Adjudicating Economic, Social and Cultural Rights at National Level

A Practitioners Guide

International Commission of Jurists

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Practitioners Guide No. 8

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Summaries for cases where judgements have not been given in English are based on unofficial translations undertaken by the ICJ.

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List of Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
CAT	United Nations Committee against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	United Nations Committee on the Elimination of All Forms of Discrimination Against Women
CERD	United Nations Committee on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	United Nations Committee on the Rights of the Child
CRPD	United Nations Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ESC rights	Economic, social and cultural rights
GC	General Comment
HRC	United Nations Human Rights Committee

ICAT	International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
ICEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICRC	International Convention on the Rights of the Child
ICRPD	International Convention on the Rights of Persons with Disabilities
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
OP-ICEDAW	Optional Protocol to the International Convention on the Elimination of Discrimination against Women
OP-ICRC	Optional Protocol to the International Convention on the Rights of the Child on a communications procedure

OP-ICRPD	Optional Protocol to the International Convention on the Rights of Persons with Disabilities
OP-ICCPR	First Optional Protocol to the International Covenant on Civil and Political Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
WHO	World Health Organization

Chapter 1: Introduction

The present Guide serves two purposes. First, it aims to reinforce the point that economic, social and cultural rights[1] are fully subject to adjudication before judicial and quasi-judicial bodies and to show how such adjudication has been successfully pursued in numerous jurisdictions. To this end, the Guide presents an updated version of the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*).[2] It is thus heavily based on the earlier work of the ICJ but also includes recent jurisprudence in the area.[3] Secondly, it not only updates the state of play, but also presents this information in a manner aimed to facilitate its use by legal practitioners working especially at the national level. In this perspective, the Guide adopts a more flexible electronic format that allows for easier updating and for the use of modules and excerpts, as required especially for training purposes. It makes the link to important external resources including case law databases. Alongside this flexibility and adaptability, the Guide can also be printed in the form of a coherent stand-alone publication.

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[1] As described in the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], the term "economic, social and cultural rights" ("ESC rights") is used all through the present Guide to reflect the international parlance of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other universal human rights instruments, and because this is the term generally accepted in the field of international human rights law. In some constitutional traditions, other terms are more frequently used, such as "social rights", "socio-economic rights", "fundamental social rights", "welfare rights" or "welfare entitlements". While there is some reluctance by certain common law jurisdictions to recognize the existence of ESC rights as "fundamental" or "constitutional", the fact is that some of these rights are already enshrined in statutes and sometimes in national constitutions.

[2] Report published in 2008 as the 2nd volume of the Human Rights and Rule of Law Series, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf

[3] Summaries for cases where judgements have not been given in English are based on unofficial translations undertaken by the ICJ.

In addition to the *ICJ Justiciability Study*, the Guide also draws on the ICJ's "Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights"[4] and builds on lessons from the ICJ's work in various countries. In particular, it has been informed by two processes, namely in Morocco and El Salvador, aimed at investigating and assessing access to justice and the availability and effectiveness of remedies for victims of ESC rights' violations.[5] Work on access to justice by the ICJ Programmes on Business and Human Rights and on Women's Human Rights[6] was also of great value and inspiration in producing this present Guide.

Importantly, the Guide benefits from the input and insight of a group of legal practitioners from different countries and legal traditions, who have been consulted during the process of elaborating this Guide.

Progress in ESC rights adjudication

At the time, the *ICJ Justiciability Study* contributed substantially to the debate of the elaboration and adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[7] It was then necessary to dispel

[4] The Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, published in 2010 as a joint publication of the ICJ and the Inter-American Institute of Human Rights, is accessible in English, Spanish and French at: http://www.icj.org/comentario-del-protocolo-facultativo-del-pacto-international-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/

[5] The two country studies are accessible respectively in French or Arabic and Spanish at: http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/, and http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/

[6] Country studies on access to justice under different ICJ programmes are available at: http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/

[7] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/RES/63/117 [hereafter OP-ICESCR].

certain prejudices and misconceptions about ESC rights and their nature as legal and justiciable rights, and to show that the adjudication of economic, social and cultural rights was desirable, feasible and already being carried out by judicial and quasi-judicial bodies in all continents. This project was all the more important as certain States continued to resist acknowledging the justiciable nature of ESC rights when considering the creation of individual and inter-State communications, during the course of the intergovernmental negotiations on the OP-ICESCR.

The unanimous adoption (without a vote) by the UN General Assembly of the OP-ICESCR, on 10 December 2008,[8] ultimately marked a watershed moment in the recognition and acceptance of the justiciability of ESC rights. The Protocol entered into force on 5 May 2013, and is presently binding for the States that have become party to this instrument.[9]

Today, it must be acknowledged that an important number of ESC rights cases have been adjudicated and that this trend continues. These cases emerge from jurisdictions in various countries and regions, and among diverse legal systems. It is also interesting to note that, although a large proportion of ESC rights jurisprudence has for a long time concerned labour rights, all ESC rights have been adjudicated in cases concerning both positive and negative obligations.

Undoubtedly, for victims of violations of ESC rights, recourse to judicial and quasi-judicial bodies is often a long, expensive and complex way to justice and redress. In order to be realized, ESC rights require robust public policies designed and implemented in accordance with human rights principles such as participation, transparency and accountability. However, judicial and quasi-judicial bodies can and do play a critical role

[8] *Ibid.*

[9] As of 30 July 2014, 15 States of the 45 signatories were party to the OP-ICESCR. To obtain an updated list of the ratifications and accessions, please visit: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en&clang=_en

in informing and shaping these policy decisions by clarifying the legal parameters within which they are to be conceived. Judicial and quasi-judicial bodies continue to develop case law that is indispensable to the realization of the rights of victims of violations worldwide.

Content of the Guide

To achieve its objectives, in the context of the realities mentioned above, the Guide is essentially structured following the main steps of a litigation process. It takes as its departing point the standards relevant to ESC rights under international law and, with a focus on domestic jurisdictions, looks at how judicial and quasi-judicial bodies throughout the world have explicitly or implicitly given effect to these standards. In doing so, the Guide goes beyond the traditional constitutional or conventional reviews by judicial or quasi-judicial bodies and explores the role that other courts and adjudicative bodies can play, in their respective areas of competence, to bring redress to rights-holders by addressing various elements of the normative content of ESC rights. It is based on the conviction that, even in non-common law countries in which case law does not necessarily serve as controlling authority, practitioners will be able to make use of the concepts and jurisprudence exposed, directly or by analogy, no matter where they operate.

Although addressed to both lawyers involved in bringing and judges in deciding cases on ESC rights, some parts of this Guide will be more useful to one audience than to the other depending on the focus of each part of the Guide. It is hoped, though, that the Guide as a whole will be of interest to all those who want to promote the use of legal action and judicial procedures to protect and enforce ESC rights in their domestic system and beyond.

To set the scene, Chapter 2, "ESC Rights under International Law and the Role of Courts", provides in summary form certain basic information on ESC rights under international law, their justiciability and the right to an effective remedy in this context.

Chapter 3, "Initiating judicial proceedings - Making the case", presents issues that should be taken into consideration by legal practitioners and legal counsel before or while initiating legal action on behalf of the rights-holders they represent and advise.

Chapter 4, "Beyond constitutional remedies - Exploring various jurisdictions", offers an overview of comparative law from various jurisdictions that might be further explored by practitioners. It looks at the relevance of different bodies of law, including civil and penal law, for ESC rights and how remedies in these areas can provide some kind of redress to victims and contribute to reparation in cases of violations of ESC rights.

Chapter 5, "Standards and Techniques of Review in Domestic Adjudication of ESC Rights", provides examples of case law, examined according to various standards of review, used by judges who have had to decide whether ESC rights have been violated.

Chapter 6, "Remedies and Enforcement of Decisions", discusses remedies and the issue of enforcement and implementation of judicial decisions.

Methods of presentation

In each chapter and section, the Guide summarizes the main lessons learned to date in the adjudication of ESC rights, from doctrinal to practical legal issues. Whenever relevant, it proposes references to useful resources and tools for practitioners at the national level who want to bring cases of alleged violations of ESC rights to judicial and quasi-judicial bodies.

The jurisprudence[10] and the experiences provided in the Guide should be considered as examples and sources of inspiration. They do not in any way pretend to be exhaustive, nor to duplicate the valuable work done by other institutions that entertain and centralize case law databases that are referred to at the

[10] In the context of the present Guide, the term "jurisprudence" is used to describe both decisions of courts and commentaries of quasi-judicial bodies.

end of this Guide.[11] Rather, they illustrate some of the main issues that lawyers and judges face when they have to litigate and adjudicate ESC rights. They also provide information on the manner in which practitioners, in various jurisdictions and in relation to various rights and legal issues at stake, have found ways to protect ESC rights.

Because the Guide adopts a flexible format, some references and cases appear in several parts of the document in order to illustrate various issues, such as particular standards of review or remedies provided. The chosen format and organization of the Guide aims to assist practitioners to access the information in a useful and easy manner.

[11] See Toolbox in annex 2.

Chapter 2: ESC rights under international law and the role of judicial and quasi-judicial bodies

This chapter offers a summing-up of basic information on ESC rights, as well as of the meaning and implications of the right to an effective remedy in cases of violations of ESC rights. It also serves as a reiteration of States' obligations and what can constitute breaches of these obligations under international law.

It should also be recalled that, although progress has been made in the acceptance of the justiciability of ESC rights, prejudices and doubts remain at the global, regional and national levels about the role of judicial and quasi-judicial bodies in the enforcement and protection of these rights. The present chapter sets the scene and aims to give practitioners arguments to identify and challenge violations of ESC rights, including those due to the absence or ineffectiveness of remedies available to victims.

I. Progress towards a global recognition of the justiciability of ESC rights

1. The justiciability of ESC rights

The term "justiciability" means that people who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy enforced.[12]

[12] ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], p. 1.

The question as to the justiciability of ESC rights has been the subject of a multitude of academic, institutional and advocacy publications.

Practitioners who want to read more on the general issue of the justiciability of ESC rights can, among the rich literature on the subject, refer to:

A. Nolan, B. Porter and M. Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal.* New York University center for human rights and global justice, Working Paper No. 15, 2007, accessible at: http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf

Bruce Porter, "Justiciability of ESC Rights and The Right to Effective Remedies: Historic Challenges and New Opportunities" in *Economic, Social and Cultural Rights and the Optional Protocol to the ICESCR*, Chinese Academy of Social Sciences, Beijing, 2008.

Bruce Porter and Martha Jackman, "Justiciability of Social and Economic Rights in Canada" in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative International Law*, Cambridge University Press, Cambridge, 2008, accessible at: http://www.socialrights.ca/domestic-political/documents/cambridge.pdf

International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2, Geneva, 2008, accessible (in English, French and Spanish) at: http://www.icj.org/courts-and-the-legal-enforcement-of-economic-social-and-cultural-rights/

Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, Cambridge, 2008.

Malcolm Langford and Aoife Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier,* Center on Housing Rights and Evictions, 2006.

Malcolm Langford and Bret Thiele (eds.), *Litigation of Economic, Social and Cultural Rights: The State of Play*, The University of New South Wales Press, Sydney, 2005.

M. Langford, C. Rodriguez and J. Rossi (eds.), *Making it Stick: Compliance with Social Rights Judgments in Comparative Perspective*, Pretoria University Law Press, Capetown, 2014.

M. Langford, B. Thiele, and J. Squires (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights*, UNSW Press, Sydney, 2005, accessible at: http://209.240.139.114/wp-content/uploads/2012/02/The-Road-to-a-Remedy.pdf

Sandra Liebenberg, "The protection of economic and social rights in domestic legal systems", in *Economic, Social and Cultural Rights: A Textbook,* Martinus Nijhoff Publishers, The Hague, 2001.

Sandy Liebenberg and Karrisha Pillay, *Socio-economic Rights in South Africa: A Resource Book*, Community Law Centre (University of Cape Town), 2000.

French

Diane Roman, *Justiciabilité des droits sociaux: vecteurs et resistances,* Editions A. Pedone, Paris, 2012.

Spanish

Magdalena Sepúlveda, "La justiciabilidad de los derechos económicos, sociales y culturales frente a la supuesta dicotomía entre las obligaciones impuestas por los pactos de Naciones Unidas", en Cantón, O. y Corcuera, S. (coords.). *Derechos económicos, sociales y culturales. Ensayos y materiales,* México: Universidad Iberoamericana, Porrúa, 2004, pp. 109–148.

Malcom Langford (ed.), *Teoría y jurisprudencia de los derechos sociales: Tendencias incipientes en el derecho internacional y comparado* , Universidad de los Andes and Siglo del Hombre Editores, Bogotá, 2012.

Martín Abregú and Christian Courtis (eds.), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Editores del Puerto, 2004.

Victor Abramovich and Christian Courtis, *Derechos sociales: instrucciones de uso*, Fontamara, 2003.

Victor Abramovich and Christian Courtis, *El umbral de la ciudadanía: el significado de los derechos sociales en el Estado social constitucional*, Editores del Puerto, 2006.

V. Abramovich, C. Courtis and L. Ferrajoli, *Los derechos sociales como derechos exigibles*, Vol. 2, Trotta, Madrid, 2002.

Without repeating in full the analysis contained within such publications, it is important to highlight the prejudices and main objections against the judicial enforcement of ESC rights in order to overcome them. These objections have had consequences both at domestic and international levels. The nega-

tive effect at both levels, in a mutually reinforcing manner, has effectively precluded many judicial and quasi-judicial bodies from playing their dual role in the protection of ESC rights and in ensuring that victims of all human rights violations are guaranteed access to effective remedies.

As explained in the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*), these arguments have served to inhibit recourse to litigation at the domestic level where ESC rights have been violated, thus leaving the protection of these rights almost exclusively to political, rather than judicial, bodies.[13]

At the international level, prejudices and obstacles had for a number of years prevented the establishment of a communication procedure before the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in the form of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[14]

The two general international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), codifying and adding to many of the provisions of the Universal Declaration of Human Rights (UDHR), were both adopted in 1966. The ICCPR benefitted from the concurrent adoption of an individual communication (complaint) mechanism to which 115 States are currently parties.[15] In addition, the other major human rights treaties also came with communication procedures, as opt-in provisions or as separate optional protocols.[16] Nevertheless, it was not until 10 December

[13] *ICJ Justiciability Study*, p. 2.
[14] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/RES/63/117 [hereafter OP-ICESCR].
[15] First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), UN Doc. A/6316 [hereafter OP-ICCPR].
[16] See Optional Protocol to the International Convention on the Elimination of Discrimination against Women (adopted 10 December 1999, entered into force

2008 that a similar protection mechanism was finally adopted under the OP-ICESCR. Only on 5 May 2013, three months after the deposit of the 10th instrument of ratification to the Optional Protocol, did the new OP enter into force. This instrument finally provides for remedies at the international level to victims of violations of economic, social and cultural rights. It establishes a mechanism that enables the CESCR to examine complaints and initiate inquiries in cases of alleged violations of these rights in the States parties to the OP-ICESCR whenever victims are not able to obtain justice at the national level.

In addition, on 14 April 2014, the third Optional Protocol on a communication procedure for the International Convention on the Rights of Child (OP-ICRC) came into force, following its adoption on 19 December 2011.[17] A significant number of provisions of the International Convention on the Rights of the Child (ICRC)[18] relate to ESC rights, and this mechanism will no doubt contribute to ensuring the right to a remedy and the development of international jurisprudence with respect to persons whose ESC rights were violated at the time they were under 18 years of age.

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20 December 2000), UN Doc. A/54/49 (Vol. I) [hereafter OP-ICEDAW]; Optional Protocol to the International Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc. A/61/106 [hereafter OP-ICRPD]; article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), UN Doc. A/RES/61/177 [hereafter CED]; article 22 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), UN Doc. A/39/51 [hereafter ICAT]; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969), UN Doc. A/6014 [hereafter ICERD]; article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (individual complaint mechanism not yet in force) (adopted on 18 December 1990, entered into force on 1 July 2003), UN Doc. A/RES/45/158 [hereafter ICRMW].

[17] Optional Protocol to the International Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014), UN Doc. A/RES/66/138 [hereafter OP-ICRC].

[18] International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), UN Doc. A/RES/44/25 [hereafter ICRC].

The new avenue for justice created by the OP-ICESCR will undoubtedly have an influence on the availability and effectiveness of domestic remedies, as well as on the development of jurisprudence and standards on ESC rights at all levels: national, regional and global.

Practitioners wishing to have detailed information on the OP-ICESCR, including concerning the procedures the new instrument creates and the modalities to lodge a complaint, can refer to the following links and websites:

http://op-icescr.escr-net.org/

http://www.icj.org/comentario-del-protocolo-facultativo-del-pacto-international-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/

http://www.geneva-academy.ch/docs/publications/Briefings and In breifs/The optional protocol In brief 2.pdf

http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.49.3.pdf

http://ratifyop3crc.org/

http://www.childrightsconnect.org/index.php/connect-with-the-un-2/op3-crc

See also the ESCR-Net manual, Claiming ESCR at the United Nations (2014), accessible at:
http://www.escr-net.org/node/365482

2. Litigating ESC rights

As is the case with any human right, litigation neither can nor should be considered as the only means to ensure States' compliance with their duties relating to ESC rights. Rather, it is typically a means of last resort. Courts and other adjudicative bodies alone cannot supervise the design and implementation of public laws and policies in areas such as health, work, food, housing or education. The creation or strengthening of such policies requires public debate and action by the executive and legislative branches of the State. This is similarly true for civil and political rights, which similarly require implementing legislation, policies and the availability of services and infrastructure. While judicial action is not the exclusive means of implementation and redress, the role of the courts in the protection of ESC rights is fundamental. As highlighted in other parts of the Guide, litigation is thus not only an instrument to ensure compliance with ESC rights but also to guarantee the realization of the right to an effective remedy.

Excerpts from the *ICJ Justiciability Study*
Litigation is only one of several means to enforce and implement ESC rights, as is it with civil and political rights. The belief that ESC rights should not be granted any kind of judicial or quasi-judicial protection, and should be left to the discretion of political branches of the State, is one of the main reasons why ESC rights have been devalued within the legal hierarchy. While courts and litigation should not be seen as the only means for realizing ESC rights the absence of an effective method of recognizing justiciability for these rights:

- *narrows the range of mechanisms available for victims of rights violations to receive remedies and reparations;*
- *weakens the accountability of States;*
- *undermines deterrence; and*
- *fosters impunity for violations.*[19]

[19] See Bangalore Declaration and Plan of Action, para. 14:
"An independent Judiciary is indispensable to the effective implementation of economic, social and cultural rights. Whilst the judiciary is not the only means of securing the realization of such rights, the ex-

Furthermore, completely excluding courts and tribunals from considering violations of ESC rights is incompatible with the idea that "an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights".[20]

3. Dismantling prejudices against the justiciability of ESC rights

The prejudices and misconceptions that have long discouraged judicial and quasi-judicial bodies from playing an active role in the protection of ESC rights in cases of violations, relate both to the nature of these rights (and the nature of corresponding State obligations) and to the ability and legitimacy of judicial and quasi-judicial bodies to adjudicate them.[21] The following part of this chapter discusses some of the main issues concerning the nature of ESC rights. Matters concerning the capabilities of judicial and quasi-judicial bodies to adjudicate cases concerning ESC rights, as well as their real or perceived legitimacy to do so, will be addressed in subsequent chapters of the Guide, in which an array of case law and arguments will be presented to show how judicial and quasi-judicial bodies have

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istence of an independent judiciary is an essential requirement for the effective involvement of jurists in the enforcement, by law, of such rights, given that they are often sensitive, controversial and such as to require the balancing of competing and conflicting interests and values".

The Bangalore Declaration and Plan of Action was issued following a conference on economic, social and cultural rights and the role of lawyers, convened by the International Commission of Jurists in Bangalore, India, October 23-25, 1995.

[20] See Vienna Declaration and Programme of Action, (adopted by the World Conference on Human Rights in Vienna 25 June 1993) UN Doc. A/CONF.157/23, para. 27.

[21] Concerning this second strand against the justiciability of ESC rights, arguments are essentially political and procedural. These include, among others, the assumptions that in reviewing certain social policies and law and making decisions that have resource implications, the judiciary would exceed its powers and encroach on the decision-making power of the executive and legislative in a democratic regime; or that judicial or quasi-judicial bodies are not equipped procedurally and technically to deal with collective and/or complex cases around social and economic policies.

found their way around purported obstacles to the justiciability of ESC rights.

The *ICJ Justiciability Study* describes the commonly aired objections against the justiciability of ESC rights that are based on the perceived nature of these rights and the attendant obligations of States. The following are excerpts from the *Study*, aimed at refuting both the contention that ESC rights impose only positive obligations on States, and are thus costly, and that ESC rights are too vague to be the subject of judicial review.

Excerpts from *ICJ Justiciability Study*

Those who argue that ESC rights are not justiciable tend to assume that the content of these rights and obligations they impose are all very similar. Yet, a review of any accepted list of ESC rights suggests the opposite; the obligations imposed by ESC rights work in a number of different ways. These include:

- *providing freedoms*
- *imposing obligations on the State regarding third parties*
- *imposing obligations on the State to adopt measures or to achieve a particular result, among other examples.*[22]

[22] For example, the list of rights provided by the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UN Doc. A/6316 [hereafter ICESCR], or of regional instruments such as the Revised European Social Charter (adopted 3 May 1996, entered into force 1 July 1999), CETS No. 163 [hereafter Revised European Social Charter]; or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" (adopted 17 November 1988, entered into force 16 November 1999), OAS Treaty Series No. 69 [hereafter Protocol of San Salvador]. This list of instruments is not exhaustive, and it is not intended to convey the idea that ESC rights are only enshrined in these sources. ESC rights could be found in a variety of human rights instruments: other specific ESC rights instruments (such as the International Labour Organization (ILO) conventions); instruments mainly directed at recognizing civil and political rights (such as the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), UN Doc. A/6316 [hereafter ICCPR]; the European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), CETS No. 005 [hereafter ECHR]; the American Convention on Human Rights (adopted 21 Novem-

In many respects, therefore, these rights must be approached in exactly the same way as civil and political rights as set out in regional and international law instruments. The civil and political rights set out in such conventions establish an equally wide variety of obligations, guaranteeing freedoms for individuals, prohibiting certain actions by States, imposing obligations regarding third parties, as well as duties to adopt legislative and other measures, or duties to provide access to services or institutions.

This point also sheds some light on a further objection to the justiciability of ESC rights: that ESC rights are frequently equated with the provision of services, money or in-kind benefits. Yet, civil and political rights may also encompass similar aspects, such as access to services or to payments, which has never been used to deny the justiciability of civil and political rights in general. That being said, the idea that duties to provide services, money or in-kind benefits are incompatible with adjudication is also misleading. Even if elements of certain ESC rights are less easy to adjudicate, this is not a reason to reject the justiciability of ESC rights as a whole.

The Committee on Economic, Social and Cultural Rights has summarized some of these ideas in its General Comment Nº 9:

> *"In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cul-*

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ber 1969, entered into force 18 July 1978), OAS Treaty Series No. 36 [hereafter ACHR]; and instruments where no significant difference between ESC rights and civil and political rights is made (such as, for example, the Universal Declaration of Human Rights (adopted 10 December 1948), UN Doc. A/810, pp. 71-77 [hereafter UDHR]; American Declaration of Rights and Duties of Man (adopted in April 1948) O.A.S. Res. XXX, OEA/Ser L V/II.82 Doc 6 Rev 1; the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5 [hereafter ACHPR]; the ICERD; the International Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), UN Doc. A/34/46 [hereafter ICEDAW]; the ICRMW; and the International Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc. A/RES/61/106 [hereafter ICRPD].

> *tural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation....While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. 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."*[23]

Another set of arguments against the justiciability of ESC rights asserts that they are so vague or uncertain in character that their content cannot be adequately defined. Consequently, it is said, such rights are impossible to adjudicate. According to this view, while civil and political rights provide clear guidance on what is required in order to implement them, ESC rights only set out aspirational and political goals. The content of ESC rights is supposedly variable and devoid of the certainty required for adjudication. It is frequently said, for example, that rights such as the "right to health" or the "right to housing" have no clear meaning, and that they offer no obvious standard by which one can determine whether an act or omission

[23] Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24 (1998), para. 10.

conforms to the right or diverges from it, i.e. whether an act or omission fulfils the right or violates it.

A lack of specificity regarding the exact content of ESC rights, and therefore the legal obligations that stem from them, would certainly seriously impede their judicial enforcement. Without clear requirements for the content and scope of a right, combined with a failure to identify rights-holders and duty-bearers, judicial enforcement would be difficult. The process of judicial decision-making needs a relatively clear "rule of judgment" which can be used to assess compliance or non-compliance with certain obligations. Without this "rule of judgment", it seems impossible to differentiate between adjudication and law making.

However, the question of content and scope of a right is not a problem exclusively related to ESC rights. The determination of the content of every right, regardless of whether it is classified as "civil", "political", "social", "economic" or "cultural", is vulnerable to being labeled as insufficiently precise. This is because many legal rules are expressed in broad terms and, to a certain extent unavoidably, general wording.[24] *Thus, "classic" rights such as the right to property, freedom of expression, equal treatment or due process face this hurdle to the same extent as ESC rights. Yet, this has never led to the conclusion that these "classic" rights are not rights, or that they are not judicially enforceable. On the contrary, it has resulted in ongoing efforts to specify the content and limits of these rights, through a series of mechanisms aimed at defining their meaning (for instance, the development of statutory lawmaking, administrative regulation, case law and jurisprudence).*[25]

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[24] See Hebert L. A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961; 2nd edition with postscript by Joseph Raz and Penelope Bulloch (eds.), Oxford University Press, Oxford, 1994, Chapter VII; Genaro Carrió, *Notas sobre derecho y lenguaje,* Abeledo-Perrot, Buenos Aires, 1964, pp. 45-60; Isabel Trujillo Pérez, "La questione dei diritti sociali", in *Ragion Pratica* 14, 2000, p. 50.

[25] On the possibility of conceptually developing the content of ESC rights see, for example on the right to work, Rafael Sastre Ibarreche, *El derecho al trabajo,* Trotta, Madrid, 1996. For the right to health, see Barbara Pezzini, "Principi costituzionali e politica della sanità: il contributo della giurisprudenza cos-

In identifying the scope of ESC rights and their content, the ICJ set out the following principles in the ICJ Bangalore Declaration and Plan of Action:

> *"Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcements requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable."*[26]

Paradoxically, the consequence of this long-standing notion that ESC rights are non-enforceable has been an absence of any effort on the part of the judiciary in many countries to define principles for their construction. Due to the purely rhetorical value ascribed to these rights, and to the lack of attention paid to their interpretation by the judiciary and legal academics, fewer concepts have been developed that would help to understand rights such as the right to education, the right to an adequate standard of health, the right to adequate housing or the right to food. However, the lack of practical elaboration of many of these rights does not justify the claim that because of some essential or hidden trait, ESC rights, as a whole category, cannot be defined at all. Critics claim that the content of ESC rights cannot be defined, so little effort has been invested to define their content. The lack of practical elaboration is then used to argue that ESC rights are not justiciable.

As will be shown throughout this Guide, and more specifically in Chapters 4 and 5, the past deficit of jurisprudence in this area has created difficulties in ESC rights adjudication. Never-

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tituzionale alla definizione del diritto sociale alla salute", and Massimo Andreis, "La tutela giurisdizionale del diritto alla salute", in Carlo Emanuele Gallo and Barbara Pezzini, (comps.), *Profili attuali del diritto alla salute,* Giuffrè, Milano, 1998.

[26] Bangalore Declaration and Plan of Action, para. 18(2), *supra* note 19.

theless, a growing body of more recent domestic case law is now offering better criteria to further specify the content of ESC rights.

II. From justiciability to access to justice

With growing jurisprudence emerging from domestic and regional judicial and quasi-judicial bodies, and with the adoption and entry into force of the Optional Protocol to the ICESCR, the theoretical debate around justiciability of ESC rights has been largely overcome. Nevertheless, important procedural and practical issues still represent challenges for judges and lawyers who adjudicate and litigate ESC rights.

1. The right to an effective remedy and reparation for violations of ESC rights under international law

The growing general acceptance of the justiciability of ESC rights will ultimately need to translate into concrete progress in making justice and domestic remedies accessible and effective for rights-holders who want to claim their rights and seek protection. Toward this end, a more in-depth analysis of how judicial and quasi-judicial bodies have been dealing with ESC rights claims, and how they have overcome (or not) the array of legal, procedural and practical issues raised by ESC rights litigation, can provide very valuable knowledge to legal practitioners.

It is a general principle of law that every right must be accompanied by the availability of an effective remedy in case of its violation.

For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm.[27]

[27] For a detailed analysis of the elements of the right to a remedy under international law, see Chapter III of the ICJ Practitioners' Guide No. 2, The Right to

The right to an effective remedy is defined in international law. A number of human rights instruments expressly provide for the right to a remedy in the case of violations of rights and freedoms guaranteed under those instruments.[28]
The UDHR provides that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[29] In addition, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power establishes the principles of access to justice and fair treatment of victims who "…should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."[30]

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a Remedy and to Reparation for Gross Human Rights Violations (2006), accessible at:
http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/

[28] See, for example, article 2(3) of the ICCPR; article 13 of the ICAT; article 6 of the ICERD; articles 12, 20 and 24 of the CED; article 8 of the UDHR; principles 4 and 16 of the United Nations Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, UN Doc. A/RES/44/159 (1989); principles 4-7 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 (1985); paragraph 27 of the Vienna Declaration and Programme of Action; articles 13, 160-162 and 165 of the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF.189/5 (2001); article 9 of the Declaration on Human Rights Defenders, UN Doc. A/RES/53/144 (1999); article 13 of the ECHR; article 47 of the Charter of Fundamental Rights of the European Union, (Date of publication: 26 October 2012), 2012/C 326/02; article 25 of the ACHR; article XVIII of the American Declaration of the Rights and Duties of Man; article III(1) of the Inter-American Convention on Forced Disappearance of Persons, (adopted 9 June 1994, entered into force on 28 March 1996), OAS Treaty Series No. 68; article 8(1) of the Inter-American Convention to Prevent and Punish Torture, (adopted 9 December 1985, entered into force 28 February 1987, OAS Treaty Series No. 67; article 7(1)(a) of the ACHPR; and article 9 of the Arab Charter on Human Rights, (adopted 22 May 2004, entered into force 15 March 2008), English translation reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005).

[29] Article 8 of the UDHR.

[30] Article 4 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,*[31] as endorsed by consensus of the UN General Assembly in 2005, establishes that "the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (*a*) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (*b*) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (*c*) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (*d*) Provide effective remedies to victims, including reparation, as described below."[32]

As far as access to justice for victims of violations of ESC rights is concerned, the CESCR has reiterated on several occasions that remedies must be made available to rights-holders by States parties to the ICESCR.[33] In particular, the Committee has stated as a general principle of international law that: "appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of

[31] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).

[32] Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. This principle applies not only to gross violations but to all human rights violations and thus to the violations of ESC rights.

[33] Committee on Economic, Social and Cultural Rights, General Comment No. 9, *supra* note 22, paras. 2 and 3. See also Committee on Economic, Social and Cultural Rights, General Comments No. 12, UN Doc. E/C.12/1999/5 (1999), paras. 32-35; No. 14, UN Doc. E/C.12/2000/4 (2000), paras. 59-62; No. 15, UN Doc. E/C.12/2002/11 (2002), paras. 55-59; No. 18, E/C.12/GC/18 (2006), paras. 48-51; and No. 19, UN Doc. E/C.12/GC/19 (2008), paras. 77-81.

ensuring governmental accountability must be put in place".[34] The Committee has also indicated that it considers the provision of domestic legal remedies for violations of ESC rights as being part and parcel of State obligations under article 2.1 of the ICESCR, which requires States parties to take all "appropriate means" for the realization of the rights under the Covenant, and adds that "other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies".[35]

This Guide describes and evaluates a wide range of possible remedies, including judicial and administrative remedies. As mentioned above, to discharge its obligations, including under article 2 of the ICESCR, the State must provide not simply a remedy, but an "effective" remedy. A fundamental element of the right to an effective remedy is that it must lead to the cessation of the violation and to "full and effective reparation… which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition".[36]

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[34] Committee on Economic, Social and Cultural Rights, General Comment No. 9, *supra* note 22, para. 2.

[35] *Ibid.*, paras. 2 and 3. See also Principle 2 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[36] See Part IX, "Reparation for harm suffered", of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. United Nations treaty bodies have also affirmed that these forms and elements of reparation are inherent to the obligations under their respective treaties. This is the case of the Human Rights Committee in its General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 16-18. In these paragraphs, the Human Rights Committee states that: "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. … Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices." As far as it is concerned, the Committee Against Torture adopts the same definition of reparation in its General Comment No. 3, UN Doc. CAT/C/GC/3 (2012), especially at para. 6 where it states that: "… redress includes the following five

Furthermore, where domestic remedies are not effective, they need not be exhausted in order for the right-holder to submit an individual communication alleging violation(s) of her or his ESC rights, i.e. in order for the right-holder to have recourse to the CESCR under the OP-ICESCR.

2. The position of ESC rights in the domestic legal framework

Rights-holders will first and foremost seek justice at the local or domestic level. This course is necessitated by the practical consideration that recourse to judicial and quasi-judicial bodies will typically require a substantial investment in human and material resources, and the legal mandate that domestic remedies must usually[37] be exhausted before a victim may resort to international mechanisms.

Domestic remedies vary depending on the legal system in which one seeks justice for rights violations. This variability is especially pronounced in respect of ESC rights because they are often not expressly or fully guaranteed in constitutions or legislation.

On the specific issue of the incorporation of the ICESCR into the domestic system, General Comment 9 of the CESCR sets forth the scope of the obligation. States parties to the ICESCR are required to ensure that the national protection of the rights in the Covenant is at least as high as if the ICESCR is directly and fully applicable. Even if some provisions of the ICESCR are not considered self-executing, States are under the obligation to enact the necessary national laws to incorporate these provisions into the domestic legal order. At a minimum, domestic judges should interpret domestic law consistently with the States obligations under the ICESCR.

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forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

[37] International protection mechanisms usually foresee exceptions to the exhaustion of domestic remedies when those are not available, or not effective because unduly prolonged or unlikely to bring redress. See, for instance, article 3(1) of the OP-ICESCR; article 5(2) of the OP-ICCPR; article 4(1) of the OP-ICEDAW; article 2(d) of the OP-ICRPD; or article 7(e) of the OP-ICRC.

The provisions of the ICESCR are a primary source of ESC rights obligations. Those provisions must be read in conjunction with the commentaries of the CESCR as an overarching interpretive framework for ESC rights. However, the ICESCR is not the only treaty source for ESC rights. The ICRC contains many highly detailed ESC rights provisions, albeit that they are only applicable to persons under 18 years of age. In addition most other human rights treaties contain some ESC rights elements, with the Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW) and the Convention on the Rights of Persons with Disabilities (ICRPD) containing several particular ESC rights provisions. Finally, a number of regional treaties establish ESC rights obligations, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the African Charter on Human and Peoples' Rights (ACHPR), the African Charter on the Rights and Welfare of the Child,[38] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[39] and the Revised European Social Charter. For practitioners, it is critical to review all of the relevant treaties to which the State at issue is a party, as well as the jurisprudence of their supervisory bodies, to determine the full content and scope of ESC rights that may be engaged.

In the light of these mutually reinforcing international human rights law provisions, and with a view to fully and unambiguously complying with those, several States that have undergone transitional and constitutional reform processes have incorporated, in their new constitutions or legislative framework, international human rights law standards, including the ones related to ESC rights, and clarified the remedies and enforcement mechanisms that are available in cases of violations.[40]

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[38] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999), OAU Doc. CAB/LEG/24.9/49.

[39] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, "Maputo Protocol" (adopted 11 September 2000, entered into force 25 November 2005), OUA Doc. CAB/LEG/66.6.

[40] For constitutional recognition of ESC rights see also Chapter 4, section II, *infra* note 185 of the present Guide.

The recognition of the ESC rights contained in international human rights treaties in constitutions, or at least primary legislation, typically provides not only for the fullest protection of ESC rights but it is also the most appropriate way of ensuring legal certainty and predictability. The clarity that is thereby offered to both justice system actors and rights-holders is a fundamental condition to ensure access to justice for victims of rights violations.

Besides constitutional guarantees, the recognition and operationalization of ESC rights in administrative law and regulations also play a fundamental role since many constitutions and legislations of a more general nature may only set out overarching principles and protections. The spelling out of modalities to implement constitutional and/or conventional rights is all the more important since the accessibility of constitutional remedies for rights-holders is very limited in many countries and legal systems.

In this regard it must be noted that, in a number of States of civil law tradition such as Italy, France and francophone African States sharing a similar legal system, control of constitutionality is essentially limited to an *a priori* review and/or is not directly accessible to rights-holders. Oversight of the conformity of new laws with Constitutional provisions, depending also on the status of international treaties in the internal hierarchy of norms for such States, takes place before these laws are passed. With regard to laws already in force, the *a posteriori* control of the constitutionality of laws, or of their compliance with international treaties (and especially with international standards pertaining to ESC rights), is limited and hardly accessible to individual right-holders. In many of these States, *a priori* control of constitutionality cannot be triggered by individuals but instead only by those such as the head of State, heads of parliamentary chambers or by a group of members of these chambers. Recently, some reforms within these States have enhanced the possibilities to ensure *a posteriori* (or dif-

fuse) control of existing legislative provisions.[41] The raising of an "exception of (un)constitutionality" can take place in the course of legal proceedings before judicial and quasi-judicial bodies if a party to the case argues that a legislative provision contradicts fundamental rights and freedoms. The question is thus transmitted for control by the constitutional body in charge. If considered unconstitutional, the provision in question will be repealed.

3. The role of the judiciary in the protection of ESC rights

While it is important for an independent and robust judiciary to exercise its judicial authority robustly to safeguard rights, judicial posturing alone will not guarantee the continuity, predictability and certainty of an explicit normative recognition of all rights under the ICESCR. Judicial interpretation may also be transitory, and depend on the membership of a judiciary at any moment. Nonetheless, the development of jurisprudence to reinforce human rights can greatly contribute to the clarification of the scope and content of ESC rights, and resolve questions in the interpretation of ESC rights where the treaties and constitutional or legislative provisions are silent or ambiguous. The role of judges in the development of the law in common law countries is in fact essential to the protection of ESC rights. This is true in civil law countries as well where, despite the propensity of judges to more rigidly adopt a predominately textual interpretation of the law, they have found ways in their interpretive work to give greater effect to ESC rights in a number of instances.

This is reflected in the jurisprudence developed by the highest courts of different countries of various legal traditions and systems.

In addition to well-known examples of the highest jurisdictions in countries like Colombia and India, the Constitutional Chamber of the Supreme Court of El Salvador provides a good ex-

[41] See article 61-1 of the French Constitution, introduced by the 2008 constitutional amendment; and article 133 of the 2011 Constitution of Morocco.

ample of the role of a proactive judicial doctrine in favour of the protection of ESC rights. Decision 53-2005/55-2005 of February 2013 reflects the willingness of the highest levels of the judiciary in El Salvador to ensure an expansive protection of all ESC rights in line with relevant international obligations.[42] In the decision, the Court established the following with regard to its protection of ESC rights: a) certain rights not currently expressly protected under constitutional or legislative provisions may nevertheless be protected by the Constitutional Chamber through its construction or interpretation of existing provisions and rights present in the constitutional or legislative framework; b) public authorities have both negative and positive obligations in respect of ESC rights; and c) the realization of rights may require, depending on the circumstances, that authorities act in a certain way or that they refrain from taking certain action.

III. Identifying breaches of international obligations of States pertaining to ESC rights

Under international law, violations of ESC rights occur when States breach their obligations, through acts or omissions, to ensure the enjoyment of these rights without discrimination, and to respect, protect and fulfil these rights. The following sections review a number of the critical applicable international ESC rights standards with the aim of encouraging practitioners to apply them to the widest extent in their work at the domestic level. Awareness of the international standards, including provisions and jurisprudence, to which their States have adhered will help practitioners to identify the human rights aspects of the situations and cases they are confronted with in their daily work. Referring to international standards defining obligations and violations of ESC rights also contributes to fill normative gaps that exist in most domestic legal frameworks, and helps to give content and meaning to the existing provisions that are relevant to ESC rights protection.

[42] Supreme Court of El Salvador, Constitutional Chamber, Decision 53-2005/55-2005, February 2013.

1. State obligations stemming from international law

Developments in the understanding of the nature and scope of State obligations have been greatly contributed to by the work of international legal experts. This work has in turn inspired the CESCR in its own interpretive function. This is particularly so in the case of the Limburg Principles on the Implementation of the ICESCR,[43] which remain a very useful document for legal practitioners.

The Limburg Principles are the first of a series of three documents elaborated and adopted by international legal experts in the area of ESC rights. The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, adopted in 1986, defined the scope and nature of State obligations under the ICESCR.
Ten years later, early 1997, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted and provided guidance as to what acts and omissions constitute violations of ESC rights.

Both documents can be found in annex 3 of the present Guide and are reproduced in the ICJ Compilation of Essential Documents, accessible at:
http://www.icj.org/economic-social-and-cultural-rights-a-compilation-of-essential-documents/ (pp. 63-92).

More recently a third document was adopted by international legal experts: The 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights defined the scope and nature of State obligations to individually and jointly respect, protect and fulfil ESC rights

[43] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17 (1986).

beyond their borders. This document can be found in annex 3 of the present Guide and is accessible at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf

a) General obligations

General Comment No. 3 of the CESCR concretely explains the general nature of obligations of States parties to the treaty. States parties who want to implement in good faith the ICESCR must:

- Take all appropriate measures (including, but not limited to legislative measures) toward the realization of ESC rights;
- Foresee remedies in legislative texts introducing policies relevant for the realization of ESC rights;[44]
- Adopt targeted, effective and low-cost programmes to protect the most at risk, even in instances of limited resources.

It should be highlighted that the adoption and implementation of national human rights plans is considered internationally as a best practice and can represent a useful tool for a coherent and effective action towards the realization of all human rights. In the area of ESC rights the enactment of framework legislation, and the adoption of national plans and strategies towards the full realization of rights, has been recommended by the CESCR in a wide variety of instances.[45] These strategies are identified as a crucial element of compliance with the obliga-

[44] Committee on Economic, Social and Cultural Rights, General Comment No. 9, *supra* note 23, para. 3: "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."

[45] See, for example, Committee on Economic, Social and Cultural Rights, General Comments No. 12, *supra* note 33, paras. 29 and 30; No. 13, UN Doc. E/C.12/1999/10 (1999), para. 52; No. 14, *supra* note 33, paras. 53-56; No. 15, *supra* note 33, para. 50; or No. 19, *supra* note 33, paras. 67-69.

tion to fulfil the rights enshrined in the ICESCR. They should not only be embedded within the human-rights framework, following fundamental principles such as participation, accountability, rule of law and transparency, but they should also set clear targets and benchmarks against which to check State performance towards the full realization of these rights. Plans and framework legislation should also establish and indicate the particular remedies that rights-holders have at their disposal to claim their rights and to complain against violations.

