapter, which has highlighted only a few important aspects of such rights. It has shown, in particular, that the view has been held ever since the drafting of the Charter of the United Nations that civil and political rights, on the one hand, and economic, social and cultural rights, on the other, are intrinsically interdependent for their true fulfilment. This integrated approach has also been emphasized by the Committee on Economic, Social and Cultural Rights and upheld in the domestic jurisprudence analysed in this chapter.

Through its General Comments, the Committee on Economic, Social and Cultural Rights has also provided detailed interpretations of the legal obligations of States parties in respect of several of the rights contained in the International Covenant on Economic, Social and Cultural Rights. This increased legal precision of the normative content of such rights provides a welcome and helpful tool not only for Governments but also for domestic judges, whether they are interpreting and applying the Covenant itself or other forms of legislation.

However, this improved definition of governmental legal obligations to protect economic, social and cultural rights must necessarily go hand in hand with a firm determination to uphold civil and political rights, because without effective protection of these rights based on the rule of law, economic, social and cultural rights are likely to remain empty promises.