In addition to the general framework described, UN treaty-bodies, especially the CESCR, as well as regional and national courts and authorities have fundamentally contributed to interpret and operationalize the provisions of relevant international instruments. In particular, great progress has been achieved in defining the scope of State obligations with regard to ESC rights. As mentioned in the section above regarding misconceptions in this field, the work of the CESCR, among others, has largely contributed to "demystifying" ESC rights and challenging the perception that justiciability over these rights would open the door to all kinds of unreasonable claims upon the State. For instance, it is today well established that the right to health is not the right of everyone to be healthy or that the rights to work and to housing do not result in a right of everyone to claim a job or a house from the State. Rather, States must ensure minimal level of protection in these areas and exert their best efforts toward full realization, using the maximum of available resources and appealing to international cooperation and assistance when necessary.[46] States have also

[46] See Committee on Economic, Social and Cultural Rights, General Comment No. 3, contained in UN Doc. E/1991/23 (1990). See also Committee on Economic, Social and Cultural Rights, Statement on an evaluation of the obligation to take steps to the "maximum of available resources under an optional protocol to the covenant", UN Doc. E/C.12/2007/1 (2007), para. 4 stating: "The "availability of resources", although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect the most

a negative obligation not to interfere with the enjoyment of ESC rights, and to take protective measure to prevent third parties from doing so.

i) Immediate obligations, non-retrogression

Although the ICESCR lays out the general obligation of progressive achievement with respect to the rights enumerated in the Covenant,[47] the CESCR and other authorities have identified that not every aspect of a particular right is subject to this progressive qualifier. In realizing rights, the State has general and specific obligations. A specific ESC right can therefore be translated into a series of obligations, some of which are of an immediate nature and others of which are subject to progressive realization.

The Committee has in its General Comments indicated certain elements of provisions "capable of immediate application by judicial and other organs in many national legal systems".[48] These include ICESCR provisions such as article 2(2) on non-discrimination; article 3 specifically on equality between men and women; article 7(a)(i) on fair wages and equal remuneration; article 8 on the right to form trade unions and the right to strike; article 10(3) on the special protection of minors; article 13(2)(a) on compulsory free-of-charge primary education; article 13(3) on freedom of parents' choice in educational matters; article 13(4) on private education; and article 15(3) on freedom of scientific research. These obligations continue to apply at all times, even in times of economic crisis.[49]

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disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes."

[47] See article 2(1) of the ICESCR stating: "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 progressively achieving the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[48] Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46, para. 5.

[49] *Ibid.*, para. 12: "Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of

While these provisions have been identified as being of immediate application, the obligation "to take steps" also imposes obligations of immediate effect to take deliberate and targeted steps and *use all appropriate means*.[50] These include legislative measures, such as the incorporation of the ICESCR into domestic law, and the provision of judicial or administrative remedies. It also includes other appropriate means such as administrative, financial, educational or social measures.[51] For example, adopting and implementing a national strategy and plan of action in the field of education, health, or water and sanitation can be related to the immediate obligation to "take steps".[52]

Obligations of immediate application are also expressed in the concept of the *minimum core content* of each of the ESC rights. This obligation creates a fundamental minimum level of obligations that includes the negative duty of States not to arbitrarily interfere with the exercise by individuals of their human rights. The core content of ESC rights is explored in more detail in the section below.

Obligations of immediate effect thus include the following elements:

- An obligation to prioritize the achievement of the minimum essential level of each right and the individuals and groups who are the most disadvantaged;
- An obligation *not to discriminate* among different groups of people in the realization of rights;

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society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."

[50] *Ibid*., para. 2: States remain bound to a general duty to "take steps" without delay and adopt immediate measures to promote the full application of the Covenant, regardless of the State's level of development or the existence of an armed conflict.

[51] *Ibid.*, paras. 3 and 5-7.

[52] See, for instance, article 14 of the ICESCR.

- An obligation to *take steps* (including devising specific strategies and programmes) deliberately targeted towards the full realization of rights.

ii) Obligations of progressive realization

The concept of "progressive realization" is premised on the understanding that the realization of ESC rights in their entirety "will generally not be able to be achieved in a short period of time… reflecting the realities of the real world and the difficulties involved for any country in ensuring [their] full realization".[53] This limitation has often been used to justify States' inactivity. However, the Committee has clarified that progressivity "should not be misinterpreted as depriving the obligation of all meaningful content".[54] Considered in light of the "overall objective, indeed the raison d'être" of the Covenant, the Committee clarifies that article 2(1) "imposes an obligation to move as expeditiously and effectively as possible" towards the full realization of Covenant rights.[55] States must not remain inactive and must not defer to another time the design and implementation of steps that aim at the full realization of ESC rights. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting obligations under the Covenant.[56]

In imposing an obligation to move as "expeditiously and effectively as possible" towards the Covenant's goal, the ICESCR generally prohibits any measures that may involve a step back in the level of enjoyment of ESC rights.[57] The Committee has in this context invoked the term "retrogressive measures", to refer to certain State practices that undermine the protection afforded to ESC rights.[58] General Comment No. 4 on the right

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[53] Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46, para. 9.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*, para. 2.
[57] *Ibid.*
[58] This phraseology is derived originally from General Comment No.3, which emphasizes that any such measures "would require the most careful consideration and would need to be fully justified by reference to the totality of the

to adequate housing provides an illustration of retrogressive measures in the context of housing:

> "[A] general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant."[59]

As a rule, adoption of a deliberately retrogressive measure, whether through direct action of the State or resulting from a failure of the State to regulate or otherwise protect against the misfeasance of non-State entities, which adversely affects any of the ESC rights would likely be in breach of obligations imposed by the ICESCR.[60] There is in this regard a "strong presumption of impermissibility of any retrogressive measures" taken in relation to substantive right[61] Retrogressive measures are in this way *prima facie* incompatible with the Covenant. States have a resulting burden of proof to justify the lawfulness of any such measures with due regard for the limitations provisions of article 4 of the ICESCR.[62] Thus, a State that takes such measures will have the onus of proving that the measures taken are in pursuit of a compelling goal; that these measures

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rights provided for in the Covenant and in the context of the full use of the maximum available resources." See Committee on Economic, Social and Cultural Rights, General Comments No. 3, *supra* note 46, para. 9; No. 13, *supra* note 45, para. 45; No. 14, *supra* note 33, para. 32; No. 15, *supra* note 33, para. 19; No. 19, *supra* note 33, para. 42.

[59] Committee on Economic, Social and Cultural Rights, General Comment No. 4, contained in UN Doc. E/1991/23 (1991), para. 11.

[60] See section III. 1. b) ii) of this chapter on the obligation to protect. See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), in ICJ Compilation of Essential Documents, accessible at: http://www.icj.org/economic-social-and-cultural-rights-a-compilation-of-essential-documents/

[61] Committee on Economic, Social and Cultural Rights, General Comments No. 13, *supra* note 45, para. 45; No. 14, *supra* note 33, para. 32; No. 15, *supra* note 33, para. 19; and No. 19, *supra* note 33, para. 42.

[62] Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46, para. 9: "[A]ny deliberately retrogressive measures … 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."

are strictly necessary; and that there are no alternative or less restrictive measures available.[63]

iii) Core content obligations

Another key aspect in the context of ESC rights is the concept of a minimum core content of all ESC rights. This minimum core content (also known as "vital minimum", "minimum core obligations", or "essential content") obliges States with immediate effect to satisfy human rights to an absolute minimum core level.

The concept was developed first in an effort to avoid providing States with an excessive margin of discretion in their interpretation and application of ESC rights obligations.[64] Although ultimately States must implement fully all the rights, certain elements are considered the most essential or fundamental and the obligations to meet these minimum levels must be given immediate effect. This core content can be considered as an intangible baseline that must be guaranteed for all individuals in all situations and from which States parties can envisage further progressive realization.[65]
When this minimum level of core content is not realized, a State will presumptively have breached its obligation to guarantee that human right. Progressive realization of rights should occur additionally to the satisfaction of this minimum core content.

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[63] *Ibid.*, para. 9.
[64] See generally Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46; and Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, pp. 25-75.
[65] The rationale of establishing this minimum level is to delineate what elements or guarantees of a right must be deemed fundamental that must be guaranteed in any circumstances, irrespective of the economic development, the political situation or the institutional structure of the State. As suggested above, it should be noted that the notion of "progressive fulfilment" still requires that certain steps be taken immediately. See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *supra* note 60, para. 8.

The CESCR has described the substance of this obligation as follows:

> "… the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."[66]

The composition of the core content is clearer for some rights than for others. Article 14 of ICESCR, for example, states explicitly that primary education must be, at the very least, free and compulsory for all. The CESCR has also described the core content of some rights, for example in General Comment 13 on the right to education and in General Comment 15 on the right to water.[67] The core content of human rights is not a stagnant concept, and continues to evolve with scientific and technological advances and as societies change.

The CESCR has affirmed that in meeting the core content of a right, the resource constraints of that particular State may be taken into account, keeping in mind that resources include those made available by international cooperation and assistance.

Regardless of the availability of resources however, the CESCR has emphasized that States must use all of its available resources to prioritize the fulfilment of the minimum core content of each right.

> "Even in times of severe resource constraints… vulnerable members of society *can* and indeed *must* be protected by the adoption of relatively low-cost targeted programmes".[68]

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[66] Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46, para. 10.
[67] Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 45, para. 57; Committee on Economic, Social and Cultural Rights, General Comment No. 15, *supra* note 33, para. 37.
[68] Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 46, para. 8.

The principle of core content has also been recognized in various domestic systems. In Germany, for example, the courts have decided that the constitutional principles of the welfare (or social) State and the concept of human dignity can be translated into positive State obligations to provide an "existential minimum" comprising access to food, housing and social assistance to persons in need.[69]

Right and article of the ICESCR	Core content and General Comment of the UN CESCR
Right to work / article 6 ICESCR	*GC 18* • Protection against forced labour; • Protection of employment and against unlawful dismissal to all, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity.

Right to social security / article 9 ICESCR	*GC 19* • Equal enjoyment to all of adequate protection from core social risks and contingencies; • Access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and

[69] *ICJ Justiciability Study*, p. 25. See also Chapter 5 of the present Guide.

	sanitation, foodstuffs, and the most basic forms of education.
Right to an adequate housing /article 11 ICESCR	*GC 4 and 7* • Security of tenure for protection against forcible evictions and homelessness for all; • Ready access to basic amenities to all.
Right to adequate food / article 11	*GC 12* • Satisfaction of minimum essential level to all required to be free from hunger; • Availability of food to all in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
Right to Water / article 11 ICESCR	*GC 15* • Access to the minimum essential amount of water to all, that is sufficient and safe for personal and domestic uses to prevent disease.
Right to health / article 12 ICESCR	*GC 14* • Access to essential primary health care to all, including to basic services, goods and infrastructures; • Access to essential drugs; • Access to minimum essential food, basic shelter, housing and sanitation.

Right to education / article 13 ICESCR	*GC 13* • Access to basic forms of education and provide primary education that is compulsory and available free to all.
Right to benefit from the protection of the moral and material interests re-	*GC 17* • Effective protection to all of the moral and material interests of authors, as the creators of their scientific, literary and artistic productions.

sulting from one's scientific, literary or artistic production / article 15 ICESCR	
Right to take part in cultural life / article 15 ICESCR	*GC 21* • Creation and promotion of an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice; • Right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice; • Right of everyone to engage in their own cultural practices.

	Decision C-376/10 of the Colombian Constitutional Court
Year:	2009 (Date of Decision: 1 November, 2009)
Forum, Country:	Constitutional Court; Colombia
Standards,	Core content; Right to education; Children

***Rights**:*	
***Summary Background**:*	The plaintiffs filed a constitutional claim challenging the imposition of fees for public primary education.
Holding:	The Court ruled that charging tuition for public primary school was a violation of the Constitution and ordered that all such schools in the nation must cease charging students tuition fees [para. VII]. The Court also referenced the Constitutional National Assembly discussions and found that the authors of the Colombian Constitution intended that primary education in the country would be free [para. VI 8.1]. This approach was seen to be in conformity with Colombia's obligations under international human rights treaties, which constitute a basis for the Constitution. Additionally, the Court expressed concern that the levy of fees for primary education could pose an obstacle to accessing the education system and realizing the right to education [para. VI 6]. Citing a wide array of international human rights law instruments, the Court concluded that the State has a clear, immediate obligation to guarantee free primary education, while in the case of secondary and higher-level education, the obligation is of a progressive nature [paras. VI.3].
Additional Comments:	This case addresses the State duty to respect the human right to education.
Link to Full	http://www.corteconstitucional.gov.co/RELATO

Case: RIA/2010/C-376-10.htm

iv) Non-discrimination and equality

The principles of non-discrimination and equality are applicable to all human rights, including ESC rights. In addition to the anti-discrimination contained in the ICESCR and other instruments protecting the rights of specific groups and individuals, it is important to give regard to the guarantee of equal protection of the law under international human rights law.[70]

Practitioners at the national level have extensively used anti-discrimination and equality laws and frameworks to defend ESC rights. This is particularly true in the numerous contexts in which none or very few ESC rights are constitutionally or legislatively protected, but where discrimination is prohibited and equality before the law is a fundamental principle. Chapter 5 provides case law examples of how this has been applied in various jurisdictions and in concrete cases to protect individuals and groups of individuals discriminated against on prohibited grounds.

[70] Article 26 of the ICCPR establishes the right of everyone to be protected without discrimination by the law, including when the latter regulates ESC rights.

Important resources on principles and case law include:

- Chapter 5 and 6 of the ICJ Practitioners Guide No.6 on migration and international human rights law accessible (in English and Italian) at: http://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/

- The ICJ's sexual orientation and gender identity (SOGI) programme' s online resources

  ICJ SOGI UN case law database accessible at: http://www.icj.org/sogi-un-database/

  ICJ SOGI casebook accessible at: http://www.icj.org/sogi-

  ICJ legislative database accessible at: http://www.icj.org/sogi-legislative-database/

- The ESCR-Net Guide: Claiming Women's ESC Rights Using OP-ICEDAW and OP-ICESCR accessible at http://www.escr-net.org/node/365157

The importance of non–discrimination and equality for ESC rights adjudication is strengthened by the fact that non–discrimination and equality are not understood by international law as applying merely in a formal way. The prohibition of discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" is expressed in article 2(2)[71] of

[71] Article 2(2) of the ICESCR states: "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,

ICESCR as an overarching principle applying to all Convention rights.

In addition, article 3 of the ICESCR imposes obligations for States parties to realize the right to equality between men and women with regard to the enjoyment of all rights under the Covenant. The ICESCR also gives targeted meaning and application of the obligation of non-discrimination and equality to specific rights.[72]

In General Comment No. 20,[73] the CESCR has clarified the scope of article 2(2) and the specific obligations of States arising as a result of that provision. It has also specified the list of prohibited grounds of direct or indirect discrimination and especially what can be understood as grounds of discrimination falling under "other status" in article 2(2) of the ICESCR. In addition to the express prohibited grounds mentioned in the ICESCR, the CESCR has thus interpreted the non exhaustive list of article 2(2) as encompassing disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.[74] Last but not least, the CESCR has clarified that equality should not only be understood as formal or de jure equality but should also encompass substantive equality. It implies a need to take positive measures – temporary or permanent as the need may be – to redress certain forms of historical or systemic discrimination. The CESCR states that: "… States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination…"[75]

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sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[72] For example, article 7 of the ICESCR clarifies the application of non-discrimination to equal remuneration; or article 13 allows for the equal enjoyment of compulsory and free primary education.

[73] Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20 (2009).

[74] *Ibid.*, paras. 27-35.

[75] *Ibid.*, para. 9.

It is important to highlight here that the obligation to ensure women's exercise and enjoyment of all human rights, including ESC rights, on the basis of equality, and non-discrimination on grounds of sex, is also enshrined in the ICEDAW. The ICEDAW requires States to take a wide range of targeted measures to address and prevent discrimination against women.[76] Among other things, it places particular requirements on States in relation to measures necessary to respect and ensure women's equal rights in the spheres of health,[77] employment,[78] education[79] and family and marital relations.[80] The approach of the CESCR, as laid down in the General Comment 20, is thus consonant with the provisions of the ICEDAW in its article 4 concerning temporary special measures to achieve de facto equality.[81]

R.K.B. v. Turkey (Communication No. 28/2010)

[76] Article 2 of the ICEDAW. See also Committee on the Elimination of Discrimination against Women, General Recommendation No.28, The Core Obligations of States Parties under article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28 (2010).
[77] Article 12 of the ICEDAW. See also Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, Women and Health, contained in UN Doc. A/54/38/Rev.1, Chapter I (1999).
[78] Article 11 of the ICEDAW.
[79] Article 10 of the ICEDAW.
[80] Article 16 of the ICEDAW. See also Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in Marriage and Family Relations, contained in UN Doc. A/47/38 (1994).
[81] Article 4(1) of the ICEDAW. See also Committee on the Elimination of Discrimination against Women, General Recommendation No.25 on temporary special measures, contained in the Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, pp. 282-290 (2004).

Year:	2012 (Date of Decision: 24 February, 2012)
Forum, Country:	UN CEDAW; Turkey
Standards, Rights:	Non-discrimination and equal protection of the law; Right to decent work; Women
Summary Back-ground:	In this case, the issue at stake was whether the complainant (or "author" of the communication) had been unjustifiably dismissed from her workplace on the basis of gender stereotypes. While she had been fired due to a rumour that she had had an extra-marital affair with a male colleague, her male co-worker's contract was not terminated. Before leaving, under threat of the spread of rumours of her relationship with other men, she was pressured, but refused, to sign a document that attested that she had benefited from all her rights under contract. Local courts had found in her favour but did not reference gender discrimination.
Holding:	The Committee found that the local Turkish courts [State institutions] failed to give due consideration to the clear, prima facie indication of infringement of equal treatment in the field of employment [para. 8.6]. By scrutinizing in the course of the case, the moral integrity of only the author (a female employee) but not that of male employees, the courts revealed their lack of gender sensitivity in breach of Committee observations in General Recommendation No. 28 (2010) [paras. 8.6-8.7]. The Committee emphasized that full implementation of the Convention imposes an obligation on States parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes

	and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women. The Committee was of the view that gender stereotypes are perpetuated through a variety of means and institutions including laws and legal systems and that they may be perpetuated by State actors in all branches and levels of government and by private actors. In this case, the courts had helped perpetuate gender stereotyping [para. 8.8]. The Committee concluded that the author's rights against gender stereotyping and gender discrimination as guaranteed under ICEDAW had been violated. Accordingly the Committee held that appropriate reparation should be provided to the author; that the State should take measures to implement laws on gender equality in the workplace; and that the State should provide training to judges, lawyers and law enforcement personnel on the Convention and women's rights so as to ensure that stereotypical prejudices and values do not affect decision-making [para. 8.10].
Additional Comments:	The decision highlights that merely adopting legislation protecting rights is never sufficient. Proper enforcement is key to the effective realization of rights.
Link to Full Case:	http://www2.ohchr.org/english/law/jurisprudence.htm

As far as the special measures are concerned, it is also important to note that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also pre-

scribes States parties to take such temporary measures[82] when they are necessary to guarantee the equal enjoyment of all rights, including ESC rights,[83] to groups that are disadvantaged on the grounds of their race, colour, descent, nationality or ethnic origin.

In addition to the standards agreed upon by the States parties to the ICESCR, the ICEDAW and the ICERD, the ICRC and the ICRPD also prescribe standards and specific obligations of States parties in respect of non-discrimination and equal protection. With regard to the rights of the child, the ICRC requires that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[84]

As far as the ICRPD is concerned, States parties are required to guarantee non-discrimination against, and substantive equality of, persons with disabilities by taking the reasonable accommodation measures that are needed.[85] Article 2 of the ICRPD defines "reasonable accommodation" as being the "necessary and appropriate modification and adjustments not im-

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[82] Article 1(4) of the ICERD. See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, UN Doc. CERD/C/GC/32 (2009), para. 11.

[83] Article 5 of the ICERD.

[84] Article 3(1) of the ICRC. A concrete example of how the principle of the best interests of the child has been used to protect ESC rights of children and of their families is provided by the Case of the Children of Chiquimula, Guatemala that is summarized in Chapter 4, section VI of the present Guide.

[85] Article 5 of the ICRPD establishes that:

> "1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

posing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[86]

b) Specific obligations

In addition to the general and cross-cutting obligations and principles exposed in the preceding section, the CESCR has identified three types or levels of obligations that apply to the substantive rights under the ICESCR: 1) The obligation to respect, requiring States to refrain from measures or conduct that hinder or prevent the enjoyment of rights; 2) The obligation to protect, which requires States to act to prevent third parties, such as businesses or armed groups, from interfering with or impairing the enjoyment of these rights; and, 3) the obligation to fulfil rights by taking positive measures towards their realization.[87]

While not all methods of achieving the full enjoyment of a human right and not all State acts or omissions neatly fit within these categories since most processes overlap several categories, this issue has been of great importance in shaping the development of the jurisprudence of regional and international protection mechanisms. Therefore, the following case law examples illustrate how judicial and quasi-judicial bodies have used this conceptual framework to assess compliance with the various State obligations, and more particularly the trilogy of the specific duties to respect, protect and fulfil.

Regional	**European Roma Rights Centre v. Portugal (Complaint No. 61/2010)**

[86] Article 2 of the ICRPD.

[87] On the categorization in three types of specific obligations, see in particular Guideline 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *supra* note 60; and Olivier De Schutter, *International human rights law: cases, materials, commentary* - Cambridge University Press, United Kingdom, 2010. See also, *inter alia*, Committee on Economic, Social and Cultural Rights, General Comments No. 12, *supra* note 33, para. 15; No. 14, *supra* note 33, paras. 34-37; No. 19, *supra* note 33, para. 43.

Year:	2011 (Date of Decision: 30 June, 2011)
Forum, Country:	European Committee of Social Rights; Portugal
Standards, Rights:	Non-discrimination and equal protection of the law; Right to adequate housing; Ethnic minorities
Summary Background:	The complaint submitted by the European Roma Rights Centre (the "ERRC") alleged that a range of housing related injustices suffered by the Roma community in Portugal violated rights protected under the Revised European Social Charter including the right of the family to social, legal and economic protection (article 16), the right to protection against poverty and social exclusion (article 30), the right to housing (article 31), alone or in conjunction with the right to non-discrimination (article E).
Holding:	In examining the case, the Committee took particular note of three issues: the precarious and difficult housing conditions for a large part of the Roma community; the high number of Roma living in segregated environs; and, the inadequacy of rehousing programmes for the Roma community [para. 15]. In its decision, the Committee addressed the need to implement integrated housing policies for the Roma in a non-discriminatory manner, underscoring that one of the primary purposes of the Charter is to strengthen solidarity and promote social inclusion [para. 18]. The Committee clearly stated that both direct and indirect discrimination (including failing to take account of relevant differences and failing to take adequate steps to ensure accessible rights) are prohibited [para. 19]. The Committee further observed that the disproportionately high percentage of Roma living in poor housing conditions triggered a positive

	obligation of the authorities to take this into account and respond accordingly [para. 30]. It quoted the ECHR in noting that, as a vulnerable minority, the Roma required specific protection measures. In addition, the substandard housing conditions of the Roma [paras. 32-35, 38] prompted the Court to affirm that the right to housing includes a right to fresh water [para. 36]; adequate space, protection from harsh weather conditions and other threats to health as well as a dwelling that is structurally secure [para. 37]; a location which allows access to public services and other social facilities [para. 41]; and a residence that is culturally suited [para. 49]. The Committee placed the issue of location within the broader issue of segregation and declared that States must be vigilant in implementing housing policies so as to prevent spatial or social segregation of ethnic minorities or immigrants [para. 41]. In light of its findings, the Committee concluded that there were violations of articles 16, 30 and 31 of the Charter in conjunction with the right to non-discrimination.
Additional Comments:	This case examines the State's obligation to respect, protect and fulfil the human right to housing.
Link to Full Case:	http://www.escr-net.org/sites/default/files/ERRC%20v.%20Portugal%20%28decision%29.pdf

Decision T-760 of 2008	
Year:	2008 (Date of Decision: 31 July, 2008)

Forum, Country:	Constitutional Court; Colombia
Standards, Rights:	Core content; Right to health
Summary Background:	The judgement came as the culmination of litigation efforts to enforce implementation of the right to health in circumstances that disregarded the constitutional right to health in Colombia.
Holding:	In examining Colombia's international legal obligations, the Court reaffirmed the right to health as constituting a fundamental right [para. II.3.2]. It ordered a dramatic restructuring of the country's health system to correct structural failures in the Colombian public health system [para. III.16]. The Court demonstrated its commitment to the minimum core approach by giving very specific content to the right to health, as a right immediately enforceable for certain categories (which it defined in detail) of plaintiffs even though they are unable to afford health care [para. II.3]. For these categories, the Court ordered the provision of a wide range of goods and services, including viral load tests for HIV/AIDS as well as anti-retrovirals, costly cancer medications, and even the financing of treatment of patients abroad when appropriate treatment was unavailable in Colombia, all of which are considerably resource intensive measures. The Court distinguished an essential minimum core of the right to health based on the POS (mandatory health plan)/POSS (subsidized mandatory health plan), which was to be immediately enforceable [para. II.3.2.3.], and other elements that are subject to progressive

	realization taking into account resource constraints. The Court's decision explicitly adopted the right to health framework set out by the CESCR [para. II.3.4]. In keeping with the Committee's interpretation of the right to health, the Court: (i) expanded on the multiple dimensions of State obligations that flow from the right to health, and how oversight is essential to *protecting* the right to health as well as to accountability; (ii) repeated that the State is responsible for adopting deliberate measures to achieve progressive realization of the right to health and that retrogression (backsliding) is generally impermissible; and (iii) declared that the right to health calls for transparency and access to information, as well as for evidence-based planning and coverage decisions based on participatory processes.
Link to Full Case:	http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=33490

i) The obligation to respect

The *obligation to respect* requires that a State when discharging public powers, refrain from itself interfering with the existing enjoyment of a right by rights-holders.

In, *SERAC and CESR v. Nigeria,* the African Commission on Human and Peoples' Rights defined the duty to respect and held that the Government failed to respect the rights to health and a healthy environment by "attacking, burning, and destroying several Ogoni villages and homes."[88]

[88] *SERAC and CESR v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, para. 54. Cases of international courts and treaty bodies dealing with breaches of the obligation to respect also include *Islamic Community in Bosnia and Herzegovina*, Human

Obligations to respect impose a number of *negative obligations*, which in most cases may not be subject to progressive realization. These obligations apply fully and immediately and are no different in character than those contained in the civil and political rights. It should be added that like any human rights obligations, this entails the adoption of positive measures to prevent interference with such rights by establishing appropriate institutions, and by providing for an effective system of administration of justice to conduct proper investigations and to provide for remedy and reparation to any violation by State agents.

In the example of *SERAC and CESR v. Nigeria* mentioned *above*, the African Commission stated that:

> "[a]t the very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.... The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent civilians who have attempted to return to rebuild their ruined homes. The-

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Rights Chamber for Bosnia and Herzegovina, CH/96/29, 11 June 1999; *Quaker Council for European Affairs v. Greece*, European Committee of Social Rights, Complaint No. 8/2000, 27 April 2001. Decisions of domestic courts dealing with breaches of the obligation to respect include inter alia *Jaftha v. Schoeman; Van Rooyen v. Stoltz*, Constitutional Court South Africa, 1 BCLR 78 (CC), 8 October 2004; *BverfGE 82, 60(85)* and *BVerfGE 87,153(169)*, German Federal Constitutional Court; *Comisión Municipal de la Vivienda c. Saavedra, Felisa Alicia y Otros s/Desalojo s /Recurso de Inconstitucionalidad Concedido*, Buenos Aires Supreme Court, 7 October 2002.

> se actions constitute massive violations of the right to shelter, in violation of Articles 14, 16 and 18(1) of the African Charter."[89]

ii) The obligation to protect

The *obligation to protect* requires a State to take measures that prevent third parties from interfering with the enjoyment of a right. This is also referred to under the rubric of third-party effect (or in French les obligations *d'effets horizontaux*, or in German, *Drittwirkung*).

The obligation to protect may involve a heightened measure when there is a power imbalance between an individual and a third party, such as in respect of large business enterprises. [90] This obligation places emphasis on State action that is necessary to prevent, stop or obtain redress or punishment for third party interference. This duty is normally achieved through:

- State regulation of private party conduct, together with inspection and monitoring of compliance; and

- The enforcement of administrative and judicial sanctions against non-compliant third parties, such as employers, landlords, providers of health care or educa-

[89] *SERAC and CESR v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, paras. 61 and 62.

[90] Principle 1 of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annexed to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31 (2011), adopted by the Human Rights Council in its resolution A/HRC/RES/17/4 (2011): "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." On State obligations related to abuses by business enterprises affecting children, see Committee on the Rights of the Child, General Comment No.16, UN Doc. CRC/C/GC/16 (2013).

tional services, potentially pollutant industries or private food and water suppliers.[91]
- The provisions of means of redress for victims abuse by third parties.

This obligation should complement other State activity such as regulation and law enforcement.

The obligation to protect should in practical terms provide protection against a wide range of conduct, including:

- Privately-conducted forced evictions;
- Adverse labour conditions in private labour markets;
- Failure to comply with health or education requirements in the private sphere;
- Discrimination in contracts for the provision of basic services such as health, water, housing or education; or
- Abusive termination or modification of these contracts.[92]

iii) The obligation to fulfil

An obligation to fulfil requires a State to take legislative, administrative, budgetary, judicial and other measures towards

[91] Guideline 15 (d) of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *supra* note 60.

[92] Cases of international courts and treaty bodies dealing with the obligation to protect include *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001; *Mapiripán Massacres v. Colombia*, Inter-American Court of Human Rights, 15 September 2005; *Ituango Massacres v. Colombia*, Inter-American Court of Human Rights, 1 July 2006; *International Commission of Jurists v. Portugal*, European Committee of Social Rights, Complaint No. 1/1998, 10 September 1999; *Hajrizi Dzemajl et al. v. Yugoslavia*, UN Committee Against Torture, Communication No. 161/2000, 2 December 2002. Decisions of domestic courts dealing with breaches of the obligation to respect include *T-377/95*, Colombian Constitutional Court, 24 August 1995; *T-065/93*, Colombian Constitutional Court, 26 February 1993; *Molski v. Gleich*, US Federal Court of Appeal Ninth Circuit (Southern California), 307F.3d 1155, 2 Cal. Daily Op. Serv. 10, 310, 2002 Daily Journal D.A.R. 11, 901, 6 February 2003; *Roberto E. Etcheverry c. Omint Sociedad Anónima y Servicios*, Argentine Supreme Court, 13 March 2001.

the full realization of rights, including by means of international assistance and cooperation.

The precise scope and content of the obligation necessarily depends on the particular context, but generally involves establishment by a State of institutional machinery essential for the realization of rights. This can take different forms. In effect, it mirrors the requirements embodied in the phrase "all appropriate means" within article 2(1) of the ICESCR. As a general rule, States are required to create legal, institutional, administrative, and procedural conditions, as well as to provide material benefit for the realization of certain rights without discrimination.

In other words, States are expected to be proactive agents, capable of increasing access to ESC rights, and ensure the enjoyment of at least a minimum essential level of the rights to all.

The obligation to fulfil involves positive action, which means that violations in this area involve State omissions.[93] Although they may seem to be more difficult to define and circumscribe, judicial orders requiring public authorities to act in relation to health care are common in many jurisdictions.

This duty places emphasis on:

- Identifying problematic situations;
- Providing relief;
- Creating conditions that would allow right-holders to manage their own access to the provisions protected by rights;
- Removing obstacles to the full enjoyment of rights; and
- Implementing measures to modify discriminatory social and cultural patterns that result in any disadvantage(s) for vulnerable groups.

The obligation to fulfil can provide protection against:

[93] See section III. 2. in this chapter.

- Failures to meet substantive standards regarding the quality of services;
- Failures to meet procedural standards for planning, implementing or monitoring services;
- Insufficient allocation of resources;
- Failure to implement statutory obligations; or
- Failure to provide services to eligible individuals.[94]

	International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece Complaint No. 49/2008
Year:	2009 (Date of Decision: 11 December, 2009)
Forum, Country:	European Committee of Social Rights; Greece
Standards, Rights:	Non-discrimination and equal protection of the law; Right to adequate housing; Ethnic minorities
Summary	A complaint was submitted by the Interna-

[94] Cases of international courts and treaty bodies dealing with breaches of the obligation to fulfil include *R.K.B. v. Turkey*, Committee on the Elimination of Discrimination against Women, Communication No.28/2010, 24 February 2012; and *International Association Autism-Europe v. France*, European Committee of Social Rights, Complaint No. 1/2002, 7 November 2003. Decisions of domestic courts dealing with breaches of the obligation to fulfil include inter alia *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, Constitutional Court of South Africa, 2001 (1) SA 46 (CC), 4 October 2000; *Oberti v. Board of Education of the Borough of Clementon School District*, US Court of Appeals Third Circuit, 99 F.2d 1204 (3d Cir. 1993), 28 May 1993; *Yated and others v. the Ministry of Education*, Supreme Court of Israel, HCJ 2599/00, 14 August 2002; *People's Union for Civil Liberties v. Union of India and others*, Supreme Court of India, 2 May 2003; *Asociación Benghalensis y otros c. Misiterio de Salud y Accion Social – Estado Nacional s/amparo ley 16.688*, Argentine Supreme Court, 1 June 2000; *Soobramoney v. Minister of Health*, *KawZulu-Natal*, South African Constitutional Court , 1998 (1) SA 765 (CC), 27 November 1997.

Background:	tional Center for the Protection of Human Rights (INTERIGHTS), alleging that the Roma community in Greece face violations of their housing rights as well as suffer discrimination in access to housing. The applicants considered this to be in breach of article 16 of the revised European Social Charter, which covers the right of a family to social, legal and economic protection.
Holding:	The Committee held that Greece had failed to provide access to adequate housing to the Roma community despite a prior decision of the Committee that mandated progress in this respect [paras 35-37]. While the Committee recognized certain positive steps taken by the Greek government in ameliorating the living conditions of the Roma, including the development of non-discrimination legislation [para. 38], it emphasized that merely ensuring identical treatment as a means of protection against any discrimination was not sufficient. The State was required to respond to the unique circumstances of the Roma with discernment and take appropriate positive measures in order to achieve meaningful equality [para. 40]. The Committee thereafter examined the issue of forced evictions. Even when communities unlawfully occupy land, certain procedural guarantees must be complied with during the eviction process and these include proper justification for the evictions, adequate and reasonable notice, process conditions that respect the dignity of the affected, including consultations with the evictees prior to eviction, alternative accommodation and accessibility of legal remedies. However, the State did not properly respect procedural guarantees. In light of all the above, the Committee

	concluded that the State was in violation of the right to housing as protected within the right of the family to social, legal and economic protection under the Charter [paras. 55-70].
Additional Comments:	The case examines the duty of the State to respect, protect and fulfil the Right to Housing.
Link to Full Case:	http://www.escr-net.org/node/365124

iv) Extraterritorial obligations of States in the area of ESC rights

Human rights obligations generally, including in the area of ESC rights, have extraterritorial application. The increasing pace of economic globalization has made the discharge of such obligations ever more a critical part of the human rights landscape. This state of affairs impelled the ICJ and University of Maastricht to convene an expert process leading to the elaboration of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,[95] these were adopted by a group of international legal experts in 2011 with a view to addressing these dimensions of human rights protection. Leading international legal experts including UN Special Procedures mandate-holders and members of the UN Treaty Bodies, were among the signatories to the principles.

In a world of growing interdependencies, a risk of severe protection gaps is presented by traditional conceptions of human

[95] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: http://www.etoconsortium.org/en/library/maastricht-principles/ or see annex 3 of the present Guide.

rights obligations and responsibilities that tend to consider the territorial State as the main duty-bearer. The impact of actors other than the territorial State on the realization of human rights including ESC rights (or lack thereof) is well known to the human rights movement and poses significant obstacles to legal practitioners at various levels.

The Maastricht Principles bridge these gaps by defining obligations of States extraterritorially, indicating what can constitute breaches of these obligations and where State responsibility can be engaged, and by suggesting key elements for remedies in cases of such breaches and violations. The document builds upon two previous documents of this kind, the Limburg Principles and the Maastricht Guidelines that are referred to in other parts of the present Guide.[96]

The Maastricht Principles define State extraterritorial obligations (hereafter ETOs) to respect, protect and fulfil human rights separately and jointly as comprising:
"a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally."

The Maastricht Principles establish the basis for jurisdiction and responsibility that allow for the operationalization of and the assessment of compliance with ETOs. In particular, the Maastricht Principles specify that ETOs will apply in:
"a) **situations over which it exercises authority or effective control**, whether or not such control is exercised in accordance with international law;

b) situations over which **State acts or omissions bring about foreseeable effects** on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

[96] See box in section III. 1. of this chapter.

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is **in a position to exercise decisive influence or to take measures** to realize economic, social and cultural rights extraterritorially, in accordance with international law."[97]

A State's responsibility will be engaged when State conduct - or acts and omissions of non-State actors for which State responsibility can be attributed - breach the concerned State's obligations under international human rights law.[98] States have both negative and positive ETOs. They must not harm ESC rights of people living in another State; they must protect from harm by third parties the people that they regulate, control or are in a position to influence; and they must contribute to fulfiling ESC rights globally to the maximum of their available resources.

A final part of the Maastricht Principles is dedicated to the issue of accountability and remedy for breaches of ETOs. Undoubtedly, these questions are critical to the task of legal practitioners. National and international human rights accountability mechanisms are often ill-equipped to deal with cases that involve the responsibility of foreign actors, including foreign States and transnational companies, and even less in cases that concern the failure of the community of States in general.

However, progress is being made in this respect and some UN Special Procedures and Treaty Bodies have started to monitor and address situations in which they have considered acts and omissions of foreign States and other "extraterritorial" actors as constituting breaches of those actors' responsibility under international human rights law.[99]

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[97] Principle 9 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (emphasis added).
[98] Principles 11 and 12 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.
[99] For examples of the use of Extraterritorial Obligations of States, and of the Maastricht Principles, see the ETO Consortium web page at: http://www.etoconsortium.org/. In particular, the Committee on Economic, Social and Cultural Rights has issued several recent recommendations on Austria, Belgium and Norway addressing extraterritorial obligations on the States

Of course, as non-judicial mechanisms, Treaty Bodies and Special Procedures are not constrained by procedural and normative limitations that national courts and other adjudicative bodies encounter concerning alleged rights violations perpetrated in another State and/or concerning foreign actors. On the other hand, while important, they are not always as effective as judicial mechanisms or administrative mechanisms whose decisions have the force of domestic law, as some states will consider their authority to be merely of a recommendatory character.

This area of ESC rights litigation will most probably see important developments in the coming years. In the meantime, academic experts and human rights defenders have started to analyse real and hypothetical situations involving ETOs that could be the subject of adjudication by national and international courts and other adjudicative bodies.

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under review: see Concluding Observations from 2013 on Austria, UN Doc. E/C.12/AUT/CO/4, paras. 11 and 12; on Belgium, UN Doc. E/C.12/BEL/CO/4, para. 22; on Norway, UN Doc. E/C.12/NOR/CO/5, para. 6. At the national level, see also the advisory opinion of the French Human Rights Commission concerning the future National Plan on Business and Human Rights that refers explicitly to the Maastricht Principles and more specifically to the duty of the French State to protect people abroad against violations of human rights generated by acts of companies under its jurisdiction, available at: http://www.cncdh.fr/sites/default/files/13.10.24_avis_entreprises_et_droits_de_lhomme_0.pdf, para. 63.

Practitioners who are interested in knowing more about ETOs, the Maastricht Principles and case studies for possible litigation can refer to the following:

- On ETO in general, see ETO Consortium webpage at: http://www.etoconsortium.org/
- For the full text of the Maastricht principles see annex 3.

For practitioners who want to refer to primary sources and case law rather than just the Principles themselves, see:

- De Schutter, O. Eide, A. Khalfan, A. Orellana, M. Salomon, and I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", Human Rights Quarterly, 34(4), 2012, pp. 1084-1169. Accessible at: http://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf
- On case studies: R. Künnemann, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", in Coomans, Fons, and Menno T. Kamminga (eds.), *Extraterritorial application of human rights treaties*, Vol. 2. Intersentia, Antwerp, 2004; and Gibney, Mark, and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments*, Routledge, 2013.

2. Violations of ESC rights under international law

Examples of violations and how judicial and quasi-judicial bodies have dealt them with across the world are addressed at length in Chapter 4 and 5. The present section describes, at a general level, the nature of violations of rights. As mentioned in the introduction to this section, States may be responsible for a violation of human rights and ESC rights because they fail to take the measures necessary to realize the rights or because their conduct, whether through act or omission, has in-

terfered with enjoyment of rights by individual or groups of individual rights-holders.

Following the Limburg Principles on the implementation of the ICESCR, a group of international legal experts contributed to the definition and understanding of what constitutes a violation of ESC rights as well as remedies for those violations. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted in 1997 and provide useful guidance to legal practitioners in the litigation of these rights. They have greatly helped to shape the interpretive work of international authorities, including the CESCR and other UN Treaty Bodies, as reflected in the following sections.

Statutory and regulatory definitions of ESC rights and violations through omissions of States

In accordance with the rule of law and the separation of powers principles, defining the content and scope of a right is primarily the task of the legislative branch and, subsequently, further elaborated by administrative regulations.[100]

The large majority of cases that have been considered by domestic and international courts concerning ESC rights involve either a claim that the State administration is not complying with a statutory duty, or a challenge to the existing legislation or regulations because they are inconsistent with statutory or constitutional duties or they violate a prohibition on conduct. Thus, judicial and quasi-judicial bodies less often judicially review a complete omission, and more often review legislation or regulations that allegedly inadequately implement conventional, constitutional or statutory duties or prohibitions. By way of example, the well-known South African cases relating to the right to housing in the *Grootboom* case, or to the right to health in the "Treatment Action Campaign" case,[101] illustrate

[100] *ICJ Justiciability Study,* pp. 16 and 17.
[101] *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, Constitutional Court of South Africa, Decision 2001 (1) SA 46 (CC) (2000); *South African Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, Decision 2002 (5) SA 721 (2002).

how judicial and quasi-judicial bodies have found violations of the rights generated by partial omissions of the State. In these cases, the South African Constitutional Court considered that the public policy adopted to comply with a certain ESC right fell short of the required legal standard. In other words, the means chosen were insufficient in relation to the legal obligation, because they excluded a certain group. In other cases,[102] the omission did not concern the failure to include specific groups of right-holders but instead involved an omission to include important aspects of rights, services or goods vital to the realization of the ESC rights, or a failure to grant the necessary financial and material means to operationalize the policy at play.

French Constitutional Council – partial omission of the legislature in matters of compensation for working time

The French Constitutional Council, reviewing the constitutionality of a 2008 law on the reform of working time (in French *Loi portant rénovation de la démocratie sociale et réforme du temps de travail*), found a partial non-compliance of the law with constitutional provisions. In particular, the Council determined that those parts of the law that left to collective bargaining, or to a future decree, the regulation of compensation for overtime worked beyond the annual authorized quota contravened article 34 of the Constitution. That provision defines the areas of express competence of the legislature. Those include the areas of labour, trade unions and social security. In the law being contested, the legislature failed to define the modalities of implementation of the fundamental principles of labour law, namely the right to rest and to compensation for overtime.[103]

More infrequently, the judiciary finds a violation of rights due to a total omission by other branches of government. In the case from El Salvador, summarized below, the failure to pass a law to give effect to a Constitutional right was sanctioned by the Supreme Court.

[102] *ICJ Justiciability Study*, pp. 40 and 41.
[103] Declaration of partial unconstitutionality, French Constitutional Council, Decision No. 2008-568 DC (2008).

El Salvador: Total omission of the legislature to pass a law regulating compensation for workers

The adoption of primary legislation and administrative measures necessary to implement constitutional provisions is fundamental to avoid legal uncertainties and challenges for justice users and providers. This imperative has been reiterated in the above-mentioned Decision 53-2005/55-2005 of February 2013[104] of the Constitutional Chamber of the Supreme Court in El Salvador. In the decision, the Constitutional Chamber condemned a total legislative omission of the State that, according to article 252 of the Constitution, should have adopted a law to regulate and give effect to article 38 of the Constitution, which guarantees employees' rights in cases of resignation.

Beyond legislative omissions, violations through omission can also occur when the State has failed to elaborate a programme or administrative plans necessary to give effect to constitutional or conventional rights. Omissions often also occur concerning the regulation of the activities of and the prevention of abuses by business enterprises. As recalled above, under the obligation to protect, the State should make sure that it has in place the necessary laws and regulations to prevent third parties, including business enterprises, from interfering with the enjoyment of ESC rights.

The ICJ has produced a series of studies on access to justice for victims of abuses by private actors.[105] While these studies focus on the legal frameworks of the individual countries concerned, they provide a useful overview of the opportunities and challenges for victims in trying to take legal action against private actors, as well as a detailed analysis of domestic remedies, their availability and efficiency. Practitioners may find it

[104] See section II. 2. of this chapter and *supra* note 42.
[105] The ICJ studies on China, South Africa, Colombia, Poland, India, Brazil, Democratic Republic of Congo and Peru are accessible at: http://www.icj.org/category/publications/?theme=international-economic-relations

useful to consult these resource documents for comparative purposes, especially looking at countries with a similar legal tradition.

a) Violations through actions of States

States may violate ESC rights when they fail to respect these rights. A typical example of this kind of violation is seen in instances of forced evictions carried out by public authorities. [106] These State-led or authorized actions adversely affect and disrupt the enjoyment of the right to housing, and may also adversely impact other human rights. Constituting a clear breach of the obligation to respect existing enjoyment of the right to housing, forced evictions have been defined as a *prima facie* violation of State obligations under the right to adequate housing and the ICESCR.[107]

i) Forcible evictions and the right to adequate housing

There is a rich body of case law addressing violations of the right to adequate housing and other rights due to evictions that fail to comply with procedural safeguards prescribed by international human rights and national laws. Depending on the applicable legal framework, court judgements have been based on the right to housing itself, or on other constitutionally protected rights and principles such as the right to property, to privacy, the right to a dignified life, non-discrimination or equality before the law, to name only a few. Again, Chapter 4 and 5 provide examples of national litigation protecting the right to housing. Beyond forced evictions, failures by States to respect the right to adequate housing can occur when States

[106] Committee on Economic, Social and Cultural Rights, General Comment No. 7, contained in UN Doc. E/1998/22, annex IV (1997), para. 3: The CESCR defines forced evictions as being "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."

[107] See Committee on Economic, Social and Cultural Rights, General Comment No.4, *supra* note 59; and General Comment No. 7, *supra* note 106.

infringe the right of people to build housing in conformity with their culture and needs.

An issue of growing importance for practitioners at the domestic level is the limitation of ESC rights based on arguments put forward by States on the basis of public interest, general welfare or the common good, notably in cases of evictions, displacements and expropriations. The pressure on land and real estate property has risen with the enormous needs for urbanization, exploitation of natural resources and speculation by investment and finance actors.[108]

While States have legitimate development objectives and plans, general public interest arguments have frequently been used to justify situations in which the rights of individuals, or of groups of individuals, have been violated.

Such cases confront judges (and to a certain extent the lawyers involved in such cases) with complex and politically sensitive issues to be settled, including the balancing of competing interests. National and regional judicial and quasi-judicial bodies have produced an important body of jurisprudence regarding these issues, reviewing the legitimacy of general public interest arguments and issuing decisions ranging from ordering the cessation of projects to ordering compliance with procedural safeguards, including the obligation of meaningful consultation with those affected where these were ignored. A significant share of the case law concerns indigenous lands.

In this regard, the 2010 decision of the African Commission on Human and Peoples' Rights concerning the Endorois indigenous community in Kenya provides a recent and useful framework for a review of public interest arguments.

[108] See for instance United Nations Special Rapporteur on the right to food, O. de Schutter, Addendum to the Report to the 13th session of the Human Rights Council, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenges, UN Doc. A/HRC/13/33/Add.2 (2009).

Taking into account relevant international standards and case law, the Commission specified that article 14 of the African Charter establishes "a two-pronged test, where that encroachment can only be conducted – "in the interest of public need or in the general interest of the community" and "in accordance with appropriate laws". Thereby, the Commission refused the sole argument of the State to have acted in the public interest. Furthermore, the Commission reiterated the principle of proportionality that should apply in similar cases and recalled that any limitation or restriction of rights must be proportionate to and absolutely necessary for the aim pursued.[109]

At the international level, various General Comments elaborated by the CESCR give examples of specific acts that constitute breaches of the State duty to respect rights.

Without aiming to be exhaustive, the following paragraphs provide excerpts from CESCR's interpretive work and thus give examples of acts likely to be considered to constitute violations of various ESC rights under international law. They thereby also identify what should be the subject of remedial action at the domestic level.

ii) Right to take part in cultural life:

- prevent[ing] access to cultural life, practices, goods and services by individuals or communities;[110]
- [refraining from] *any form of discrimination based on cultural identity, exclusion or forced assimilation[;] ...* [any act preventing] *access to ... varied information exchanges, ... to cultural goods and services, understood as vectors of identity, values and meaning[;] ... freedom indispensable for scientific research and creative*

[109] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission of Human and Peoples' Rights, Decision 276 / 2003, 25 November 2009, paras. 211-213.

[110] Committee on Economic, Social and Cultural Rights, General Comment No. 21, UN Doc. E/C.12/GC/21 (2009), para. 62.

activity[;] ... free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices.[111]"

iii) Right to education:

- "closing private schools;[112]
- *introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; ... the prohibition of private educational institutions; ... the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in nonconformity with article 4* [of the ICESCR].[113]"

iv) Right to food:

- "formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, ... ; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with preexisting legal obligations relating to the right to food.[114]"

v) Right to health:

- *"formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly*

[111] *Ibid.*, para. 49.
[112] Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 45, para. 50.
[113] Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 45, para. 59.
[114] Committee on Economic, Social and Cultural Rights, General Comment No. 12, *supra* note 33, para. 19.

incompatible with pre-existing domestic or international legal obligations in relation to the right to health.[115]

- *denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health*."[116]

vi) Right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production:

- *"infringing the right of authors to be recognized as the creators of their scientific, literary or artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their productions that would be prejudicial to their honour or reputation [,] ... unjustifiably interfering with the material interests of authors, which are necessary to enable those authors to enjoy an adequate standard of living;*[117]
- *formal repeal or unjustifiable suspension of legislation protecting the moral and material interests resulting from one's scientific, literary and artistic productions."*[118]

vii) Right to social security:

- *"refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security; arbitrarily or unreasonably inter-*

[115] Committee on Economic, Social and Cultural Rights, General Comment No. 14, *supra* note 33, para. 48.
[116] *Ibid.*, para. 50.
[117] Committee on Economic, Social and Cultural Rights, General Comment No. 17, UN Doc. E/C.12/GC/17 (2005), para. 30.
[118] *Ibid.*, para. 42.

feres with self-help or customary or traditional arrangements for social security; arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.[119]

- *formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security; active support for measures adopted by third parties which are inconsistent with the right to social security; the establishment of different eligibility conditions for social assistance benefits for disadvantaged and marginalized individuals depending on the place of residence; active denial of the rights of women or particular individuals or groups."*[120]

viii) Right to water:

- *"refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law*.[121]
- *formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water*."[122]

[119] Committee on Economic, Social and Cultural Rights, General Comment No. 19, *supra* note 33, para. 44.
[120] *Ibid.*, para. 64.
[121] Committee on Economic, Social and Cultural Rights, General Comment No. 15, *supra* note 33, para. 21.
[122] *Ibid.*, para. 42.

ix) Right to work:

- *"denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers;*[123]
- *formal repeal or suspension of legislation necessary for continued enjoyment of the right to work; denial of access to work to particular individuals or groups, whether such discrimination is based on legislation or practice; and the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work."*[124]

b) Other features of violations

As this Guide has well established, violations can occur through acts or omissions. They also have other or additional features, the analysis of which is relevant for understanding and interpretation purposes.

Violations can be either of an individual or large-scale nature. In both cases, the degree of their seriousness can vary, and so can the degree of their systemic nature. For instance, an individual violation can be gross without being the result of a systemic failure of an adequate policy or a systematic discriminatory practice.

Individual violations have often led to the identification of a broader issue of non-compliance with international obligations, and judicial and quasi-judicial bodies have in some instances ordered a systemic remedy, sometimes in the form of a legal or policy reform, when examining the case of an individual. The decisions of the Colombian Constitutional Court concerning

[123] Committee on Economic, Social and Cultural Rights, General Comment No. 18, *supra* note 33, para. 23.
[124] Committee on Economic, Social and Cultural Rights, General Comment No. 18, *supra* note 33, para. 32.

the right to health constitute a good illustration of this.[125] In turn, judicial and quasi-judicial bodies addressing a claimed violation of a conventional or constitutional provision in abstract can order remedies that will then be applied to protect the rights of an individual in a specific case.

These examples show that a strict classification is often neither possible nor useful in practice. Nevertheless, identifying various types of violations can have a more concrete relevance for practitioners as the nature and scope of violations may, in certain circumstances, have an impact on the remedies available at least at the regional and international levels. For instance, under the Optional Protocol to the ICESCR, "grave or systematic" violations of ESC rights may benefit from an inquiry procedure.[126] This procedure enables lawyers and human rights activists to request an inquiry into a particularly serious and widespread issue of concern generating violations of ESC rights. Compared to the individual communications mechanism, the inquiry procedure can be a more timely and more flexible response, particularly because it does not require the exhaustion of domestic remedies.

Gross violations of ESC rights may sometimes reach the threshold of crimes under international law and thus to be subject to scrutiny by other bodies and jurisdictions. For instance, under the 1949 Geneva Convention, the 1977 Additional Protocol I, and the Rome Statute of the International Criminal Court, a number of violations also constitute ESC rights violations, such as forced evictions through population transfer, use of starvation as a method of warfare, enforced sterilization or forced labour and sexual slavery.[127]

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[125] See for instance Alicia. E. Yamin and Oscar Parra Vera, "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates", in *Hastings International & Comparative Law Review*; 33(2), 2010, pp. 431-459. See also section III. 1. b) of this chapter.

[126] See article 11 of the OP-ICESCR: the inquiry procedure is a so-called opt-in procedure and thus only applies to States that have made the necessary express declaration.

[127] For relevant international criminal law provisions, see, *inter alia*, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), UN Doc. A/CONF. 183/9 [hereafter Rome Statute]: Delib-

Chapter 3: Initiating judicial proceedings - Making the case

This chapter raises some of the major issues with which lawyers and, to a certain extent judges, and other authorities may be confronted in the context of ESC rights litigation. Without exploring in depth the political, strategic and procedural aspects that necessarily inform aspects of ESC rights litigation, it briefly highlights a number of strategic and procedural considerations that should be kept in mind by litigators, beside the purely legal matters. Yet, all these various aspects undoubtedly play a significant role in ESC rights adjudication and practitioners may find some of the points mentioned and references offered hereafter useful, especially in the first phases of litigation.

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erate infliction on a group of people of conditions of life calculated to bring about its physical destruction as crime of genocide (article 6(c)); Forced evictions through unlawful deportation or transfer of a civilian population as war crimes (article 8(2)(e)(viii)) and crimes against humanity (article 7(1)(d)); Destruction and appropriation of property violating the right to housing that is not justified by military necessity as war crimes (article 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii)); Intentional use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival as war crimes (article 8(2)(a)(iii) and (b)(xxv)); Intentionally directed attacks against buildings dedicated to education, art, science or health care provided they are not military objectives (article 8(2)(b)(ix)); Violations of sexual and reproductive health rights through rape, sexual slavery, enforced prostitution, forced pregnancy or enforced sterilization as crimes against humanity (article 7(1)(g)) and crime of genocide (article 6(b) and (e)); Pillage (article 8(2)(b)(xvi) and article 8(e)(v)). See also Committee on Economic, Social and Cultural Rights, General Comment No. 7, *supra* note 106, paras. 7 and 13 (on forced evictions in armed conflicts); Committee on Economic, Social and Cultural Rights, General Comment No. 14, *supra* note 33, para. 34 (on limitation of access to health services during armed conflicts); and Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18 (on the recognition of certain human rights violations as criminal under either domestic or international law). For further information on ESC rights and international criminal law see also Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, forthcoming 2014.

I. Strategic considerations around litigation

1. Providing victims/clients with information about rights and remedies

Studies looking at strategic dimensions of litigation and testimonies of practitioners across jurisdictions confirm the fundamental importance of ensuring the overall awareness of rights-holders about their rights and the corresponding State obligations towards their realization.[128]

Clearly, higher levels of general education and in particular human rights education of the population will better facilitate access to justice in cases of alleged violations of ESC rights.[129] Awareness about rights is not only important in specific cases in which violations occur, but also serves an important role in preventing such violations. Rights-holders need to be empowered to claim and defend their rights. Yet, through varying degrees across countries, rights-holders typically know little about their rights and more generally about possibilities for their legal protection. For instance, the laws and important judicial decisions pertaining to ESC rights are often only published in an official gazette or similar document that has very limited reach, especially for individuals from marginalized and disadvantaged groups, more likely to be victims of ESC rights violations. In this respect, lawyers and judges will have a critical role to play in making information available and understood. One such contribution is the development and maintenance of case law databases by judiciaries and legal practitioners.[130] In addition, there are education and transparency initiatives, such as, in El Salvador, where the Constitutional Court judges regularly dedicate time to inform people about their

[128] See box at p. 84 of the present chapter.
[129] The ICJ Studies on Access to Justice for social rights in Morocco and El Salvador, respectively accessible in French and Spanish at: http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/, and http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/, show the importance of education and awareness-raising in two specific contexts.
[130] See Toolbox in annex 2 of this Guide.

work, the Constitution and the rights it protects.[131] In Kenya, a pilot programme was launched in 2013 to train all undergraduates of the Laikipia University in human rights international and national standards.[132]

Awareness of rights-holders becomes indispensable when knowledge of rights moves out of the abstract and they become actual victims of violations. Depending on the gravity and particular facts at play and legal issues raised, as well the scope of the remedies sought, lawyers will often have to strike a balance between the specific interests of their clients and the consideration of the general legal and policy impact a case may engender. An informed, constant and active involvement of rights-holders in the litigation process and possible strategic decisions is optimal. Where there is a possibility for the achievement of more systemic means of providing remedies and policy changes that have an impact beyond the individual situations, it will be essential that the individual victims are aware of this potential and buy into any approach that aims to address the broader question.

Thus, a threshold question that may have to be resolved is whether litigation is the best option in a given situation. In addition, as many of the emblematic ESC rights cases demonstrate, the development of a broad strategy in which litigation can be only one component among others is fundamental. In such cases, legal and political advocacy may play a determinative role in ensuring that whenever a positive decision and remedies are achieved, these will be enforced broadly. This is particularly true when the remedies ordered imply structural changes in law and policy. In some instances, even when litigation was not successful, positive change has still been

[131] The website of the Constitutional Chamber of the Supreme Court of El Salvador is accessible at: http://www.csj.gob.sv/SALAS_CSJ.html#

[132] For more information, see OHCHR Annual Report, Thematic priorities: Impunity and the Rule of Law, p. 40, accessible at: http://www2.ohchr.org/english/OHCHRReport2013/WEB_version/pages/thematic_priorities.html; and the website of the Laikipia University accessible at: http://laikipia.ac.ke/home/humanrights.html

achieved through the public campaign and advocacy around the case.[133]

Rights-holders as well as civil servants and duty bearers will need to be aware of the legal framework and principles they must respect when delivering public goods and services necessary to realize human rights in ESC rights. In that regard, it is interesting to note progress in the human rights training of civil servants. For example, in Bolivia the State initiated a new educational programme for all civil servants to train them in human rights standards against discriminatory attitudes and acts in public administration.[134]

Well-informed public administration personnel are in a better position both to prevent violations of rights and to more actively and effectively contribute to their realization. In cases of complaint against poor functioning public services, they may be better able to provide immediate, or at least timely, redress through administrative remedies that can ensure cessation of a violation, avoid aggravation and be more accessible to rights-holders as public service. In that sense, the importance of human rights training of public officials is as important in the field of ESC rights as for other human rights, as it plays a determining role in guaranteeing all the elements of adequate reparation as understood by international law, which includes guaranteeing non-repetition.[135]

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[133] The *Lindiwe Mazibuko & Others v. City of Johannesburg & Others* case, Constitutional Court of South Africa Case CCT 39/09, [2009] ZACC 28, 8 October 2009, provides a good illustration of a positive change through public campaign and advocacy, compensating a relatively conservative decision by the court. For further details see Chapter 5, section III. 2. of this Guide.

[134] See Report of the United Nations High Commissioner for Human Rights on the activities of her office in the Plurinational State of Bolivia, UN Doc. A/HRC/22/17/Add.2 (2013), para. 34, accessible at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add-2_en.pdf

[135] For information on relevant instruments on human rights training, see ICJ Practitioners' Guide No. 2, the Right to a Remedy and to Reparation for Gross Human Rights Violations, pp. 104-105, accessible (in English, French, Spanish, Arabic and Thai) at: http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/

The use of judicial remedies should, in most instances, be the last resort because of their length and limited accessibility for the vast majority of victims of violations of ESC rights.

Literature on Strategic Litigation:

- Bruce Porter, "The Crisis in ESC Rights and Strategies for Addressing It", in Malcolm Langford and Bret Thiele (eds.), *Litigation of Economic, Social and Cultural Rights: The State of Play*, The University of New South Wales Press, Sydney, 2005.
- Malcolm Langford, "From practice to theory: the justiciability of social rights", in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge UP, Cambridge, 2008.
- James L. Cavallaro and Emily J. Schaffer (2004-2005), "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas" in *Hastings Law Journal* 56 (2), pp. 217-281.
- Tara J. Melish (2006), "Rethinking The 'Less as More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas", *New York University Journal of international Law & Politics* 39 (1), pp. 171-342.

Other resources on Strategic Ligitation:

- Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en Guatemala, Capacitación Técnica en Litigio Estratégico en Derechos Humanos de los Pueblos Indígenas Componente de Justicia del Programa Maya II, Manual Litigo Estratégico: "Estrategia General para los litigios de Alto Impacto", accessible at: http://www.ohchr.org.gt/documentos/programaMAYA/ANEXO2.pdf
- Strategic Litigation Initiative (SLI) of ESCR-Net, accessible at: http://www.escr-net.org/node/365113

2. Choosing the forum

In considering the possibility of recourse to judicial and quasi-judicial bodies to seek redress and reparation for violations of ESC rights, victims and their lawyers may have the choice of a number of forums and, correspondingly, different areas of applicable law. At the national level, these may include administrative, civil or criminal law.[136]

At the international level, lawyers may have the choice of a regional human rights system or to the United Nations bodies that may offer a quasi-judicial review of compliance with their respective treaties.

Various factors may be at play and need to be considered when making the choice. They include:

- The legal framework offered by the convention concerned and the degree of protection of ESC rights such law provides;
- The positions taken and jurisprudence of the judicial or quasi-judicial body concerned with regard to the legal issues at stake in a specific case;
- The procedural issues, such as admissibility and standing issues or the length of the procedure, that the specific protection mechanism offers;
- The type of remedies that can be ordered, the nature of the decisions and the perspective of enforcement and implementation.

The choice of the most appropriate and strategic jurisdiction can also be relevant for the adjudication of ESC rights at the domestic level. The criteria listed above concerning litigation at the international level also apply, to a certain extent, at domestic level. In particular, the swiftness and timeliness of the various available procedures will play a determining role, as

[136] For concrete examples from different jurisdictions on access to justice using various bodies of law see Chapter 4 of this Guide.

well as other considerations such as those related to the rules of evidence.

For instance, in cases of violations of rights at work and breaches of the labour code that are penalized under the penal code, such as in matters of sexual harassment, lawyers may advise their clients to initiate the penal procedure first. This will trigger an investigation and may strategically contribute to overcoming the obstacles often faced by victims to prove the facts in such cases.

II. Procedural aspects

As alluded to in section I.2 above, procedural aspects related to the ability to lodge a complaint play a determining role in ensuring that remedies for ESC rights violations are accessible and effective.

In alleging a violation of an ESC right, the claimant will typically have to consider what cause(s) of action arising from the facts at the origin of the allegation might be available. Depending on the jurisdiction, such actions might arise, for example, from the law of tort, breach of a statutory duty, or violation of a constitutionally guaranteed right. The claimant may also have to give due consideration to doctrinal bars to pursuing such causes of actions, such as questions of standing, immunities of the State or officials, questions of ripeness or mootness of the actions. These considerations, as well as rules of evidence, will figure both into whether the action can be effectively pursed and, if so, the most appropriate jurisdiction in which to do so.

1. Standing

Under international human rights standards, "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law… Where appropriate, and in accordance with domestic law, the term "victim" also includes the

immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."[137]

The question of who has standing to submit a communication to the Committee on Economic, Social and Cultural Rights (CESCR) is addressed in article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). This provision allows for communications to be submitted by individuals who claim to be victims of violations of the rights guaranteed in the ICESCR, groups of individuals who claim to be victims of violations of the rights guaranteed in the ICESCR, others acting on behalf of those individuals or groups of individuals with their consent, and others acting on behalf of those individuals without their consent but having justification to do so.[138]

ESC rights, like any other human rights, require remedies for violations suffered by individuals in very specific situations who seek a concrete redress for the harm suffered. However, a great number of ESC rights violations also have a collective dimension and require structural and systemic remedies, especially to guarantee non-repetition. Moreover, although ESC rights are individual rights, some of the rights such as the rights of article 8 of the ICESCR guaranteeing the right of trade unions to establish national federations or confederations,[139] the right of trade unions to function freely,[140] or the right to strike[141] are essentially exercised collectively.
Additionally, victims of ESC rights often belong to the most disadvantaged and marginalized sectors of society. The mate-

[137] Principle 8 of United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).
[138] Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/RES/63/117 [hereafter OP-ICESCR].
[139] Article 8.1 b) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UN Doc. A/6316 [hereafter ICESCR].
[140] Article 8.1 c) of the ICESCR.
[141] Article 8.1 d) of the ICESCR.

rial obstacles that justice users usually face can therefore be especially daunting for victims of ESC rights violations. As showed below, procedural innovations in certain countries have helped render the recourse to judicial and quasi-judicial bodies more affordable and timely to groups of victims who are particularly disadvantaged, such as persons living in extreme poverty.

Some procedural arrangements regarding standing will thus be more responsive to these realities than others. As the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*) highlights, "procedures designed for hearing individual grievances are not well suited to the resolution of collective claims, such as those involving group rights, massive rights violations or situations that require a collective remedy. Certain requirements make it impossible to challenge measures that affect a whole group. These include the need to show a sufficient or exclusive individual interest in the case for the purposes of establishing standing (*locus standi*) or the limitation of remedies to those that address the concerns of the individual plaintiff, and the lack of collective representation mechanisms, which is characteristic of civil procedures in many countries."[142]

Much of the ESC rights litigation conducted to date has confirmed the importance of these arrangements. In fact, there appears a clear correlation between the development of a rich and transformative case law on ESC rights and the degree of accessibility and flexibility of the procedures to initiate legal actions, and in particular constitutional petitions.

The situation of India is an exemplary case in this regard.[143] The development of public interest litigation and the general

[142]ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], pp. 93 and 94.

[143] See the *ICJ Justiciability Study* p. 96, and examples of cases including: *The Mumbai Kamgar Sabha, Bombay v. M/S. Abdulbhai Faizullabhai and others*, Supreme Court of India, Decision AIR 1976 SCC 1455 (1976); *Upenda Baxi v. State of U. P. & ors.*, 1982 (1) SCC 84 [502], (1983), 2 SCC 308 (1986) 4 SCC

loosening of the procedural requirements have been a determining factor in the capacity to obtain court orders remedying massive violations of ESC rights. In particular, the Supreme Court for constitutional petitions against violations of rights has accepted complaints brought to its attention in a largely non-formalistic manner. Also, public interest litigation allows for the court to act *suo moto* (on its own initiative) and a judicial review of a situation of alleged violation may be initiated on behalf of victims or without a party having to seize the court. Any person or NGO can take an active role in demanding, in the public interest, the review of omissions or actions of the State and redress when these violate constitutional rights.[144]

Other countries have also witnessed procedural innovation and effectively increased the accessibility of constitutional rights petitions and review mechanisms for victims of violations of ESC rights. In Colombia the *acción de tutela* (legal action to seek immediate relief for violation of a constitutional right), like the procedure in India, allows rights-holders alleging a violation of a constitutional right through an action or omission of any public authority or private actors to approach any competent court or tribunal where the threat or violation occur. Because it essentially aims at avoiding irreparable harm and at filling potential protection gaps, the procedure is easily accessible and fast. Victims or representatives acting on their behalf, including potentially the *Defensor del Pueblo* (Ombudsperson), only need to present facts. They do not need to be represented by a lawyer and there is no need to identify the Constitutional provisions that are breached. The question can be transmitted

106, AIR 1987 191; *Sheela Barse v. Union of India and another* (1993) 4 SCC 204; *In the Matter of: Prison Reform Enhancements of Wages of Prisoners etc*., High Court of Kerala (India), AIR Ker 261. See, generally, Sangueeta Ahuja, *People, Law and Justice. Casebook on Public Interest Litigation*, Orient Longman, New Delhi, 1997, T. I, Introduction, pp. 4-8; Siddarth Bawa, *Public Interest Litigation*, New Era Law Publications, Delhi, 2006, pp. 72-141; D.J. De, *New Dimensions of Constitutional Law*, Eastern Law House, Calcutta, 1991, pp. 8-21; Mamta Rao, *Public Interest Litigation, Legal Aid and Lok Adalats*, 2nd edition, Eastern Book Company, Lucknow, 2004, pp. 64-111 and 265-285.

[144] Under article 32 of the Constitution of India.

for revision by the Constitutional Court. But in any cases, an order will be given within ten days.[145]

The *ICJ Justiciability Study* discusses issues and the developments of new procedures better adapted to address the issues faced by victims of ESC rights violations.

Excerpt from ICJ Justiciability Study
Procedural reform and the lessons from the development of comparative law
To a certain extent, the contemporary evolution of procedural law has taken into account some of these difficulties, highlighting the need to adapt the old model of individual actions to new challenges, such as the collective incidence of some violations, or the need for urgent protection of fundamental legal rights before a violation takes place. Environmental, consumer and mass tort procedures have opened up new paths in this direction. Comparative law also offers many helpful examples, such as:

- *class actions;*
- *collective amparo;*
- *new standards regarding preliminary measures (for example, the precautionary principle);*
- *the Brazilian ação civil pública, mandado de segurança and mandado de injunção; and*
- *locus standi for public prosecutors, the office of the Attorney General or Ombudsperson to represent collective complainants; qui tam actions.*

Constitutional, legislative and judicial evolution in this field has been dramatic in some Latin American countries, such as Argentina, Brazil, Colombia and Costa Rica. In Argentina, the judicial development of a new constitutional action enshrined in the 1994 amendments to the Constitution, providing for a collective amparo through a direct interpretation of the constitu-

[145] Presidential Decree No. 2591 (1991), implementing article 86 of the Colombian Constitution, accessible at:
http://www.corteconstitucional.gov.co/lacorte/DECRETO 2591.php

tional provision, has been particularly creative. In Brazil, the use of a novel procedural mechanism called "public civil action" (ação civil pública) to trigger judicial protection in environmental, consumer and occupational safety and health cases has become widespread since its regulation in 1985.[146] *In Colombia, a number of new procedural mechanisms – namely, acción de tutela before the Constitutional Court, acción popular before ordinary courts, and acción de cumplimiento – have radically altered the possibilities for challenging State activities or omissions before the judiciary. In Costa Rica, a centralized and rather simplified amparo jurisdiction before the Constitutional Section of the Supreme Court has led to noteworthy results, including cases brought by children challenging educational decisions by school directors.*

These examples of progressive procedural law reforms may be drawn on by practitioners to encourage judicial and administrative authorities in countries in which procedural inaccessibility continues to inhibit the role of judicial and quasi-judicial bodies in protecting ESC rights. As recalled in Chapter 2, section II. 1., the provision of effective remedies is a conjunctive State obligation to the obligations pertaining to the substantive right under international human rights law, and authorities administrating justice should play their role in ensure that the obligation is effectively discharged.

a) The role of parties

Taking into account the realities described above, third parties often have a significant role to play in ESC rights litigation. Non governmental [human rights] organizations, trade unions and consumers' associations can play an active role in initiating collective complaints and public interest petitions, and/or representing and defending the interests of persons, individually or collectively. In addition, due to their monitoring and advocacy work, they often benefit from an understanding of the broader

[146] See, for example, Rodolfo de Camargo Mancuso, *Açao Civil Pública*, Ed. Revista dos Tribunais, São Paulo, 1999, pp. 46–55; Márcio Flávio Mafra Leal, Açoes Coletivas: História, Teoria e Prática, Ed. Sergio Fabris, Porto Alegre, 1999, pp. 187–200.

structural issues underlying individual cases. They also may bring essential analysis, expert opinions and evidences to a case.

In that regard, the importance of NGO interventions, in particular through the submission of amicus briefs and similar third party interventions, is reflected in a large number of emblematic cases of ESC rights adjudication. Such amicus briefs may provide domestic courts with useful comparative and international law standards. At all levels, judicial and quasi-judicial bodies may benefit greatly from interventions of third parties and experts so as to integrate an "ESC rights perspective" from the start of a legal action. [147]

2. Other procedural challenges

Aside from the question of who may have standing to bring an action, significant political and material challenges often render ESC rights litigation problematic or vain. Practitioners ought to keep them in mind to overcome them or mitigate their impact. Even if, as will be discussed in Chapter 4, section III, a significant share of litigation of ESC rights involves two private parties, the adjudication of ESC rights as of any human rights intrinsically and essentially involves aggrieved individuals and the State or public authorities. This poses a number of issues that include:

[147] There are a large amount of cases in which third party interventions have played an important role. The ESCR-Net case-law database, accessible at http://www.escr-net.org/caselaw/, offers under most case pages links to amicus briefs and interventions. The intervention of the ICJ through the submission of an amicus brief to the Court for the Protection of Children and Adolescents and for Adolescents in conflict with criminal law, Department of Zacapa, Guatemala, in the Cases No.19003-2011-00638-Of.1a; No. 19003-2011-00639-Of.2a; No. 19003-2011-00637-Of.3a; No. 19003-2011-00641-Of.1 (2013) provides an illustration of this importance. The amicus brief has significantly contributed to ensure that the juvenile court interprets the child protection legislation in compliance with provisions of the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights and to achieve the structural remedy needed. For more information, see the ICJ statement on the cases and its amicus brief at*:* http://www.icj.org/guatemala-condenado-por-violaciones-a-derechos-economicos-sociales-y-culturales/

- The potential for "politicization" of the issues under consideration. (Questions involving trade unions and labour rights for instance are often considered more political than purely legal);
- The power imbalance between the parties in the case (in many countries, this already existing imbalance can be aggravated by procedural advantages granted to the State and thus seriously infringe the principles of fair trial and equality of arms);[148]
- The possible deference of the judiciary towards decisions, omissions and actions of the executive and the legislative, striking the balance between the need to guarantee the right to effective remedies and the separation of powers.
- The difficulties in enforcing judgements on remedies, including injunctions and orders against the State and governmental power at various levels.[149]

Considering these challenges, it is important to recall that the independence of the judiciary is a fundamental element of the Rule of Law and a prerequisite to the effective protection of human rights. Safeguards in favour of the respect and promotion of the independence of the judiciary must be guaranteed.[150] In particular, the provisions around expertise, selection and immovability of judges, especially of the highest jurisdictions, may influence their ability to take decisions against the State' s acts or omissions and to order systemic remedies.

A number of cases in the world show how important an independent well-equipped judiciary is for the protection of human rights in general and for the protection of ESC rights in particular. As mentioned in the preceding section on standing, and taking into consideration the risk of inequality of arms between

[148] *ICJ Justiciability Study*, p. 94.
[149] For a more detailed discussion on the issue of remedies and enforcement of decisions in the area of ESC rights, see Chapter 6 of the present Guide.
[150] See Basic Principles on the Independence of the Judiciary, United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

the rights-holders alleging violations of their rights in a process against the State, procedural law has started to allow for greater judicial scrutiny and to take into account the vulnerability and weaker position of victims of violations of human rights, especially of people living in poverty who are particularly affected by these violations. For instance, the *acción de tutella* in Colombia is designed to respond to this reality and to give a proactive role to judges to act *suo motu* leaving the judge the possibility to transform a simple denunciation of facts, without a specification of the rights provisions breached, into full-fletched constitutional petitions.

However, whatever the procedural setting of a particular country may be, judges have acted in the "interest of justice" to proactively protect rights. One of many examples is a case decided by the High Court of Fiji concerning the right to food of a prisoner, which is described in Chapter 4.[151] In this case, the Court decided to go beyond the party's argument and take a proactive stance to defend rights' provisions that were not raised by the aggrieved party. In its decision, the Court said that it would: "disregard the appellant's concession because he is not in a position, for good reason, to appreciate the constitutional issues which involve sections 25 and 28 of the constitution. These matters require some attention in the interests of justice."[152] In certain instances, courts that have been very active in their treatment of questions on ESC rights have come under political challenged and criticism from the government. The Hungarian Constitutional Court for example, which had a record of proactive conduct, was criticized by some commentators for being engaged in "socialism redivivus". This also caused the government to appoint new judges, who were sympathetic to the Prime Minister Viktor Orbán, in 1998.[153] Likewise, the judicial efforts of the Constitutional Court of Colombia in the effective protection of the constitutionally guar-

[151] See Chapter 4, section II of the present Guide.
[152] *Rarasea v. The State,* High Court of Fiji, criminal appeal no. HAA0027 (2000), para. 3.
[153] See Malcolm Langford, "Hungary: Social Rights or marked Redivivus?", in Malcolm Langford, *Social Rights Jurisprudence; Emerging Trends in International and Comparative Law,* Cambridge University Press, Cambridge, 2008, p. 265.

anteed ESC rights was criticized as having violated the principle of separation of powers by ordering the realization of public policies and allocation of resources.[154]

a) Material accessibility of judicial and quasi-judicial bodies

There is a rich literature concerning the issue of material accessibility to judicial and quasi-judicial bodies and the justice system for victims of violations of human rights, either in general or in the context of specific domestic systems.[155] In fact, the lack of financial resources is frequently an obstacle to access to justice by victims of violations of human rights globally. This obstacle is generally even more severe in the area of ESC rights because:

- Victims of violations of ESC rights often belong to the most marginalized and disadvantaged sectors of society;
- Due to the content of these rights, the impact of their violations may place victims in a difficult, or even desperate, economic situation;
- Legal aid schemes often have limitations that exclude civil law and constitutional law matters from their coverage to focus on criminal law matters;
- Even where legal aid schemes are relatively comprehensive, the costs of taking a legal action are not only constituted by the costs of legal representation and le-

[154] See Magdalena Sepúlveda, "Colombia: The Constitutional Court's Role in Addressing Social Injustice", in Malcolm Langford, *Social Rights Jurisprudence; Emerging Trends in International and Comparative Law,* Cambridge University Press, Cambridge, 2008, p. 160.

[155] On the general material obstacles to access to justice for ESC rights, see United Nations Secretary General Report on the question of the realization in all countries of economic, social and cultural rights (2013), UN Doc. A/HRC/25/31, paras. 16-24. On the specific situations in El Salvador and Morocco, see ICJ Studies on Access to Justice for social rights, available respectively in French and Spanish at: http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/, and http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/

> gal fees, but they may include the overall expenses that victims have to cover in the use of the justice system, such as transportation, gathering of authenticated documents, loss of income due to absence from work. Victims may especially be reluctant to incur these expenses when they lack trust in the system to obtain redress.

In this regard, two remarks can be made concerning the involvement of domestic legal practitioners in the institution and promotion of legal aid. First, the importance of legal aid for rights protection has been largely recognized even in countries with limited resources. In fact, legal aid has been integrated in the realm of actions and projects that can benefit from support in the context of international cooperation and assistance. The latter is explicitly recognized as a fundamental element for the realization of ESC rights in the same article of the ICESCR that implies States to provide for effective remedies in cases of violations.[156] The initiative for an ambitious legal aid scheme launched in 2011 in Botswana provides a positive example of collaboration between the State, through the Attorney General Chambers, the law society and private lawyers, civil society organizations in general, and international donors.[157]
In addition to pro bono work of private lawyers, ESC rights litigants have sometimes relied on the support of a growing

[156] Article 2(1) of the ICESCR. See also Chapter 2, section II. 1. of this Guide.
[157] For an analysis of the pilot project of Legal Aid Bostwana, see ICJ Study, *Women's Access to Justice in Botswana: Identifying the Obstacles & Need for Change*, (2013), pp. 38 and 39: "The first legal aid system in Botswana, which was established following a pilot project launched in 2011-2012, guarantees qualified individuals representation in criminal matters before the High Court and Court of Appeal. It also extends to Magistrates Courts where specifically authorized by the Interim legal Aid Coordinator. It also explicitly entitles qualified individuals to legal representation in civil claims concerning divorce, child custody, maintenance and protection from domestic violence. Legal representation in other matters, such as claims related to constitutional rights or discrimination, may be provided upon authorization on a case-by-case basis by the Interim legal Aid Coordinator." The study is accessible at: http://www.icj.org/meaningful-action-needed-to-advance-womens-access-to-justice-in-botswana/

number of law clinics at universities who can play a quite significant role in preparing and accompanying litigation.[158]

Other judicial and quasi-judicial bodies have protected procedural rights and taken into consideration the weaker position of the rights-holders as parties in a case, as the case described below and decided by the Russian Constitutional Court shows.

	Holding N. 1320 –O-O of the Constitutional Court of the Russian Federation (*Red Star Consulting LLC v. former employee*)
Year:	2009 (Date of Decision: 13 October, 2009)
Forum, Country:	Constitutional Court; Russia
Standards, Rights:	Procedural fairness and due process; Non-discrimination and equal protection of the law; Right to decent work
Summary Background:	The case raised the issue of the constitutionality of article 393 of the Labor Code of the Russian Federation, prescribing the exemption of employees from the payment of legal expenses in labor litigation. In January 2009 the plaintiff, "Red Star Consulting" LLC, sued a former employee in a District Court of Archangelsk in an attempt to recover a compensation for legal expenses, including power of attorney and the attorney's legal services, arising from a labor dispute between the two parties. The Court ruled against "Red Star Consulting" LLC, while

[158] For a non-exhaustive list and contact details of law clinics at university offering support in preparing and accompanying litigation see Toolbox in annex 2 of this Guide.

in part upholding the claims of the employee. The regional Appeals Court of Archangelsk upheld the decision without changes. "Red Start Consulting" subsequently filed an application to the Constitutional Court, alleging that article 393 of the Labor Code violated the Russian Constitution, particularly article 19, paragraph 1, which prescribes the principle of equality before the law in court. The petitioner also alleged that there was no precedent in Russia, by a general jurisdiction court, on the issue of applicability of article 393 of the Labor Code to civil litigation.

Holding: The Constitutional Court rejected the claims of the petitioner and declared its application inadmissible [para. 2.1].
In its reasoning, the Court stated that the right to judicial protection belongs to the fundamental and inalienable human rights and freedoms and, at the same time, constitutes a guarantee for the enjoyment of all other rights and freedoms [para. 2.3].

The provisions of article 37 of the Russian Constitution, prescribe freedom of the employment agreement, as well as the right of the employee and of the employer to resolve, upon mutual agreement, questions arising from the institution, subsequent change and termination of labour relations. They also determine the obligation of the government to ensure the appropriate protection of the rights and legal interests of the employee as the economically weakest part within the labour relation. The Court underlines that this is consistent with the fundamental goals of the legal regulation of labour within the Russian Federation as a social state of law (article 1 part 1, article 2 and article 7 of the Constitution).

Accordingly, the lawmaker shall consider not only the economic dependence of the employee upon the employer, but also the organizational dependence of the latter upon the former. Therefore, the lawmaker shall establish procedural safeguards for the protection of the labour rights of employees when considering labour litigation in court, in the absence of which (i.e. procedural safeguards) the "realization" of the employee and, consequentially, of the right to fair trial, would remain unaccomplished.
Among such procedural guarantees the Court mentions: the possibility to address the court of a trade union or a counsel defending the rights of employees (article 391 of the Labour Code of the Russian Federation), the assignment of the burden of proof on the employer (for example, in the cases foreseen by article 247 of the Labour Code or in litigation on the rehiring of personnel, whose labour agreement has been breached on the initiative of the employer), and the exemption of the employee from the payment of legal expenses (article 393 of the Labour Code) [para. 2.5].

The Court concludes by emphasizing that the rule of exempting the employee from legal expenses upon the adjudication of labour disputes aims at ensuring his right to legal protection, in order to provide him with an equal access to justice and to respect the principle of equality, embedded in article 19(1) of the Constitution of the Russian Federation [para. 2.6].

For all the above-mentioned reasons, the Court held the application by "Red Star Consulting" inadmissible.

Link to Full Case:	http://www.ksrf.ru/ru/Decision/Pages/default.aspx

b) Important institutional actors in litigation and in ensuring victims' access to justice

In many countries, Ombudspersons and national human rights institutions can play a key role in facilitating access to justice for victims of violations of ESC rights. It is of course necessary that these institutions benefit from the necessary material and human capacities, as well as the necessary independence.[159] Due to their nature and functions, these institutions often offer support to individuals alleging violations of their rights by public authorities and can help them to take legal actions. As shown in the following, not only may they offer within their own mandates effective complaint mechanisms, they can engage directly in litigation. In this regard, they fulfil similar functions to these of Special Procedures and Independent Experts of the international and regional human rights system, that include monitoring general implementation of and compliance with human rights obligations, training of duty-bearers and rights-holders, as well as addressing specific cases of alleged violations of human rights including ESC rights.

> Practitioners may engage more systematically and actively with these institutions as relevant in their national contexts.

i) Ombudspersons

In many civil law countries, such as in countries of French law tradition with a separate administrative law pillar, the institu-

[159] National Human Rights Institutions need to comply with the Principles relating to the Status of National Institutions (The Paris Principles), UN Doc. A/RES/48/134 (1993).

tion of the *Médiateur* is an instrumental interface between public service users and the administration.[160]
For instance, the *Médiateur* in Morocco receives and addresses complaints of individuals in relation to relevant issues for ESC rights such as in matters of public housing schemes, of the provision of public water services and of social security benefits of employees in the public sector. Besides his functions in the area of general policy recommendations and monitoring the *Médiateur* can offer mediation, advise alleged victims and refer cases to the competent judicial bodies.[161]

ii) National Human Rights Commissions

More generally, national human rights institutions, including human rights commissions, may play a significant and proactive role in the legal enforcement of ESC rights, especially when they comply with the Paris Principles.

In a manner similar to the Ombudspersons, national human rights commissions, depending on their specific mandates, may have a range of possibilities to address and contribute to redress violations of ESC rights. Thanks to their policy monitoring and advisory prerogatives of human rights issues in their country, they can draw attention to potential and occurring systemic violations of ESC rights and contribute to prevent them. In many instances, they can furthermore take an active share in bringing cases to courts.

[160] Equivalents to the Médiateur in other countries who also have the mandate to handle complaints of maladministration, conduct investigations, rectify any act or omission in administrative conduct through mediation, conciliation or negotiation, or advise on appropriate remedies, include for example, the Public Prosecutor in South Africa, the Ombudsman in Gambia, the National Ombudsman in Namibia, the Federal Ombudsman (Wafaqi Mohtasib) and Provincial Ombudsmen in Pakistan, the Ombudsmen in Thailand, the Commonwealth Ombudsman in Australia, and the Parliamentary Ombudsman in Norway.
[161] See the ICJ study on Access to Justice for social rights in Morocco (2013), pp. 46 and 47, available in French at: http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/

An example of this function is given by the so-called *Bhe* case decided by the Supreme Court of South Africa in 2005.[162] In this emblematic case, the Constitutional Chamber found certain provisions, drawn from customary law, concerning inheritance discriminatory against women and extra-marital children unconstitutional and invalid because they contradicted the equality provisions of the Constitution. In this case, the South African Human Rights Commission joined as a party and actively contributed to achieve the systemic remedy and structural impact leading to a change in inheritance law that followed the decision.

3. Issues around the rules of evidence

Another procedural challenge of fundamental importance in ESC rights litigation concerns the production of factual information that may be used as evidence to sustain a claim.

ESC rights litigation will, as described in greater depth in Chapter 5, involve fulfilling the evidentiary requirement of the various standards and technics of the judicial scrutiny that judicial and quasi-judicial bodies can and have applied. As highlighted in II.2, a certain imbalance is likely to occur when an individual, or a group of individuals, seeks to complain against a wrong-doing by the State and its authorities, which are likely to have greater access to certain information.

Excerpt from ICJ Justiciability Study
The ICJ Justiciability Study addresses some of these issues:

[162] *Bhe and Others v. Magistrate, Khayelitsha and Others; Shibi v. Sithole and Others; SA Human Rights Commission and Another v. President of the RSA and Another*, Supreme Court of South Africa, Decision 2005 (1) SA 580 (CC) (2005).

- *The State in civil law systems can often have procedural advantages over private individuals. For example, the State has more time to respond to pleadings, it can bring its own administrative dossier as proof, and it has privileges that individuals do not have. Judgements against the State ordering the fulfilment of its positive obligations are often merely declaratory, do not come with sufficient procedural safeguards and are regularly difficult to enforce, especially if they require structural reforms or long-term implementation. This may also raise problems of compliance and implementation: judgements that impose duties on the State may be postponed or subjected to merely cosmetic compliance.*
- *The last issue to be addressed is the difficulty of executing orders against the State and, generally, the particular position of the State before domestic courts. In the continental administrative tradition there are certain procedural advantages for the State, which would be considered unjust in private suits. While some of these advantages can be justified, in many other cases complete discretion, lack of impartiality, breach of the "equality of arms" principle and other features could be considered violations of due process, and may also require legislative reform and jurisprudential development.[163] Cases involving judicial review of the legal pro-*

[163] The subjugation of administrative action to the rule of law and to the requirements of due process – which, in turn, offers a basis for judicial review – has also been an early and longstanding concern of the International Commission of Jurists. As early as 1959, a Congress of the ICJ pointed out that:
"Since [judicial] supervision [of administrative action] cannot always amount to a full re-examination of the facts, it is essential that the procedure of such ad hoc [administrative] tribunals and agencies should ensure the fundamentals of fair hearing including the right to be heard, if possible, in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgements. Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel…. Irrespective of the availability of judicial review to correct illegal action by the executive after it has occurred, it is generally desirable to institute appropriate antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make presentations so as to minimize the likelihood of unlawful or unreasonable executive action…. It will further the Rule of Law if the executive is required to formulate its reasons

> *cedures established to grant, adjust or terminate labour rights, pensions, social security benefits and other ESC rights are not uncommon and have been the subject of litigation before international human rights bodies.*[164]

With a view to addressing some of these imbalances, it is important to give due attention to the right to information, provided, among other sources, under article 19 of the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights.[165] In various domestic legal frameworks, the right to information has evolved to include not only the right to exchange and diffuse information as part of the right of freedom of expression, but also to access and receive information from public authorities.[166] The right to infor-

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when reaching its decisions of a judicial or administrative character and effecting the rights of individuals and the request of a party concerned to communicate to him".
See International Commission of Jurists, "Need for and limitations of effective governmental powers", adopted at the Congress of Delhi (1959), Committee II, in International Commission of Jurists, The Rule of Law and Human Rights: Principles and Definitions (1966), Geneva, pp. 12 and 13. See also "Human rights and aspects of administrative law", and "Procedures utilized by administrative agencies and executive officials", adopted in the Congress of Rio (1962), *Ibid.*, pp. 19-22.

[164] See, for example, *Baena v. Panama*, Inter-American Court of Human Rights (2001), paras. 124, 126 and 127, where the Court considered the right to a fair trial to be applicable to an administrative procedure for dismissal of trade union workers; *5 Pensioners v. Peru* (2003), paras. 116 and 135, where the Court granted judicial review in a case dealing with administrative measures reducing pensions; Inter-American Commission on Human Rights, Report 03/01; case of *Amílcar Menéndez, Juan Manuel Caride, et al. (Social Security System) v. Argentina*, Admissibility Report, case 11.670 (2001), where the Commission considered that a complaint based on the alleged violation of procedural rights in the area of social security pensions was admissible. The case ended with an amicable settlement.

[165] The right is an essential element of the right to freedom of expression. Paragraph 2 of article 19 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), UN Doc. A/6316 affirms that: "Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive and impart information** and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." (emphasis added).

[166] See for instance, Tshwane Principles, Global Principles on National Security and the Right to Information (2013), available at:

mation can prove crucial to rights-holders and practitioners who need to access key administrative documents. The Right to Information Act in India and the huge campaign conducted by Indian civil society to obtain the adoption of this Act is illustrative of the strategic importance of transparency and accountability for the compliance with human rights.

Not all ESC rights cases will have a high degree of complexity and be challenging in terms of the production of evidences. However, the evidentiary challenges will particularly arise in complex cases and/or those raising structural issues of failing public policies, demanding systemic remedies. For instance, cases in which the exploration and exploitation of resources is claimed to represent a threat to the enjoyment or a violation of the rights to housing, water or food, victims of the threat or violations will usually have to produce alternative impact assessments, expert reports on environmental impact, medical forensic evidence of the impact of certain pollutants on human health or the changes in the ecosystem upon which these individuals rely for their livelihoods. This poses a broader issue of establishing the causality link between an act or omission and the harm caused to an alleged victim,[167] which is not exclusive to ESC rights litigation per se but to litigation in a whole range of areas.

a) ESC rights litigation and the burden of proof

One consequence of the information imbalance is that in certain instances, procedural fairness may require a shift in the burden of proof. Generally, in non-criminal matters, a com-

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http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles. Principle 1 states that: "Everyone has the right to seek, receive, use, and impart information held by or on behalf of public authorities, or to which public authorities are entitled by law to have access." And Principle 10 "Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure" establishes that: "Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy."

[167] The problem of establishing the causality link is also posed notably in cases of occupational health for instance.

plainant bears the burden of proof to establish the legal elements of a case. However, in certain instances, the burden may be reversed. In some ESC rights litigation the onus may be on the State to prove that its acts and omissions have not contributed to the violation and/or that the measures of the absence thereof are reasonable or proportionate to the goal pursued.

For example, this reversal of the burden of proof is explicitly required by the CESCR in cases of retrogressive measures and of the failure to meet the minimum core obligations to ensure a minimum core content of each right, which are *prima facie* violations of the ICESCR. In General Comment 3, the Committee affirms:

"… 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….In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[168]

In addition, the European Court of Human Rights in a case dealing with indirect discrimination of Roma students in the Czech Republic,[169] established that in instances of indirect discrimination, i.e. those involving apparently neutral norms that nonetheless have disproportionate negative impacts on certain groups, the burden of proof should be shifted and the rules of evidence less strict. The Court, acknowledging the difficulties

[168] Committee on Economic, Social and Cultural Rights, General Comment No. 3, contained in UN Doc. E/1991/23 (1990), paras. 9 and 10.

[169] *D.H. and others v. the Czech republic*, European Court of Human Rights, Application No. 57325/00, Grand Chamber Judgement, 2007. The case was brought by a group of Roma students alleging that themselves specifically and Roma children from across the Ostrava region in the Czech Republic more generally were overwhelmingly placed in special schools for children with learning difficulties and provided inferior education on racial grounds rather than based on their intellectual capacity.

of victims to prove indirect discrimination, recognized the need to accept a variety of means, including through the provision of statistical evidence. Reliable and significant statistical data can thus constitute *prima facie* evidence in such cases and the onus is on the State to prove that there is no indirect discrimination.[170] The Court affirms: "Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory".[171]

Case law examples show how judicial and quasi-judicial bodies in the domestic context deal with this issue of the burden of proof, in positive and negative ways.

In the context of civil law, labour matters and conflicts in some jurisdictions illustrate some of the issues regarding the burden of proof and some of the procedural issues that can represent significant obstacles for victims of violations of ESC rights to seek redress before courts or administrative bodies. A specific example concerns sexual harassment at the work place, for which victims may face insuperable hurdles in providing evidence. In these cases, a victim's colleagues may be unwilling to testify and some evidence may not be permitted, such as recordings of the person accused of the harassment, without the person's consent.

Although in some jurisdictions, labour law and procedures recognized the weaker position of the workers, this is not universally the case and it does not always translate into the necessary procedural arrangements regarding the rules of evidence. For instance, the Supreme Court of Morocco established, in a decision of 2009, that the burden to prove a failure to pay the legal minimum wage is on the worker.[172]

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[170] *D.H. and others v. the Czech Republic*, European Court of Human Rights, Application No. 57325/00, Grand Chamber Judgement, 2007, paras. 186-188.
[171] *Ibid.*, para. 189.
[172] Social Chamber, Moroccan Cour de cassation, Decision 697/5/1/2008-2654 (2009).

b) Establishing violations in cases with resource implications

An alleged lack of State resources no doubt constitutes another area in ESC rights litigation giving rise to difficulties in establishing a case. Many ESC rights cases in which there are alleged breaches of positive obligations requiring availability of resources primarily but not exclusively involve the obligation to fulfil.[173] In many cases that have important financial implications, the State often argues a lack of resources and the impossibility to remedy violations without putting an unacceptable burden on the national or local budget.

In some cases, judicial and quasi-judicial bodies will be reluctant to contradict the argument of the State. An example of this is provided by a case decided by the Supreme Court of Morocco concerning the right to health. Although the administrative courts condemned the failure of the authorities to provide free life-saving treatment to a patient, the Supreme Court reversed the decisions on the ground that the lower courts should have taken into consideration the resource implications of such decisions.[174]

However, other jurisdictions have showed more willingness to review cases even if the remedy required has important budgetary implications. Several examples of this are provided by the rich jurisprudence from the South African Supreme Court. The *Blue Moonlight Properties* case constitutes one such instance.[175]

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[173] See Chapter 2, section III. 1. b).

[174] See Chapter 4, section V of the present Guide: Moroccan Cour de Cassation, Decision 59/4/2/2009-28 (2010). The Supreme Court declared that the lower courts should not have found any State responsibility, for the death of the patient because of the failure to provide the treatment, without having duly assessed the means the State has at its disposal. The Supreme Court rejected any State responsibility because of the exceptional effort that the latter would have had to produce, which would have exceeded its capacities.

[175] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another*, Constitutional Court of South Africa, Case CCT 37/11 [2011] ZACC 33.

	City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another, CCT 37/11 [2011] ZACC 33
Year:	2011 (Date of Decision: 1 December, 2011)
Forum, Country:	Constitutional Court; South Africa
Standards, Rights:	Reasonableness; Right to adequate housing
Summary Background:	The case raised the issue of occupiers of 7 Saratoga Avenue - a community of 86 poor people living in a disused industrial property in Berea, Johannesburg. In 2006, they were sued for eviction by the owner of the property. The question submitted for the decision of the court was whether the occupiers must be evicted to allow the owner to exercise their rights regarding the property and, if so, whether their eviction gave rise to the obligation of the City to provide them with accommodation, even if they were evicted from a private estate and not from public land. In the case, the question of the resources of the City was also raised.
Holding:	The Court accordingly upheld the order of the Supreme Court of Appeal [SCA] by ordering the eviction of the occupiers 14 days after the City was ordered to provide those occupiers who were in need with temporary accommodation. This was to ensure that they would not be rendered homeless because of the eviction. The Court found that the City had a "duty to plan and budget proactively for situations like that of the Occupiers" [para. 67] and that its lack of resources was the product of its incorrect understanding of the relevant legislation.

	Furthermore, the Court upheld the finding of the SCA that the City was not able to show that it was incapable of meeting the needs of the Occupiers. The Court further stated that "[t]he City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations" [para. 74].
Additional Comments:	The Occupiers submitted that 'it would not be just and equitable to grant an eviction order, if the order would result in homelessness' [para. 32]. As for the City, it contended that the eviction was sought at the instance of the owner of the property, and noted that it cannot be "held responsible for providing accommodation to all people who are evicted by private landowners" [para. 32].
Link to Full Case:	http://www.saflii.org/za/cases/ZACC/2011/33.html

In September 2013, the Supreme Court of Appeal of South Africa strongly affirmed that the State had the onus of proving the impossibility to redress a violation because of lack of resources. In the *Baphiring Community & Ors v. Tshwaranani*

Projects CC & Ors case,[176] the Supreme Court of Appeal had to review a dispute over a land claim under the Restitution of Land Rights Act 22 of 1994. A central issue of the appeal focused on the feasibility of the restoration of land to a community that had suffered land deprivation during the *apartheid* era, and on the evidence brought by the State allowing the court to make an assessment of the feasibility of specific land restoration, as opposed to granting alternative State land or compensation. The Court found the evidence brought by the State to support the non-feasibility of restoring the land absent or inadequate.
The Court in particular reproached the State for not having conducted a feasibility study. On the grounds of appealing the decision of the lower court order of non-restoration, the Supreme Court of Appeal considered that "the failure to call for such evidence constituted a material irregularity and vitiates the order of non-restoration." It further stated that: "[the court's assessment of feasibility] does not mean that a court will second guess an assertion by the state that it is unable to fund the cost of the restoration. But it does mean that it will be required to place credible evidence before the court to justify this assertion."[177]

c) Useful tools and allies in producing evidence

In the light of the challenges mentioned above, it is clear that ESC rights adjudication can greatly benefit from relying on third party expertise including of national human rights institutions and NGOs. The latter may, for instance, conduct regular monitoring of public policies and budget analysis, which can be useful to assess the availability of resources among other issues.

In that regard, it is important to note that the Optional Protocol to the ICESCR adopts the standard of "reasonableness" that had been established by the South African Supreme Court

[176] *The Baphiring Community v. Tshwaranani Projects CC,* Supreme Court of Appeal of South Africa, Case 806/12 [2013], ZASCA 99 (2013).
[177] *The Baphiring Community v. Tshwaranani Projects CC,* Supreme Court of Appeal of South Africa, Case 806/12 [2013], ZASCA 99 (2013), para. 22.

when having to review breaches of obligations in the field of ESC rights. This will be the standard applied by the CESCR when it reviews State compliance in individual cases. Therefore, significant means will also be required to prove non-compliance with conventional rights and obligations.

As far as documentary evidence is concerned, useful resources include the information provided in monitoring documents that are available for the periodic review of treaty-bodies of the implementation of the various human rights treaties, as well as other United Nations resources such as those available from specialized agencies.[178]

The analysis emerging from human-rights based monitoring and the use of human rights indicators can help lawyers, judges and quasi-judicial bodies, such as the UN CESCR, to assess the reasonableness of progress in the realization of ESC rights and the use of the maximum available resources as required by the ICESCR.

Finally, it is important to take note of the developments in the area of human-rights impact assessments that States and businesses are increasingly called under international law to conduct prior to investment, the conclusion of new agreements and/or the initialization of development projects.[179] In particular, States have often been advised to conduct human rights impact assessments in the area of trade and investment.[180] In

[178] For more details see Toolbox in annex 2.

[179] See Guiding principles on human rights impact assessments of trade and investment agreements, in United Nations Special Rapporteur on the right to food, O. de Schutter, Addendum to Report, UN Doc. A/HRC/19/59/Add.5 (2011); see also Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (2011). These sector-specific guidelines on human rights impact assessments provide some elements that could contribute to the consolidation of an effective devise to map out risks on ESC rights and their relationship with States obligations under the ICESCR.

[180] See Committee on Economic, Social and Cultural Rights, Concluding observations on Ecuador, UN Doc. E/C.12/1/Add.100 (2004), para. 56; Committee on the Rights of the Child, Concluding observations on El Salvador, UN Doc. CRC/C/15/Add.232 (2004), para. 48; Committee on the Elimination of Discrimination against Women, Concluding observations on Colombia, UN Doc.

addition, the Committee on the Rights of the Child has provided an explicit statement of the general requirement of impact assessments including in the design of the development policies.[181] The assessments may represent useful documentary evidence for litigators.

CEDAW/C/COL/CO/6 (2007), para. 29; Committee on the Elimination of Discrimination against Women, Concluding observations on the Philippines, UN Doc. CEDAW/C/PHI/CO/6 (2006), para. 26; and Committee on the Elimination of Discrimination against Women, Concluding observations on Guatemala, UN Doc. CEDAW/C/GUA/CO/6 (2006), para. 32; see also United Nations Special Rapporteur on the right to food, O. de Schutter, Report on his mission to the World Trade Organization, UN Doc. A/HRC/10/5/Add.2 (2009), paras. 37 and 38.

[181] Committee on the Rights of the Child, General Comment No.5, General Measures of Implementation for the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (2003), para. 45. See also Committee on the Rights of the Child, General Comment No.16, State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (2013), paras. 78-81.

Chapter 4: Beyond constitutional remedies - Exploring various jurisdictions

I. Introduction

The focus of the present Guide is adjudication of ESC rights at the domestic level, supported by examples from regional and international judicial and quasi-judicial bodies. Undoubtedly, in cases of violations of ESC rights, the notionally preferable avenue for exercising the internationally guaranteed right to a remedy is through legal means that are constitutionally grounded.[182] However, taking into account that the constitutional guarantee of ESC rights remains limited or non-existent in many national constitutions, and that constitutional justice may not be easily accessible to rights-holders everywhere, it is worthwhile to explore other avenues for justice.[183] Adopting this pragmatic approach, the present chapter explores access to justice through various jurisdictions and bodies of law. These may be more accessible and, in specific instances, more effective to bring victims a timely, even if only partial, redress.

Civil courts and even administrative bodies often contribute to constitutional review and protection of ESC rights through the domestic specific procedures enabling referral of questions to higher/constitutional.[184] Many claims that are relevant for ESC rights and even emblematic decisions are initiated as civil and administrative matters, as shown below.

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[182] See Chapter 2, section II. 2.

[183] As a possible model of base line study and assessment of domestic remedies and avenues to seek justice and redress see the ICJ Access to Justice studies on Access to Justice for social rights in Morocco accessible (in French and Arabic) at: http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/and on Access to Justice for social rights in El Salvador accessible (in Spanish) at: http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/

[184] See, for example, *Giudizio di legittimità costituzionale in via incidentale* in Italy (article 134 of the Italian Constitution); *Questions prioritaires de constitutionalité* in France (article 61-1 of the French Constitution); *Exception d'inconstitutionalité* (article 133 of the Constitution of Morocco).

II. Constitutional actions

Constitutional courts and bodies performing the review of constitutionality and/or the compliance with international conventions of national laws and administrative regulations and official conduct, remain the main forum for rights claims. For this reason, a separate Chapter 5 of the Guide is dedicated to certain standards and techniques that judicial and quasi-judicial bodies have developed and used to adjudicate ESC rights claims.

In general, because they are the guardians of the Constitution and control the compliance of other authorities or actors with these highest laws in the domestic hierarchy of norms, Constitutional courts and bodies are generally well placed within the judiciary to ensure enforcement of effective remedy and full reparation that include the guarantee of non-repetition. Their decisions are binding on lower jurisdictions and their orders can have far-reaching effects on the domestic legal and policy frameworks.

Constitutional remedies are therefore important because:

- They may expressly refer to human rights and freedoms as provided in the Constitution and/or international human rights law, including treaties;
- They may serve to provide the link between the domestic and international authorities as the last instance and as the interpretive body in matters of human rights;
- They may establish the basis for the most comprehensive scope of remedies and reparations and may be in a position to order the necessary legal reform to guarantee non-repetition of similar violations.

In fact, comparative experiences show that the constitutional guarantee of ESC rights, at least as they are provided for in international human rights instruments, is the most secure

scenario for an effective protection of these rights.[185] Such guarantees provide legal certainty and predictability to both those seeking justice and officials with a duty to provide it. The authority that derives from the decision of a constitutional court may also serve to insulate government decision makers from political factors and calculations that might otherwise lead to short term policy priorities that are to the detriment of safeguarding human rights.

Even where there are gaps in respect of the constitutional guarantee of ESC rights, constitutional courts and authorities have sometimes found ways to "read" such guarantees into other existing provisions, often those protecting civil and political rights. The latter are typically provided a greater range of guarantees and protections by domestic constitutions. Particularly given the intrinsic interdependence and interrelatedness of all human rights, civil and political rights offer important possibilities to protect ESC rights. The right to life, the right to privacy, the right to personal integrity, the right to equality before the law or to a fair trial, are among the rights that have served as a basis in the litigation of ESC rights including, among others, the right to health, to housing, and to food.

Of course, this protection through civil and political rights is not fully satisfactory. Using civil and political rights guarantees as a means to protect ESC rights will only be effective where and to the extent there is overlap between the sets of rights. Such protections will therefore necessarily remain only partial. In addition, while judiciaries can and should be robust in protecting rights, it is not consistent with the judicial function to elasticize their interpretation of the scope of rights beyond breaking point. Judiciaries may hold themselves open to reproach for infringing on prerogatives of executive and legislative branches. Courts should not have the primary responsibil-

[185] For an overview of the constitutional guarantee of ESC rights, please refer to the information paper of the United Nations Food and Agriculture Organization on the "Recognition of the right to food at the national level", accessible at: http://www.fao.org/docrep/meeting/007/j0574e.htm#P1060_44517. See also the analysis of the importance of the constitutional guarantee of ESC rights in the specific cases of El Salvador and Morocco in the ICJ studies on access to justice mentioned above, *supra* note 183.

ity of filling in normative gaps and failures of other branches of government in respect of international human rights obligations.

The ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*), should be consulted, as it dedicates a chapter to the indirect protection of ESC rights through civil and political rights.[186] Additionally, in Chapter 5, the present publication will make reference to cases adopting various categories of techniques and standards of judicial review in which civil and political rights have been invoked to protect ESC rights.

A few exemplary cases are highlighted below where judicial and quasi-judicial bodies in several jurisdictions have developed a broader interpretation of some of the fundamental rights and freedoms enshrined in their constitutions that are more classically defined as civil and political rights.

By way of example, courts of highest jurisdiction in India and Colombia have interpreted the right to life as entailing normative content beyond the narrow understanding of a protection against arbitrary deprivation of life. Using the concept of life in "dignity", these courts have protected the right to health, to housing, to food or to education under the constitutionally guaranteed right to life.[187]
The Indian Supreme Court is well-known for its proactive standpoint in protecting ESC rights through an interpretation of the right to life as entailing not only protection against such

[186] ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], pp. 65-72.
[187] Under article 21 of the Indian constitution providing for the protection of life, the Indian Supreme Court has protected *inter alia* the right to education such as in *Mohini Jain v. State of Karnataka*, Supreme Court of India, Writ petition No. 456 (1991); or the right to housing such as in *Olga Tellis v. Bombay Municipal Corporation*, Supreme Court of India, Decision 3 SCC 545 (1985); The Colombian Constitutional Court has linked the protection of the right to health to the right to life in a series of decisions, such as in cases T-974/10 (2010) or T-841 (2011) summarized in Chapter 5, section II. 2. of this Guide.

practices as unlawful killings, but also as entailing elements such as access to health, food, education and housing, which provide for a dignified life that should be guaranteed to every human being.

One of these emblematic cases is *Paschim Banga Khet Mazdoor Samity & Ors v. State of West Bengal & Anor* (1996).[188] In its judgement, the Supreme Court of India found a violation of the right to life under article 21 of the Constitution because of the failure of government hospitals to provide emergency health care to the petitioner, who had fallen off a train and suffered serious head injuries. The petitioner was denied emergency medical treatment at a series of public health facilities on the grounds that they lacked capacity to attend to his needs for care, either because of the lack of adequate services or the lack of vacant beds. An important aspect of the Court's judgement was the reparation it provided. The Court ordered compensation to redress the violation of the right to life suffered by the individual petitioner. In addition, the Court decided on a number of remedial measures to improve the functioning of the public health system with a view to prevent future repetitions of such violations of the right to life. The decision is not only important because it protects access to emergency health care, as an element necessary to the preservation of human life in a "welfare State", but also because it rejects the contention of the respondent public authorities that it could not act owing to a lack of resources to provide the necessary health facilities, services and goods for emergency care. The Court stated that: "It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done."[189]

Another strand of jurisprudence based on civil and political rights that protects important aspects of the normative content of ESC rights concerns the rights of persons deprived of their

[188] *Paschim Banga Khet Mazdoor Samity & Ors v. State of West Bengal & Anor.*, Supreme Court of India, Decision 4 SCC 37 (1996).
[189] *Ibid.*, para.16.

liberty, who are in a situation of increased dependency on the State to enjoy their rights. In various cases, judicial and quasi-judicial bodies have protected ESC rights of this category of rights-holders in the context of a review of the conditions of detention and/or the right to be free from torture or cruel, inhuman or degrading treatment or punishment, and more generally to physical integrity.[190] Based on global or regional human rights standards in relation to the treatment of persons deprived of liberty, a number of judicial and quasi-judicial bodies have clearly condemned infringements of ESC rights, including by indicating that conduct which would effectively violate such rights must not in any way be used as a punitive response to an offence or crime, or justified by the fact that a person is in detention.

The two following cases illustrate the indirect protection of the rights to food and health in this context.

Habeas corpus case – El Salvador

In a 2013 decision under the habeas corpus procedure,[191] the Constitutional Chamber of the Supreme Court of El Salvador admitted a habeas corpus writ petition of a claimant in detention suffering from diabetes and hypertension against the penitentiary administration. The claimant argued that the failure to provide him with adequate food and an appropriate diet violated his right to health and physical integrity. Although the Court rejected the detainee's petition on the grounds that medical evidence did not in fact support the claim, the case shows the willingness of the Court to consider the protection of ESC rights under habeas corpus procedures. The Court reviewed a range of international and regional human rights standards, by which the State through the penitentiary authorities is bound and should guarantee to any person in detention. In addition to the General Rules of the Penitentiary Law guaranteeing adequate

[190] Articles 7 and 10 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), UN Doc. A/6316 [hereafter ICCPR].

[191] *José Alberto Preza Hernández v. Director General de Centros Penales y la Directora de la Penitenciaría Central "La Esperanza"*, Constitutional Chamber of the Supreme Court of El Salvador, Decision HC 12-2012 (2012).

food to all detainees, including to those with specific dietary needs for health reasons,[192] the Court invoked the right to the highest attainable standard of health of persons in detention as implying obligation of the State to ensure the cooperation between the health care services of detention centres and the general health system.[193]

The Constitutional Chamber also reiterated the doctrine it has developed concerning the use of habeas corpus procedure to protect the dignity and integrity of persons in detention. In this context, it highlighted the central role of protecting the right to health of detainees and warned that a failure to guarantee such protection can unlawfully worsen the conditions of even a lawful detention.

In a case decided by the High Court of Fiji in May 2000,[194] the reduction of food rations as a form of punishment of a detainee was considered to be in violation of section 25 (1) of the Constitution that provides for the prohibition of torture and cruel, inhumane, degrading or disproportionately severe treatment or punishment. It also based its decision, among other factors, on article 10 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person, and makes reference to article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which identifies the right of everyone to be free from hunger.

Another way in which civil and political rights may provide indirectly for the protection of ESC rights, relates to the procedural aspects of the normative content of ESC rights and, more generally, rule of law principles. These include equality before the

[192] Article 286 of the Reglamento General de la Ley Penitenciaria.

[193] Principle X of the *Principles* and *Best Practices* on the *Protection* of *Persons Deprived* of *Liberty in the Americas,* approved by the Inter-American Commission on Human Rights on 13 March 2008. This principle affirms the obligation of the State to "ensure that the health services provided in places of deprivation of liberty operate in close coordination with the public health system so that public health policies and practices are also applied in places of deprivation of liberty."

[194] *Rarasea v. The State,* High Court of Fiji, criminal appeal no. HAA0027 (2000).

law and the principle of legality.[195] In this regard, the *ICJ Justiciability Study* provides a series of examples that practitioners may find useful.[196]

III. Civil courts and the relevance of private law for ESC rights

A wide range of situations that generate or constitute violations of ESC rights may be dealt with by civil courts. The relevance of civil law for ESC rights is manifold, reaching family law matters, labour and social security matters, conflicts between landlords and tenants, and the recovery of damages for victims of torts in cases of civil liabilities. In line with the general approach of this chapter, the issues considered below only intend to provide indicators for legal practitioners concerning the relevance of certain civil law matters and suits to the indirect or partial protection of ESC rights.

In general and in addition to the traditional areas mentioned above, private law has a growing significance for the protection of ESC rights[197] and their adjudication. This is because of the global trend towards privatization of basic services that used to be, essentially, in the hands of public authorities. These typically include health care, water and electricity procurement services, education and cultural institutions.[198]

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[195] See Chapter 5, section I of the present Guide.

[196] *ICJ Justiciability Study*, Chapter 3, pp. 54-64.

[197] See the work of the Committee of International Civil Litigation and the Interests of the Public International Law Association, Final Report of the Sofia Conference (2012), accessible at: http://www.ila-hq.org/en/committees/index.cfm/cid/1021. The legal practices and tools rising from national jurisdictions are currently a subject of doctrinal assessment with a view to develop best practices to address the private international law issues that often face national courts when they are confronted with international civil litigation for human rights violations.

[198] See, for instance, *Bayer Corp v. Union of India,* High Court of Delhi, Appeal Case LPA 443/2009 (2010). In this judgement concerning revisions of the Patent Act, the High Court considered the issue of the availability of essential medicine for all, and the protection of private patent rights at the cost of depriving access to affordable, life-saving treatments for public health interests. Even if not the point of law at stake in the case, the Court stated that: "There are other problems in accepting the submission of Bayer. If the patent holder in respect of a life saving drug decides only to seek marketing approval and

In this respect, the standards and mechanisms for the protection of consumers' rights constitute a field of increasing importance for practitioners involved in ESC rights adjudication.[199] There has been an important development of the normative framework surrounding the protection of the rights to information of and remedies available to consumers that can also be invoked by judges and lawyers in various areas such as water or energy prices and quality of service, food quality or drug safety. In some countries, consumer protection law offers an institutional and procedural framework that can be of great help in realizing ESC rights, preventing violations through the development of new protective standards and facilitating access to justice and remedies for victims of violations of these rights.

Consumer protection associations may be of generalist or specialized competency, such as those tasked with the protection of rights of tenants or of users of specific services. Each may contribute to overcome or mitigate the obstacles created by the lack of appropriate class action procedures in ESC rights cases. They may be able to represent multiple victims; to join or initiate civil or criminal proceedings to obtain remedies such as the award of damages for individual and collective grievanc-

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not manufacturing approval, it would mean that it will be importing into the country that drug which will consequently be priced very high. Accepting on the other hand, Bayer's contention would mean that the patent holder would be able to block off all generic manufacturers who might have been able to make the drug available in the market at affordable prices, subject of course to their being able to successfully resist injunctions in infringement suits instituted by the patent holder. If the patent holder does not apply for even a marketing approval, then the drug will be virtually unavailable in India till such time the patent holder decides it should be available" [para. 29].

[199] At the level of the United Nations, a set of Guidelines has been adopted and updated that lists rights of consumers, including the rights to information and redress. See United Nations Guidelines for Consumer Protection, original text adopted by the United Nations General Assembly in 1985, Resolution A/C.2/54/L.24, the 1999 revised version is accessible at: http://unctad.org/en/Docs/poditcclpm21.en.pdf. A new revision should be finalized in 2014.

es or to obtain the deletion of abusive clauses in standard contracts (for instance in housing and rent matters).[200]

In certain countries, the official institutional infrastructure for the protection of consumers offers flexible, accessible and swift responses to situations that constitute or can escalate to violations of ESC rights.[201]

1. Family law matters

Family law matters are inextricably linked to the enjoyment of ESC rights. For instance, issues of child maintenance and custody typically have an impact on the right to education, housing, food and health of the child concerned as well as the parent(s) caring for her or him.

Another example of this interlinkage concerns issues around access and control over property in cases of divorce or inheritance. Especially for women who in many countries still lack economic and financial agency, decisions of civil courts on these matters have a great importance for their ability to enjoy ESC rights such as the right to an adequate standard of living, the rights to adequate housing and food and the right to health. The problems around access and maintenance of control over property are particularly stark around ESC rights of women in rural areas, as such women are often highly dependent on secure land tenure to maintain their livelihoods and those of their dependent relatives.

In addition, cases that begin as civil cases often raise broader constitutional issues, such as the relevance and sometimes incompatibility of customary law with constitutional and interna-

[200] See Italian Law 1195-b of 1 July 2009, introducing the *azione collective* for consumers; the French Law 2014-344 on consumption of 17 March 2014, introducing collective action for consumers in civil suits. See also article 157 of the Moroccan Law 31-08/ Dahir No. 01.11.03 of 18 February 2011, giving consumers' associations the possibility to represent groups of consumers in civil suits.

[201] For information on the system of consumer protection in El Salvador that was created by the Peace Agreements and is particularly developed, see ICJ Study on Access to Justice in El Salvador, *supra* note 183, pp. 53-57.

tional human rights standards. Relevant case law includes *Bhe and Others* from South Africa, in which the Constitutional Court declared the African customary law rule of primogeniture unconstitutional since it discriminates unfairly against women and illegitimate children on the grounds of race, gender and birth. [202] Another interesting example can be found in a Beninese Constitutional Court decision from 2013 concerning the law establishing the code on private and state-owned land tenure, which was declared partially unconstitutional as it was contrary to the constitutional guarantees on equality of men and women before the law. The Constitutional Court ordered that the law should mention that it ensures the equal access of men and women to land.[203] While a deeper analysis of the role of customary law and judicial and quasi-judicial bodies is beyond the scope of the present Guide,[204] it is uncontested that these are

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[202] *Bhe and Others v. Magistrate, Khayelitsha and Others; Shibi v. Sithole and Others; SA Human Rights Commission and Another v. President of the RSA and Another*, Constitutional Court of South Africa, Decision 2005 (1) SA 580 (CC) (2005). For a case summary visit: http://www.escr-net.org/docs/i/400589

[203] Constitutional Court of Benin, Decision DCC 13-031 (2013).

[204] For further case law see also *Hadijatou Mani Koraou v. The Republic of Niger*, Economic Community of West African States (ECOWAS) Community Court of Justice, ECW/CCJ/JUD/06/08 (2008), accessible at: http://www.unodc.org/res/cld/case-law-doc/traffickingpersonscrimetype/ner/2008/h_m__v__republic_of_niger_html/Hadijatou_Mani_v._Republic_of_Niger_Community_Court_of_Justice_Unofficial_English_translation.pdf. For further literature see for instance Wieland Lehnert, *The role of the courts in the conflict between African customary law and human rights*, South African Journal on Human Rights, Volume 21, No 2 (2005), pp. 241-277, accessible at: http://reference.sabinet.co.za/sa_epublication_article/ju_sajhr_v21_n2_a4; Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, Cornell Law Faculty Publications, Paper 187 (2011), accessible at: http://scholarship.law.cornell.edu/facpub/187; Evadne Grant, *Human Rights, cultural diversity and customary law in South Africa*, Journal of African Law, Volume 50, No. 1 (2006), pp. 2-23, accessible at: http://democraciaejustica.org/cienciapolitica3/sites/default/files/human_rights_cultural_diversity_and_customary_law_in_sa.pdf; Else A. Bavinck, *Conflicting Priorities: Issues of Gender Equality in South Africa's Customary Law*, Amsterdam LF, Volume 5, No. 2 (2013), p. 20, accessible at: http://amsterdamlawforum.org/article/view/316; Anne Hellum, *Women's human rights and African customary laws: Between universalism and relativism-*

greatly relevant in ESC rights litigation, not least because of their areas of jurisdictions including in civil matters. In addition, these are often the first and most accessible authorities that rights-holders turn to in a number of regions and countries. Working with actors of customary legal jurisdictions to enhance knowledge of international human rights standards may significantly contribute to a better realization and protection of ESC rights.

2. Labour law

Many labour rights form part of the broader human rights law corpus.[205] Articles 6, 7 and 8 of the ICESCR guarantee various rights to work and at work: from the right to gain a living from

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individualism and communitarianism, The European Journal of Development Research, Volume 10, No. 2 (1998), pp. 88-104.

[205] Rights to work and at work are guaranteed at articles 4, 20, 23, 24 of the Universal Declaration of Human Rights (adopted 10 December 1948), UN Doc. A/810, pp. 71-77; articles 8 and 22 of the ICCPR, *supra* note 190; articles 6, 7, 8 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1979), UN Doc. A/6316 [hereafter ICESCR]; article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), UN Doc. A/34/46; article 27 of the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc. A/RES/61/106; articles 15 and 32 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), UN Doc. A/RES/44/25; articles 11, 25, 26, 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted on 18 December 1990, entered into force on 1 July 2003), UN Doc. A/RES/45/158. In addition to guarantees under human rights instruments at the global level, an important body of labour standards has been adopted under the auspices of the International Labour Organization (ILO). Fundamental ILO Conventions include the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Of equal importance are the Governance Conventions, including the Labour Inspection Convention, 1947 (No. 81); the Employment Policy Convention, 1964 (No. 122); the Labour Inspection (Agriculture) Convention, 1969 (No. 129); and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

work which has been freely chosen, access to vocational training,[206] fair remuneration and the equal rights of female and male workers, healthy and safe conditions of work[207] to rights of joining and forming trade unions.[208] Decent work and working conditions may be a basis for the enjoyment of other human rights.

There is a vast body of international and comparative case law relating to labour issues, as the field is among the oldest and most developed[209] in the human rights corpus. Labour codes classically regulate the standards around recruitment, contracting and dismissal or resignation. They protect workers against discrimination on various prohibited grounds, including race and sex. They also protect against abuses of their rights at work in relation to remuneration and promotion, working hours and rest, protection of pregnant and breastfeeding women or in relation to safety and hygiene at the work place. All of those are fundamental elements of the rights as enshrined in international human rights law.

While the system of legal and judicial protection of labour rights[210] differ from one country to another, most have in common a system of prevention, control and conciliation that can enable workers to access a timely and effective remedy, especially in cases of individual conflicts. In this respect, labour inspections can play a very important role in preventing, investigating and denouncing abuses of workers' rights, although the effectiveness of this function is subject to the availability of sufficient human and material resources for the inspection to fulfil its role.

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[206] Article 6 of the ICESCR.
[207] Article 7 of the ICESCR.
[208] Article 8 of the ICESCR.
[209] For an historical analysis of the protection of labour rights, see *ICJ Justiciability Study*, Chapter 2, pp. 13 and 14.
[210] Jurisdictions in charge of labour disputes differ greatly from one country to another. In some systems, labour cases will be dealt with by civil courts and chambers, such as in Morocco. In other domestic frameworks, they will be dealt with by a specialized jurisdiction such as the system of "Prud'homme" in France (for individual conflicts) or the Industrial and Labour courts in common law countries such as in Australia, Botswana, Kenya, United Kingdom, India or Malaysia.

In addition, a number of legal systems recognize the disparity of resources between a worker and an employer and address this through procedural arrangements and provisions which enable workers to access justice at little or no personal cost.

Domestic courts have typically decided issues of:

- Equal pay for work of equal value/ gender equality, such as in the following case decided by the Supreme Court of Canada, in 2011.

	Public Service Alliance of Canada v. Canada Post Corporation and Canadian Human Rights Commission
Year:	2011 (Date of Decision: 17 November, 2011)
Forum, Country:	Supreme Court; Canada
Standards, Rights:	Non-discrimination and equal protection of the law; Reasonableness; Right to decent work; Women
Summary Background:	The Canadian Supreme Court reviewed a decision of the Canadian Human Rights Tribunal (CHRT) regarding a claim by the Public Service Alliance of Canada (PSA) that employees in the male-dominated Postal Operations Group were paid more than employees in the female-dominated Clerical and Regulatory Group for work of equal value, contrary to section 11 of the *Canadian Human Rights Act ("equal wages" provision.)* Using job evaluations to determine the comparability of the work of the two groups of employees, the CHRT had determined that there was sufficient evidence of wage discrimination between 1982 and 2002. Canada Post commenced ju-

dicial review proceedings in the Federal Court, where the CHRT's decision was overturned. On appeal to the Federal Court of Appeal, the majority agreed with Canada Post that the CHRT decision was unreasonable, as the use of job evaluations did not meet the requisite standard of proof to support a finding that wage discrimination had taken place. The PSA appealed to the Supreme Court of Canada.

Holding: The Supreme Court endorsed the reasons of the dissenting Evans J.A from the Federal Court in support of the initial decision by the CHRT. This was based on the arguments that the CHRT was reasonable in using the Postal Operators group as the male-dominated comparator, even though this group included a large number of highly paid women [para. 5]. Justice Evans reaffirmed that this did not preclude the existence of systemic gender discrimination elsewhere in the corporation [para. 69]. Secondly, Evans J.A. supported the CHRT's reliance on the job evaluations and its application of the "balance of probabilities" standard of proof in finding that a wage gap existed between the two groups [para. 68]. He reiterated the Tribunal's discretion in choosing a methodology to determine the existence and extent of a wage gap, and that it did not act "unreasonably" in adopting one proposed by the CHRC. Finally, Evans J.A and the Supreme Court emphasized the high degree of discretion awarded to specialized tribunals in their determination of appropriate remedies. The Tribunal at first instance did thus not err in awarding compensation to "make the victims whole," while reducing the cost of the damages where the magnitude of the damage was uncertain.

The decision of the CHRT was subsequently

	restored, requiring Canada Post to compensate 50 per cent of the wage gap between the two groups over the twenty-year period.
Link to Full Case:	Public Service Alliance of Canada *v.* Canada Post Corp.**,** 2011 SCC 57, [2011] 3 S.C.R. 572 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7975/index.do

- Illegal and unfair dismissal or termination of contract on grounds of health status such as in the following cases decided by the Industrial Court of Gaborone in 2003 and 2004.[211]

	Diau v. Botswana Building Society
Year:	2003 (Date of Decision: 19 December, 2003)
Forum, Country:	Industrial/Labour Courts; Botswana
Standards, Rights:	Non-discrimination and equal protection of the law; Reasonableness; Human dignity; Right to decent work
Summary Background:	The applicant employee challenged the lawfulness and constitutionality of the respondent employer's termination of her employment contract. The applicant contended that her refusal to undergo an HIV/AIDS test was "unreasonable" and in violation of sections 3, 7(1), 9(1) and 15(2) of the Botswana Constitution, and that the six month imposed probationary

[211] *Diau v. Botswana Building Society,* 2003 (2) BLR 409(IC), Industrial Court, Gaborone, Case No. IC No 50 of 2003, 19 December 2003; *Lemo v. Northers Air Maintenance (PTY) LTD,* 2004 (2) BLR 317 (IC), Industrial Court, Gaborone, Case No: IC No 166 of 2004, 22 November 2004.

period of work exceeded the requisite three months permitted for "unskilled workers" as per section 20(1) of the Employment Act.
The Court determined the applicant had in fact been an "unskilled worker" and affirmed the unlawfulness of the termination of the contract past the three-month probationary period. The imposition of the HIV test and subsequent termination was held to be in violation of the right to dignity and liberty.

Holding: The Court addressed the issue of whether the respondent's termination of the employment contract shortly after the employee's refusal to take an HIV test amounted to unfair discrimination, violation of privacy, dignity and liberty. While the reasons for termination were not expressly confirmed by the respondent, the Court took the view that the applicant's dismissal without valid reason was clearly linked to her refusal to submit to an HIV test.

The Court noted that while Botswana does not provide binding legislation governing issues of HIV/AIDS and the workplace, the National AIDS Policy is consistent with the World Health Organization, SADC Code of Good Practice on HIV/AIDS and Employment (1997), HIV/AIDS and Human Rights: International Guidelines, United Nations (1998) and ILO guidelines on HIV/AIDS in the workplace, which encourage *voluntary* testing and denounce compulsory employment testing in determining one's fitness to work [p. 12, para. D].
The Court acknowledged the stigmatization perpetuated by such mandatory measures and the "grossly unreasonable and unjust" consequences of employment terminated following a finding of an HIV positive result. The Court recalled the South African case of *Hoffman v. South African Airways (2002),* in which an in-

dividual successfully completed a four stage interview process and medical examination for a cabin attendant position, yet whose report was marked "unsuitable " following an HIV positive test result [p. 13, para. D].
The Court went on to assess the specific violations of constitutional rights alleged by the applicant.

The right to privacy
Section 9(1) of the Constitution- Prohibits unauthorized search of the person, yet in this case no actual invasion took place as the applicant refused to submit to a test. Thus the right to privacy was not violated.

The right to non-discrimination
Section 15 of the Constitution- The Court referred to the contention that the applicant's refusal to submit to an HIV test was due to a suspicion that she was likely to be HIV positive. While it could thus be inferred that the respondent terminated the contract on the "suspicion or perceived HIV positive status of the applicant," there is no evidence to support that the applicant was in fact suspected to be HIV/AIDS positive. The respondent's conduct thus could not be discriminatory, as no evidence demonstrated dismissal on the grounds of this suspicion.
Notably, the Court affirmed that the list of unconstitutional grounds of discrimination is not exhaustive, and that the ground of HIV status or *perceived* HIV status would be considered to be an unlisted ground under section 15(3) of the Botswana Constitution. Additionally, the Court noted that the principle of equality does not prohibit treating people differently, but rather "people in the same position should be treated the same," free from irrational or unjustifiable discrimination [p. 18 at para. D].

The right to dignity

Section 7(1) of the Constitution- Quoting Ngcobo J *in Hoffman v. South African Airways (2002),* the Court noted that *"Society's response to (people living with HIV) has forced many of them not to reveal their HIV status for fear of prejudice. This has in turn deprived them of the help they would otherwise have received. People who are living with AIDS are one of the most vulnerable groups in society (and) the impact of discrimination on HIV positive people is devastating."* [p. 18 para. E].

The Court concluded the respondent's conduct was inhumane and degrading, as he imposed upon the applicant the choice between protecting her employment by undergoing the test and simultaneously violating her right to privacy and bodily integrity, or insisting upon this right and losing her employment. This infringement of the right to dignity was found to be "demeaning, undignified, degrading and disrespectful to the intrinsic worth of human beings." [p. 18 para. H].

The right to liberty

Section 3(a) of the Constitution- 'Liberty' was understood by the Court to include the right of individuals to make inherently private choices, free from irrational and unjustified interference by others. These involve those inherently personal matters that "go to the core of what it means to enjoy individual dignity and independence" [p. 20, para. A]. On the facts, the Court deemed that the choice to take an HIV test was fundamentally personal and relating to individual autonomy, and thus the respondent's imposition of an HIV/AIDS test coupled with the employee's dismissal infringed the applicant's right to liberty.

Additional Comments:	The Court noted that "even the remotest suspicion of being HIV/AIDS positive can breed intense prejudice, ostracization and stigmatization" [p.18, para. H], highlighting the necessity to analyse such cases with particular scrutiny.
Link to Full Case:	http://compendium.itcilo.org/en/compendium-decisions/industrial-court-of-botswana-sarah-diau-v.-botswana-building-society-19-december-2003-no.-ic-50-2003

	Lemo v. Northern Air Maintenance (PTY) LTD
Year:	2004 (Date of Decision: 22 November, 2004)
Forum, Country:	Industrial/Labour Court; Botswana
Standards, Rights:	Non-discrimination and equal protection of the law; Procedural fairness; Right to decent work; Right to be free from torture and cruel, inhuman or degrading treatment or punishment
Summary Background:	Issue at stake in this case: The applicant alleged dismissal from employment on the grounds that he was HIV positive. While the employer respondent did not expressly communicate this basis, the inference was raised as the applicant was dismissed one day after disclosing his positive status. It was noted that the respondent had been "accommodating" in permitting his employee to take extended unpaid leave over a three-year period due to his deteriorating health condition. The letter of termination listed "continual poor attendance over the last three years" as explanation for the cessation of employment. The Court addressed the question as to what, after three

years of concessions, had actually triggered the dismissal of the applicant.

Holding: The Court found in favour of the applicant on the grounds of unfair dismissal and lack of procedural fairness. It rejected the respondent's argument that it in fact sought to terminate the applicant's contract one day *prior* to learning of his positive HIV/AIDS result, as there was no evidence that the applicant had been informed of a decision to dismiss him, nor was any valid reason given for his dismissal.

As the respondent largely authorized the applicant's persistent absenteeism over three years, the Court rejected this as a valid ground for dismissal. Similarly, the applicant's refusal to submit to medical examination by a private medical practitioner was not valid grounds for dismissal, as his fitness was already being assessed by a hospital. Thus even if the applicant were dismissed the day prior to disclosing his positive results, there was no valid reason for doing so.

The Court reiterated the interdiction on dismissal of an employee solely on the grounds of being HIV positive *(*citing *Diau v. Botswana Building Society [2003]).* While an HIV positive employee is not exempt from termination of employment, such action is only acceptable where the illness results in an inability to perform duties, as is the case with any illness or incapacity, in which case the normal rules of termination of services for inability apply. The Court warned of discriminatory practices towards HIV positive employees, which are at risk of violating section 7(1) of the Constitution, the prohibition on inhuman and degrading treatment. It condemned the unfair treatment of persons based on personal traits or

	circumstances that have "no relationship to individual capacities" [p. 7, para. H] and reaffirmed the constitutional principle of the elimination of discrimination at the workplace, enshrined in the International Labour Organization Declaration on Fundamental Principles and Rights at Work [para. A]. Additionally, the Court cited the ILO Termination of Employment Convention (1982) requiring dismissal based on a reason "connected with the capacity or conduct of the worker" [p. 6, para. E]. In sum, the respondent's actions were found to be procedurally and substantively unfair. The Court emphasized that fair procedure requires the applicant to be consulted and warned that persistent absence may lead to dismissal, and that an employee must be granted the opportunity to ameliorate attendance performance, with full knowledge that failure to do so may result in dismissal. The Court found it inappropriate to reinstate the applicant in his employment given the breakdown of relations and instead directed the respondent to pay compensation equivalent to six months of the applicant's salary, as per section 19(2) of the Trade Disputes Act.
Additional Comments:	The Court emphasized that modern antiretroviral drugs have largely curtailed the interference of the HIV/AIDS virus with the fulfilment of employment duties, and so the legitimacy of grounds for dismissal based on "incapacity" must be carefully scrutinized.
Link to Full Case:	http://www.oit.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_242081.pdf

- Discrimination on account of trade union activities such as in the following case decided by the Labour Tribunal/Conseil de Prud'hommes de Bobigny and adjudicated by a judge from the Tribunal d'Instance in 2011.

	Lopez and Syndicat SYNPTAC-CGT v. SARL Théâtre d'Aubervilliers
Year:	2011 (Date of Decision: 6 December, 2011)
Forum, Country:	Industrial/Labour Court; France
Standards, Rights:	Non-discrimination and equal protection of the law; Proportionality; Right to decent work
Summary Background:	Issue at stake in this case: the lawfulness of the dismissal of the plaintiff, a representative of a trade union who, as part of her responsibilities within the company board, denounced to the police and the labour inspectorate in 2005 gaps in safety conditions at her work place. Since then, and although she had been under permanent contract for four years, she had been facing threats of dismissal and disciplinary measures against her. The labour inspectorate and several administrative and judicial bodies had questioned and sought to prevent the dismissal of Ms Lopez.

Holding:	The judge found a violation of several articles of the Labour Code, especially article L.1132-1 prohibiting any discrimination including on the ground of union activities or membership [p. 5]. In particular, the judge found a clear causality link between the steps taken by Ms Lopez to ensure safe and fair conditions of work within her company and the attacks against her, based on the chronology of events, and the fact that no complaint had been made previously about the employee [p. 6]. He also reviewed the reasons put forward by the employer to explain the disciplinary measures and considered the latter has failed to provide objective elements and thus these reasons were disproportionate and insufficient to justify a dismissal [p. 6].
Additional Comments:	While he did not decide in favour of the plaintiff in respect of her allegation of psychological harassment, on the grounds of insufficiency of evidence, the judge did order the maintenance of the plaintiff in her job and her reinstatement in the responsibilities of 2004, before the conflict with her employer. He further awarded Ms Lopez damages of 40,000€ to compensate the five years of discrimination on the ground of union activities and of facing disciplinary measures against which she had to defend herself.
Link to Full Case:	For contact details of the Conseil de Prud'hommes de Bobigny, please visit: http://www.cour-paris.justice.fr/index.php?rubrique=11016&ssrubrique=11069&article=14715 Copy of the decision on file with ICJ

- Occupational health and safety at work

	Tahirzade v. AME
Year:	2011 (Date of Decision: 15 July, 2011)
Forum, Country:	Constitutional Court, Azerbaijan
Standards, Rights:	Right to decent work; Right to health; Right to life
Summary Background:	Mr Tahirzade initiated civil proceedings against the "AMEC Services Limited" company, claiming compensation for harm caused to his health in the performance of his employment. The assessment of this claim required an interpretation by the Constitutional Court of the expressions "employer, guilty (completely or partially)" and "through employer's fault" contained in the text of article 239.I and 239.II of the Labour Code.
Holding:	The Court addressed the right to work as enshrined in article 35 of the Constitution. As per article 35.I, the right to work impacts on the welfare and development of individuals and families and plays a vital role in both personal and public wellbeing. The Court affirmed the right to fair payment of wages and safe working conditions. It reaffirmed the legal protection of the right to safe and healthy working conditions and to receive payment from employment at or above the minimum wage set, and free from discrimination (article 35.VI Azerbaijan Constitution.) The Court empha-

	sized the link between this right and the rights to life and health. With regard to financial liability and compensation for violation of labour safety regulations, an employer may only be held liable where their guilt is proven. The Court considered article 239 of the Labour Code and held that an employer will only be liable for harm suffered to an employee's health due to violations of labour safety standards where the employer is at fault. Article 239 of the Code requires an employer guilty of occupational accident or illness to pay full compensation to the employee for damage resulting from the injury, as well as costs of treatment, benefits and other additional costs established by the Civil Code. According to the text of article 239 of the Labour Code, regardless of the full or partial fault of an employer, where the conditions in article 191 of the Code are satisfied (a. detection of actual damage, b. the act/omission of the guilty party contradicts a law and c. causal link between act/omission and damage suffered), the employer bears full responsibility for providing redress to the employee.
Link to Full Case:	http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/aze/aze-2012-2-002?f=templates&fn=default.htm&vid=

3. Tort law (common law and statutory law)

In addition to the above examples involving direct violations of civil law and administrative law, there is also the possibility in many jurisdictions, that civil courts will also be able to adjudicate and award damages in cases of a tort violation, where a tortious violation may also constitute a violation of ESC rights. Recourse to civil courts to recover damages in tort may be ef-

fective either in parallel to other proceedings or may constitute an alternative means of exercising the right to an effective remedy and reparation for an ESC rights violation.

The Colindres case decided by the Supreme Court of El Salvador provides an example of this. It concerns the illegal dismissal of Dr Benjamin Eduardo Colindres from his position as a judge of the Supreme Electoral Tribunal (Tribunal Supremo Electoral), who was accused by the Legislative Assembly of El Salvador of being immoral and lacking relevant education. Mr Colindres civilly sued the State of El Salvador for the moral damage caused. On June 13 2001, the Civil Chamber of the of the Supreme Court of El Salvador ordered the State of El Salvador to pay two million colones.[212]

Below are some examples of common law tort cases that have provided an access to remedy and reparation for violations of ESC rights.

	Park West Management Corp. v. Mitchell, 391 N.E.2d 1288 (N.Y. 1978)
Year:	1978 (Date of Decision: 2 May, 1978)
Forum, Country:	Appellate Division of the Supreme Court of New York, United States of America
Standards, Rights:	Reasonableness; Right to adequate housing; Right to health
Summary Background:	This case involves the property law right of the "implied warranty of habitability", which guarantees a tenant a livable home environment. The landlord is responsible for the upkeep and maintenance of a property, and cannot allow for conditions that would affect the health and safe-

[212] For more information on this case, please refer to the ICJ Study on Access to Justice - available remedies for social rights in El Salvador, *supra* note 183, pp. 49-51.

ty of the tenant. In this case, tenants of this building withheld their rent to protest the interruption of extensive garbage removal and janitorial services which affected the health and safety of the tenants. The janitorial staff had gone on strike, causing many services and amenities to stop. This caused the building to turn into an environment where rats, roaches and other vermin flourished. Routine maintenance was not completed and trash incinerators were wired shut.

Holding: The Court determined that anything detrimental to life, health, and safety is considered a breach of the warranty of habitability and violates a tenant's rights as guaranteed by the housing code. The ruling described a residential lease as a sale of shelter and needs to encompass services, which render the premises suitable for which they are leased. While the premises need not be perfect, they must not perpetuate conditions that can adversely affect the tenant's health and safety [p. 1294-95]. Further, the overarching test for determining whether a property is livable is based on a reasonable person standard. If a reasonable person would not find a place habitable, then the implied warranty of habitability has been breached [p. 1295]. This would also be a violation of the Right to housing.

Additional Comments: Damages should be awarded through a balancing test in which the fact finder must weight the severity of the violation, the duration of the conditions, and the steps taken by the landlord to remedy the situation. In this case, the judge awarded 10 per cent deduction on the rent due to the severity of the conditions and the meagre attempts by the landlord to remedy the situation [p. 1295].

Link to Full Case:	http://www.leagle.com/decision/197936347NY2d316_1327.xml/PARK%20W.%20MGT%20v.%20MITCHELL

	Correa v. Hospital San Francisco, 69 F.3d 1184 (1st Cir. App. 1995)
Year:	1995 (Date of Decision: 31 October, 1995)
Forum, Country:	Court of Appeals, United States of America
Standards, Rights:	Negligence; Right to health
Summary Background:	The deceased patient's children and grandchildren brought this case against the hospital for medical malpractice and violations of the Emergency Medical Treatment and Active Labor Act (EMTALA).
Holding:	The Court of Appeals affirmed the lower Court's decisions in favor of the plaintiff. The lower Court held that the defendant's failure to provide appropriate screening to the decedent and assigning her a number when she told the hospital she had chest pains demonstrated a lack of justification that amounted to an effective denial of a screening examination [p. 1193].
Additional Comments:	Jury awarded the family $200,000 damages for pain and suffering, which the Court of Appeals affirmed [p. 1197]. The Hospital argued that the jury award was excessive, but the Court held that the damages were not excessive as the record supported the evidence presented regarding emotional suffering [p. 1197-98]. Further, the hospital's negligence in addressing

	the deceased plaintiff's medical problems led the jury to hand out a reasonable amount of damages [p. 1198].
Link to Full Case:	http://caselaw.findlaw.com/us-1st-circuit/1014686.html

	Pape v. Cumbria CC, [1992] I.C.R. 132
Year:	1991 (Date of Decision: 23 May 1991)
Forum, Country:	High Court (Queens Bench Division), United Kingdom of Great Britain and Northern Ireland
Standards, Rights:	Negligence; Right to decent work; Right to health
Summary Back-ground:	The plaintiff worked for the defendants as a cleaner. She was not warned of the dangers arising from frequent use of detergents and other cleaning materials and she received no instructions from the defendants to wear the gloves that were provided. As a result of her hands coming into contact with cleaning agents, she developed dermatitis on her hands and wrists in 1982. The condition spread to other parts of her body and by 1985 she had developed erythroderma. She received medical treatment and after periods of sick leave she had to give up work in November 1986.

Holding:	The Court held that the defendants had failed in their duty to warn the plaintiff of the dangers of handling chemical materials with unprotected hands and to instruct her in the need to wear rubber gloves [p. 138]. Therefore, the plaintiffs were liable in negligence to pay the plaintiff damages assessed at £22,000 including general damages for pain, suffering, and loss of amenity; special damages; damages for future loss of earnings; damages for future outlays and losses other than earnings [p. 139].
Link to Full Case:	http://international.westlaw.com/Find/Default.wl?rs=WLIN1.0&vr=2.0&DB=4740&FindType=g&SerialNum=1991220644

IV. Criminal courts

Criminal law has important, if limited, relevance for the enforcement and protection of ESC rights. The limitations derive from the consideration that only a small number of violations of ESC rights or elements of such violations are considered as crimes under national or international law. In addition criminal justice typically does not address all the elements of a victim's right to remedy and reparation, focused as it is on the State's interest in holding accountable and punishing the authors of criminal acts.

Nonetheless, practitioners at domestic level involved or interested in ESC rights litigation should, in appropriate instances, take criminal law and criminal justice systems into due consideration.

The punishment of authors of rights violations can in specific instances contribute to the provision of adequate reparation as part of the right to an effective remedy for violations of human rights as understood in international law. The deterrent effect of criminal justice prevents future violations and contributes to

the guarantee of non-repetition. It can sometimes, therefore, constitute an element of the satisfaction of the victims.[213]

At the international level, violations of ESC rights that also violate the right to life or the right to be free from torture and cruel, inhuman and degrading treatment, among other rights, may amount to crimes under international law and thus be subject to criminal prosecution. For example, under international humanitarian law, a number of offences that constitute war crimes and grave breaches of the 1949 Geneva Convention or 1977 Additional Protocol I, as well as certain war crimes and crimes against humanity under the ICC Statute, may also constitute ESC rights violations.[214]

In the same vein, some violations of ESC rights or of elements of their normative content may constitute a crime or a punishable offence under domestic law. Examples include breaches of legal provisions that are punishable such as breaches of labour codes in cases related to safety and protection of workers or to sexual harassment at work; breaches of statutory provisions on education in cases related to sexual harassment; or breaches of health codes in cases related to failure to assist persons in danger or negligence in the area of health care.

V. Administrative courts

Administrative law typically regulates aspects of conduct and operations of local and national/federal governments, including agencies within Ministries or departments. In that regard, administrative law is of particular importance to ESC rights, as government agencies dealing with such issues as labour, hous-

[213] See Chapter 2, section II. 1.; Part IX, "Reparation for harm suffered", of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005); and the ICJ Practitioners Guide No.2 on the right to a remedy and to reparation for gross human rights violations, pp. 46-49, accessible (in English, French, Spanish, Arabic, Thai) at: http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/

[214] On the relevance of international criminal law for ESC rights, see Chapter 2, section III. 2., p. 79.

ing, health and social security. ESC rights violations typically occur through an administrative act or an omission.

Administrative law covers key issues for ESC rights including:

- decisions concerning social security and assistance benefits, including food aid;
- regulation of building licenses for housing and industrial activities;
- decisions concerning licenses of exploitation of natural resources;
- administration of public health care through public hospitals and public or universal medical insurance schemes or the regulation of private health services;
- administration or regulation of public education; and
- regulation of public utilities, including water, means of heating and electrical services.

Depending on the country and system under consideration, the review of administrative law and acts may, at first instance be undertaken by administrative commissions, courts, or other bodies. In other systems, the function is undertaken by an independent and specialized institutional branch of the judiciary with their own procedural arrangements.[215] These bodies can thus play an important role for ESC rights adjudication. However, the procedures followed in certain administrative courts may present some disadvantages because of the length of the procedure or the limitations of damages and remedies that can be awarded.

Administrative courts have often had to address important ESC rights cases. For example, administrative tribunals of first instance and appeal have condemned, on the basis of the explicit need to protect the right to health as guaranteed by the ICESCR, the failure of the State to provide and cover the costs

[215] This is particularly true in continental civil law countries such as Belgium, France, Germany, Switzerland or Sweden.

of the vital dialysis needed by a woman with kidney disease, which she could not afford. [216]

VI. Children's/Juvenile courts

As mentioned in Chapter 2, international standards for the guarantee of child rights, and in particular the Convention on the Rights of the Child (ICRC), cover important areas of ESC rights protection.[217]

The protection of the rights of the child, including the judicial bodies charged with such protection, are important for ESC rights adjudication in various ways. In particular:

- International and national law for the protection of child rights include and specify or even expand the normative and protection framework of ESC rights;[218]
- The principle of the best interests of the child, and overriding principle governing all rights of the child, can be used strategically to protect children rights within their families and communities and thus contribute to the protection of the rights of other members of these families and communities.

A recent case decided by a children's court in Guatemala is illustrative of this relationship between child rights and ESC rights and offers an example that is likely to be of interest for practitioners involved or interested in ESC rights adjudication.

[216] Tribunal Administratif d'Agadir (2004), Decision 12-8-2005 (763); confirmed by Decision 323-6-2007-1 (125), Cour d'Appel de Marrakech (2007). Although that decision was reversed by the Cour de Cassation, it shows the active role that administrative jurisdictions can play in the protection of constitutional or conventional rights.
[217] See Chapter 2, section II. 2.
[218] The Convention on the Rights of the Child guarantees and applies to children a whole range of ESC rights, including the rights to education and health.

	Cases No. 19003-2011-00638-Of.1a; No. 19003-2011-00639-Of.2a; No. 19003-2011-00637-Of.3a; No. 19003-2011-00641-Of.1
Year:	2013 (Date of Decisions (in the order cited above): 3 April 2013; 12 April 2013; 10 May 2013; 31 May 2013)
Forum, Country:	Children's and Juvenile Court; Guatemala
Standards, Rights:	Best interests of the child; Core content; Right to adequate food; Right to life; Right to an adequate standard of living; Right to health; Right to housing; Children
Summary Background:	The poverty level in the municipality of Camotán in the Guatemalan Department of Chiquimula has chronically been very high and was worsened in 2001 and 2002 as a result of a food crisis, caused by a drought and the effects of a drop in the international price of coffee on the rural economy. The production of coffee was the single most important base for subsistence of the local population. The food crisis generated severe malnutrition and increased child mortality, especially affecting children under 5. Despite the existence of some local government policies to eradicate the famine in the region, the overall situation remained unchanged, which left children of the municipality vulnerable. In November 2011, this led the parents of the girls, Dina Marilú, Mavélita Lucila Interiano Amador and Mayra Amador Raymundo; and the boys Brayan René, Espino Ramírez and Leonel Amador García, supported by the civil society Guatemala Without Hunger Campaign, to file a case in accordance with article 104 of the Law for Integral Protection of Chil-

dren and Adolescents, which seeks to examine and settle complaints arising from situations that threaten or violate the rights of children and adolescents. The legal proceedings initiated against the State of Guatemala alleged that the State violated through omission the right to food, the rights to life, health, education, and an adequate standard of living and housing, of the children suffering from acute malnutrition in the municipality.

Holding: The Department of Zacapa Court for the Protection of Children and Adolescents and for adolescents in conflict with the criminal law based its legal analysis on national and international law. In particular, the analysis focused on the principle of the best interests of the child as a person with full legal personality, and on the obligation of the State to implement measures and mechanisms to ensure the effective fulfilment of ESC rights.

The Court contemplated the facts in the light of the State's duties under international instruments, including the ICESCR and the ICRC, to which the State is a party and that guarantee the right to be free from hunger, and the right to adequate food as a fundamental basis for the enjoyment of other human rights [para. C, Análisis de las disposiciones legales correspondientes].

Based on the facts and arguments described above, the Court for Children and Adolescents and the Court for Adolescents in Conflict with Criminal Law of the Department of Zacapa found a violation of the rights to food, life, an adequate standard of living, health and housing of the children parties to the cases and the responsibility of the State of Guatemala for such violations through omission, as it failed to pro-

	vide effective programs, policies, actions and measures to address the children's poor health caused by the chronic and acute undernourishment and the lack of adequate food [para. C, Parte resolutiva, I]. In addition, the Court ordered the enforcement of various measures for a comprehensive reparation for the physical, social and psychological damages suffered by the children. These short and longer-term measures included the implementation of policies that guarantee the enjoyment of the right to food, health and adequate housing for the whole family. In particular, the Ministry of Agriculture, Livestock, and Food must deliver food aid to the families of the affected children; and provide seeds and necessary technical support to allow the families to grow adequate food. In addition, the Court ordered the implementation of various programs such as in the area of health, psychological care and education, which shall enable the development of children in their family environment [para. C, Parte resolutiva, II].
Additional Comments:	The expert opinions and reports especially from medical specialists working on child malnutrition, as well as the active support of civil society organizations and a broader social mobilization played a determining role in achieving the decision based on international human rights law standards.
Link to Full Case:	http://www.icj.org/guatemala-condenado-por-violaciones-a-derechos-economicos-sociales-y-culturales/

VII. Environmental law

The protection of the environment, through environmental law and standards, has long played an important role for the protection of ESC rights. In fact, the right to a safe and healthy environment is included in various conventions and constitutional enumeration of rights.[219] Principles, such as the precautionary or prevention principles, which have their genesis in environmental law have been generally invoked outside of the environmental law context.[220]

In addition, a wide array of violations of ESC rights are directly linked to environmental pressures and degradation. These typically include the pollution of water sources, soils or air that deeply impact on the rights to water, food, health, adequate standard of living and work. However, the dramatic impacts and growing awareness of global environmental questions, including climate change, has conferred a new dimension to the relationship between ESC rights and environmental law.

At the regional level, the African Commission has used the right to a safe and healthy environment as a conjunctive and instrumental right for the protection of the right to housing and food, particularly in the SERAC and CESR v. Nigeria case.[221] In this case the African Commission found that the Federal Republic of Nigeria had violated several rights of the African Charter on Human and Peoples' Rights, inter alia, because the government failed to prevent ecological degradation in Ogoni-

[219] See article 7 of the ICESCR guaranteeing safe and healthy working conditions. See also at national level, article 14 of the Constitution of Ecuador or article 24 of the Constitution of South Africa. See also the United Nations Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, J.H. Knox, Preliminary Report, UN Doc. A/HRC/22/43 (2013), paras. 12-17.

[220] Precautionary principles are used in cases such as in the fields of public health and food safety.

[221] *SERAC and CESR v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002). Full decision accessible at: http://www.achpr.org/communications/decision/155.96/, for a summary of the case, please visit: http://www.escr-net.org/docs/i/404115

land, resulting from operations of the State oil company, which caused health problems to the Ogoni people.[222]

In April 2013, the Inter-American Commission of Human Rights received a petition filed by Inuit communities against Canada for violations of their rights due to emissions of black carbon causing Arctic Melting.[223] As mentioned above, the increasingly tangible impact of climate change and the causal link between carbon emissions and global warming is likely to give rise to expansive litigation related to ESC rights in the future. Meanwhile, some fundamental legal and procedural obstacles need to be overcome to effectively undertake such litigation. For instance, there is a challenge in attributing liability or responsibility to defined and individual States for harm resulting from global warming or to define and enforce effective remedies. In any case, practitioners interested in ESC rights litigation will want to closely follow developments in this field.

At the domestic level, a variety of cases demonstrate the relevance of environmental issues and law to the protection of ESC rights. The decisions summarized below are only some examples of this variety.

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[222] The Federal Republic of Nigeria was found in violation of Articles 2 (right to freedom from discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (protection of the family and vulnerable groups), 21 (right to free disposal of wealth and natural resources) and 24 (right to a general satisfactory environment) of the African Charter on Human and Peoples' Rights. The Commission also held that the implied right to housing (including protection from forced eviction), which is derived from the express rights to property, health and family was violated by the destruction of housing and harassment of residents who returned to rebuild their homes (para. 62). Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the right to food that is implicit in the right to life, the right to health, the right to economic, social and cultural development (para. 66).

[223] Petition to the Inter-American Commission on Human Rights seeking relief from violations of the rights of arctic Athabaskan peoples resulting from rapid arctic warming and melting caused by emissions of black carbon by Canada available at: http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf

	Mendoza Beatriz Silva et al v. State of Argentina et al, File M. 1569. XL
Year:	2008 (Date of Decision: 8 July, 2008)
Forum, Country:	Supreme Court; Argentina
Standards, Rights:	Right to life; Rights to water and sanitation; Right to health
Summary Background:	This case was filed by residents of the Matanza/Riachuelo basin against the national Government of Argentina, the Province of Buenos Aires, the City of Buenos Aires and several private companies. The suit sought compensation and a remedy for the environmental damage stemming from pollution of the basin. The petitioners further demanded the halting of contaminating activities.
Holding:	The Court decided in favour of the petitioners and ordered the Government respondents to take affirmative measures to improve the residents' quality of life, remedy the environmental damage and prevent future damage. In its decision, while the Court did not explicitly frame the analysis within human rights law, it focused on issues that have dramatic impact on and relevance for human rights, including the rights to life, health, water, sanitation and a healthy environment. The Court established an action plan mandating the Government agency responsible for the Matanza/Riachuelo basin to undertake the following: facilitating better information flow to the public [para. 17. II]; containing and cleaning up industrial pollution [para. 17. III]; expand-

	ing water supply as well as sewer and drainage facilities [para. 17, VI-VIII]; creating an emergency health plan [para. 17, IX]; and adopting an international monitoring framework as a yardstick to assess compliance with the plan's goals. The Court directed the goal should primarily be to improve the quality of life for residents [para. 17, I].
Additional Comments:	Although the case did not adopt an explicit human rights approach, it clearly highlighted the State's duty to respect, protect and fulfil rights. The remedies ordered are particularly comprehensive and a mechanism for monitoring compliance and enforcement is included.
Link to Full Case:	Accessible at: http://www.escr-net.org/docs/i/1469153 English translation accessible at: http://www.escr-net.org/docs/i/1469150

	South Fork Band Council and others v. United States Department of the Interior
Year:	2009 (Date of Decision: 3 December, 2009)
Forum, Country:	Court of Appeals, United States of America
Standards, Rights:	Right to free exercise of religion; Rights to water and sanitation; Right to adequate housing; Right to health; Indigenous people
Summary Back-	The plaintiff appellants comprised the South Fork Band Council of Western Shoshone Nevada and other tribes and organizations ("the

***ground**:* Tribes"). The Tribes sought an emergency injunction regarding the approval of a gold mining project by the US Department of Interior and its Bureau of Land Management ("BLM") located in a sacred site. The project involved ten years of mining and up to three years of ore processing, and would allegedly create a "substantial burden to the exercise of religion." Domestic law prohibits governmental entities from imposing such burdens *unless* the government can show that the practice is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest (US Code §2000bb-1). The injunction was denied by the Federal District Court. The appellants alleged violations of the Federal Land Policy Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA") and sought an injunction to be granted on appeal.

Holding: To be granted injunctive relief, the Court required that the appellants demonstrate they were likely to "suffer irreparable harm" if a preliminary injunction were denied, that the balance of equities tipped in their favour and that an injunction was in the public interest [para. 14]. In addition, it was necessary to show that BLM's actions were either arbitrary and capricious or contrary to law [p. 15828].

While the Court declined to find that the appellants had demonstrated the likelihood of success for their FLPMA claims given the in-depth Environmental Impact Statement undertaken by the respondents in consultation with the Tribes and public over a two-year period, it did grant an injunction regarding the NEPA actions to allow a study that adequately considered the environmental impact of "millions of tons of refractory ore," the adverse impact on local

	springs and streams, and the extent of fine particulate emissions [pp. 15828 and 15831-15840].
Additional Comments:	This case is relevant to the broader framework of issues raised by international human rights bodies condemning the failure of US federal policy to protect Indian land rights and environmental law *(see, for instance, the western Shoshone petition to the UN Committee on the Elimination of Racial Discrimination (2006) and the Inter-American Commission on Human Rights (2002).)*
Link to Full Case:	http://cdn.ca9.uscourts.gov/datastore/opinions/2009/12/03/09-15230.pdf

	Amparo No. 631/2012 (Independencia Aqueduct)
Year:	2013 (Date of Decision: 8 May, 2013)
Forum, Country:	Supreme Court; Mexico
Standards, Rights:	Right to adequate housing; Rights to water and sanitation; Right to free, prior and informed consent; Right to an adequate standard of living; Indigenous people
Summary Background:	The Mexican Government approved a large-scale water supply and construction project involving the transmission of around 60 million cubic metres of water from the "El Novillo" dam to the Sonora river basin to supply the city of Hermosillo. The Yaqui tribe (the initial appellants) claimed the project was in violation of their rights to territory, consultation and to a

	safe environment and sought a writ for the protection of their constitutional rights *(an "amparo")*. The group argued the river is a source of both economic and cultural sustenance and that they were, by law, holders of 50 per cent of the water, as provided for in a presidential decree. The Fourth District Court found in favour of the Yaqui tribe. SEMARNAT, (the federal environmental agency,) appealed to the Supreme Court of Justice.
Holding:	The Supreme Court upheld the Fourth District Court's decision in favour of the Yaqui tribe and maintained that the State of Mexico had erred in failing to inform or consult the tribe at first instance [p. 88]. Upon request for further clarification from the appellants, the Supreme Court issued a decision expressly outlining the conditions to be met by the State; namely, the project was to be halted until proper consultation was effected between the State and the Yaqui tribe [p. 86]. The Supreme Court ordered that such consultation be prompted in accordance with the appropriate tribe customs, that it outline any irreversible damage caused by the project, and that a finding of any violations may result in the project being stopped [p. 83].
Additional Comments:	Since this decision was issued, it has been noted that enforcement of the judgement has been poor and consultations with the Yaqui tribe are yet to take place. This was the first time the Inter-American standards on the right to consultation with indigenous communities was acknowledged in Mexico.
Link to Full Case:	http://www.escr-net.org/node/365312

VIII. International remedies

Victims of violations of ESC rights and their counsel may have to consider bringing their case to the scrutiny of international or regional human rights protection mechanisms, when they have been unable to obtain justice at domestic level, either because the laws or legal mechanisms are unavailable or ineffective in practice.

Regional and international human rights systems offer a variety of judicial and non-judicial mechanisms and procedures. These include those administered by supervisory bodies monitoring the general implementation of the human rights. There may also be certain limited opportunities for the judicial review by international judicial and quasi-judicial bodies of alleged violations of the rights and provisions of these instruments. In addition, a communication may be brought to the attention of independent experts serving under special procedures, not for adjudication or decision, but with a view possibly to facilitating informal resolution of a complaint.

There is a range of quasi-judicial and judicial bodies at both universal and regional levels that are specifically dedicated to the examination of complaints in cases of alleged violations. Today, almost all UN human rights treaties benefit from an individual complaint or communication mechanism.[224] Among these communications procedures that can all be relevant to the protection of ESC rights, the Optional Protocol to the ICESCR, which came into force in May 2013 for the States that are parties to it, is the most comprehensive instrument for the general international protection of ESC rights.[225] The Optional Protocol creates a complaint mechanism as detailed below, as

[224] For a list of the complaint mechanisms at the international level under the human rights treaties and for more information on the United Nations Treaty Bodies receiving these complaints, please visit: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#ftn1

[225] See Chapter 2, section I, pp. 15 and 16. On the status of ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, please visit: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

well as an inquiry procedure for States that explicitly accepted the competency of the ESCR Committee to conduct such inquiries. The Optional Protocol also introduces a possibility for the UN Committee on Economic, Social and Cultural Rights (CESCR) to recommend interim measures to avoid irreparable harm.

In order to use the individual communications procedure under the OP-ICESCR, practitioners will have to pay particular attention to the admissibility criteria introduced by the Optional Protocol.[226]

Some of the main issues that practitioners considering a communication under the OP-ICESCR will have to take into account:

- Communications can concern any of the ESC rights enshrined in the ICESCR;
- Communications can be brought by and on behalf of individuals and groups of individuals;
- To be admissible a communication will have to fulfil the criteria contained in article 3 of the Optional Protocol that reads:

> ***"Article 3 Admissibility***
>
> *1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.*
>
> *2. The Committee shall declare a communication inadmissible when:*
>
> *(a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had*

[226] For references on resources concerning the Optional Protocol to the ICESCR, see box in Chapter 2, section I, p. 16.

not been possible to submit the communication within that time limit;
(b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(d) It is incompatible with the provisions of the Covenant;
(e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
(f) It is an abuse of the right to submit a communication; or when
(g) It is anonymous or not in writing."

At the regional level, the human rights protection systems offer various opportunities, particularly in Africa, the Americas and Europe. In Asia, particularly in the Southeast Asian subregion covered by ASEAN, and the Middle East, much of which is covered by the League of Arab States machinery under the Arab Charter on Human Rights, such systems are only at an embryonic stage.[227] In Europe and the Americas, the systems have been used strategically to litigate ESC rights, but the protection mechanisms are more developed for civil and political rights than for ESC rights. Indeed, in the context of the Council of Europe, the European Court of Human Rights is a judicial body that issues binding decisions based on the European Convention on Human Rights and Fundamental Freedoms (ECHR), including on questions that engage ESC rights, if indirectly. The ECHR protects a full range of civil and political rights such as the right to life, to privacy and freedom from torture or dis-

[227] ASEAN Human Rights Declaration (adopted 18 November 2012) and Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), English translation reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005).

crimination that have been the basis for jurisprudence relevant for ESC rights.

The Council of Europe does contain a treaty protecting ESC rights, namely the European Social Charter, the implementation of which is ensured by the European Committee of Social Rights. The latter is not strictly a judicial body and can receive only collective complaints.[228] However, it has been used successfully to remedy a number of ESC rights violations, including violations of the right to housing[229], to education[230], to be free from forced labour[231] and the prohibition of child labour.[232]

In the Americas, the additional protocol of San Salvador complements the American Convention on Human Rights in the area of Economic, Social and Cultural Rights. This can be seen in the Inter-American Commission on Human Rights' admissibility report for the *Jorge Odir Miranda Cortéz and others v. El Salvador* case, regarding the State's failure to supply HIV drugs. The Commission stated that it will interpret article 10 of the Protocol of San Salvador on the right to health in the light of provisions of articles 26 and 29 of the American Convention on Human Rights.[233] Likewise, in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court interpreted the meaning of a dignified life as contained in article 4 (1) of the American Convention (right to life) in the light of article 10 (right to health), article 11 (right to a healthy environment), article 12 (right to food), article 13 (right to education) and article 14 (right to benefits of culture) of the Proto-

[228] See for instance the case law examples mentioned in Chapter 2, section III. 1. b).
[229] *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, European Committee of Social Rights, Complaint N° 49/2008, 11 December 2009 and *European Roma Rights Centre v. Portugal*, European Committee of Social Rights, Complaint N° 61/2010, 30 June 2011.
[230] *International Association Autism-Europe v. France*, European Committee of Social Rights, Complaint No. 1/2002, 7 November 2003.
[231] *Quaker Council for European Affairs v. Greece*, European Committee of Social Rights, Complaint No. 8/2000, 27 April 2001.
[232] *International Commission of Jurists v. Portugal*, European Committee of Social Rights, Complaint No. 1/1998, 10 September 1999.
[233] *Jorge Odir Miranda Cortéz and others v. El Salvador*, Inter-American Commission on Human Rights, Admissibility Report 29/01, case 12.249 (2001).

col of San Salvador and concluded that the State had failed to ensure that the community lived under dignified conditions.[234]

As in the European context, practitioners and human rights defenders have used civil and political rights and other provisions for an indirect protection of ESC rights by the quasi-judicial and judicial bodies of the regional system. In Africa, ESC rights practitioners can rely on the African Charter for Human and People's Rights, which includes a substantial catalogue of rights, including ESC rights, and from which a rich jurisprudence has emerged.[235]

Even if not at the core of litigation work, legal practitioners may also want to consider the broader array of opportunities to bring attention to a case at the international level. Indeed, any ESC rights violation may be brought to the attention of an international procedure, even if the procedure does not have an adjudicative function. For instance, even the periodic monitoring exercises of both the United Nations and regional systems, allow for the submission of information on specific situations of violations of human rights. Practitioners involved in litigation of ESC rights may therefore consider reaching out to civil society groups who submit information to the United Nations Universal Periodic Reviews at the Human Rights Council, or more importantly to the United Nations treaty-bodies in charge of supervising the implementation of their respective treaties, and in particular in charge of the examination of States periodic reports of this implementation. Similar procedures and opportunities exist at the regional level.[236]

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[234] *Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Case No. 12. 313 (2005), paras. 163-169.

[235] See for example the case of *SERAC and CESR v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002), summarized in section VII of this chapter. For further details on the African Human Rights system see Toolbox in annex 2 of this Guide.

[236] European Court of Human Rights and European Committee on Social Rights, for more information on applications, please visit: http://www.echr.coe.int/Pages/home.aspx?p=applicants, http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrganisationsIndex_en.asp; African Commission and Court on Human and Peoples' Rights, for more information on applications, please visit:

Among the UN treaty-bodies, the CESCR is not only of significance for ESC rights litigants and lawyers, but also for the other Committees who have regularly addressed legal and policy issues that are relevant for ESC rights.[237] Indeed, other Committees can either supervise a treaty that also entails ESC rights or address ESC rights through their connection with other rights that fall within their mandate.

In addition to the opportunity to draw attention to a case in the context of the monitoring of policies and State reporting, international and regional mechanisms offer various complaint and inquiry procedures. At the UN level, the special procedures,[238] held by independent experts address important conceptual issues in their thematic reports that can be helpful to practitioners searching documentary and expert evidences. Many of these procedures, including those addressing ESC rights, communicate directly with States and other actors involved in violations in the context of their country missions and allegation letters, as well as through urgent appeals procedures requesting immediate action to avoid irreparable harm. The latter is a kind of complaint procedure by which a special procedure mandate holder is asked, by victims and their supporters, to intervene in a case by engaging in a dialogue with the government of the State concerned. In addition, there is the also the possibility of engaging the urgent appeal procedures, where the special procedure mandate holder will request the concerned State to take immediate preventive action to

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http://www.achpr.org/communications/procedure/, http://www.achpr.org/communications/guidelines/ ,http://www.african-court.org/en/index.php/component/content/article/13-cases-from-court/22-submission-of-cases-to-the-court; and Inter-American Commission and Court on Human Rights, for more information on presenting a complaint, please visit: https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E, https://www.cidh.oas.org/cidh_apps/login.asp

[237] See Chapter 2, section III. 1. a) of this Guide.

[238] At the international level, the United Nations Human Rights Council has a range of Special Procedures that are specialized in the area of ESC rights, including the rights to housing, food, water and sanitation, health and education. The list can be consulted at: http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx

avoid irreparable harm to a victim or potential victim, much like a request for interim measures to an adjudicative body.

Special Procedures that are presently addressing ESC rights include:

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context. For more information visit:
http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx

Special Rapporteur on the right to food. For more information visit:
http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx

Special Rapporteur on the right to education. For more information visit:
http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. For more information visit:
http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx

Special Rapporteur on the human right to safe drinking water and sanitation. For more information visit:
http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx

Special Rapporteur in the field of cultural rights. For more information visit:
http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx

Special Rapporteur on extreme poverty and human rights.

For more information visit: http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx

Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. For more information visit: http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx

Special Rapporteur on the rights of indigenous peoples. For more information visit: http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx

Practitioners who want to send information on alleged violations to Special Procedures and submit a complaint to a treaty-body can find useful information respectively at:

http://ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx
http://ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx

Chapter 5: Standards and techniques of review in domestic adjudication of ESC rights

This chapter surveys a number of the critical concrete contributions made by judicial bodies that have served to define and refine the scope and content of ESC rights. The examples provided are clustered according to specific techniques and "constitutional standards of review" that judicial bodies around the world have used to protect and enforce the guarantees pertaining to these rights. The chapter also provides the opportunity to update the case law examples that the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*) already provided.

As the *ICJ Justiciability Study* explained, "*when judges examine an allegation that a right has been violated, they do not necessarily focus on the determination of a specific obligation to be imposed on the State or on an individual. Judges usually assess the course of action undertaken by the duty-bearer in terms of legal standards such as "reasonableness", "proportionality", "adequacy", "appropriateness" or "progression". Such standards are not unknown to courts when they carry out judicial reviews of other types of decisions taken by the political branches. In deciding whether an individual person's right has been satisfied judges do not need to supplant political branches in designing the most appropriate public policies to satisfy a right. Rather, they examine the effectiveness of the measures chosen to fulfil that right. Although the State's margin of discretion to select appropriate measures is broad, certain aspects of policy-making or implementation are likely to be reviewed by the courts through the application of a "reasonableness" or similar standard. For example, as will be shown later, when reviewing the State's compliance with its obligations courts may consider issues such as the exclusion of groups to be granted special protection, the lack of coverage of*

minimum needs defined by the content of the right, or the adoption of deliberately retrogressive measures."[239]

The categories of standards used in this chapter are intended to illustrate the cases under discussion. In many cases, especially those entailing complex facts and points of law, several standards or principles will be used conjunctively.

I. Reviewing general constitutional principles

Certain ESC rights cases alleging a violation of constitutional provisions that directly address one of these rights may be brought to the scrutiny of a court empowered to address constitutional questions. However, some constitutional review cases may be linked to a provision that is not explicitly a "right" protection provision, but rather a more general rule of law principle anchored in the constitution. These include, for instance, the principle of legality, the principle of non retroactivity of the law, the principle legality or the principle of the protection of legitimate expectations[240] that individuals can argue, in many domestic legal systems, to challenge a legislative or administrative change that affects their interests and rights.

The following cases are illustrative in this respect.

1. Legitimate expectations

[239]ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], pp. 21 and 22.

[240] Legitimate expectations originating in English administrative law finds equivalents in French law under the "principe des droits acquis", "principio de confianza legitima" in Spanish law, or "Vertrauensschutz" in German law.

	Case No. 2009-43-01 on Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009
Year:	2009 (Date of Decision: 21 December, 2009)
Forum, Country:	Constitutional Court; Latvia
Standards, Rights:	Proportionality; Legitimate expectations; Right to social security
Summary Back-ground:	This case challenged the constitutionality of State pension law that temporarily restricted payment of pension funds to reduce the State's budget deficit. The Parliament in response said that it was necessary as a step to effectively contain the country's escalating financial crisis.
Holding:	Based on the Constitutional mandate to harmonize human rights provisions within the Constitution with the international human rights regime, the Court cited article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and concluded that the right to pension is included within the fundamental right to social security under article 109 of the Constitution [para. 20]. The Court acknowledged that this fundamental right may be restricted if such restriction is established by law, justified by a legitimate end and conforms to the principle of proportionality [para. 26]. The restrictions were clearly established by law and the Court found that the challenged provisions did have a legitimate end – namely securing the sustainability of the social insurance budget ensuring the welfare of society [paras. 26 and 27]. Reaffirming its earlier case law, the

Court stated that the principle of proportionality prescribes that, in cases where a public authority restricts the rights and lawful interests of persons, a reasonable degree of proportionality between the interests of persons and the interests of the State or society should be attained. To determine whether a legal provision adopted by the legislature satisfies the principle of proportionality, one should clarify 1) whether the means used by the legislature are appropriate for achieving the legitimate end; 2) whether such an action is indispensable, i.e. the end cannot be achieved by other means, namely less restrictive alternatives; and 3) whether the benefit for society will be more significant than the detriment to the rights of individual persons. If, while assessing a legal provision, it can be established that it does not comply with at least one of these criteria, it follows that the legal provision in question does not comply with the principle of proportionality and therefore is unlawful [para. 28]. The law failed the proportionality test because Parliament had not considered other less restrictive alternatives. Thus the new pension law provisions were held to be in violation of article 109, of an individual's right to pension [paras. 30-30.2.1.].

The Court also held that the provisions violated the principle of legitimate expectations as protected by article 1 of the Constitution. This principle requires the State, when it alters the existing legal order, to maintain a reasonable balance between a person's confidence in the currently effective legal order and those interests for the sake of which changes are being made. The court held that in determining whether an appropriate balance has been struck, consideration should be given to whether the planned transition to the new legal order is sufficiently lenient and whether there has

been an adequate transition period or granting compensation. Both these conditions were not met in this case where the transition was exceedingly rushed and there was no plan for future compensation of the reduced pensions [para. 32].
In reaching its overall conclusions in this case, the Court, citing the Limburg Principles, its own prior jurisprudence and the General Comment 19, considered that minimum essential levels must be guaranteed irrespective of resources and vulnerable groups such as pensioners must be particularly protected [paras. 28-31.2].

In addition and in response to the State's reference to obligations under international loan agreements as a factor underlying the pension cuts, the Court ascertained that it was actually the Cabinet of Ministers who had proposed reductions of pension funds. But even if these conditions have been explicitly imposed by the creditors, the Court stated that conditions "cannot replace the rights established by the Constitution." The Court held that international commitments assumed by the Cabinet of Ministers cannot by themselves serve as a basis for the restriction of the fundamental right to social security [para. 30.1].

Also important to note is that in analyzing compliance of the State to its human rights obligations, the Court held that the State has a threefold duty in the area of each fundamental right, namely to respect, protect and guarantee the rights of persons. Acting in conformity with human rights, States thus should enact a range of measures – both passive, for example non-interference with rights, as well as active, for example fulfilling people's individual needs [para. 24].

	In conclusion, the Court ordered that since the challenged pension provisions have been found unconstitutional and invalid, that the pension cuts must be discontinued and that the Parliament had to establish a reimbursement procedure for deductions already made [The Ruling Part at the end of the Decision, paras. 1-3].
Additional Comments:	Given that social security systems in different countries are facing budget cuts and austerity measures in the wake of global financial crisis, this is an important case that elevates human rights considerations in the context of public policy decision making.
Link to Full Case:	http://www.satv.tiesa.gov.lv/upload/Judgment2009-43.htm

2. Non-retroactivity of the law

	Constitutional Case No. 15 of 2010, State Gazette Issue 91, p. 3
Year:	2010 (Date of Decision: 11 November, 2010)
Forum, Country:	Constitutional Court; Bulgaria
Standards, Rights:	Non-retroactivity; Rule of law; Welfare State; Right to decent work
Summary Background:	This case addressed two independent applications, one by the President of Bulgaria and the other by 51 parliamentarians, seeking a declaration that para. 3 of the transitional provisions and articles 176.3 and 224.1 of the Labour Code, and articles 59.5 and 61.2 of the law on

state officials, are unconstitutional and contrary to treaties to which Bulgaria is party, including the ICESCR. These provisions amended entitlements to untaken paid leave prior to the provisions' entry into force.

Holding: The Constitutional Court held that para. 3 of the transitional provisions of the Labour Code and para. 8(a) of the transitional and final provisions of the law on state officials were contrary to articles 57.1, 16, 48.1 and 48.5 of the Constitution of Bulgaria; indent 5 of the Preamble to the Constitution of Bulgaria, articles 2.1 and 24 of the UDHR, and article 2 of ILO Convention No. 52, which protect the interdependence of fundamental rights, the right to work, the right to leave and the principle of the welfare state.

The Constitutional Court dismissed the application for unconstitutionality of article 176.3 of the Labour Code and article 59.5 of the law on state officials because the articles' stipulation that the right to paid annual leave lapses two years after the leave is granted extinguishes the exercise of the right to leave rather than the right itself.

The Constitutional Court found that article 224.1 of the Labour Code and article 61.2 of the law on state officials violated article 6 of ILO Convention No. 52, as well as the principle of the rule of law for contradicting articles 48.5 and 176.3 of the Labour Code, in light of the right to work enshrined in articles 16 and 48.1 of the Constitution of Bulgaria.

Additional Comments: The extent to which the Constitutional Court accounts for European and international legal documents is of interest.

Link to Full Case:	Summary by the Constitutional Case Law InfoBase of the Venice Commission: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/bul/bul-2010-3-003?f=templates$fn=document-frame-set.htm$q=%5Bfield,E_Thesaurus%3A3.5*%5D$x=server$3.0 - LPHit1 Full judgement (only available in Bulgarian): http://dv.parliament.bg/DVWeb/broeveList.faces

II. Non-discrimination and equality

Non-discrimination and equality retain a very fundamental intrinsic and instrumental value for the protection of ESC rights.[241] Indeed, non-discrimination and equality, as well as the equal protection of the law are recognized as rights in and of themselves in international law and most domestic normative frameworks. In addition, the particular obligation to guarantee the enjoyment of all other rights without discrimination is a cross-cutting and immediate obligation of States under the international law pertaining to ESC rights.[242]

The following case-law examples illustrate how judicial bodies in various jurisdictions have heavily relied on the prohibition of discrimination and on the equality provisions of their domestic law to protect ESC rights, especially in the absence of a constitutional or statutory guarantee of these rights, and how they have sanctioned discriminatory laws and practices in relation to

[241] *ICJ Justiciability Study*, pp. 54-61.
[242] For more details on the principles of non-discrimination and equality see Chapter 2, section III. 1. a) of the present Guide.

various other ESC rights, and in relation to various prohibited grounds for discrimination.[243]

1. Cases concerning discrimination against persons with disabilities

	Decision of T-051/11 Julio David Perez v. Mayor's Office of Monteria. File T-2650185
Year:	2011 (Date of Decision: 4 February, 2011)
Forum, Country:	Constitutional Court; Colombia
Standards, Rights:	Non-discrimination and equal protection of the law; Right to education; Persons with disabilities
Summary Background:	Issue at stake in this case: whether the right to education was violated by denial of availability of a sign interpreter in College due to less than ten hearing impaired students in class. The complainant was a student with hearing disabilities who was adversely affected by the aforementioned denial.
Holding:	Referencing elements of the UN and regional human rights law framework, including General Comment 5 by the Committee on Economic, Social and Cultural Rights (CESCR), the Inter-

[243] For case law examples concerning migrants and decisions finding discrimination on the grounds of national origin or legal status, see the ICJ Practitioners' Guide on migration and human rights, accessible (in English, Italian and Greek) at: http://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/. For cases concerning the discrimination on the ground of sexual orientation and gender identity (SOGI) in the area of employment, inheritance and social benefits, see the ICJ SOGI Caselaw Database at: http://www.icj.org/sogi-un-database/ and http://www.icj.org/sogi-casebook-introduction/

	American Convention of Elimination of all forms of Discrimination Against Person with Disabilities, article 23 of the Convention on the Right of the Child, [para. IV. 4.2.] as well as articles of the Colombian Constitution [para. IV. 4.1.] and national case law [para. IV. 4.4.], the Constitutional Court held that the complainant's right to education had been violated. In addition, the Court concluded that the law that decreed appointing sign language interpreters only in the case of minimum enrolment of hearing-impaired students was unconstitutional, as the mandated requirements were discriminatory and served to deepen the stigmatization and exclusion of students with hearing disabilities [para. V]. The Court required Monteria to make appropriate amendments to the budgets, planning, curricula and organization of its educational institutions to effectively realize the right to education for people with hearing disabilities [para. V]
Link to Full Case:	http://www.corteconstitucional.gov.co/relatoria/2011/t-051-11.htm

	Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa, Government of the Province of Western Cape, Case no: 18678/2007
Year:	2010 (Date of Decision: 11 November, 2010)
Forum, Country:	High Court; South Africa
Standards,	Reasonableness; Non-discrimination and equal

Rights:	protection of the law; Human dignity; Negligence; Right to education; Persons with disabilities
Summary Background:	This case concerned the rights of severely and profoundly intellectually disabled children in the Western Cape and allegations that their educational needs were not being adequately met by the South African national and Western Cape Governments. Children with such disabilities were unable to receive care except at limited places in centres run by NGOs, which were insufficient in number. Children who could not obtain access to these centres received no education at all. It was contended that State educational provisions made for these children were very much reduced as compared to other children and any provisions made were inadequate to cater to the educational needs of the affected children.
Holding:	The Court held that the respondents (the South African and West Cape Governments) had failed to take reasonable measures to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape, in breach of the rights of children to a basic education, protection from neglect or degradation, equality, human dignity [para. 52 (1)]. On the right to education, the Court found that the State had violated this right, both in respect of the positive dimension of the right, by failing to provide the affected children with a basic education and also in respect of the negative dimension of the right, by not admitting the children concerned to special or other schools [para. 45]. The Court found no justification for this violation. The State failed to establish that their policies were reasonable and

	justifiable in an open and democratic society based on human dignity, equality and freedom [para. 42]. The Court additionally held that the children's rights to dignity had been violated as the discrimination they have faced had in effect caused them to be marginalized and ignored [para. 46]. The failure to provide the children with education placed them at the risk of neglect, as it meant that they often had to be educated by parents who did not have the skills to do so and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation. This unjustifiably violated their right of protection from neglect and degradation [paras. 46 and 47]. In light of these findings, the judgement required the State to take reasonable measures (including interim steps) to ensure access to education for every child in the Western Cape who was severely and profoundly intellectually disabled, provide necessary funds for special care centres and transportation of the children to these centres and to develop a plan of action to remedy the aforementioned violations [para. 52].
Additional Comments:	The national Government chose not to appeal this decision.
Link to Full Case:	http://www.saflii.org/za/cases/ZAWCHC/2010/544.html

	Decision T-974/10
Year:	2010 (Date of Decision: 30 November, 2010)
Forum, Country:	Constitutional Court; Colombia
Standards, Rights:	Non-discrimination and equal protection of the law; Human dignity; Right to health; Right to education; Children; Persons with disabilities
Summary Background:	This case was filed by a mother, on behalf of her intellectually disabled daughter, against EPS Coomeva, a State health care provider in Colombia. The child required an integrated program of therapy and special education and the mother asserted that EPS Coomeva violated her daughter's fundamental rights to health, development, and bodily integrity in denying a disabled child the comprehensive care she needed. EPS Coomeva argued that it was the State's obligation to provide educational services, that special education is not a health service but an educational one and that the applicant was required to pay in accordance with her means.
Holding:	The holding of the Court was that EPS Coomeva has violated the child's right to health by refusing to provide comprehensive treatment and was obligated to provide the child with the treatment she needed. The court thus ordered EPS Coomeva to coordinate with local education agencies to attain a comprehensive medical assessment of the minor, as well as to ascertain the medical and educational services required for her disability [paras. 6.4 and 7]. The Court cited Colombia's obligations under the ICESCR and the Convention on the Rights of

Persons with Disabilities, requiring the State to ensure that persons with disabilities are not denied educational opportunities on the basis of disability, as well as the obligation to ensure reasonable accommodation based on each individual's requirements [paras. 5.6.1. and 5.6.2.2.2]. On the issue of States' obligation to provide education, the Court affirmed that the local governments have to guarantee availability, access, permanence, and quality while providing education [para. 5.5]. The Court held that education for people with disabilities should preferably be inclusive and special education should be a last resort, but necessary if the same level of education cannot be provided at regular institutions [para. 5.6.2.2].

The Court also highlighted that children are subject to a special constitutional protection and that this is particularly enhanced with regards to children with disabilities [para. 5.3]. For vulnerable populations, such as persons with disabilities, health providers needed to provide comprehensive care comprising services not included in the State's mandatory plans. The existence of specialized educational institutions should not be an excuse to deny access to comprehensive medical treatment for children with intellectual disabilities.

As per the Court's analysis, in the case of a person with intellectual disabilities, State obligations related to health and education must be analyzed in a holistic manner to ensure dignity and equality. The Court observed that there were gaps in the cooperation between health and education agencies as regards protection of disabled people. Therefore, the Court ordered the Ministry of Education and the Ministry of Social Protection to collaborate and in the process thereof, invite the participation of civil society,

	so as to define their areas of work, create better synergy and plan appropriate mechanisms to meet the needs of the population with disabilities [paras. 6 and 7].
Link to Full Case:	http://www.corteconstitucional.gov.co/relatoria/2010/t-974-10.htm

2. Case concerning gender discrimination

	Decision T-841
Year:	2011 (Date of Decision: 3 November, 2011)
Forum, Country:	Constitutional Court; Colombia
Standards, Rights:	Non-discrimination and equal protection of the law; Right to health; Children; Women
Summary Background:	An injunction was filed in this case to safeguard a juvenile's human right to health, in particular, her mental health. The girl's doctor had ascertained that her pregnancy posed a risk to her mental health, which qualifies as one of the circumstances under which a legal abortion can be performed in Colombia. However, a particular health administrator that was part of the Colombian social insurance system was said to have unreasonably created so many administrative obstacles that the girl was compelled to continue her pregnancy even though this was detrimental to her health.
Holding:	The Court, citing applicable international human rights instruments including the ICESCR, the Convention on the Elimination of All Forms

	of Discrimination against Women and the Convention on the Rights of the Child, strongly affirmed women's rights to reproductive autonomy and access to health services without discrimination [para. 22], especially in cases where the reproductive rights of juveniles are at stake. The Court emphasized that the health administrators operating as part of the social insurance system have an obligation to provide adequate and timely access to health services including abortion [paras. 17. III and 35]. In this case, the administrator ignored this obligation and posed a grave risk to the child's health, on the basis of a mere technicality [para. 21]. The Court ordered the health administrator in question to pay appropriate compensation and prohibited the imposition of additional conditions that unreasonably delay access to abortion services in future cases, for example requiring a waiting period or requiring necessary certification from only an affiliated doctor.
Link to Full Case:	http://www.corteconstitucional.gov.co/relatoria/2011/t-841-11.htm

3. Case dealing with substantive equality

	Decision T-291/09
Year:	2009 (Date of Decision: 29 April, 2009)
Standards, Rights:	Non-discrimination and equal protection of the law; Right to decent work; Right to life; Right to an adequate standard of living
Forum, Country:	Constitutional Court; Colombia

Summary Background: A group of waste pickers from the City of Cali filed an appeal of legal protection against several municipal entities which had allegedly violated their rights to work and a decent life through the closure of Navarro waste dump. At the Navarro site, the waste pickers had developed over the course of 30 years the economic activity of recycling to provide a livelihood for themselves and their families.

Traditionally recycling activities in Colombia have been undertaken by extremely poor and marginalized sectors of society. But gradually, as recycling became more profitable, a privatization trend set in with waste management companies dominating the scene. In 2008, Colombia enacted legislation penalizing activities associated with informal waste pickers' work activities. When the City of Cali privatized its waste management system, at the time of the public bidding process, it disregarded prior orders from the Constitutional Court that public agencies take affirmative actions to guarantee the participation of informal recyclers in the privatization process. It was at this time that the Navarro Landfill in Cali was closed. More than 1000 families that worked in that landfill were not permitted to work in the new landfill that replaced the Navarro Landfill. Although they were assured a social reintegration plan that included opportunities of employment, capacity-building programs, health and education, these commitments were never honoured.

Holding: The Court held that municipal authorities had violated the Navarro waste pickers' fundamental right to a decent life in connection with the right to work [para. III.9.1.1].

The Court also made clear that the defendant entities established discriminatory laws and policies, which had adversely affected the petitioners [para. III.2].

> The Court's ruling decision (1) developed the precedent established in earlier cases regarding the rights of informal recyclers during the privatization of waste collection, (2) suspended the bidding process, (3) ordered the State to adopt all the necessary measures to assure effective implementation of recyclers' right to health, education and food, (4) ordered the State to ensure recyclers' access to education as well as to other social services, (5) included recyclers in State Solid Waste Disposal Programs of collection, and recognized them as autonomous solidarity-based entrepreneurs, (6) created a committee to reform the municipal waste management policy of Cali and integrate the informal recyclers into the formal economy of waste management, (7) ordered emergency measures to be taken to address the Navarro recyclers' survival needs and (8) suspended legal and administrative provisions that were adverse to waste pickers' trade in Cali [para. IV].
>
> The case emphasized the positive measures the State must undertake towards overcoming the material inequality between groups. The Court stated that "Equality is one of the pillars upon which is based the Colombian State. The Constitution recognizes equality as a principle, a value and as a fundamental right that goes beyond the classical equality formula before the law, used to build a postulate that points towards the realization of conditions of material equality. In that perspective, a central objective in the equality clause is the protection of traditionally discriminated or marginalized groups: on one side, as an abstention mandate or interdiction of discriminatory treatment and, on the other side, as an intervention mandate, through which the State is obliged to carry out actions oriented towards the overcoming of the

	material inequality faced by such groups" [para. III.3].
Additional Comments:	The case explores the State's duty to respect, protect and fulfil.
Link to Full Case:	http://www.corteconstitucional.gov.co/relatoria/2009/t-291-09.htm

4. Cases concerning discrimination on the ground of sexual orientation and gender identity

The ICJ has published a variety of materials and developed case-law databases that may be searched online and includes several cases in which judicial bodies have protected right-holders against discrimination in their enjoyment of ESC rights on the ground of their sexual orientation and gender identity. Among these are cases in the field of employment, social benefits and education.[244]

	John Doe et al. v. Regional School Unit 26, No. 7455/2001, Decision 2014 ME 11
Year:	2014 (Date of Decision: 30 January, 2014)
Forum, Country:	Supreme Court; United States of America
Standards, Rights:	Non-discrimination and equal protection of the law; Right to education; Rights to water and sanitation; LGBTI

[244] All materials are accessible at: http://www.icj.org/themes/sexual-orientation-and-gender-identity/. The case-book database is accessible at: http://www.icj.org/sogi-casebook-introduction/

Summary Background:	Susan Doe is a transgender girl. Her identity as a girl is accepted by all parties and the diagnosis of her gender dysphoria is not disputed. The issue of her use of communal girl's bathroom was not raised until September 2007, her fifth-grade year, when pressure started to come from other students and their families. As a response to this pressure, the school terminated Susan's use of the girls' bathroom and required her to use the single-stall, unisex staff bathroom. In her sixth-grade year at Orono Middle School, she was also denied use of the girl's bathroom and instead required to use a separate, single-stall bathroom.
Holding:	This case is an appeal by John and Jane Doe, the parents of Susan Doe, of a summary judgement from the Superior Court that was in favour of the Regional School Unit 26 against the Doe family. The family argued that the school's decision to discontinue Susan's use of a communal bathroom consistent with her gender identity was a violation of the prohibition of discrimination on the ground of sexual orientation and gender identity under the Maine Human Rights Act (MHRA) as amended in 2005. The Regional School Unit 26, for its part, argued that the non-discrimination provision of the MHRA conflicts with the provisions regulating sanitary facilities in schools entailed in the Maine Revised Statute (20-A M.R.S. section 6501). The Maine Supreme Judicial Court thus considered two issues: whether there was a conflict between the provisions of the two statutes; and whether the exclusion of Susan Doe from communal girl's bathroom violated the Maine Human Rights Act. In particular, the Court looked into the Public Accommodation section in the Maine Human Rights Act (section 4592(1) of MHRA) and the

Sanitary Facilities provision in Maine Revised Statute (20-A M.R.S. §6501). The former prohibited discrimination based on sexual orientation in public accommodations. The Court held that an elementary school is a place of public accommodation. The latter required a "school administrative unit shall provide clean toilets in all school buildings, which shall be…separated according to sex and accessible only by separate entrances and exits." [paras. 14, 16 and 17].

The Court held that these statutes served different purposes and they were reconcilable by adopting a consistent reading. The public-accommodations and educational-opportunities provisions of the MHRA aimed to prohibit discrimination based on sexual orientation and to ensure equal enjoyment of and access to educational opportunities and public accommodations and facilities. The sanitary facilities provision on the other hand aimed to establish cleanliness and maintenance requirements for school bathrooms. It did not purport to establish guidelines for the use of school bathrooms and offered no guidance concerning how gender identity relates to the use of sex-separated facilities. It was the responsibility of each school to make its own policies concerning how to use these public accommodations and to ensure such policies comply with the MHRA [para. 19].

The Court held that the ban on Susan's use of the girls' bathroom constituted discrimination based on her sexual orientation. The Court refuted the defence of the School that it had to comply with the provision for sex segregation in sanitary facilities under the M.R.S. The Court asserted that the decision of the school to discontinue the use by Susan of the girl's bathroom was not based on a change of her status, but solely on complaints by others. The decision was

	adversely affecting Susan's psychological well-being and educational success. The Court established that this discrimination based on Susan's sexual orientation violated the MHRA [para. 22].
Link to Full Case:	http://www.maine.gov/mhrc/doe.pdf

5. Cases concerning discrimination against non-nationals/migrants

	Control of constitutionality - interlocutory action (Giudizio di legittimità costituzionale in via incidentale)
Year:	2011 (Date of Decision: 12 December, 2011)
Forum, Country:	Constitutional Court; Italy
Standards, Rights:	Non-discrimination and equal protection of the law; Right to health; Right to education; Right to social security; Children; Persons with disabilities; Migrants
Summary Background:	Juveniles of non-European Union origin with disabilities and without a long-term resident permit, which can be acquired only after five years of permanent residency, and their families were excluded from the benefits of financial assistance (*indennità di frequenza*). The allowance aims at helping disabled juveniles and their families who face economic difficulties in covering the medical needs, as well as other special needs they may have, in the area of education and vocational training to promote their integration in society. The Genoa Court of Appeal referred the case to the Constitutional

	Court for the review of the constitutionality of this discrimination in the assignment of this social benefit (article 80.19 of Law no. 388 of 23 December 2000).
Holding:	Pursuant to article 117.1 of the Constitution, which requires legislation to comply with international obligations, the Constitutional Court considered that the exclusion from the assistance scheme of non EU disabled juveniles and their families to be in breach of the right to non-discrimination as guaranteed under article 14 of the ECHR and of article 3 of the Constitution providing for equality of treatment [Considerato in diritto, para. 5]. The Court also found violations of article 32 of the Constitution, protecting the right to health; article 34, protecting the right to education; and article 38, protecting the right to social assistance [Considerato in diritto, para. 1].
Additional Comments:	The Court makes an implicit distinction between documented and undocumented migrants. This decision is thus limited to the discrimination between citizens and documented migrants based on the long-term nature of the permit. The Court alludes to the possibility of a different outcome in respect of undocumented migrants, considering the existing ECtHR jurisprudence.
Link to Full Case:	http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=329

	Kong Yunming v. Director of Social Welfare, FACV No. 2
Year:	2013 (Date of Decision: 17 December, 2013)
Forum, Country:	Court of Final Appeal; Hong Kong
Standards, Rights:	Proportionality; Non-discrimination and equal protection of the law; Right to social security; Migrants
Summary Background:	This judicial review of the complainant's rejected social security application assessed the constitutionality of the seven-year residence requirement for social security. The complainant moved to Hong Kong to live with her husband, but she became homeless because her husband passed away a day after her arrival and his residence was repossessed. The complainant applied for social security four months after arriving in Hong Kong. The complainant would have qualified for social security but for the new seven-year residence requirement.
Holding:	Ribeiro J; Tang PJ, Lord Phillips NPJ & Ma CJ concurring: The Court held that policies formulated to uphold the right to social welfare in article 36 of the Basic Law must be read together with "economic conditions and social needs", as per article 145 [paras. 17 and 18]. Article 145 does not preclude reducing welfare entitlements if that maintains the sustainability of the welfare system [para. 37]. Although the Court did not recognize the right to social welfare as a fundamental right, it held that that population growth, an ageing population and rising social security expenditure were not rational justifications for the seven-year require-

	ment, as there were other means of addressing those problems [paras. 66, 75, 96]. The Court indicated that deterring immigration, immigrants' ability to rely on charities were not arguments for the reasonable proportionality of the seven-year requirement [sections L.1 and L.2]. The Court ruled that the Director's discretion in and guidelines for waiving the seven-year requirement presented immigrants with "a very high threshold" [section L.3, para. 136]. Bokhary NPJ stated that the seven-year requirement violated the principle of equality before the law under article 25 of the Basic Law and article 22 of the Hong Kong Bill of Rights, the latter of which is taken from article 26 of the ICCPR. Bokhary NPJ also held that article 145 of the Basic Law implies that social security policies should be formulated progressively rather than retrogressively. Bokhary NPJ also cited Basic Law provisions that constitutionally guarantee articles 2 and 9 of the ICESCR, as well as CESCR's concluding observations in 2005 on Hong Kong. The Court unanimously declared the Director's seven-year residence requirement to be unconstitutional, restoring the previous one-year requirement [para. 144].
Additional Comments:	What distinguished Bokhary NPJ's separate concurring judgement was his account for international human rights law as well as his emphasis on constitutional guarantees for *all* Hong Kong residents, including non-permanent ones like the complainant.
Link to Full Case:	http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=90670

III. Reasonableness

"Reasonableness" is a standard of review often used for by courts for making a determination as to the constitutionality or lawfulness of legislation and regulations, particularly in common law jurisdictions, and through which judges will assess whether the questioned law or practice can be justified vis-à-vis the objectives targeted and the constitutional rights to be protected.

The standard of "reasonableness" may be invoked in a variety of contexts and for different purposes in ESC rights litigation.[245] Not all such invocations are identical or parallel concepts, so importing the standard from one case to another will not always be appropriate. The degree of deference to the choices of legislative and administrative authorities will also vary significantly. Still, it is striking to note how often one variant or another of the concept has been relied upon by judicial and quasi- judicial bodies, especially in cases involving positive obligations of the State to fulfil ESC rights.

1. Reasonableness in ESC rights litigation

In the area of ESC rights litigation, the South African jurisprudence has played a particular exemplary role, especially the *Grootboom* case from the Constitutional Court of South Africa.[246] Examining the constitutional right to adequate housing, the Court held that the State's housing policy was unreasonable and unconstitutional because it focused on long-term development of housing, but did not provide shelter for those who were currently homeless. The *Grootboom* case has been influential in development of the doctrine of the South African

[245] "Reasonableness", "unreasonableness" or even "rational basis review" are different but close standards of review used in various jurisdictions. For a more exhaustive account see Brian Griffey, *The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, in Human Rights Law Review 11:2 (2011), pp. 275-327, at pp. 305-309.

[246] The full decision is accessible at: http://www.constitutionalcourt.org.za/Archimages/2798.PDF. For a case study see *ICJ Justiciability Study*, pp. 38 and 39.

Court and of judicial and quasi-judicial bodies beyond South Africa when deciding on cases of positive obligations in the area of ESC rights.[247]

Especially in the absence of harmonized domestic understandings and uses of the standard of reasonableness, it is interesting to consider developments at the international level. In this perspective, it is important to note that a reasonableness test was included in the Optional Protocol to the ICESCR (OP-ICESCR). Under article 8.4 the Committee on Economic, Social and Cultural Rights (CESCR) shall consider the "reasonableness" of the steps taken by the State Party in accordance with the rights laid out in the ICESCR. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the ICESCR.[248] In a 2007 statement issued to inform the negotiations of the OP-ICESCR, the CESCR gave some indications as to what criteria would be considered in assessing what measures taken by States could be deemed "adequate or reasonable":

"In considering a communication concerning an alleged failure of a State party to take steps to the maximum of available resources, the Committee will examine the measures that the State party has effectively taken, legislative or otherwise. In assessing whether they are "adequate" or "reasonable", the

[247] The reasonableness standard was adopted, after some negotiation, by the open-ending intergovernmental Working Group elaborating the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, based partly on the South African experience. See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/RES/63/117 [hereafter OP-ICESCR]. See also Bruce Porter, *The Reasonableness of article 8(4) - Adjudicating Claims from the Margins*, Nordic Journal for Human Rights, Vol.27, No.1 (2009), pp. 39-53.

[248] See ICJ Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, pp. 80-84, accessible in English, Spanish and French at: http://www.icj.org/comentario-del-protocolo-facultativo-del-pacto-international-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/; and Brian Griffey, *supra* note 245.

Committee may take into account, inter alia, the following considerations:

(a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;

(b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;

(d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;

(e) The time frame in which the steps were taken;

(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk." [249]

2. Application of the reasonableness test – Examples of variations in different jurisdictions

In certain instances, a stricter test of "rationality", rather than reasonableness has been adopted to assess the propriety of a restriction on an ESCR right. For example, in the US Supreme Court case of *USDA v. Moreno*, the Court declared that an agency assistance program was "wholly without any rational basis" when it denied food stamps to any household containing a person who was not related to the other members of the

[249] Committee on Economic, Social and Cultural Rights, Statement: "An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the covenant", UN Doc. E/C.12/2007/1 (2007), para. 8.

household.[250] Evidence suggested that the law had been enacted to prevent persons from alternative communes from applying for social assistance.

In *Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624,* the Supreme Court of Canada, found that the Government had failed to demonstrate that it had a reasonable basis for denying medical interpretation services in light of their costs. In order to justify a limitation of a Charter right, the Government must establish that the limit is 'prescribed by law' and is 'reasonable' in a 'free and democratic society'.

In *Lindiwe Mazibuko & Others v. City of Johannesburg & Others,* further detailed below, *a* case alleging violation of right to have access to sufficient water under section 27 of South - African Constitution, the Constitutional Court held that the right of access to adequate water did not require the State to provide upon demand every person with adequate water, but rather required State to take reasonable legislative and other measures to realize achievement of the right within available resources.[251]

	Reyes Aguilera, Daniela v. Argentina
Year:	2013 (Date of Decision: 5 February, 2013)
Forum, Country:	Supreme Court; Argentina
Standards, Rights:	Reasonableness; Proportionality; Non-discrimination and equal protection of the law; Right to health; Right to social security; Right to an adequate standard of living; Children; Persons with Disabilities; Migrants

[250] US Department of Agriculture v. Moreno, 413 US 528 (1973).
[251] *Lindiwe Mazibuko & Others v. City of Johannesburg & Others, Case CCT 39/09, [2009] ZACC 28,* Constitutional Court of South Africa (2009).

***Summary Back-ground**:*	The petitioners in the case asked for a court order compelling the Comisión Nacional de Pensiones Asistenciales (national agency in charge of welfare pensions) to grant a disability pension to Daniela Reyes Aguilera, a 12-year-old Bolivian girl with a severely disabling condition. On the basis of national constitutional law and international human rights law, the petition challenged a discriminatory regulation requiring immigrants to prove 20 years of residence in Argentina to become eligible for a disability pension.
Holding:	The Court decided the case in favour of the petitioners and declared that Daniela was entitled to obtain benefits. The Court affirmed that there is a cognizable human right to social security. The eligibility requirement of 20 years residency for immigrants to receive disability pension was found to be unconstitutional as it was not justified [pp. 8, 27, 34 and 41], was unreasonable ("irrazonable") [p. 39] and was a disproportionate limitation to the right to social security. The decision also cited other grounds for unconstitutionality of the rule including breach of the right to non-discrimination on the basis of national origin [p. 2 and p. 36], as well as violation of the rights to life [pp. 15], equality before the law [p. 5, 19] and right to health and social security [p. 7].
Additional Comments:	The strict scrutiny test was applied. It is also important to note that since the judgement applied only to the case brought before the Court, Daniela did receive a disability award as per the Court's decision but the residency requirement rule for immigrants was not altered.

Link to Full Case:	http://www.cels.org.ar/common/documentos/reyes_aguilera.pdf

	Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and others, 2010 (3) SA 454 (CC)
Year:	(Date of Decision: 10 June, 2009)
Forum, Country:	Constitutional Court; South Africa
Standards, Rights:	Reasonableness; Right to adequate housing; Right to an adequate standard of living
Summary Background:	Around 20,000 occupiers of the Joe Slovo informal settlement in Cape Town appealed an order for their eviction. The order was issued by the High Court on the basis of a petition from government agencies and a housing company developing low-income housing at the site. The housing company pledged temporary accommodation, but did not guarantee any permanent housing to the occupiers.
Holding:	The Constitutional Court analyzed the evictions in question against the reasonableness standard, referenced precedents in this area of review, such as the *Grootboom* case, and held that while there might have been more meaningful engagement with the residents who were established as "unlawful occupiers", overall the eviction action was reasonable [paras. 6, and 115-118]. Given that the eviction was sought for the purpose of developing low cost housing with safe and healthy conditions as a step to progressively realizing the right of

housing for those living in extreme conditions of poverty, homelessness or intolerable housing, as well as that the respondents had since assented to a significant allocation of the new development for the present occupiers to account for their dire housing needs, the judgement considered that the government had acted in a reasonable manner in seeking to promote the human right to housing [paras. 138, 139, 172-175, 228 and 234]. However, as regards the eviction, the court order stipulated, based on a suggestion by the respondents, that adequate alternative temporary accommodation meeting court-specified standards had to be provided [para. 10] and the occupiers' expectation that 70 percent of the houses in the new development would be allocated to them had to be fulfilled if they qualified for the housing [paras. 5 and 400].

The Court further mandated that there must be individual engagement with householders before their move, including on the timetable for the move and other issues, for instance, assistance with moving their possessions, and the provision of transport facilities to schools, health facilities and places of work. Additionally, the Court specified that the accommodation had to be ensured at the point of eviction [paras. 5 and 400].

Additional Comments: In this case, the standard of reasonableness review is difficult to evaluate, as the emphasis of the Court is on achieving consensus between the two parties, rather than scrutinizing the State policy for compliance with its housing right obligations under the Constitution. It becomes clear when looking at the various case law invoking the reasonableness test as a standard of review, that it "allows the court considerable freedom when assessing the con-

	stitutionality of State action". (Kirsty McLean, *Constitutional Deference, Courts and Socio-economic Rights in South Africa*, p. 173). The emphasis on the need to comply with certain procedural protections before any eviction can take place (and the reference in this context to General Comment 7 of the CESCR) [paras. 236 and 237] highlights the State's duty to respect the right to housing while the focus of the State's long term plan to progressively realize the human right to housing elevates the State's duty to fulfil the right.
Link to Full Case:	http://www.saflii.org/za/cases/ZACC/2009/16.html

	Lindiwe Mazibuko & Others v. City of Johannesburg & Others, Case CCT 39/09, [2009] ZACC 28.
Year:	2009 (Date of Decision: 8 October, 2009)
Forum, Country:	Constitutional Court; South Africa
Standards, Rights:	Reasonableness; Rights to water and sanitation
Summary Background:	This case considers the lawfulness of a project the City of Johannesburg piloted in Phiri in early 2004 that involved re-laying water pipes to improve water supply and reduce water losses, and installing pre-paid meters to charge consumers for use of water in excess of the six kiloliters per household monthly free basic water allowance.

Holding: The Court held that the right of access to adequate water protected under the Constitution did not require the State to provide upon demand every person with sufficient water, but rather required the State to take reasonable legislative and other measures to realize achievement of the right within available resources [para. 50].

In the Court's estimation, the free basic water policy established by the City of Johannesburg, which charged consumers for use of water in excess of the free basic water allowance of six kiloliters, fell within the bounds of reasonableness [para. 9]. In elaborating on the reasonableness test and delineating the court's role as regards the State's positive obligations, the decision states, "the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realize the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness…. Finally, the obligation of progressive realization imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realized" [para. 67]. The Court affirmed the democratic value of litigation on social and economic rights. It noted that the applicants' case required the City to account comprehensively for the policies it has adopted and establish that they are reasonable [paras. 160-163].

On the issue of minimum core protection of the right to water, the Constitutional Court concluded, in contrast to the High Court and

	the Supreme Court of Appeal, that it is not appropriate for a court to give a quantified content to what constitutes "sufficient water", as this is a matter best addressed in the first place by the government [paras. 56 and 61-68].
Additional Comments:	This case reflects a deferential approach by the Court and in particular, a reluctance to interfere in matters it deems as falling within the executive and legislative spheres.
Link to Full Case:	http://www.saflii.org/za/cases/ZACC/2009/28.html

IV. Proportionality

The test of proportionality requires that limitation or restriction of a human right obligation is proportionate with the (legitimate) reasons for such limitation. Common rationales for proportionate limitation include security or national sovereignty, protection of other fundamental rights and protection from clear and present danger. By contrast, the Constitutional Court of the Czech Republic, in *Pl. US 42/04* from 6 June 2006,[252] found that a two year time frame for potential beneficiaries to apply for a pension for a dependent child was disproportionate to the goal of properly administering public social security funding, and the same goal could be achieved through different means without affecting a fundamental right.

In a more recent case, *ADPF 186 (Arguição de Descumprimento de Preceito Fundamental No. 186),* the Brazilian Federal Supreme Court used proportionality and reasonableness as criteria to assess the constitutionality of policies aimed at achieving racial equality. The Federal Supreme Court understood propor-

[252] For more information on this case, please refer to the *ICJ Justiciability Study*, p. 37.

tionality as proportionality between the means selected and the goals sought, and reasonability as reasonability of means and ends.[253]

	ADPF 186 (Arguição de Descumprimento de Preceito Fundamental No. 186)
Year:	2012 (Date of Decision: 26 April, 2012)
Forum, Country:	Supreme Court; Brazil
Standards, Rights:	Reasonableness; Proportionality; Non-discrimination and equal protection of the law; Right to education
Summary Background:	The issue at stake in this case is the constitutionality of racial quotas in the admission process at the University of Brasilia.
Holding:	In this case, the Brazilian Federal Supreme Court declared the racial quotas in University admission processes to be constitutionally lawful. The case referenced national constitutional law as well as the International Convention on the Elimination of All Forms of Racial Discrimination [p. 8]. The Court stated that these affirmative policies set a plural and diversified academic environment, and aimed at overcoming historically entrenched social distortions as well as to promote the principle of *de facto* equality as applied to racial discrimination in education [p. 47].

[253] See the case summary below and ESCR-Net Caselaw Database, accessible at: http://www.escr-net.org/node/364909

	The Court addressed the issues of proportionality and reasonability as standards to evaluate the constitutionality of policies aimed at achieving racial equality. The decision concluded that the means employed by the University were distinguished by proportionality and reasonability to the ends pursued, particularly given the transient nature of their scope of application (with the inclusion of a periodic review of as to results) [p. 45]. The President of the Court asserted that the Constitution has given legitimation to every public policy promoting historically and culturally marginalized social sections: "[t]hose are affirmative policies entitling every human being the right to an equal and respectful treatment. This is the way we build up a nation".[254] During the Court session, the Ministers (the title given to Supreme Court Judges in Brazil) stated that the quotas were compatible with the Constitutional mandate to establish a free, fair and united society and the eradication of social marginalization and inequality.
Additional Comments:	The decision confirmed the constitutionality of racially-based affirmative action programs adopted by other universities in Brazil. Brazilian universities who have adopted affirmative action can now preserve these programs.
Link to Full Case:	http://www.acoes.ufscar.br/admin/legislacao/arquivos/arquivo13.pdf

[254] See the information provided by the Federal Tribunal, accessible at: http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=207138

V. Procedural fairness and due process of law

The guarantees of procedural fairness and due process of law are important elements of the right to equality before courts and tribunals and to a fair trial, which is guaranteed in international human right law.[255] Realization of this right requires that the administration of justice is able to guarantee a set of specific rights and that it can ensure that no one will be deprive, in procedural terms, of the right to claim justice.[256] In particular, this right encompasses, among other things, the guarantee of equality of arms and of non-discrimination between the parties to the proceedings.[257]

At the domestic level, the constitutional guarantees of due process of law and of procedural fairness are discharged by judicial and quasi-judicial bodies in a variety of cases and proceedings. As such, they are important to the protection of ESC rights or at least elements of these rights.[258]

	Joseph v. City of Johannesburg, Case CCT 43/09
Year:	2009 (Date of Decision: 9 October, 2009)
Forum, Country:	Constitutional Court; South Africa
Standards, Rights:	Procedural fairness; Human dignity; Right to adequate housing
Summary	In this case, the applicants sought a declara-

[255] In particular, this right is guaranteed at article 14 of the International Covenant on Civil and Political Rights.
[256] Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32 (2007), paras 2 and 9.
[257] Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32 (2007), para. 8.
[258] For a more detailed account of the use of procedural guarantees including fair trial rights in ESC rights litigation at domestic and international, see *ICJ Justiciability Study*, pp. 61-64.

Background: tion regarding their entitlement to notice before municipal agencies terminated their power supply. Although the applicants who were tenants had regularly paid the owner of their building their electricity bills as part of the rent, the owner had run up arrears, due to which the City of Johannesburg's electricity service provider, City Power, discontinued supply, giving notice to the owner, but not the tenants with whom City Power has no contractual relationship. The applicants lived without electricity for around one year, as they could not afford to move.

Holding: In this case, violation of human dignity was argued as the termination of electricity supply constituted a retrogressive measure violating the negative obligation to respect the right to adequate housing protected under the Constitution; however the case was primarily decided on the basis of the procedural fairness principle [paras. 2 and 32].

The Court held that electricity is one of the most important basic municipal services and that municipalities have constitutional and statutory obligations to provide electricity to the residents in their area as a matter of public duty [paras. 34-40]. The Court thus affirmed that the applicants were entitled to receive this service as a public law right [para. 40].

The Court further held that the government was required to act in a manner that is responsive, respectful and in conformity with procedural fairness when fulfiling its constitutional and statutory obligations [para. 46]. The Court outlined the importance of procedural fairness in the following terms: "Procedural fairness… is concerned with giving peo-

	ple an opportunity to participate in dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy" [para. 42]. Accordingly, the Court decided that in depriving the tenants of a service they were receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right [para. 47]. The Court found that procedural fairness in this case included adequate notice (containing all relevant information) at least 14 days before disconnection [para. 61]. Implied in the affording of such notice is that users of the municipal service may approach the City, within the notice period, to challenge the proposed termination or to tender arrangements to pay off arrears [para. 63]. The order also declared that, to the extent the electricity by-laws permit the termination of electricity supply "without notice", these by-laws are unconstitutional. In addition the discontinuation of electricity supply to the applicant's residence was found to be unlawful and the City was ordered to reconnect the building immediately [para. 78].
Additional Comments:	This case addresses the State's duty to respect ESC rights.
Link to Full Case:	http://www.saflii.org/za/cases/ZACC/2009/30.html

VI. Human dignity

Combined with other principles or as a stand-alone standard, the protection of human dignity is often used by Constitutional Courts to protect ESC rights. This is particularly important once again in contexts in which these rights do not benefit from an explicit recognition in the domestic normative frameworks.

The case below is a representative example of instances in which judicial and quasi-judicial bodies have construed aspects of ESC rights as part of the protection of dignity.

	Patricia Asero Ochieng and 2 others v. the Attorney-general & Another
Year:	2012 (20 April, 2012)
Forum, Country:	High Court; Kenya
Standards, Rights:	Human dignity; Right to health; Right to life
Summary Background:	Case centres on a challenge to the constitutionality of the Anti-Counterfeit Act 2008, due to the negative impact of the Act on access to generic HIV/AIDS medication. Sections of the act appeared to inappropriately conflate generic drugs with counterfeit medicine. The application of these sections would result in civil and criminal penalties for generic medicine manufacturers and thus harshly restrict access to affordable medicine in Kenya. This lack of access in turn would impair the right to life, health and human dignity.
Holding:	The Court, in agreement with the impact assessment of the Act as outlined by the petition-

	er, held that the sections in question were unconstitutional and concluded that it is incumbent on the state to reconsider the provisions of section 2 of the Anti - Counterfeit Act [paras. 87 (b)(v) and 88]. The Court held that the right to life, human dignity and health as protected by the Constitution encompasses access to affordable and essential drugs and medicines including generic drugs and medicines [para. 87(a)]. It further held that fundamental rights (for instance the rights to life, human dignity and health) take precedence over intellectual property rights [para. 86]. The Court in its decision referenced the ICESCR as well as General Comment No. 14 on the Right to Health and stipulated that the State's failure to put in place conditions in which its citizens can lead a healthy life means that it has violated, or is likely to violate, their right to health [paras. 58-59 and 61-63].
Additional Comments:	This case examines State's obligations in the context of ESC rights, particularly the duty to respect and protect.
Link to Full Case:	http://donttradeourlivesaway.files.wordpress.com/2012/04/kenya-judgment-petition-no-409-of-2009.pdf

VII. Minimum level of existence (Existenzminimum)

Closely linked to the right to dignity and its protection, the right to a minimum level of existence or subsistence has been used notably by German and Swiss courts to protect ESC rights.

Although a principle in and of itself in certain jurisdictions, it follows the concept underlying the definition of a core content or of core obligations by the CESCR for each substantive right. The principle of minimum level of existence has been used to protect minimum levels of enjoyment of the right to social assistance, adequate standard of living and education.

	Judgement of the Federal Constitutional Court, 1 BvL 10/10
Year:	2012 (Date of Decision: 18 July, 2012)
Forum, Country:	Constitutional Court; Germany
Standards, Rights:	Core content; Human dignity; Welfare State; Right to an adequate standard of living; Right to social security; Migrants
Summary Background:	The issue at stake was whether the amount of cash benefits for asylum seekers was compatible with the fundamental right to a minimum level of existence as emerging from the right to human dignity (article 1.1 of the Basic Law) read in conjunction with the principle of a social welfare State (article 20.1 of the Basic Law).
Holding:	The Court held that the provisions governing the cash benefits in question violate the fundamental right to the guarantee of a dignified minimum existence protected under the German Basic Law [paras. 1 and C.I.1]. This right is universal and applies to both nationals and foreign citizens [para. C.I.1.a]. It includes "...both humans' physical existence, that is food, clothing, household items, housing, heating, hygiene and health, and guarantees the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life, since a human as a person necessarily exists in social context."

[para. C.I.1.b]. The benefits in question were just not enough to live a dignified standard of life.

The Court found that the benefits had not been altered since 1993, despite significant price increases in Germany and stated that adequate benefits have to be established in the particular context of circumstances in Germany. The Basic Law does not allow that needs for a dignified life be calculated at a lower level by referring to the existence levels in the country of origin or in other countries [para. C.I.1.d].

The Court was clear that political considerations must not undermine the principle of *existenzminimum*, stating that "Migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration…may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum existence... Human dignity…may not be modified in light of migration-policy considerations" [para. C.II.2.c]. Further, the Constitution did not allow for differentiation among recipients of basic social benefits in accordance to their residence status; the legislature must always be guided by the concrete needs to secure a person's existence [para. C.I.1.dd].
In addition the Court indicated that it was not clear that a realistic, needs-oriented calculation had been made in determining the amount of benefits. The decision mandates that it must be possible to calculate the amounts in a transparent manner that responds to actual and current needs [para. C.I.1.f].

In conclusion, the Court ordered the legislature to immediately enact new provisions in relation to cash benefits for asylum seekers that would

	secure them a dignified minimum existence. As an interim measure, the Court also put into place a transitional arrangement for the payment of increased cash benefits [paras. D.1 and 2].
Additional Comments:	The decision also refers to the margin of appreciation principle in holding that the State enjoys such a margin in determining the form in which the benefits are given (in cash, kind or services) and the amount of the benefits to secure a minimum existence [para. C.I.1.d].
Link to Full Case:	http://www.bundesverfassungsgericht.de/en/decisions/ls20120718_1bvl001010en.html

VIII. Margin of appreciation

The concept of the 'margin of appreciation', i.e. the discretionary latitude that authorities are said to have in reaching a certain goal towards the full realization of ESC rights, cannot be said to constitute an overarching principle of ESC rights jurisprudence. The doctrine has been applied in a limited manner to certain civil and political rights by the European Court of Human Rights (ECtHR).[259] However, the principle of margin of appreciation has particularly been used within the ECtHR in cases that involve public or general interest and decisions around socio-economic policies.[260]

[259] See inter alia *Handyside v. United Kingdom*, European Court of Human Rights Judgement, Application No. 5493/72 (1976), para. 48; and *Evans v. the United Kingdom*, European Court of Human Rights (ECtHR), Application No. 6339/05 (2007), para. 77.

[260] In 1991, in its decision on admissibility of the application No. 16756/90 on an alleged violation of the right to peaceful enjoyment of his possessions, *ZAMMIT and others v Malta,* the European Commission of Human Rights affirmed that the wide margin of appreciation afforded to States in regulating housing problems should be borne in mind. In particular, the Commission recalled its case-law and the one case of the ECtHR "which recognises that State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to a legislature in implementing social and economic

The standard of margin of appreciation has thus essentially been developed by the ECtHR jurisprudence and has been largely adopted by State parties to the European Convention on Human Rights (ECHR) in their domestic jurisprudence. In addition to the reference to this standard by the German Constitutional Court in the *Existenzminimum* case described above, the transposition of the standard in domestic jurisprudence is further exemplified in a decision by the Danish Supreme Court from 2012 regarding unemployment benefits of foreigners.[261]

	A v. Municipality of Egedal and Ministry of Labour
Year:	2012 (Date of Decision: 15 February, 2012)
Forum, Country:	Supreme Court; Denmark
Standards, Rights:	Core content; Non-discrimination and equal protection of the law; Margin of discretion; Right to an adequate standard of living; Right to social security; Migrants
Summary	After having been granted refugee status in

policies is necessarily a wide one both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the rules for the implementation of such measures. The Convention organs will respect the legislature's judgement as to what is in the general interest unless it be manifestly without reasonable foundation." Based on this jurisprudence, the ECtHR for instance in *Fleri Soler and Camilleri v Malta,* application No. 35349/05 (2006), reaffirmed that "in the implementation of policies of a socio-economic nature, the margin of appreciation of the State was very wide". See also *Ghigo v Malta,* application No. 31122/05 (2006) in which the ECtHR accepted "the Government's argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants… were also aimed at preventing homelessness, as well as at protecting the dignity of poorly-off tenants…".

[261] *A v. Municipality of Egedal and Ministry of Labour*, Supreme Court of Denmark, Case 159/2009 (2012).

Background:	2003, the applicant received "Start Help" benefits (reduced unemployment benefits) until 2007, instead of regular unemployment benefits, which could only be granted to persons who had spent at least seven years in Denmark. He claimed that this violates article 75.2 of the Constitution, which obliges the State to help those who cannot support themselves. Moreover, he alleged a violation of article 14 ECHR (prohibition of discrimination) in conjunction with article 8 ECHR (right to respect for private and family life) and article 1 Protocol 1 ECHR (protection of property) because the requirement of having spent at least seven years in Denmark affects relatively more foreigners than Danish nationals and therefore constituted an indirect discrimination.
Holding:	The Supreme Court found that article 75.2 of the Constitution entails an obligation for the State to ensure a minimum level of existence for persons covered by it. However, the court found that the size of the "Start Help" and other benefits that the applicant received were sufficient to satisfy this provision. With regard to the ECHR, the Court noted that it leaves the States wide discretion to determine matters of social and economic policy. Therefore, the Court held that "Start Help" did not constitute indirect discrimination in contravention to article 14 ECHR in conjunction with article 1 Protocol 1 ECHR.
Additional Comments:	"Start Help" was abolished in December 2011 and the regular unemployment benefits may now be obtained even if the person in question has not resided in Denmark for a specified period of time.
Link to Full	http://www.codices.coe.int/NXT/gateway.dll/C

Case: ODICES/precis/eng/eur/den/den-2012-3-001?f=templates&fn=default.htm&vid=

Although it has been effectively used in certain cases before the ECtHR to protect the right to housing of disadvantaged individuals, there are significant risks to the effectiveness of ESC rights litigation carried by the adoption of this doctrine, by which courts' standards of review are rendered highly deferential to the executive.

In this regard, it is worth noting that after some debate during negotiation, States rejected the inclusion in the Optional Protocol to the ICESCR of a variation on the concept.[262]

[262] During the negotiation of the OP-ICESCR, States rejected a proposal to include the "margin of discretion" as a standard of review to be used by the CESCR; instead the standard of "reasonableness" was adopted. For the text of article 8.4 before the last round of negotiation, still including the reference to margin of discretion, see Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in UN Doc. A/HRC/8/WG.4/3 (28 March 2008), p. 6. For the final text of article 8.4 retaining only reasonableness, please refer to the OP-ICESCR, *supra* note 247, p. 4.

Chapter 6: Remedies and enforcement of decisions

The ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*), draws attention to some of the main issues and challenges around provision of and access to effective remedies and the enforcement of judicial decisions. It notes that "[D]evising and implementing remedies in complex litigation may shift the weight of the procedure from the hearing to the remedial phase. But traditional procedures assume that the trial phase is the most important – and thus, devote most of the procedural regulations to this phase. The remedial phase is only ancillary, so little guidance is offered on adequate procedures to devise remedies and to monitor their implementation."[263]

The right to an effective remedy is an integral part of international human rights law.[264] For a remedy to be effective it must be prompt, accessible, before an independent legal authority and capable of leading to the cessation of the violation and reparation for any injury.

There is no doubt an on-going doctrinal debate, encompassing objections raised by certain governments, as to the competency of courts to prescribe particular types of remedies in ESC rights cases. This chapter, while not venturing into the conceptual undergrowth, provides several examples from diverse jurisdictions to illustrate how judicial and quasi-judicial bodies have dealt with the granting of remedies in specific cases. [265]

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[263]ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], p. 94.

[264] See ICJ Legal Commentary to the ICJ Geneva Declaration, p. 24 and p. 182, accessible at: http://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/ and ICJ Practitioners Guide No. 2 on the right to a remedy and to Reparation for gross human rights violations, pp. 46-49, accessible (in English, French, Spanish, Arabic, Thai) at: http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/

[265] *ICJ Justiciability Study*, pp. 80-88.

I. Various types of remedies

Remedies for ESC rights violations, as with any human rights violations, are aimed at achieving justice and repairing injuring for the victim(s) of such violations. In some instances the remedy may consist in the requirement of the State to adopt measures that lead to changes in law, policy or practices, the impact of which reaches well beyond the individual victims in a particular case. However, as highlighted throughout this Guide, redress for ESC rights violations does not always necessitate systemic remedies with far-reaching policy or legal reforms, and with significant budgetary implications. Nonetheless, the remedial phase of ESC rights adjudication will typically be important for clarifying the measures that have to be taken to realize these rights more generally.

1. Avoiding irreparable harm

In some ESC rights litigation, repairing a harm will not, in the first instance, be the objective. Rather, litigation may be aimed at preventing a harm from occurring by petitioning a judicial or quasi-judicial body, sometimes on an urgent basis, to order measures, which may be temporary in character, aimed at avoiding irreparable harm. Most international human rights treaties, directly or under rules of procedures, provide for the possibility of the designated, judicial and quasi-judicial bodies to prescribe interim, provisional or precautionary measures.[266]

[266] See article 63.2 of the American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978), OAS Treaty Series No. 36; article 5 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/RES/63/117 [hereafter OP-ICESCR]; article 6 of the Optional Protocol to the International Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014), UN Doc. A/RES/66/138; article 5 of the Optional Protocol to the International Convention on the Elimination of Discrimination against Women (adopted 10 December 1999, entered into force 20 December 2000), UN Doc. A/54/49 (Vol. I); article 4 of the Optional Protocol to the International Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc. A/61/106 (2006); rule 92, Rules of Procedure of the Human Rights Committee (adopted 11 January 2012), UN Doc. CCPR/C/3/Rev.10; rule 114(1) Rules of Procedure of the

The absence of availability of such interim or equivalent measures to judicial and quasi-judicial bodies would in many cases render further litigation futile, emptying such a complaint of its raison d'être. This is true, for instance, in cases in which the implementation of an extractive industrial project, such as a dam construction, would be likely to definitively destroy the means of subsistence and the environment upon which the community depends; in cases in which the denial by public health authorities of a particular treatment would affect the health and life of a patient; or in cases in which a wrongful decision of an educational institution would have an irreparable impact on the ability of a student to follow his or her education studies.

At the domestic level, judicial and quasi-judicial bodies also have procedures that allow for interim relief and possibilities to provide interim and urgent measures to avoid irreparable harm that cannot be compensated by subsequent monetary or other damage awards. In many civil law countries, the procedure of *référé* in civil and administrative law, provides for the possibility for the judge to give an urgent response, within days, in the form of any necessary measures to avoid an irreparable infringement of a right or to secure the availability of important documentary evidences.[267] The Colombian *acción de tutella* procedure, described in Chapter 3, is another example of procedures that address the need to avoid irreparable harm and give an urgent and provisional response in cases of violations of rights. Common law jurisdictions will typically also have arrangements providing for immediate injunctive relief in respect of various situations.

Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 13 August 2013), UN Doc. CAT/C/3/Rev.6; rule 39(1) of the Rules of the Court, European Court of Human Rights (entered into force 1 July 2014); rule 98 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (entered into force 18 August 2010); and article XIII of the Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force on 28 March 1996), OAS Treaty Series No. 68.

[267] In French labour law, under article L4732-1 and L4732-2, for instance, the labour inspectorate can ask the juge des référés to take urgent measures to protect the physical integrity, health and security of workers in cases related to occupation safety.

2. Types of remedies

The notion of "remedy" may vary from jurisdiction to jurisdiction. In some cases, remedy refers mainly to the procedural aspect of redress; in others remedy is the substantive relief obtained. Under international law, at a minimum, an effective remedy must lead to the cessation of the violation and the provision of reparation. Reparation may include restitution, compensation, rehabilitation but also the satisfaction of victims and the guarantee of non-repetition. The latter, in particular, will often require policy and legal changes when normative and policy gaps are at the source of the violation.

In certain cases, the remedy required will be very specific and limited to the case at play. For example, it may only involve the payment of a due wage or a social benefit in cases of administrative abuse and wrongful decision making towards an individual, or the reinstatement of an illegally dismissed worker or the admission of a student illegally rejected on a discriminatory ground. In such cases, the violations do not necessarily reveal a structural and systematic failure in a policy or law.

In the same vein a simple declaratory order may be sought, as in the case described below.[268] In this instance, the plaintiffs sought a clarification of a point of law through a declaratory order of the Supreme Judicial Court, and more precisely whether the exclusion, of lawful immigrants with less than five-year residency, from the State subsidized health care program was discriminatory and hence unconstitutional.

[268] *Dorothy Ann Finch and others v. Commonwealth Health Insurance Connector Authority*, Massachusetts Supreme Judicial Court, Case No. SJC-11025 (MA S. Jud. Ct., 5 January 2012). See also for example *Joseph v. City of Johannesburg*, Constitutional Court of South Africa, Case CCT 43/09 (2009), case summarized in Chapter 5, section III. 2. of the present Guide.

	Dorothy Ann Finch and others v. Commonwealth Health Insurance Connector Authority, Case No. SJC-11025 (MA S. Jud. Ct., Jan. 5, 2012)
Year:	2012 (Date of Decision: 6 January 2012)
Forum, Country:	Supreme Court; United States of America
Standards, Rights:	Non-discrimination and equal protection of the law; Right to health; Right to social security; Migrants
Summary Background:	This case involves a legislative decision of the State of Massachusetts that denied State subsidies (provided under the Commonwealth Care Health Insurance Program) to lawful non-citizen immigrants living in the United States for less than five years. Plaintiffs sought a declaration from the Court that this exclusion from the program was unconstitutional.
Holding:	The Massachusetts Supreme Judicial Court, applying strict scrutiny, decided that excluding the said category of lawful, non-citizen immigrants from the aforementioned health insurance program was in violation of the equal protection clause of the Massachusetts Constitution. It was held that the exclusively fiscal concerns, which had motivated the exclusion could never constitute a compelling government interest in a strict scrutiny review [pp. 237-242]. Further, the Court found that the State had made no attempt to meet the rigorous procedural requirements designed to ensure that the legislation was narrowly tailored to further a compelling interest [pp. 242-249]. "Narrow tailoring requires 'serious, good faith consideration' of 'workable' non-discriminatory alternatives that will achieve the

	Legislature's goals." Those requirements were not met in this case [p. 242]. In its conclusion the Court states "[m]inorities rely on the independence of the courts to secure their constitutional rights against incursions of the majority….If the plaintiffs' right to equal protection of the laws has been violated…then it is our duty to say so" [p. 249].
Additional Comments:	Since the case was determined on State constitutional grounds, there could be no further appeal to the U.S. Supreme Court, so this judgement stands as the final judgement on this aspect of the case.
Link to Full Case:	http://masscases.com/cases/sjc/461/461mass232.html

Similarly, in a case from 2013 decided by the Ugandan Constitutional Court, *Advocates for Natural Resources & 2 Ors v. Attorney General & Anor*,[269] a declaratory order was sought by the petitioners concerning the constitutionality of both a law and an act under article 137 of the Constitution. The declaration of the Court nullified section 7(1) of the Land Acquisition Act because of its inconsistency with article 26(2) of the Constitution on the right to property, as it failed to provide for prior payment of compensation in cases of compulsorily acquisition of land by the government. It also declared unconstitutional, under the same article 26(2) of the Constitution, the acts of the Uganda National Roads Authority who took possession of land without prior payment of compensation.

In other cases, violations will be identified by judicial and quasi-judicial bodies not in the context of a concrete review, but

[269] *Advocates for Natural Resources & 2 Ors v. Attorney General & Anor*, Constitutional Court of Uganda, Constitutional petition number 40 of 2013, [2013] UGCC 10 (2013).

through a general or abstract review of constitutionality or conventionality of a law or administrative act.

The South African, Indian and Colombian courts offer interesting examples of systemic remedies with orders to design policies or extend benefits to specific groups of the population. These cases involve inter alia a violation of the constitutional right to adequate housing in South Africa; restrictions on the provision of anti-retroviral drugs to HIV positive pregnant women, a violation of the rights to life and health in Colombia; a violation of the right to food resulting in starvation deaths, which occurred despite excess grain stocks in India; and a violation of the constitutional and reproductive rights of two women below the poverty line who were denied access to adequate maternal care in India. In these cases, courts have used a range of different orders and injunctions directed at the authorities to act.[270]

	Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors, W.P.(C) No. 8853 of 2008
Year:	2010 (Date of Decision: 6 April, 2010)
Forum, Country:	High Court; India
Standards, Rights:	Right to life; Right to health; Right to adequate food; Women; Children

[270] See, for instance, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, Constitutional Court of South Africa, Decision 2001 (1) SA 46 (CC) (2000); *South African Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, Decision 2002 (5) SA 721 (2002); *People's Union for Civil Liberties v. Union of India & Others (PUCL)*, Supreme Court of India, Petition (Civil) No. 196/2001 (2001); *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors, High Court of Delhi*, Decision W.P.(C) 8853/2008 (2009).

Summary Background: This case addressed separate petitions dealing with the violation of the constitutional and reproductive rights of two women below the poverty line who were denied access to adequate maternal care, both during and immediately after their pregnancies. Lack of access to health services resulted in the death of one of the women.

Holding: The Court ruled that there had been a complete and systemic failure on the part of the Government to effectively implement the pre- and post-natal services available under State-sponsored schemes to reduce maternal and infant mortality. This severely affected not just the two women on whose behalf the petitions were brought, but also a large number of women and children placed in similar positions across the country [paras. 1, 2 and 40].

The Court underscored how the petition focused on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother. The other right, calling for immediate protection and enforcement in the context of the poor, was the right to food [paras. 2 and 19]. Drawing on international human rights law and national jurisprudence, the Court illustrated how all these rights are interrelated and indivisible. The legal basis on which the Court determined this case and found violations of core constitutional rights was essentially the need to preserve, protect and enforce the different facets of the human right to life protected under article 21 of the Constitution [paras. 19-27].

	The judgement considered that the onerous burden on the poor to prove their eligibility for health services, exemplified by the requirement to show a valid ration card to access services, constituted a major barrier for them to access services; and emphasized that the Government had an obligation to create easier access to these essential services and ensure coverage of as much of the target population as possible [para. 48]. The Court declared that: "when it comes to the question of public health, no woman, more so a pregnant woman should be denied the treatment at any stage irrespective of her social and economic background. This is where the inalienable right to health which is so inherent to the right to life gets enforced" [para. 48]. Additional to compensation for the claimants [paras. 55 and 56-61], the Court determined that maternal health schemes themselves needed reform; that access to health services should be available across the State; that clarification be made regarding over-lapping provisions and gaps in the various schemes; and that the administration of these schemes be over-hauled [para. 62 (i), (ii), (iii), (iv)].
Additional Comments:	This case is particularly interesting in relation to the remedies and orders decided by the Court.
Link to Full Case:	http://www.escr-net.org/sites/default/files/Mandal_Court_Decision.pdf

In Guatemala, a case decided by a children's court in favour of the Chiquimula children,[271] for violations of the rights to food, life, an adequate standard of living, health and housing, entailed a comprehensive list of remedies and measures to be taken to address both immediate needs of the children and their families and the more structural issues that needed to be addressed for a more sustainable improvement of their situation. In order to implement the decision, the Court ordered the establishment of a protocol that includes the creation of an inter-ministerial and inter-administration committee aimed at guaranteeing coordination and effective implementation.

The *Decision T-291/09* of the Colombian Constitutional Court described in Chapter 5, which deals with the situation of waste pickers in Cali, also illustrates a more fully-fledged form of remedial measure, with immediate as well as mid and long-term actions. These included measures in favour of the realization of the recyclers' rights to health, education, decent housing and food, from emergency measures to attend to the survival needs of the waste pickers to more mid and long term measures to facilitate access to social protection schemes, education, or to reform the waste management system of the municipality and to integrate the waste pickers in the formal economy.

II. Enforcement of decisions/monitoring

Irrespective of the nature of the remedies ordered, judicial and quasi-judicial bodies often face difficulties in enforcement of their decisions. In the face of these difficulties, some judicial and quasi-judicial bodies have been proactive in fashioning creative approaches.

1. Recourse in cases of non-compliance with judicial decisions

[271] For more details on this case, see Chapter 4, section VI. of the present Guide.

The respect and enforcement in good faith of final judicial decisions by other branches of government is a key element of the rule of law.[272] Yet, enforcement of decisions, especially in cases with a high degree of political sensitivity and/or with significant economic interests at play, has been a real and recurrent challenge to the legal and judicial protection of ESC rights.

At the domestic level, procedural arrangements exist, in principle, to impose the enforcement of judicial decisions. However, the effectiveness of such procedures is often weak, especially when these decisions require systemic remedial measures.

The following example illustrates this difficulty.

In common law jurisdictions, such as Swaziland, in which this procedure gives broader power to judges than in civil law countries, judges have found public authorities in contempt of court for failing to respect and enforce their decisions in cases relevant for ESC rights. [273]

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[272] Principles 2 of the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, accessible at: http://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/

[273] Contempt of court procedures have also been used inter alia in South Africa and India, see for instance Malcolm Langford, *Domestic Adjudication And Economic, Social and Cultural Rights: A Socio-legal Review*, in SUR, Vol. 6, No.11 (2009), pp. 91-121, at p. 106. In *Philane Hlophe & Ors v. City of Johannesburg, Executive Mayor, City Manager & Ors*, South Gauteng High Court, Johannesburg, Case No. 48102/2012 (2013), the Court ordered authorities of the City, including the Mayor and the City Manager, to take all the steps necessary to provide the shelter required within two months, or face being held in contempt of court, and could be given fines or prison sentences. The City missed several deadlines to provide temporary shelters to those facing homelessness on evictions from private land although it had agreed to do so in compliance with previous court orders. In the case *South African Minister of Health v. Treatment Action Campaign* of the Constitutional Court of South Africa, Decision 2002 (5) SA 721 (2002), contempt of court proceedings were launched against the Minister of Health and the Member of the Executive Committee for Health of the Mpumalanga province in the immediate aftermath of the judgement during December 2002. For further information see Mark Heywood, *Contempt or compliance? The TAC case after the Constitutional Court judgment*, ESR Review, Vol. 4, No. 4 (2003), pp. 7-10; and Mia Swart, *Left out in the*

	Madeli Fakudze v. Commissioner of Police and Ors (8/2002)
Year:	2002 (Date of Decision: 1 June, 2002)
Forum, Country:	Supreme Court; Swaziland
Standards, Rights:	Rule of law; Right to adequate housing
Summary Back-ground:	Madeli Fakudze (the respondent in this appeal) was one of four individuals served with a removal order in August 2000 by the Minister of Home Affairs. The respondent claimed that security forces had wrongfully evicted him after he was granted an injunction from the High Court to stop his eviction. Upon returning to his home, the respondent was confronted by police officers and told they were acting upon a verbal order from the Commissioner of Police to eject the respondent immediately, in contravention of the court order. The High Court then proceeded to overturn the injunction it had granted, purporting to restore the *status quo ante.* The police officers claimed they were fully aware of the court orders issued at the time, but that issues of "national security" had prevented them from enforcing these orders and that threats to national security overrode all other interests, whether they rise out of a court order or not.

cold? Crafting constitutional remedies for the poorest of the poor, South African Journal on Human Rights, Vol. 21 (2005), p. 215 and pp. 223 and 224.

Holding:	The Court rejected the defence of national security, deeming it a "last gasp attempt" to raise a barrier to the enforcement of the court order [p. 8]. The Court highlighted that an officer from the Attorney-General had made no objection or raised any security concerns at the initial decision of the Court of Appeal to permit the evictees to return to their homes. The Court denounced the police officer's failure to disclose any information to the Court on which a reasonable apprehension could be based that a threat to national security might exist, and thus had acted in contempt of the court order with no reasonable excuse for deviation [p. 8]. The Court reaffirmed the injunction of Matsebula J, stating "anyone wilfully refusing or failing to comply with an order of this Court exposes himself to the imposition of a penalty…to compel performance in compliance with the court order" [p. 9]. The Court acknowledged that contempt of court is a criminal offence, yet as per *S v. Beyers 1968,* it held that in cases of civil contempt as in this case, it is left to the aggrieved party in the proceeding to seek the relief. It sentenced one police officer to a term of imprisonment [p. 10].
Link to Full Case:	http://www.swazilii.org/sz/judgment/supreme-court/2002/9

In many civil law jurisdictions, judicial officers and bailiffs[274] are responsible to serve the summons but also to request police intervention to execute judicial decisions. It is interesting to note that in some countries the services of the judicial officers are charged to the costs of the plaintiffs. This applies for example in El Salvador to labour conflicts, in which workers who obtained a decision in their favour had to pay for the services of the executor (*ejecutor*) in case of non-compliance.[275]

2. Monitoring of the implementation of court orders

Especially in cases of systemic and fully-fledged remedies responding to omissions of the public authorities, certain judicial and quasi-judicial bodies have undertaken to remain in charge of monitoring the implementation of their orders and injunctions.

The Indian Supreme Court has, in cases such as the *People's Union for Civil Liberties v. Union of India & Ors* case from 2001, on the right to food, provided for a long-term follow-up and monitoring of its various orders that were made to redress and fully repair violations found in the case.[276]

More generally, the enforcement and implementation of court orders often necessitates wide campaigning to draw public attention to the human rights issues underlying the case, to galvanise the struggle of the victims with broader public opinion and to apply pressure on the authorities to implement decisions.

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[274] *Huissiers de justice* in French, *ejecutors* in Spanish.

[275] See ICJ Study on Access to justice in El Salvador, Acceso a la justicia Recursos contra las violaciones de los derechos sociales en El Salvador (2013), p. 65, accessible (in Spanish) at: http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/

[276] *People's Union for Civil Liberties v. Union of India & Others (PUCL)*, Supreme Court of India, Petition (Civil) No. 196/2001 (2001).

The case of the *Yakye Axa* and *Sawhoyamaxa* in Paraguay at the regional level and the Treatment Action Campaign at the domestic level are illustrations of this.[277]

	Case of the Yakye Axa Indigenous Community
Year:	2005 (Date of Decision: 17 June, 2005)
Forum, Country:	Inter-American Court of Human Rights; Paraguay
Standards, Rights:	Procedural fairness and due process; Right to life; Right to adequate standard of living; Right to adequate housing; Right to adequate food; Rights to water and sanitation; Right to health; Right to education; Indigenous people
Summary Background:	The Yakye Axa community, a Paraguayan indigenous community, has traditionally lived in the lands of the Paraguayan Chaco, large parts of which were sold through the London stock exchange at the end of the 19th century. In 1979, the Anglican Church began a comprehensive development program and fostered resettlement of the indigenous groups to Estancia El Estribo, where the natural environment and resources are different from those of the place of origin of these indigenous groups. While they stayed there, the community lacked adequate access to food and water, health services and education. Sixteen persons died due to these living conditions.

[277] For information on the struggle of the communities in Paraguay, see for instance Amnesty International news at: http://www.amnesty.org/en/news/paraguay-land-dispute-victory-displaced-indigenous-community-2012-03-02. For information on the work of the Treatment Action Campaign, please visit: http://www.tac.org.za/about_us

Holding: The Court found that Paraguay had violated various provisions of the American Convention on Human Rights (ACHR) in relation to article 1(1) (the obligation to respect rights), such as the right to a fair trial and judicial protection (article 8 and 25) [para. 119], the right to property (article 21) [para. 156] and the right to life (article 4) [para. 176], since it failed to adopt the necessary positive measures required to ensure the community lived under dignified conditions during the period they had to do without their land [para. 168-169]. The Court considered that Paraguay had failed to adopt adequate measures to ensure its domestic law guaranteed the community's effective use and enjoyment of their traditional land and concluded that the State had the obligation to adopt positive measures towards a dignified life, particularly when high risk, vulnerable groups that require priority protection were at stake [para. 162]. The Court ordered the State to submit the traditional land to the community at no cost [para. 217], to establish a fund for the purchase of land for the community [para. 218], and to provide basic goods and services necessary for the community to survive as long as the Community remained landless [para. 221]. Moreover, the State was ordered to create a community development fund and a community program for the supply of drinking water and sanitary infrastructure. In addition, the Court ordered the State to allocate 950,000 US dollars to a community development program consisting of the implementation of education, housing, agricultural and health programs [para. 205]. Pecuniary damage had to be compensated and costs and expenses reimbursed within one year [para. 233].

Additional Comments:	The Inter-American Court stated that it would supervise enforcement and ordered the State to submit a report on measures adopted within one year after the decision was notified [para. 241].
Link to Full Case:	http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf

	Case of the Sawhoyamaxa Indigenous Community
Year:	2006 (Date of Decision: 29 March, 2006)
Forum, Country:	Inter-American Court of Human Rights; Paraguay
Standards, Rights:	Procedural fairness and due process; Right to life; Right to adequate standard of living; Right to adequate housing; Right to adequate food; Rights to water and sanitation; Indigenous people
Summary Background:	The Sawhoyamaxa Community has historically lived in the lands of the Paraguayan Chaco, which since the 1930s have been transferred to private owners and gradually divided. This increased the restrictions for the indigenous population to access their traditional lands, thus bringing about significant changes in the Community's subsistence activities and finally caused their displacement.
Holding:	The Court found various violations of the ACHR, such as of article 8 and 25 (right to a fair trial and judicial protection), article 21 (right to property), article 4(1) (right to life), and article 3 (right to recognition as a Person before the

	Law), all of them in relation to article 1(1) (the obligation to respect rights) [paras. 112, 144, 178 and 194]. The Court ordered the Paraguayan government to adopt measures for returning the ancestral lands to the Community within three years [para. 215], to provide basic goods and services and implement an emergency communication system until they recovered their land [para. 230]. Moreover, a development fund for the Community in the amount of one million US dollars had to be created [para. 224], compensation in the amount of 20,000 US dollars was to be paid to the families of the 17 persons who died as the result of the forced displacement of the Community [para. 226] as well as for non-pecuniary damages, costs and expenses [para. 239].
Additional Comments:	However, in the years following the judgement no progress was made toward the implementation of the judgements and the communities decided to unite their efforts and to ask Amnesty International to help them set up an international campaign designed to put pressure on the government. The fact that the two communities were in the exact situation and undertook joint actions may have been an important factor in the enforcement process.
Link to Full Case:	http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

Annex 1: List of cases

The present list of cases is partially based on the list entailed in the *ICJ Justiciability Study*. It proposes nevertheless an updated overview, as it includes the additional and recent cases mentioned in this Guide.

I. Domestic Courts

Argentina

Supreme Court

- *Asociación Benghalensis y otros c. Misiterio de Salud y Accion Social – Estado Nacional s/amparo ley 16.688*, 1 June 2000.
- *Mendoza Beatriz Silva y otros c. Estado Nacional y otros s/daños y perjuicios*, File M. 1569. XL, 8 July 2008.
- *Reyes Aguilera, Daniela c. Estado Nacional*, 5 February 2013.
- *Roberto E. Etcheverry c. Omint Sociedad Anónima y Servicios*, 13 March 2001.

Buenos Aires City Supreme Court

- *Comisión Municipal de la Vivienda c. Saavedra*, *Felisa Alicia y Otros s/Desalojo s /Recurso de Inconstitucionalidad Concedido*, 7 October 2002.

Azerbaijan

Constitutional Court

- *Tahirzade v. AMEC*, Constitutional Court, 15 July 2011.

Benin

Constitutional Court

- *Decision DCC 13-031, Constitutional Court, 2013.*

Botswana

Industrial Court of Gaborone

- *Diau v. Botswana Building Society*, Industrial Court of Gaborone, 2003 (2) BLR 409 (IC), Case No. IC No 50 of 2003, 19 December 2003.

- *Lemo v. Northern Air Maintenance (PTY) LTD*, Industrial Court of Gaborone, 2004 (2) BLR 317 (IC), Case No. IC No 166 of 2004, 22 November 22 2004.

Brazil

Federal Supreme Court

- ADPF 186 (*Arguição de Descumprimento de Preceito Fundamental n.186*), Federal Supreme Court, 26 April 2012.

Bulgaria

Constitutional Court

- *Constitutional Case No. 15 of 2010*, Constitutional Court, 11 November 2010.

Canada

Supreme Court of Canada

- *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997.

- *Public Service Alliance of Canada v. Canada Post Corporation and Canadian Human Rights Commission*, 2011 SCC 57, [2011] 3 S.C.R. 572, 17 November 2011.

Colombia

Constitutional Court

- *Decision C-376/10,* 1 November 2009.
- *Decision T-760,* 31 July 2008.
- *Decision T-377/95*, 24 August 1995.
- *Decision T-065/93*, 26 February 1993.
- *Decision of T-051/11, Julio David Perez vs. Mayor's Office of Monte*ria, File T-2650185, 4 February 2011.
- *Decision T-974/10*, 30 November 2010.
- *Decision T-841*, 3 November 2011.
- *Decision T-291/09,* 29 April 2009.

Denmark

Supreme Court

- *A v. Municipality of Egedal and Ministry of Labour,* Supreme Court, Case 159/2009, 15 February 2012.

Egypt

Court of Administrative Justice

- *Case No. 2457/64 Challenging the New Drug Pricing System,* Court of Administrative Justice, 27 April 2010.

El Salvador

Supreme Court

- *Decision 53-2005/55-2005*, Constitutional Chamber of the Supreme Court, February 2013.
- *José Alberto Preza Hernández c. Director General de Centros Penales y la Directora de la Penitenciaría Central "La Esperanza"*, Constitutional Chamber of the Supreme Court, Decision HC 12-2012, 2012.

Fiji

High Court

- *Rarasea v. The State, High Court,* Criminal Appeal No. HAA0027, 2000.

France

Conseil de Prud'hommes

- *Lopez and Syndicat SYNPTAC-CGT v. SARL Théâtre d'Aubervilliers,* Conseil de Prud'hommes de Bobigny/ Jugement de départage, 6 December 2011.

Guatemala

Juvenile and Children Court, Zacapa

- Cases No. 19003-2011-00638-Of.1a; No. 19003-2011-00639-Of.2a; No. 19003-2011-00637-Of.3a; No. 19003-2011-00641-Of.1, Court for the Protection of Children and Adolescents and for Adolescents in conflict with criminal law, Department of Zacapa, 2013.

Germany

Federal Constitutional Court

- *BverfGE 82, 60 (85).*
- *BVerfGE 87,153 (169).*
- *BverfGE 1 BvL 10/10, 18 July 2012.*

Hong Kong

Court of Appeal

- *Kong Yunming v. Director of Social Welfare*, Court of Final Appeal, Hong Kong Special Administrative Region, FACV No. 2, 17 December 2013.

India

Supreme Court

- *Mohini Jain v. State of Karnataka*, Writ petition No. 456, 1991.
- *Olga Tellis v. Bombay Municipal Corporation*, Decision 3 SCC 545, 1985.
- *Paschim Banga Khet Mazdoor Samity & Ors v. State of West Bengal & Anor.*, Decision 4 SCC 37, 1996.
- *People's Union for Civil Liberties v. Union of India and others*, 2 May 2003.
- *Sheela Barse v. Union of India and another*, 4 SCC 204, 1993.
- *The Mumbai Kamgar Sabha, Bombay v. M/S. Abdulbhai Faizullabhai and others*, Decision AIR 1976 SCC 1455, 1976.

- *Upenda Baxi v. State of U. P. & ors.*, 1982 (1) SCC 84 [502], 1983, 2 SCC 308 (1986) 4 SCC 106, AIR 1987 191.

High Court of Delhi

- *Bayer Corp v. Union of India*, Appeal Case LPA 443/2009, 2010.
- *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, W.P.(C) Nos. 8853 of 2008, 6 April 2010.

High Court of Kerala

- *Prison Reform Enhancements of Wages of Prisoners etc.*, AIR Ker 261.

Israel

Supreme Court

- *Yated and others v. the Ministry of Education,* Supreme Court, HCJ 2599/00, 14 August 2002.

Italy

Constitutional Court

- *Control of constitutionality - interlocutory action (Giudizio di legittimità costituzionale in via incidentale*, Constitutional Court, 12 December 2011.

Kenya

High Court

Patricia Asero Ochieng and 2 others v. the Attorney-general & Another, High Court, 20 April 2012.

Latvia

Constitutional Court

- *Case No. 2009-43-01 on Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009*, Constitutional Court, 21 December 2009.

Mexico

Supreme Court

- *Amparo No. 631/2012* (*Independencia Aqueduct)*, Supreme Court of Justice, 8 May 2013.

Morocco

Cour de Cassation

- *Decision 697/5/1/2008-2654, Moroccan Cour de cassation, 2009.*

- *Decision 59/4/2/2009-28*, Moroccan Cour de Cassation, 2010.

Cour d'Appel de Marrakech

- *Decision 323-6-2007-1 (125), Cour d'Appel de Marrakech, 2007.*

Administrative Court of Agadir

- *Decision 12-8-2005 (763)*, *Tribunal Administratif d'Agadir, 2004.*

Russian Federation

Constitutional Court

- Holding N. 1320 –O-O of the Constitutional Court *(Red Star Consulting LLC v. former employee),* 13 October 2009.

South Africa

Constitutional Court

- *Bhe and Others v. Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*, Case CCT 49/03, 2005 (1) SA 580 (CC) (2005), 15 October 2005.
- *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another*, Case CCT 37/11, 2012 (2) SA 105 (CC), 1 December 2011.
- *Jaftha v. Schoeman; Van Rooyen v. Stoltz*, Case CCT 74/03, 2005 (2) SA 140 (CC), 8 October 2004.
- *Joseph v. City of Johannesburg*, Case CCT 43/09, 2010 (4) SA 55 (CC), 9 October 2009.
- *Lindiwe Mazibuko & Others v. City of Johannesburg & Others* case, Case CCT 39/09, 2010 (4) SA 1 (CC), 8 October 2009.
- *Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and others*, Case CCT 22/08, 2010 (3) SA 454 (CC), 10 June 2009.
- *Soobramoney v. Minister of Health*, KawZulu-Natal, Case CCT 32/97, 1998 (1) SA 765 (CC), 27 November 1997.
- *South African Minister of Health v. Treatment Action Campaign*, Case CCT 9/02, 2002 (5) SA 721, 5 July 2002.

- *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, Case CCT 11/00, 2001 (1) SA 46 (CC) (2000), 4 October 2000.

Supreme Court of Appeal

- *The Baphiring Community v. Tshwaranani Projects*, Case 806/12, 2014 (1) SA 330 (SCA), 6 September 2013.

Western Cape High Court

- *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa, Government of the Province of Western Cape*, Case 18678/20072011 (5) SA 87 (WCC), 11 November 2010.

South Gauteng High Court Johannesburg

- *Philane Hlophe & Ors v City of Johannesburg, Executive Mayor, City Manager & Case Ors,* No. 48102/2012, 2013.

Swaziland

Supreme Court

- *Madeli Fakudze v. Commissioner of Police and Ors (8/2002*), Supreme Court, [2002] SZSC 9, 1 June 2002.

Uganda

Constitutional Court

- *Advocates for Natural Resources & 2 Ors v. Attorney General & Anor,* Constitutional Court, Constitutional petition number 40 of 2013, [2013] UGCC 10, 2013.

United Kingdom of Great Britain and Northern Ireland

High Court

- *Pape v. Cumbria CC, Queens Bench Division,* [1992] I.C.R. 132, 23 May 1991.

United States of America

Supreme Court

- *US Department of Agriculture v. Moreno,* 413 US 528, 25 June 1973.
- *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57 (1986), 19 June 1986.

State Courts

- *Dorothy Ann Finch and others v. Commonwealth Health Insurance Connector Authority*, Massachusetts Supreme Judicial Court, Case No. SJC-11025, 5 January 2012.
- *John Doe et al. v. Regional School Unit 26*, Maine Supreme Judicial Court, No. 7455/2001, Decision 2014 ME 11, 30 January 2014.
- *Park West Management Corp. v. Mitchell*, Appellate Division of the Supreme Court of New York, 391 N.E.2d 1288 (N.Y. 1978), 2 May 1978.

Federal Courts

- *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. App. 1995), Court of Appeals First Circuit, 31 October 1995.
- *Molski v. Gleich*, Court of Appeal Ninth Circuit (Southern California), 307F.3d 1155, 2 Cal. Daily Op. Serv. 10, 310, 2002 Daily Journal D.A.R. 11, 901, 6 February 2003.

- *Oberti v. Board of Education of the Borough of Clementon School District,* Court of Appeals Third Circuit, 99 F.2d 1204 (3d Cir. 1993), 28 May 1993.
- *South Fork Band Council and others v. United States Department of the Interior*, Court of Appeals Ninth Circuit, 3 December 2009.

II. International Courts and Treaty Bodies

UN Mechanisms

UN Committee against Torture

- *Hajrizi Dzemajl et al. v. Yugoslavia,* Communication No. 161/2000, 2 December 2002.

UN Committee on Elimination of Discrimination against Women

- *R.K.B. v. Turkey*, Communication No. 28/2010, 24 February 2012.

Regional Mechanisms

African Commission on Human and Peoples' Rights

- *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission of Human and Peoples' Rights, Decision 276/2003, 25 November 2009.
- *SERAC and CESR v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001.

European Court of Human Rights

- *D.H. and others v. the Czech Republic*, Application No. 57325/00, Grand Chamber Judgment, 13 November 2007.
- *Evans v. the United Kingdom*, Application No. 6339/05, 10 April 2007.
- *Fleri Soler and Camilleri v. Malta*, Application No. 35349/05, 26 September 2006.
- *Ghigo v. Malta*, Application No. 31122/05, 26 September 2006.
- *Handyside v. United Kingdom*, Application No. 5493/72, 7 December 1976.

European Commission of Human Rights

- *Zammit and others v. Malta,* Application No. 16756/90, 12 January 1991.

European Committee of Social Rights

- *European Roma Rights Centre v. Portugal,* Complaint No. 61/2010, 30 June 2011.
- *International Association Autism-Europe v. France*, Complaint No. 1/2002, 7 November 2003.
- *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, Complaint No. 49/2008, 11 December 2009.
- *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, 10 September 1999.
- *Quaker Council for European Affairs v. Greece*, Complaint No. 8/2000, 27 April 2001.

Economic Community of West African States (ECOWAS) Community Court of Justice

- *Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08, 27 October 2008.

Inter-American Commission on Human Rights

- *Amílcar Menéndez, Juan Manuel Caride, et al. (Social Security System) v. Argentina*, Admissibility Report, case 11.670, 19 January 2001.
- *Jorge Odir Miranda Cortéz and others v. El Salvador,* Admissibility Report 29/01, case 12.249, 7 March 2001.

Inter-American Court of Human Rights

- *Baena Ricardo et. Al. (270 workers) v. Panama,* 2 February 2001.
- *Five Pensioners v. Peru*, 28 February 2003.
- *Ituango Massacres v. Colombia,* 1 July 2006.
- *Mapiripán Massacres v. Colombia,* 15 September 2005.
- *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006.
- *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005.

Human Rights Chamber for Bosnia and Herzegovina

- *Islamic Community in Bosnia and Herzegovina*, CH/96/29, 11 June 1999.

For further cases please see the table of cases at p. 107-121 of the *ICJ Justiciability Study* (accessible in English, French and Spanish*)* at: http://www.icj.org/courts-and-the-legal-enforcement-of-economic-social-and-cultural-rights/

Annex 2: Toolbox

I. References and links for United Nations documents and mechanisms

Human Rights Treaty bodies

- OHCHR general page on the UN treaty bodies, accessible at:

http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx

Committee on Economic, Social and Cultural Rights (CESCR)

- OHCHR CESCR page, accessible at:

http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx

- CESCR working methods, accessible at:

http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx

- CESCR internal rules of procedure, accessible at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=65

- General comments of the CESCR, accessible at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSeach.aspx?Lang=en&TreatyID=9&DocTypeID=11

- Optional Protocol (OP) to the International Covenant on Economic, Social and Cultural Rights (ICESCR), accessible at:

http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx

Special Procedures

- List on Special Procedures of the Human Rights Council specialized in the area of ESC rights, accessible at:

http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx

- Human Rights Impact assessment : UN Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, O. De Schutter, UN Doc. A/HRC/19/59/Add.5 (2011), accessible at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf

OHCHR

- United Nations Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights – Handbook,* accessible at:

http://www.ohchr.org/Documents/Publications/training12en.pdf

- Human Rights Indicators: A Guide to Measurement and Implementation, accessible at:

http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf

FAO

- Information paper of the FAO Economic and Social Development Department on the "Recognition of the right to food at the national level", covering other ESC rights guaranteed in national legislation, accessible at:

http://www.fao.org/docrep/meeting/007/j0574e.htm#P1060_44517

II. References to International doctrine and expert legal documents

- Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17 (1986), and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), full texts in annex 3 or accessible at:

http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1997/01/economic-social-and-cultural-rights-compilation-thematic-report-1997-eng1.pdf

- Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), full text in annex 3 or accessible at:

http://www.etoconsortium.org/en/library/maastricht-principles/

- Tshwane Principles, Global Principles on National Security and the Right to Information (2013), accessible at:

http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

III. References for useful databases

International/global

- ESCR-Net Database, accessible at: http://www.escr-net.org/caselaw
- Hurisearch (human rights search engine), accessible at: https://www.huridocs.org/hurisearch/
- Universal Human Rights Index (database on Treaty Bodies, Special Procedures and the Universal Periodic Review), accessible at: http://uhri.ohchr.org/
- Human Rights Library of the University of Minnesota (database on decisions from regional and UN human rights bodies and international criminal tribunals), accessible at: http://hrlibrary.ngo.ru/index.html
- INTERRIGHTS Commonwealth and International Law Database, accessible at: http://www.interights.org/commonwealth-and-international-law-database/index.html
- WorldCourts (database of decisions from the UN, African and Inter-American human rights bodies and international courts and tribunals), accessible at: http://worldcourts.com/
- Oxford Reports on International Law (International and Domestic Court decisions), accessible at: http://opil.ouplaw.com/home/oril
- CODICES (Database on the Constitutional Case law of the Venice Commission), accessible at: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm

- Westlaw, accessible at: http://web2.westlaw.com/signon/default.wl?vr=2.0&fn=_top&__mud=y&rs=WLW14.04&bhcp=1

Regional

- IHRDA African case law database, accessible at:

http://caselaw.ihrda.org/

- Decisions of the African Commission on Human and Peoples' Rights, accessible at:

http://www.achpr.org/communications/decisions/

- Decisions of the African Court on Human and Peoples' Rights, accessible at:

http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions

- Collective Complaints to the European Committee on Social Rights, accessible at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

- Decisions of the European Court of Human Rights, accessible at:

http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#

- Decisions of the Inter-American Commission on Human Rights, accessible at:

http://www.oas.org/en/iachr/decisions/cases_reports.asp

- Decisions of the Inter-American Court of Human Rights, accessible at:

http://www.corteidh.or.cr/index.php/jurisprudencia

IV. Useful resources and contacts for support in litigation

Resources on strategic litigation

- ESCR-Net strategic litigation initiative and strategic litigation working group (for pool of experts and litigation support), accessible at:

http://www.escr-net.org/node/365113
http://www.escr-net.org/docs/i/465879

- Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en Guatemala, Capacitación Técnica en Litigio Estratégico en Derechos Humanos de los Pueblos Indígenas Componente de Justicia del Programa Maya II, Manual Litigo Estratégico: "Estrategia General para los litigios de Alto Impacto", accessible at:

http://www.ohchr.org.gt/documentos/programaMAYA/ANEXO2.pdf

Information on UN Treaty Bodies

- List of the United Nations Treaty Bodies receiving complaints accessible at:

http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#ftn1

- Information on submission of a complaint to a Treaty Body, accessible at:

http://ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx
http://ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx

Information on the regional human rights system

European Court of Human Rights and European Committee of Social Rights

- Information on applications to the European Court of Human Rights, accessible at:

http://www.echr.coe.int/Pages/home.aspx?p=applicants

- Information on the Collective Complaint Procedure of the European Committee on Social Rights, accessible at:

http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrganisationsIndex_en.asp

African Commission and Court on Human and Peoples' Rights

- Information on the submission of communications to the Commission, accessible at:

http://www.achpr.org/communications/procedure/
http://www.achpr.org/communications/guidelines/

- Information on applications to the Court, accessible at:

http://www.african-court.org/en/index.php/component/content/article/13-cases-from-court/22-submission-of-cases-to-the-court

Inter-American Commission and Court on Human Rights

- Information on presenting a complaint before the Commission and the Court, accessible at:

https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E
https://www.cidh.oas.org/cidh_apps/login.asp
http://www.oas.org/en/iachr/mandate/Basics/fund.asp
http://www.corteidh.or.cr/index.php/en/court-today/denuncias-consultas

Law clinics at universities offering support in preparing and accompanying litigation

- Northwestern University, Law School, Center for International Human Rights, USA. Contact details: Bluhm Legal Clinic, Northwestern University School of Law, 375 East Chicago Avenue, Chicago, IL 60611-3069, Phone: +1 312.503.8576, Fax: +1 312.503.8977, Email: legalclinic@law.northwestern.edu; further details at: http://www.law.northwestern.edu/legalclinic/about/contact.html
- Cornell University, Law School, USA. Information for potential clients at: http://www.lawschool.cornell.edu/Clinical-Programs/international-human-rights/potential-clients.cfm; contact details at: http://www.lawschool.cornell.edu/Clinical-Programs/Contact-us.cfm, Susan Tosto, Clinical Programs Administrator, 152 Myron Taylor Hall, Phone: +1 (607) 254-5186, Email: sjt29@cornell.edu
- The University of Texas and Austin, School of Law, USA. Contact details at: http://www.utexas.edu/law/clinics/humanrights/contact_us.php, Ted Magee, Administrator, Phone: +1 (512) 232-5304, Email: tmagee@law.utexas.edu

- UFR Droit – Université Paris 8, France. Contact details at: http://lacliniquejuridique.fr/contact. UFR Droit – Université Paris 8, Bureau A218, 2, rue de la Liberté, 93526 Saint-Denis Cedex, Phone: +33 01.49.40.65.29, Email: lacliniquejuridique@gmail.com)
- Heinrich Heine Universität Düsseldorf, Juristische Fakultät, Germany. Contact details at: http://www.jura.hhu.de/hilfe/fall-melden.html
- University of Warsaw, Faculty of Law and Administration, Contact details at: http://en.wpia.uw.edu.pl/9,Centre_of_Law_Advice.html

IV. References for NGO work on ESC rights issues

Justiciablity of ESC rights

- International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (2008), available (in English, French and Spanish) at:

http://www.icj.org/courts-and-the-legal-enforcement-of-economic-social-and-cultural-rights/

Access to Justice

ICJ Studies on Access to Justice

- Access to Justice for social rights in Morocco, available (in French and Arabic) at:

http://www.icj.org/new-icj-study-on-access-to-justice-for-economic-social-and-cultural-rights-in-morocco/

- Access to Justice for social rights in El Salvador, available (in Spanish) at:

http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/

- More Access to Justice studies are accessible at:

http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/

Optional Protocol to the ICESCR

- OP-ICESCR Coalition material, accessible at:

http://op-icescr.escr-net.org/

- ESCR-Net Guide: Claiming ESCR At the United Nations, available (in English and Spanish) at:

http://www.escr-net.org/node/365482

- ESCR-Net Guide: Claiming Women's ESC Rights Using OP-CEDAW and OP-ICESCR, accessible at:

http://www.escr-net.org/node/365157

- Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, published by the ICJ and the Inter-American Institute of Human Rights (available in English, Spanish and French), accessible at:

http://www.icj.org/comentario-del-protocolo-facultativo-del-pacto-international-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/

- Geneva Academy, The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, accessible at:

http://www.genevaacademy.ch/docs/publications/Briefings%20and%20In%20breifs/The%20optional%20protocol%20In%20brief%202.pdf

ESC rights and the role of lawyers

- Bangalore Declaration and Plan of Action (1995), accessible at:

http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1997/01/economic-social-and-cultural-rights-compilation-thematic-report-1997-eng1.pdf

Right to remedy and reparation

- ICJ Practitioners Guide No.2 on the right to a remedy and to Reparation for gross human rights violations available (in English, French, Spanish, Arabic and Thai) at:

http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/

Migration

- ICJ Practitioners Guide No.6 on migration and international human rights law, available (in English, Greek and Italian) at:

http://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/

Discrimination on the ground of sexual orientation and gender identity (SOGI)

- ICJ SOGI UN caselaw database, accessible at:

http://www.icj.org/sogi-un-database/

- ICJ SOGI casebook, accessible at:

http://www.icj.org/sogi-casebook-introduction/

- ICJ legislative database accessible at:

http://www.icj.org/sogi-legislative-database/

- ICJ SOGI Publications accessible at:

http://www.icj.org/category/publications/?theme=sexual-orientation-and-gender-identity

Monitoring

- OPERA framework of the Center for Economic and Social Rights, accessible at:

http://cesr.org/section.php?id=179

Documentation of violations

- Huridocs Open Evsys: a free and open source database application for documenting violations, accessible at:

https://www.huridocs.org/openevsys/

Technical tool for litigation NGOs

- Huridocs Casebox: support for litigation NGOs which are looking for an integrated and web-based application to manage their caseload, accessible at:

https://www.huridocs.org/casebox/

Extraterritorial Obligations

- ETO Consortium web site, accessible at:

http://www.etoconsortium.org/

V. References for academic work on ESC Rights issues

Fundamental resource: Circle of rights

- Economic, Social and Cultural Rights Activism: A Training Resource, accessible at: http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm

Obligations under the ICESCR

- Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003.

Justiciability and ESC rights litigation

English

- A. Nolan, B. Porter and M. Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal,* New York University center for human rights and global jus-

tice, Working Paper No. 15, 2007, accessible at: http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf

- Bruce Porter, "Justiciability of ESC Rights and The Right to Effective Remedies: Historic Challenges and New Opportunities" in *Economic, Social and Cultural Rights and the Optional Protocol to the ICESCR*, Chinese Academy of Social Sciences, Beijing, 2008.

- Bruce Porter and Martha Jackman, "Justiciability of Social and Economic Rights in Canada" in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative International Law*, Cambridge University Press, Cambridge, 2008, accessible at: http://www.socialrights.ca/domestic-political/documents/cambridge.pdf

- Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge UP, Cambridge, 2008.

- Malcolm Langford*, Judging Social Rights,* Human Rights Tribune, 11(3), 2005, accessible at: http://www.hri.ca/pdfs/HRT%20Volume%2011,%20No.3%20Autumn%202005.pdf

- Malcolm Langford and Bret Thiele (eds.), *Litigation of Economic, Social and Cultural Rights: The State of Play*, The University of New South Wales Press, Sydney, 2005.

- M. Langford, B. Thiele, and J. Squires (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: UNSW Press, 2005), accessible at: http://209.240.139.114/wp-content/uploads/2012/02/The-Road-to-a-Remedy.pdf

- M. Langford, C. Rodriguez and J. Rossi (eds.), *Making it Stick: Compliance with Social Rights Judgments in Comparative Perspective*, Pretoria University Law Press, Capetown, 2014.

- Sandra Liebenberg, "The protection of economic and social rights in domestic legal systems", in *Economic, Social and Cultural Rights: A Textbook,* Martinus Nijhoff Publishers, The Hague, 2001.

- Sandy Liebenberg and Karrisha Pillay, *Socio-economic Rights in South Africa: A Resource Book*, Community Law Centre (University of Cape Town), 2000.

French

- Diane Roman, *Justiciabilité des droits sociaux: vecteurs et résistances*, Editions A. Pedone, Paris, 2012.

Spanish

- Magdalena Sepúlveda, "La justiciabilidad de los derechos económicos, sociales y culturales frente a la supuesta dicotomía entre las obligaciones impuestas por los pactos de Naciones Unidas", en O. Cantón y S. Corcuera (coords.). *Derechos económicos, sociales y culturales. Ensayos y materiales,* México: Universidad Iberoamericana, Porrúa, 2004, pp. 109–148.

- Malcom Langford (ed.), *Teoría y jurisprudencia de los derechos sociales: Tendencias incipientes en el derecho internacional y comparado*, Universidad de los Andes and Siglo del Hombre Editores, Bogotá, 2012.

- Martín Abregú and Christian Courtis (eds.), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Editores del Puerto, 2004.

- Víctor Abramovich and Christian Courtis, *Derechos sociales: instrucciones de uso*, Fontamara, 2003.

- Víctor Abramovich and Christian Courtis, *El umbral de la ciudadanía: el significado de los derechos sociales en el Estado social constitucional*, Editores del Puerto, 2006.

- V. Abramovich, C. Courtis and L. Ferrajoli, *Los derechos sociales como derechos exigibles*, Vol. 2, Trotta, Madrid, 2002.

Reasonableness and resource implications

- Brian Griffey, *The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, in Human Rights Law Review 11:2 (2011), pp.275-327.

- Bruce Porter, *The Reasonableness of Article 8(4)- Adjudicating Claims from the Margins*, Nordic Journal for Human Rights, Vol.27, No.1, 2009, pp.39-53.

Relevance of criminal law for ESC rights

- Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, forthcoming 2014.

Extraterritorial Obligations of States

- O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, Human Rights Quarterly, 34(4), 2012, pp. 1084-1169, accessible at: http://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf

- Fons Coomans and Rolf Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, Maastricht Series in Human Rights, Vol. 13, Intersentia, Antwerp, 2012.

- Mark Gibney and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments*, Routledge, 2013.

Annex 3: The three Maastricht expert documents

I. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

(UN Commission on Human Rights, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, UN Doc. E/CN.4/1987/17)

Introduction

(i) A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant.

(ii) The 29 Participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat, and the sponsoring organizations. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.

(iii) The Participants agreed unanimously upon the following principles which they believe reflect the present state of international law, with the exception of certain recommendations indicated by the use of the verb "should" instead of "shall".

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights

PART I: THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS

A. General Observations

1. Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.

2. The International Covenant on Economic, Social and Cultural Rights, together with the International Covenant on Civil and Political Rights and the Optional Protocol, entered into force in 1976. The Covenants serve to elaborate the Universal Declaration of Human Rights: these instruments constitute the International Bill of Human Rights.

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna, 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the Preparatory work and the relevant practice.

5. The experience of the relevant specialized agencies as well as of United Nations bodies and intergovernmental organizations, including the United Nations working groups and special rapporteurs in the field of human rights, should be taken into account in the implementation of the Covenant and in monitoring States parties' achievements.

6. The achievement of economic, social and cultural rights may

be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.

10. States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

12. The supervision of compliance with the Covenant should be approached in a spirit of co-operation and dialogue. To this end, in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, hereinafter called "the Committee", should analyse the causes and factors impeding the realization of the rights covered under the Covenant and, where possible, indicate solutions. This approach should not preclude a finding, where the information available warrants such a conclusion, that a State party has failed to comply with its obligations under the Covenant.

13. All organs monitoring the Covenant should pay special attention to the principles of non- discrimination and equality before the law when assessing States parties' compliance with

the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant's objectives.

B. Interpretative Principles specifically relating to Part II of the Covenant

Article 2 (1): *"to take steps ... by all appropriate means, including particularly the adoption of legislation"*

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States Parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should be noted, however, that article 2 (1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review

shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

"to achieve progressively the full realization of the rights"

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2 (2) of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.

"to the maximum of its available resources"

25. States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. "Its available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

"individually and through international assistance and co-operation, especially economic and technical"

29. International co-operation and assistance pursuant to the Charter of the United Nations (arts. 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic social and cultural as well as civil and political.

30. International co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (cf. art. 28 Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall co- operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant.

33. International co-operation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international co-operation and assistance Pursuant to article 2 (1) the role of international organizations and the contribution of non-governmental organizations shall be kept in mind.

Article 2 (2): Non-discrimination

35. Article 2 (2) calls for immediate application and involves and explicit guarantee on behalf of the States Parties. It should, therefore, be made subject to judicial review and other recourse Procedures.

36. The grounds of discrimination mentioned in article 2 (2) are not exhaustive.

37. Upon becoming a party to the Covenant States shall eliminate *de jure* discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

38. *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

39. Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved.

40. Article 2 (2) demands from States parties that they prohibit private persons and bodies from practising discrimination in any field of public life.

41. In the application of article 2 (2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination as well as to the activities of the supervisory committee (CERD) under the said Convention.

Article 2 (3): Non-nationals in developing countries

42. As a general rule the Covenant applies equally to nationals

and non-nationals.

43. The purpose of article 2 (3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2 (3) should be interpreted narrowly.

44. This narrow interpretation of article 2 (3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.

Article 3: Equal rights for men and women

45. In the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of the supervisory committee (CEDAW) under the said Convention.

Article 4: Limitations

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

"determined by law" [278]

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

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[278] The Limburg Principles 48-51 are derived from the Siracusa Principles 15-18, United Nations Doc. E/CN.4/1984/4, 28 September 1984 and 7 Human Rights Quarterly 3 (1985), at p. 5.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition on application of limitations on economic, social and cultural rights.

"promoting the general welfare"

52. This term shall be construed to mean furthering the well-being of the people as a whole.

"in a democratic society"[279]

53. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

"compatible with the nature of these rights"

56. The restriction "compatible with the nature of these rights" requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

Article 5

[279] Compare Siracusa Principles 19-21, Ibid., at p. 5.

57. Article 5 (1) underlines the fact that there is no general, implied or residual right for a State to impose limitations beyond those which are specifically provided for in the law. None of the provisions in the law may be interpreted in such a way as to destroy "any of the rights or freedoms recognized". In addition article 5 is intended to ensure that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

58. The purpose of article 5 (2) is to ensure that no provision in the Covenant shall be interpreted to prejudice the provisions of domestic law or any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected. Neither shall article 5 (2) be interpreted to restrict the exercise of any human right protected to a greater extent by national or international obligations accepted by the State party.

C. Interpretative Principles specifically relating to Part III of the Covenant Article 8:

"prescribed by law"[280]

59. See the interpretative principles under the synonymous term "determined by law" in article 4.

"necessary in a democratic society"

60. In addition to the interpretative principles listed under article 4 concerning the Phrase "in a democratic society", article 8 imposes a greater restraint upon a State party which is exercising limitations on trade union rights. It requires that such a limitation is indeed necessary. The term necessary" implies that the limitation:

[280] The Limburg Principles 59-69 are derived from the Siracusa Principles 10, 15-26, 29-32 and 35-37, ibid., at pp. 4-7.

(a) responds to a pressing public or social need;

(b) pursues a legitimate aim; and

(c) is proportional to that aim.

61. Any assessment as to the necessity of a limitation shall be based upon objective considerations.

"national security"

62. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

63. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

64. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may be invoked only when there exist adequate safeguards and effective remedies against abuse.

65. The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international Peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive Practices against its population.

"public order (ordre public)"

66. The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (*ordre public*).

67. Public order (*ordre public*) shall be interpreted in the context of the purpose of the particular economic, social and cul-

tural rights which are limited on this ground.

68. State organs or agents responsible for the maintenance of public order (*ordre public*) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

"rights and freedoms of others"

69. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

D. Violations of Economic, Social and Cultural Rights

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, *inter alia*, if:

- it fails to take a step which it is required to take by the Covenant;

- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;

- it fails to implement without delay a right which it is required by the Covenant to provide immediately;

- it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

- it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;

- it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;

- it fails to submit reports as required under the Covenant.

73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.

PART II. CONSIDERATION OF STATES PARTIES' REPORTS AND INTERNATIONAL COOPERATION UNDER PART IV OF THE COVENANT

A. Preparation and submission of reports by States parties

74. The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the duality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non- governmental and international institutions.

75. The Preparation of reports under article 16 of the Covenant could be facilitated by the implementation of elements of the programme of advisory services and technical assistance as proposed by the chairmen of the main human rights supervisory organs in their 1984 report to the General Assembly (United

Nations Doc. A39/484).

76. States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft. The preparation of reports should also be an occasion to review the extent to which relevant national policies adequately reflect the scope and content of each right, and to specify the means by which it is to be realized.

77. States parties are encouraged to examine the possibility of involving non-governmental organizations in the preparation of their reports.

78. In reporting on legal steps taken to give effect to the Covenant, States parties should not merely describe any relevant legislative provisions. They should specify, as appropriate, the judicial remedies, administrative procedures and other measures they have adopted for enforcing those rights and the practice under those remedies and procedures.

79. Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be Presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States Parties should, where Possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-operation in order to increase the relevance and comparability of data submitted by States parties in their reports.

80. Where necessary, governments should conduct or commission studies to enable them to fill gaps in information regarding progress made and difficulties encountered in achieving the observance of the Covenant rights.

81. Reports by States Parties should indicate the areas where

more progress could be achieved through international co-operation and suggest economic and technical co-operation programmes that might be helpful toward that end.

82. In order to ensure a meaningful dialogue between the States Parties and the organs assessing their compliance with the provisions of the Covenant, States parties should designate representatives who are fully familiar with the issues raised in the report.

B. Role of the Committee on Economic, Social and Cultural Rights

83. The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, its role is to consider States parties reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties. The decision of the Economic and Social Council to replace its sessional Working Group by a Committee of independent experts should lead to a more effective supervision of the implementation by States parties.

84. In order to enable it to discharge fully its responsibilities the Economic and Social Council should ensure that sufficient sessions are provided to the Committee. It is imperative that the necessary staff and facilities for the effective Performance of the Committee's functions be provided, in accordance with ECOSOC resolution 1985/17.

85. In order to address the complexity of the substantive issues covered by the Covenant, the Committee might consider delegating certain tasks to its members. For example, drafting grounds could be established to prepare preliminary formulations or recommendations of a general nature or summaries of the information received. Rapporteurs could be appointed to assist the work of the Committee in particular to prepare reports on specific topics and for that purpose consult States parties, specialized agencies and relevant experts and to draw up proposals regarding economic and technical assistance pro-

jects that could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations.

86. The Committee should, pursuant to articles 22 and 23 of the Covenant, explore with other organs of the United Nations, specialized agencies and other concerned organizations, the possibilities of taking additional international measures likely to contribute to the progressive implementation of the Covenant.

87. The Committee should reconsider the current six-year cycle of reporting in view of the delays which have led to simultaneous consideration of reports submitted under different phases of the cycle. The Committee should also review the guidelines for States parties to assist them in preparing reports and propose any necessary modifications.

88. The Committee should consider inviting States parties to comment on selected topics leading to a direct and sustained dialogue with the Committee.

89. The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, in so far as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant. The Committee should take due account of the indicators selected by or in the framework of the specialized agencies and draw upon or promote additional research, in consultation with the specialized agencies concerned, where gaps have been identified.

90. Whenever the Committee is not satisfied that the information provided by a state Party is adequate for a meaningful assessment of progress achieved and difficulties encountered it should request supplementary information, specifying as necessary the precise issues or questions it would like the State party to address.

91. In preparing its reports under ECOSOC resolution 1985/17, the Committee should consider, in addition to the "summary of its consideration of the reports", highlighting thematic issues

raised during its deliberations.

C. Relations between the Committee and Specialized Agencies, and other international organs

92. The establishment of the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialized agencies and other international organs.

93. New arrangements under article 18 of the Covenant should be considered where they could enhance the contribution of the specialized agencies to the work of the Committee. Given that the working methods with regard to the implementation of economic, social and cultural rights vary from one specialized agency to another, flexibility is appropriate in making such arrangements under article 18.

94. It is essential for the proper supervision of the implementation of the Covenant under Part IV that a dialogue be developed between the specialized agencies and the Committee with respect to matters of common interest. In particular consultations should address the need for developing indicators for assessing compliance with the Covenant; drafting guidelines for the submission of reports by States parties; making arrangements for submission of reports by the specialized agencies under article 18. Consideration should also be given to any relevant procedures adopted in the agencies. Participation of their representatives in meetings of the Committee would be very valuable.

95. It would be useful if Committee members could visit specialized agencies concerned, learn through personal contact about programmes of the agencies relevant to the realization of the rights contained in the Covenant and discuss the possible areas of collaboration with those agencies.

96. Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realization of the

rights recognized in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States Parties to implement the Covenant and possibilities of technical and economic co-operation under article 22 of the Covenant.

97. The Commission on Human Rights, in addition to its responsibilities under article 19 of the Covenant, should take into account the work of the Committee in its consideration of items on its agenda relating to economic, social and cultural rights.

98. The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or other Covenant, there are several rights and Provisions referred to in both instruments which are not susceptible to clear differentiation. Both Covenants moreover share common provisions and articles. It is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee.

99. Given the relevance of other international legal instruments to the Covenant, early consideration should be given by the Economic and Social Council to the need for developing effective consultative arrangements between the various supervisory bodies.

100. International and regional intergovernmental organizations concerned with the realization of economic, social and cultural rights are urged to develop measures, as appropriate, to promote the implementation of the Covenant.

101. As the Committee is a subsidiary organ of the Economic and Social Council, non-governmental organizations enjoying consultative status with the Economic and Social Council are urged to attend and follow the meetings of the Committee and, when appropriate, to submit information in accordance with ECOSOC resolution 1296 (XLIV).

102. The Committee should develop, in co-operation with intergovernmental organizations and non-governmental organizations as well as research institutes an agreed system for recording, storing and making accessible case law and other interpretative material relating to international instruments on economic, social and cultural rights.

103. As one of the measures recommended in article 23 it is recommended that seminars be held Periodically to review the work of the Committee and the progress made in the realization of economic, social and cultural rights by States parties.

II. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

(Adopted by the participants of an expert seminar, organized by the International Commission of Jurists, the Maastricht Centre for Human Rights and the Urban Morgan Institute for Human Rights on the occasion of the 10th anniversary of the Limburg Principles, 26 January 1997, UN Doc. E/C.12/2000/13)

I. The significance of economic, social and cultural rights

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population. The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4% of the global income and the richest fifth 85%. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.

3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made firm commitments to address more effectively economic, social and cultural rights within the framework of seven UN World Summits conferences (1992-1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

5. As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles, the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter "the Covenant"). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

II. The meaning of violations of economic, social and cultural rights

Obligations to respect, protect and fulfil

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Obligations of conduct and of result

7. The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Margin of discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

Minimum core obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant." Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

Availability of resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

State policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Gender discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to comply

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to

distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or

it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through acts of omission

15. Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;

(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

III. Responsibility for violations

State responsibility

16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

Alien domination or occupation

17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

Acts by non-state entities

18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not

deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

Acts by international organizations

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

IV. Victims of violations

Individuals and groups

20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

Criminal sanctions

21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalizing persons for being homeless. Nor should anyone be penalized for claiming their economic, social and cultural rights.

V. Remedies and other responses to violations

Access to remedies

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

Adequate reparation

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

No official sanctioning of violations

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aide in formulating any decisions relating to violations of economic, social and cultural rights.

National institutions

25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as

vigorously as they address violations of civil and political rights.

Domestic application of international instruments

26. The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

Impunity

27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.

Role of the legal professions

28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.

Special rapporteurs

29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the UN Commission on Human Rights should appoint thematic Special Rapporteurs in this field.

New standards

30. In order to further clarify the contents of States obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

Optional protocols

31. The optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

Documenting and monitoring

32. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organizations. It is indispensable that the relevant international organizations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialized agencies and other international organizations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.

III. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

(Adopted at a gathering convened by Maastricht University and the International Commission of Jurists by a group of experts in international law and human rights, 28 September 2011)

Preamble

The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.

Despite decades of growing global wealth, poverty remains pervasive and socio-economic and gender inequalities endure across the world. Moreover, individuals and communities face the continuing deprivation and denial of access to essential lands, resources, goods and services by State and non-State actors alike.

Countless individuals are subsequently unable to enjoy their economic, social and cultural rights, including the rights to work and decent working conditions, social security and care, an adequate standard of living, food, housing, water, sanitation, health, education and participation in cultural life.

States have recognized that everyone is entitled to a social and international order in which human rights can be fully realized and have undertaken to pursue joint and separate action to achieve universal respect for, and observance of, human rights for all.

In the Vienna declaration and Programme of Action, all States affirmed the importance of an international order based on the principles of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, de-

velopment, better standards of living and solidarity. In pursuit of these objectives, States reaffirmed in the Millennium declaration their collective responsibility to uphold these principles at the global level.

States have repeatedly committed themselves to realizing the economic, social and cultural rights of everyone. This solemn commitment is captured in the Charter of the united Nations, and is found in the universal declaration on Human rights and numerous international treaties, such as the International Covenant on Economic, Social and Cultural rights, the International Convention on the Elimination of All Forms of racial discrimination, the Convention on the Elimination of All Forms of discrimination Against Women, the Convention on the rights of the Child, the Convention on the rights of Persons with disabilities, the International Convention on the Protection of the rights of All Migrant Workers and Members of Their Families, as well as in the International Covenant on Civil and Political rights and many regional human rights instruments.

These commitments include the obligation to realize progressively economic, social and cultural rights given the maximum resources available to States, when acting individually and through international assistance and cooperation, and to guarantee these rights without discrimination on the basis of race, colour, gender, sexual orientation and gender identity, language, religion, political or other opinion, national or social origin, property, birth, disability or other prohibited grounds in international law.

Drawn from international law, these principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights.

These Principles complement and build on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights (1986) and on the Maastricht Guidelines on Violations of Economic, Social and Cultural rights (1997).

I. General principles

1. All human beings everywhere are born free and equal in dignity and are entitled without discrimination to human rights and freedoms.

2. States must at all times observe the principles of non-discrimination, equality, including gender equality, transparency and accountability.

3. All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.

4. Each State has the obligation to realize economic, social and cultural rights, for all persons within its territory, to the maximum of its ability. All States also have extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights as set forth in the following Principles.

5. All human rights are universal, indivisible, interdependent, interrelated and of equal importance. The present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, without excluding their applicability to other human rights, including civil and political rights.

6. Economic, social and cultural rights and the corresponding territorial and extraterritorial obligations are contained in the sources of international human rights law, including the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and other universal and regional instruments.

7. Everyone has the right to informed participation in decisions which affect their human rights. States should consult with relevant national mechanisms, including parliaments, and civil society, in the design and implementation of policies and measures relevant to their obligations in relation to economic, social and cultural rights.

II. Scope of extraterritorial obligations of States

8. Definition of extraterritorial obligations

For the purposes of these Principles, extraterritorial obligations encompass:

a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

9. Scope of jurisdiction

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

10. Limits to the entitlement to exercise jurisdiction

The State's obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially does not authorize a State to act in violation of the UN Charter and general international law.

11. State responsibility

State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.

12. Attribution of State responsibility for the conduct of non-State actors

State responsibility extends to:

a) acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and

b) acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in the particular instance.

13. Obligation to avoid causing harm

States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.

14. Impact assessment and prevention

States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent viola-

tions or ensure their cessation as well as to ensure effective remedies.

15. Obligations of States as members of international organisations

As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extra-territorially. A State that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.

16. Obligations of international organisations

The present Principles apply to States without excluding their applicability to the
human rights obligations of international organisations under, inter alia, general international law and international agreements to which they are parties.

17. International agreements

States must elaborate, interpret and apply relevant international agreements and

standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.

18. Belligerent occupation and effective control

A State in belligerent occupation or that otherwise exercises effective control over territory outside its national territory must respect, protect and fulfil the economic, social and cultural rights of persons within that territory. A State exercising effective control over persons outside its national territory must respect, protect and fulfil economic, social and cultural rights of those persons.

III. Obligations to respect

19. General obligation

All States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 20 to 22.

20. Direct interference

All States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.

21. Indirect interference

States must refrain from any conduct which:

a) impairs the ability of another State or international organisation to comply with that State's or that international organisation's obligations as regards economic, social and cultural rights; or

b) aids, assists, directs, controls or coerces another State or international organisation to breach that State's or that international organisation's obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act.

22. Sanctions and equivalent measures

States must refrain from adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of economic, social and cultural rights. Where sanctions are undertaken to fulfil other international legal obligations, States must ensure that human rights obligations are fully respected in the design, implementation and termination of any sanctions regime. States must refrain in all circumstances from embargoes and equivalent

measures on goods and services essential to meet core obligations.

IV. Obligations to protect

23. General obligation

All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 24 to 27.

24. Obligation to regulate

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.

25. Bases for protection

States must adopt and enforce measures to protect economic, social and cultural
rights through legal and other means, including diplomatic means, in each of the following circumstances:

a) the harm or threat of harm originates or occurs on its territory;

b) where the non-State actor has the nationality of the State concerned;

c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;

d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;

e) where any conduct impairing economic, social and cultural rights constitutes a
violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

26. Position to influence

States that are in a position to influence the conduct of non-State actors even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.

27. Obligation to cooperate

All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.

V. Obligations to fulfil

28. General obligation

All States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 29 to 35.

29. Obligation to create an international enabling environment

States must take deliberate, concrete and targeted steps, separately, and jointly
through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, inter alia:

a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;

b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.

30. Coordination and allocation of responsibilities

States should coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights. The lack of such coordination does not exonerate a State from giving effect to its separate extraterritorial obligations.

31. Capacity and resources

A State has the obligation to fulfil economic, social and cultural rights in its territory to the maximum of its ability. Each State must separately and, where necessary, jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, commensurate with, inter alia, its economic, technical

and technological capacities, available resources, and influence in international decision-making processes. States must cooperate to mobilize the maximum of available resources for the universal fulfilment of economic, social and cultural rights.

32. Principles and priorities in cooperation

In fulfilling economic, social and cultural rights extraterritorially, States must:

a) prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups;

b) prioritize core obligations to realize minimum essential levels of economic, social

and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;

c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and

d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives.

33. Obligation to provide international assistance

As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States, in a manner consistent with Principle 32.

34. Obligation to seek international assistance and cooperation

A State has the obligation to seek international assistance and cooperation on mutually agreed terms when that State is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory. That State has an obligation to ensure that assistance provided is used towards the realisation of economic, social and cultural rights.

35. Response to a request for international assistance or cooperation

States that receive a request to assist or cooperate and are in a position to do so must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil economic, social and cultural rights extraterritorially. In responding to the request, States must be guided by Principles 31 and 32.

VI. Accountability and Remedies

36. Accountability

States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations. In order to ensure the effectiveness of such mechanisms, States must establish systems and procedures for the full and thorough monitoring of compliance with their human rights obligations, including through national human rights institutions acting in conformity with the United Nations Principles relating to the Status of National Institutions (Paris Principles).

37. General obligation to provide effective remedy

States must ensure the enjoyment of the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of economic, social and cultural rights. Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful

conduct took place, any State concerned must provide remedies to the victim.

To give effect to this obligation, States should:

a) seek cooperation and assistance from other concerned States where necessary to ensure a remedy;

b) ensure remedies are available for groups as well as individuals;

c) ensure the participation of victims in the determination of appropriate remedies;

d) ensure access to remedies, both judicial and non-judicial, at the national and international levels; and

e) accept the right of individual complaints and develop judicial remedies at the international level.

38. Effective remedies and reparation

Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. To avoid irreparable harm, interim measures must be available and States must respect the indication of interim measures by a competent judicial or quasi-judicial body. Victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim.

39. Inter-State complaints mechanisms

States should avail themselves of, and cooperate with, inter-State complaints mechanisms, including human rights mechanisms, to ensure reparation for any violation of an extraterritorial obligation relating to economic, social and cultural rights. States should seek reparation in the interest of injured persons

as beneficiaries under the relevant treaties addressing economic, social and cultural rights, and should take into account, wherever feasible, the views of injured persons with regard to the reparation to be sought. Reparation for the injuries obtained from the responsible State should be transferred to the injured persons.

40. Non-judicial accountability mechanisms

In addition to the requisite judicial remedies, States should make non-judicial remedies available, which may include, inter alia, access to complaints mechanisms established under the auspices of international organisations, national human rights institutions or ombudspersons, and ensure that these remedies comply with the requirements of effective remedies under Principle 37. States should ensure additional accountability measures are in place at the domestic level, such as access to a parliamentary body tasked with monitoring governmental policies, as well as at the international level.

41. Reporting and monitoring

States must cooperate with international and regional human rights mechanisms, including periodic reporting and inquiry procedures of treaty bodies and mechanisms of the UN Human Rights Council, and peer review mechanisms, on the implementation of their extraterritorial obligations in relation to economic, social and cultural rights, and redress instances of non-compliance as identified by these mechanisms.

VII. Final provisions

42. States, in giving effect to their extraterritorial obligations, may only subject economic, social and cultural rights to limitations when permitted under international law and where all procedural and substantive safeguards have been satisfied.

43. Nothing in these Principles should be read as limiting or undermining any legal obligations or responsibilities that States, international organisations and non-State actors, such

as transnational corporations and other business enterprises, may be subject to under international human rights law.

44. These principles on the extraterritorial obligations of States may not be invoked as a justification to limit or undermine the obligations of the State towards people on its territory.

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